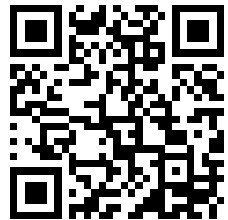


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VIRGINIA, THE SUPREME COURTS OF NORTH CAROLINA  
AND SOUTH CAROLINA, AND THE SUPREME  
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OF GEORGIA

WITH KEY-NUMBER ANNOTATIONS

CONTAINING A TABLE OF SOUTHEASTERN CASES IN WHICH REHEARINGS  
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JUDGES.

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L. JUDSON WILLIAMS. HAROLD A. RITZ.

<sup>1</sup> Died.

<sup>2</sup> Elected Chief Judge October 6, 1919.

<sup>3</sup> Elected Presiding Judge, Division No. 2,  
October 6, 1919.

<sup>4</sup> Elected to Division No. 1, October 6, 1919.

<sup>5</sup> Elected October 6, 1919.

# AMENDMENTS TO RULES

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## SUPREME COURT OF GEORGIA <sup>1</sup>

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### Certiorari Rule Adopted March 15, 1919

**Rule 1.** No decision of the Court of Appeals will be reviewed by certiorari, unless the applicant give written notice to the clerk of the Court of Appeals, within ten days after the filing of the judgment, of his intention to apply to the Supreme Court for a writ of certiorari; nor unless such application for certiorari be filed with the clerk of the Supreme Court within thirty days from the filing of the judgment in the Court of Appeals. Where a motion for rehearing is filed, the time shall run from the date of the final order of the Court of Appeals thereon.

<sup>1</sup> For other rules, see 91 S. E. vi.

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THE  
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(149 Ga. 266)

NUNNALLY et al. v. FOSTER et al.  
(No. 1214.)

(Supreme Court of Georgia. July 17, 1919.)

*(Syllabus by the Court.)*

**1. WILLS** ¶184(4)—REVOCATION OF BEQUEST  
—CODICIL—CONSTRUCTION.

The construction by the trial judge of the will and codicil involved in this case, and the directions given by him to the executor as to the administration of the estate, are approved, and the decree embodying them is affirmed.

*(Additional Syllabus by Editorial Staff.)*

**2. WILLS** ¶506(3)—CONSTRUCTION—"HEIRS"  
AS CHILDREN.

A bequest to "heirs" of a person named held to refer to his children, so as to exclude his widow.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Heirs.]

Error from Superior Court, Walton County; A. J. Cobb, Judge.

Proceedings by W. T. Foster, as executor of the will of Mrs. Mary W. Sandidge, against Mrs. Jessie Nunnally and others, to construe a will. A decree construing the will was rendered, and respondents bring error. Affirmed.

W. T. Foster, as surviving executor of the will of Mrs. Mary W. Sandidge, filed a petition in the superior court of Walton county, praying for the construction of the will and a codicil thereto, and for direction in administering the estate. The items of the will necessary to be considered in deciding the assignments of error set forth in the bill of exceptions are as follows:

"Item 17. I give and bequeath to Alonzo H. Nunnally one thousand dollars in money, the same to be his full share of my estate, unless there should more come to him in the distribution of the residuum of my estate."

"Item 25. After the foregoing bequests have been complied with, it is my will that whatever remains of my estate, of cash, notes, stocks, bonds, household and kitchen furniture, books, pictures, china, silverware, and other personal and perishable property, be sold at public or private sale, as my executors may think best,

or otherwise divided into three equal parts, and one part to be given to my sister, Martha E. Foster, her heirs and assigns, one part to be given to my brother, G. A. Nunnally, his heirs and assigns, and one part to be given to my nephew, Alonzo H. Nunnally, his heirs and assigns."

The instrument was executed on January 1, 1914. Alonzo H. Nunnally, nephew of the testatrix, and named as a legatee in the above-quoted items, died intestate prior to the death of the testatrix, leaving a widow and six children surviving him, and who were in life at the death of the testatrix. Alonzo H. Nunnally owned no realty when he died, and no administration has been had on his estate. After his death, which was known to the testatrix, she, on October 19, 1914, executed a codicil to her will. It is only necessary to consider so much of the codicil as follows:

"Third. The bequest in item No. 25, of my will, where I had already willed my sister, Mrs. M. E. Foster, I now in addition to said bequest in said will give and bequeath to, her the said Mrs. M. E. Foster and her heirs the oil paintings of myself and Mr. Mark Stroud, also all my room furniture and bedding and bedclothing of every kind. Also four thousand (\$4,000) dollars in money, the four thousand (\$4,000) dollars is to be paid from notes I have against W. H. Nunnally for the purchase money for my storehouses sold by me to said W. H. Nunnally; and it is my request, if said notes are not due at the time of my death, that the said W. H. Nunnally is to give to Mrs. M. E. Foster his note for the interest to be yearly [paid] on four thousand (\$4,000) dollars until said purchase-money notes become due.

"Fourth. In addition to my bequest in my will in item No. 17, to my nephew, Alonzo H. Nunnally, I now give and bequeath to [his] heirs at law an additional one thousand (\$1,000) dollars, said amounts to be paid from notes I hold against W. H. Nunnally for the purchase money for my storehouses sold by me to the said W. H. Nunnally; and it is my request that if said notes be not due at the time of my death, the said W. H. Nunnally is to give his note to the heirs at law of Alonzo H. Nunnally now deceased for the interest to be yearly [paid] on two thousand (\$2,000) dollars until the purchase-money notes become due, and this shall be their full share of my estate.

"Fifth. In addition to my bequest made in item 25 in my will, for and in consideration of his promise to board and care for me during the balance of my life, I give and bequeath to my brother, G. A. Nunnally, my home in Monroe, Georgia, where I now live, for and during his natural life, and at his death to be sold and equally divided between Alonzo H. Nunnally's heirs at law and J. W. Nunnally, Mell Nunnally, Mrs. Sarah Harrison, children of the late Mrs. Mary Briscoe Nunnally."

"Eighth. I give and bequeath, should there be after all other bequests are fully paid, be left as much as one thousand (\$1,000) dollars, that it be paid to the heirs at law of A. F. Nunnally equally, with the exception of W. B. Nunnally, who has already been provided for in the will."

The testatrix died on January 9, 1917, and her will was duly probated in both common and solemn form. By agreement of all parties at interest the case was submitted to the judge to be heard, and a decree rendered therein by him without the intervention of a jury. The will and codicil were put in evidence, but nothing further, save as to the death, etc., of Alonzo H. Nunnally, as above stated. The conclusions reached by the judge were as follows:

"1. The children of Alonzo H. Nunnally are entitled to \$1,000 under item 17 of the will, and an additional \$1,000 under item 4 of the codicil, making their legacy \$2,000 in the aggregate. The word 'heir' is construed 'children,' and this excludes the widow of Alonzo H. Nunnally. The intention of the testatrix is to make [the] bequest under item 17 of the will the entire interest of the children of Alonzo H. Nunnally under the will; but this does not prevent them from taking as remaindermen under item 5 of the codicil.

"2. Item 5 of the codicil creates a life estate in G. A. Nunnally in the house and lot therein referred to, and upon his death the proceeds of a sale of the same vested in the children of Alonzo H. Nunnally and the three persons named. The word 'heirs' here also construed 'children,' which excludes the widow of Alonzo H. Nunnally. The title to the proceeds of a sale of the house and lot therefore vests in the six children of Alonzo H. Nunnally and the three persons named, each taking his one-ninth ( $\frac{1}{9}$ ) undivided interest. Item 5 of the codicil provides for a sale, but the legatees by way of reconversion have the right to take the same as realty. If, within five days after the final decree is signed and entered, the nine devisees shall file with the executor their written election to take the lands in lieu of the proceeds of a sale, it will be ordered that the executor deliver possession of the house and lot to the legatees. If no such unanimous election is filed within the time stated, the executor will proceed at once to sell the house and lot at private sale, or at public sale after the manner of administrator's sale as he may deem best. If a private sale is had, it shall be subject to confirmation by the court; the authority for a private sale not being conferred by the will, or in the codicil thereto, and being authorized only under the general equity powers of the court having all parties at interest before it.

"3. Item 25 of the will is the residuary clause

of the will. Under this item the residuum goes to the three persons named in equal shares as in fee, that is, each takes one-third. The words 'heirs and assigns' are construed as words of limitation, and not of purchase; they limit and describe the estate of the taker named. One-third of the residuum should be paid Mrs. Martha E. Foster, and one-third to Mrs. G. A. Nunnally as executrix of G. A. Nunnally. The bequest to Alonzo H. Nunnally is the residue referred to in item 17 of the will, and the one-third of the residuum would have gone to his children if there had been no codicil, but item 4 of the codicil revokes the legacy in item 25 of the will and the related provisions in item 17 of the will.

"4. The legacy under the residuary clause of the will to Alonzo H. Nunnally, being revoked by the codicil, is the one-third of the residuum under item 25 of the will undivided. This depends upon whether the codicil contains a residuary clause. The codicil provides a conditional residuary clause in the eighth item thereof. If, after all the other bequests are fully paid, there be left as much as \$1,000, that it be paid to the heirs at law of A. F. Nunnally, with the exception of W. B. Nunnally, is a provision for any residuum which amounts to \$1,000 or more. Therefore the children of A. F. Nunnally, except W. B. Nunnally should take any final residuum that amounts to \$1,000 or more. The word 'heirs' here again construed as children, which excludes the widow of A. F. Nunnally. As the final residuum exceeds \$1,000, it is unnecessary to determine what would be the disposition of the residuum if it had amounted to less than \$1,000.

"5. Counsel for the executor is requested to frame a final decree in accordance with the conclusions herein set forth."

A final decree was prepared in strict conformity with the conclusions reached and announced by the judge, and was duly rendered. The widow and children of Alonzo H. Nunnally excepted to the decree, making thereon the following assignments of error:

"First. Because the said judgment and decree is contrary to law.

"Second. Because said judgment and decree is contrary to the evidence.

"Third. Because, as plaintiffs in error insist, the court erred in holding and ruling that the bequest in residuum in the twenty-fifth item of the original will to Alonzo H. Nunnally had been revoked. Plaintiffs in error insist that said will neither expressly nor by implication known to law revokes the bequest in residuum to the said Alonzo H. Nunnally; and that the court should have held and ruled that said bequest in residuum to the said Alonzo H. Nunnally stands unrevoked and should be paid to his children.

"Fourth. Because, as plaintiffs in error insist, the court erred in holding and ruling that the children of A. F. Nunnally took any sum under said will in excess of \$1,000. Plaintiffs in error insist that the eighth item of the codicil of the said will should be construed as giving the sum of \$1,000 only to the children of A. F. Nunnally, except W. B. Nunnally, to be equally divided among them; and that the court should have held and ruled that the said eighth item of the codicil gave to said children of A. F. Nunnally, except W. B. Nunnally, no

greater sum than \$1,000, and that that sum was to be paid only in the event that so much remained after paying special bequests.

"Fifth. Because as plaintiffs in error insist, the court erred in holding that the eighth item of the codicil of the will gave to the children of A. F. Nunnally, except W. B. Nunnally, one-third of the residuum. Plaintiffs in error insist that there is nothing in the will which justifies this construction.

"Sixth. Because, as plaintiffs in error insist, the court should have held and ruled that the fourth item of the codicil of the will repeats the language of the seventeenth item of the original will, down to and including the words 'to be in full of his share in my estate,' leaving the exception in item 17, to wit, 'unless there should more come to him in the distribution of the residuum of my estate,' unaffected by anything stated in said codicil; and the court should have held and decreed that the intention of the testator was shown in the fourth item of the codicil to repeat the language of the seventeenth item of the will and to leave the exception in the said seventeenth item to stand unchanged.

"Seventh. Because, as plaintiffs in error insist, the court should have held and decreed that the remainder in the home in Monroe, provided by item 5 of the codicil, was vested in ten persons, each taking one-tenth, and that the widow of Alonzo H. Nunnally took an equal share with his children and the other devisees in remainder.

"Eighth. Because, as plaintiffs in error insist, the court should have held and decreed that the codicil of the will shows no intention to leave an intestacy as to any part of the estate, shows no intention to revoke any part of the bequests in residuum provided by the twenty-fifth item of the will, and shows no intention to name a new beneficiary in residuum; but said bequest in residuum provided by the twenty-fifth item of the will remains unchanged by the codicil."

Nathan Harris, of Rome, for plaintiffs in error.

R. L. Cox and Orrin Roberts, both of Monroe, Dean & Dean, of Rome, and Brandon & Hynds, of Atlanta, for defendants in error.

FISH, C. J. (after stating the facts as above). [1] 1. In item 17 of the will Alonzo H. Nunnally is given "one thousand dollars in money, the same to be his full share of my estate, unless there should more come to him in the distribution of the residuum of my estate." In item 25, which purports to dispose of certain property as the residuum of the estate of the testatrix, it is directed that such property be sold by the executors and the proceeds "divided into three equal parts, one part to be given to my sister, Martha E. Foster, her heirs and assigns, one part to be given to my brother, G. A. Nunnally, his heirs and assigns, and one part to be given to my nephew, Alonzo H. Nunnally, his heirs and assigns." Item 4 of the codicil is to this effect:

"In addition to my bequest in my will in item No. 17, to my nephew, Alonzo H. Nunnally, I

now give and bequeath to [his] heirs at law an additional one thousand dollars, said amounts to be paid from notes I hold against W. H. Nunnally; \* \* \* and it is my request that if said notes be not due at the time of my death, the said W. H. Nunnally is to give his note to the heirs at law of Alonzo H. Nunnally, now deceased, for the interest to be yearly [paid] on two thousand dollars, until the purchase-money notes become due, and this shall be their full share of my estate."

The trial judge held that the bequest "to Alonzo H. Nunnally, his heirs and assigns," made in item 25 of the will to one-third of the residuum therein referred to was revoked by the fourth item of the codicil, which gave \$2,000 "to the heirs at law of Alonzo H. Nunnally, now deceased," to be their full share in the estate of the testatrix. Error is assigned upon this holding. We agree with his honor in the ruling here made. When the codicil was executed the testatrix knew of the death of her nephew, Alonzo H. Nunnally, and she provided in the fourth item of the codicil that the heirs at law of Alonzo H. Nunnally should take \$2,000 as their full share in her estate. In item 17 of the will, Alonzo H. Nunnally is given \$1,000, this to be his full share of the estate of the testatrix, unless more should come to him in the distribution of the residuum of her estate. In item 4 of the codicil the bequest in item 17 of the will is specifically referred to, and \$1,000 additional is given to the heirs at law of Alonzo H. Nunnally; whereas the bequest to him made in item 25 of the will is not referred to. Mentioning item 17 in the codicil, and failing to refer to item 25, evidences an intention on the part of the testatrix that the children of Alonzo H. Nunnally are to take under the fourth item of the codicil and not under the twenty-fifth item of the will. Moreover, it is significant that in item 3 of the codicil an additional bequest is made to Mrs. W. E. Foster, and it is plainly stated that the bequest was in addition to one-third of the residuum bequeathed to her in item 25 of the will. In item 5 of the codicil an additional bequest is made to G. A. Nunnally. When the testatrix made such provisions in the third and fifth items of the codicil, she certainly had in mind the provisions in the twenty-fifth item of the will, as it appears that the bequests of two-thirds of the residuum referred to in that item, that is, one-third to Mrs. Foster, and one-third to G. A. Nunnally, were ratified by the provisions of the codicil, while the persons who would have taken the remaining one-third in the residuum under item 25 of the will, if the codicil had not been executed—that is, the children of Alonzo H. Nunnally—were, in the fourth item of the codicil given, in addition to the \$1,000 bequeathed to Alonzo H. Nunnally, his heirs and assigns, in the 17th item of the will, an additional \$1,000, with the express stipulation that this sum of \$2,000 should be

their full share of the estate of the testatrix. Evidently, therefore, in view of the circumstances and the language of the will and the codicil, it was not the intention of the testatrix that the children of Alonzo H. Nunnally, who, if the testatrix had died intestate, would have been entitled, as heirs at law, to a portion of her estate, and who, if no codicil had been executed, would have taken whatever had been given him under the will, should take, in addition to the \$2,000 given them in the fourth item of the codicil, a one-third interest in the residuum as provided in item 25 of the will. It was correctly held by the trial judge that the children of Alonzo H. Nunnally take \$2,000 under the fourth item of the codicil as their entire interest in the estate of the testatrix, except as to what they might take as remaindermen under the fifth item of the codicil.

2. The judge further held and decreed that the codicil contains a conditional residuary clause in the eighth item thereof, which is to the effect that, should there be left, after all other bequests are fully paid, as much as \$1,000, it should be paid to the heirs at law of A. F. Nunnally equally, with the exception of W. B. Nunnally, who had already been provided for in the will, and, further, that this residuary clause covered the legacy of one-third of the residuum of the estate given to Alonzo H. Nunnally under item 25 of the will—thus preventing an intestacy as to that, which was revoked by the fourth item of the codicil; and it was further decreed that the children of A. F. Nunnally, except W. B. Nunnally, should take any final residuum that amounts to \$1,000 and more, the word "heir" here being construed as, "children," thus excluding the widow of A. F. Nunnally. Error was assigned upon this ruling, on the ground that under the eighth item of the codicil, the children of A. F. Nunnally are not entitled to more than \$1,000, to be equally divided among them, except W. B. Nunnally, and that the \$1,000 was to be paid only in the event that so much remained after paying special bequests. The language of the eighth item of the codicil is so clear and explicit as to leave no room for doubt as to the correctness of the judge's ruling in reference thereto. In executing the eighth item of the codicil, the testatrix doubtless had in mind that she had, in item 4 of the codicil, revoked so much of the twenty-fifth item of the will as bequeathed to Alonzo H. Nunnally a third of the residuum as therein disposed of, and that it was necessary to make some disposition of that one-third in order to prevent an intestacy as to it. And she therefore, in item 8 of the codicil, conditionally bequeathed it to the heirs at law of A. F. Nunnally, who had not been provided for in the will.

[2] 3. In item 5 of the codicil the home of the testatrix is given to her brother, G. A.

Nunnally, for life, "and at his death to be sold and equally divided between Alonzo H. Nunnally's heirs at law, and J. W. Nunnally, Mell Nunnally, and Mrs. Sarah Harrison." The judge held that upon the death of the life tenant the proceeds of a sale of the home vested in the six children of Alonzo H. Nunnally and the three persons named, each taking a one-ninth undivided interest therein, the words "heirs at law" being construed to mean "children," thus excluding the widow of Alonzo H. Nunnally. Error is assigned upon this ruling, because, as contended by the plaintiffs in error, the words "heirs at law" of Alonzo H. Nunnally, who died intestate leaving a widow and six children and owning an estate of personalty only, included the widow, and that she is entitled to an equal share in the proceeds of the sale with his children and the other legatees in remainder. We cannot concede the soundness of this contention, and agree to the holding of the judge in excluding the widow from participating in the proceeds of the sale of the home. From a consideration of the entire will and codicil, the evident testamentary scheme of the testatrix was to distribute her estate among her kin, who, if she had died intestate, would have been her heirs at law. In carrying out this purpose she made bequests to her brother, to her sister, and to numerous nephews and nieces. There were 27 of these separate bequests in the will and codicil, and in each one of them it was expressly and specifically stated that the legacy given—in nearly every instance approximately \$1,000—"shall be [his or her] full share of my estate." It seems clear, therefore, that in executing the codicil, after the death of Alonzo H. Nunnally, which was known to her, and in the fifth item thereof, giving to his "heirs at law" one-third of the proceeds of the sale of the house and lot, after the death of the life tenant, the testatrix intended that the children of Alonzo H. Nunnally, who were related to her by consanguinity, and who, if the codicil had not been executed, or if she had died intestate, would have been entitled to share in her estate, should take as "his heirs at law" to the exclusion of the widow, who, as such, would in no event be entitled to share in the estate of the testatrix. In this view we find it unnecessary to decide whether the widow of an intestate who dies leaving an estate consisting of personalty only is, under former decisions of this court, an heir at law of her husband. See, in this connection, *Cole v. Cole*, 135 Ga. 19, 68 S. E. 784; *Hanvy v. Moore*, 140 Ga. 691, 79 S. E. 772, and cases cited.

The foregoing rulings, in effect, dispose of all of the assignments of error. We agree to the conclusions reached by the judge, and affirm his decree entered thereon.

Judgment affirmed.

All the Justices concur.

(24 Ga. App. 96)

**SOUTHERN RY. CO. v. SIMMONS.**  
(No. 10257.)(Court of Appeals of Georgia, Division No. 1.  
July 17, 1919.)*(Syllabus by the Court.)***1. MASTER AND SERVANT** ⚡258(1)—**INJURIES TO SERVANT — COMPLAINT — SUFFICIENCY.**

The petition set out a cause of action, and was not subject to general demurrer.

**2. MASTER AND SERVANT** ⚡204(2), 217(1)—**INJURIES TO SERVANT — ASSUMPTION OF RISK — ACTIONS UNDER FEDERAL EMPLOYERS' LIABILITY ACT.**

The suit was brought under the federal "Employer's Liability Act" (U. S. Comp. St. §§ 8657-8665), but not on account of any violation of the federal statutes for the protection of employes. Thus the doctrine of assumption of risk was available as a complete defense, since an employe assumes the ordinary risks and hazards of his occupation, and also those risks which are known to him, or which are plainly observable, even though due to the master's negligence; and no presumption of negligence existed against the defendant.

**3. MASTER AND SERVANT** ⚡222(2) — **INJURIES TO SERVANT—ASSUMPTION OF RISK—EVIDENCE.**

The plaintiff was a section hand in the employ of the defendant, and was injured while engaged in the work which he was employed to perform. The uncontradicted evidence shows that, as to the acts of negligence charged, the defendant used all ordinary care for the plaintiff's safety, unless it be that the foreman was negligent in ordering him to remove the lever car at the time and place he did; and, even though the defendant was negligent in this respect, such negligence was known to the plaintiff, and was plainly observable. He therefore assumed the risk occasioned thereby, and cannot recover.

**Error from Superior Court, Habersham County; J. B. Jones, Judge.**

Action by Seaborn Simmons against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Seaborn Simmons brought an action against the Southern Railway Company for personal injuries, under the federal "Employer's Liability Act" of April 22, 1908 (35 Stat. 65, c. 149 [U. S. Comp. St. 1916, §§ 8657-8665]). The allegations of the petition are substantially as follows: That on February 11, 1918, while engaged by the defendant as a section hand, plaintiff was working for the defendant under the direction and control of Dalton Lovell, section foreman, who was in full charge of the section of the defendant's line of road known as the "Baldwin section;" that the plaintiff was directed by Lovell to assist the remainder of the crew in propelling

a lever car belonging to the defendant, which was being used to transport the section crew and their foreman from Baldwin, Ga., to Cornella, Ga., for the purpose of repairing the tracks of the defendant's line of railroad; that when the plaintiff was on the car helping to propel it, and had traveled about half the distance from Baldwin to Cornella, one of the defendant's passenger trains came around a sharp curve, running at great speed, some 50 or 60 miles per hour, on the main track that the lever car was on; that when Lovell saw the train coming he ordered the section crew to remove the lever car from the track, which they undertook to do, but, on account of the nearness of the train and the great speed at which it was being run, they were unable to remove the car in time to prevent the train from striking it; that when the plaintiff saw that the train was going to strike the car, he undertook to get to a place of safety, but the train struck the car and knocked it from the track and against him, breaking his leg and causing other injuries described. It was further alleged that the defendant had a double track from Baldwin to Cornella, and an agent at its station at Baldwin whose duty it was to know when trains were due to arrive, and that it was the duty of Lovell, the foreman, to ascertain from the station agent at Baldwin, before starting with the lever car, if any train was due to arrive, and which track it would be on. It is alleged that the defendant was negligent in the following respects: First, in running the lever car on the same track that it was using at the time for its passenger trains at this point; second, in ordering the plaintiff to remove the lever car from the track, as the train was so close to it; third, in not warning the plaintiff of the approach of the train, in running the train at such a great rate of speed, in not stopping the train, and in knocking the lever car from the track and against the plaintiff; fourth, in not using the other track for the lever car, as the defendant knew that the passenger train was on the track at that time and place, and that it was obviously dangerous to operate the lever car on that track. It is further alleged that the plaintiff was without fault, and in the exercise of ordinary care for his own safety, and could not have avoided the consequences of the defendant's negligence by the exercise of ordinary diligence after the negligence of the defendant became apparent; that he did not know of the approach of the train in time to prevent the injuries, and could not have found out about the acts of negligence by the exercise of ordinary care; that it was no part of his duty to look out for trains, but this was the duty of Lovell, the foreman.

Upon the trial of the case it was admitted that both the plaintiff and the defendant were engaged in interstate commerce at the

time of the alleged injury. The plaintiff himself testified:

"I had been working with Lovell ever since the last of October; October, November, December, and January. You catch trains on the double track day and night, all the time, plenty of them. \* \* \* They generally run by schedule; they run passenger trains on schedule. I have known one to be late. I know that was late that morning. I thought it was due, thought No. 36 [the train which struck the lever car] was due. I didn't know it. I didn't know about the second 36. I knew they ran extra freight trains there sometimes. I have seen trains of all kinds, extras, and Nos. 78 and 55, 45, 29, and 39, and 44—all kinds. I knew they run trains, and I could look out for one most any time. \* \* \* I knew I could expect a train on that track most any old time. I also know they run extra freight trains, and extra freights and passengers. They run them every once in a while, run a number of trains. When I was on the lever car I was expecting trains most any time."

The plaintiff further testified:

"On the 11th day of February, 1918, we put our car on the track and started to Cornelia to fix a railroad crossing. \* \* \* It was about 7 o'clock I suppose. It was hardly daylight. You could see pretty well. It made the headlight of the engine shine pretty bright. The headlight was shining. \* \* \* There were two tracks, north and south bound main line. \* \* \* I knew I was on the north-bound line. \* \* \* We got about half way from Baldwin to Cornelia, and Dalton Lovell looked back and saw 36 coming, and said 'Boys, let's get off and get the car off.' \* \* \* I had my face towards Cornelia, and the engine was coming behind me. \* \* \* The minute he said, 'Let's get off,' I knew the train was coming. \* \* \* When I first saw the train it was at least 50 yards from me. By reason of it not being quite daylight, I don't suppose I could see him as far as he could see me. I don't suppose I could. \* \* \* I saw the headlight when it was at least fifty yards away. \* \* \* When I got on the ground and started to take the lever car off, it was 50 yards away. \* \* \* I could have seen the headlight 200 yards, I guess, if we looked back. It came around the curve, and came out of the cut there. The cut at the end of the curve was 225 yards where he could have seen us. \* \* \* Cling Buchannon and the other men picked up and left. \* \* \* Cling left me. He had hold of my end. He joined the bird gang, and I still stood and looked at the engine, but was struggling with the lever car. \* \* \* Burton left; it might have been just a little before I did. \* \* \* It might have been just a minute. I say he might have left a little before I did, both of them [Burton and Lovell], but it was not over that. \* \* \* Lovell left before I did, just a little before I did. He had his back to the lever car. I saw him leave, and then I left. I didn't leave quite quick enough. If I had, I wouldn't have got hit. \* \* \* Trains Nos. 36, 37, 38, 40, 42, 29, and 30 always run fast, but didn't run much fast up grade; didn't run much faster than 36 was running the day I got hurt. \* \* \* If Dalton Lovell ever did warn me to get away

from the car, that it was going to be struck, after he told me to move it off the track, I didn't hear him."

Dalton Lovell, sworn in behalf of the plaintiff, testified:

"I was section foreman for the Southern Railway on the Baldwin section, and was on the lever car that was struck by the train coming from Baldwin to Cornelia. When I first saw the headlight, the train was about 200 yards from the lever car. When I first saw it I put on the brakes and said, 'Let's get off.' \* \* \* The engineer in charge of the train, if there had not been smoke, could have seen the lever car about 200 yards. It was early in the morning and smoky. \* \* \* The first section of train 36 had already run, but the second section had not run. The second section has not got any schedule that I know of. The first section is the one that is on the time-table. \* \* \* If the second section, which struck us, was late, I didn't know it. There was not any operator at Baldwin to tell how late it was. \* \* \* As to my warning Simmons to leave the lever car before he did leave it, I didn't go around and tell him. I always taught them before, when we could not get a car off, to get away. \* \* \* My back was in the direction the train was coming. I had been looking back that way, expecting the train any time. On these tracks they run the trains fast all the time. They run those passenger trains sometimes behind time, and sometimes on time, but always along there fast. \* \* \* As soon as I hollered \* \* \* Simmons knew it [the train] was coming. He got down off of the lever car with his face towards the train, on the right-hand side of the track coming towards Cornelia. He was on the engineer's side. \* \* \* It was a dark and foggy morning, about daylight. I don't know whether it was hardly good daylight. It was winter time. The headlight was burning. It had to be burning on account of it being dark. Standing there where I was, I don't know how far I could have seen a man on the track ahead of me. I could have seen one 50 feet across there that time of day, a dark and smoky and foggy morning. \* \* \* Fifty feet is my estimate. \* \* \* Looking back in the direction the train was coming from, there is a cut and a curve. There was not anything to keep Simmons from seeing the train after he turned around. He said he did see the train. When I first put him to work I told him that he would have to look out for trains all the time, look for himself. \* \* \* On a clear day in good daylight, the engineer could have seen the lever car about 200 yards. \* \* \* On this particular morning the engineer could not have seen more than 50 feet, I guess, about 50 feet, because it was cloudy and smoky, and not broad daylight. \* \* \* There was not any depot agent at Baldwin the morning we left there when Mr. Simmons got hurt, not at that hour. The Baldwin depot was supposed to open at 8 o'clock. \* \* \* Most of the time we left Baldwin before the depot was opened."

B. T. Holland, sworn in behalf of the defendant, testified:

"I am an engineer on the Southern Railroad. I was the engineer on the train that struck the

lever car when Mr. Simmons was hurt. I came around the curve that morning. I don't know exactly what time, about daylight. It was pretty foggy, and the first thing I knew I was right into the lever car. As I came around through the cut I was looking out. It was about daylight, very foggy. The headlight was burning. When I first discovered the lever car, I put on the air brakes as hard as it would go on in the emergency. When I first discovered the lever car I don't think it was over 15 or 20 feet from me, maybe a little more. I discovered it as soon as I could. Just as soon as the conditions would let me, I saw it. I stopped as quick as I could, put the brakes on as hard as they would go on in emergency, and stopped. \* \* \* I had on my headlight. It was burning. It was an electric headlight, the kind in common use on the Southern Railroad. I was something near 25 or 30 feet of the lever car when I first saw it. \* \* \* A man looking out on the tracks with a headlight of the kind generally in use on the Southern Railroad could not see a car and four men over 30 or 40 feet, there was such a fog. \* \* \* That headlight throws a light in front of an engine a considerable distance, owing to the condition of the weather. If there is nothing there to obscure the light, you can see a mile. \* \* \* In the condition of the fog that morning, you could not see over 40 or 50 feet. I was in 40 or 50 feet of this hand car when I first saw it. \* \* \* The train was running 35 or 40 miles an hour."

The jury returned a verdict in favor of the plaintiff, the defendant's motion for a new trial was overruled, and the movant excepted.

Edgar A. Neely, of Atlanta, for plaintiff in error.

J. J. & Sam Kimzey, of Cornella, for defendant in error.

JENKINS, J. (after stating the facts as above). Since this action was brought under the federal "Employers' Liability Act," the provisions of that act are controlling, and the case must be decided in accordance therewith. As was held in *Charleston, etc., Ry. Co. v. Sylvester*, 17 Ga. App. 85, 86 S. E. 275:

"In a suit brought under the federal Employers' Liability Act, except \* \* \* as to violations of federal statutes for the protection of employes, assumption of risk is an absolute defense, while contributory negligence merely reduces the damages. *Roberts, Injuries to Interstate Employes*, § 130; *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475."

In such a case there is no presumption of negligence against the defendant, and it is well settled that, under the provisions of this act, the plaintiff not only assumed whatever risks were normally incident to his employment, but also those defects and risks which were known to him, or which were

plainly observable, although due to the master's negligence. See *Charleston, etc., Ry. Co. v. Sylvester*, supra, and cases cited. It will be borne in mind that in cases of this sort, no matter what acts of negligence on the part of the defendant may be shown by the evidence, the plaintiff must recover, if at all, upon proof of one or more of the specific acts of negligence alleged in the petition, and that there can be no recovery unless one or more of these acts is established by proof. See *Jarrell v. Seaboard Air Line R. Co.*, 99 S. E. 386 (1b), and cases there cited. In the case of *Southern Railway Co. v. Blackwell*, 20 Ga. App. 630, 93 S. E. 321, which was a case very similar to the one now under review, this court held that—

"One of the risks assumed by the plaintiff in this case (who was employed as a track hand), upon entering the service of the railway company, was the danger ordinarily incident to the usual and proper operation of its trains over the track upon which he was at work. This proposition is the fundamental principle underlying the decision of the Supreme Court in the case of *L. & N. Railroad Co. v. Kemp*, 140 Ga. 657, 79 S. E. 558."

In the *Kemp Case*, the plaintiff was foreman in charge of a force of section hands, and his duties required him to inspect and maintain the tracks and roadway of the defendant upon his section. While engaged in the inspection of the tracks he was confronted with an emergency occasioned by the sudden appearance of a freight train, operated in the usual method, which rounded a curve, and in attempting to remove from the track the hand car on which he was riding, and avoid the impending danger to himself and his hand car, he was injured. The Supreme Court expressly ruled in that case that under this state of facts the plaintiff could not recover. It was further held in the *Blackwell Case* that—

"To justify a recovery for injury caused by a train striking a section hand while engaged in repairing a track, it must be shown that the proximate cause of his injury was the railway company's neglect of some duty to him in respect to his protection from injury by passing trains"—citing *Norfolk, etc., Ry. Co. v. Gesswine*, 144 Fed. 56, 75 C. C. A. 214, *Aerkfetz v. Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758, *Ellis' Adm'r v. Louisville, etc., Ry. Co.*, 155 Ky. 745, 160 S. W. 512, and *Morris v. Boston & Maine Rd.*, 184 Mass. 368, 68 N. E. 680, and quoting from the case of *Woods v. St. Louis, etc., R. Co.* (Mo.) 187 S. W. 11, as follows: "It is not the duty of a railroad company to notify section men that any certain trains are expected to pass over the road, but it is their duty to be on the lookout and keep out of the way."

In the case of *Connelley v. Pennsylvania R. Co.*, 201 Fed. 54, 56, 119 C. C. A. 392, 394 (47 L. R. A. [N. S.] 867), the Circuit Court of Appeals said:



"It is an obvious fact that many occupations, as, for example, a powder mill operator, a structural iron worker, a diver, a blaster, a track-walker, necessarily subject those who follow them to great dangers. When, therefore, a man contracts for such employment, he knows and takes on himself the risks and dangers incident to such dangerous work. His assumption of those obvious and unavoidable risks is in the very nature of things part of his employment. It follows, therefore, that the employer violates no legal duty to the employé in failing to protect him from dangers which cannot be escaped by any one doing such work. \* \* \* It is obvious that even where a railroad operates its trains, and moves its switch drafts in a proper and careful manner, trackwalkers and repairmen are necessarily subjected to great risks. Their very occupation is one of constant peril. Indeed, it follows from the nature of such employment that the duty of self-preservation has to rest on them, for no adequate protection, other than self-protection, can be afforded them. And such has been the reasonable holding of the law. \* \* \* Indeed, in thus making self-protection the substantial safeguard of trackwalkers and section men, the law is reasonable and just, for no other dependable safeguard can be afforded their perilous work in the practical operation of railroads."

And in the case of *Hinz v. Chicago, B. & N. R. Co.*, 93 Wis. 16, 66 N. W. 718, the Supreme Court of Wisconsin held:

"A section hand, whose duties required him to ride over the road on a hand car, and who had been notified by the company, and of his own knowledge knew, that wild trains were frequently run over the road at a high rate of speed, assumed the risk of injury from being run into by one of these trains, running at a high rate of speed, on a foggy morning."

[1, 2] Applying this principle of law to the facts adduced upon the trial of this case, we are compelled to set aside the verdict in favor of the plaintiff. As has already been stated, there is no presumption of negligence against the defendant in this case. It will be seen from the plaintiff's own testimony and that of the witnesses sworn in his behalf, as well as from the uncontradicted evidence in behalf of the defendant, the employés of the defendant in charge of its locomotive and cars which injured the plaintiff used all ordinary care and diligence to avoid the injury. The plaintiff, besides knowing that he might expect a train along this track at any time, was in point of fact specifically warned of, and saw the approach of, the train which caused his injuries in ample time to have avoided the injury by the exercise of the slightest degree of care upon his part. There is no evidence to show that the engineer in charge of the defendant's train could, in the exercise of the degree of care required by law, have known of the presence of the plaintiff on the track. According to the testimony of the plaintiff himself, it was not good daylight at the time he was injured, and while he testified, "I don't think it was misty, I

wouldn't say," the positive testimony of the foreman in charge of the section crew, who was sworn in behalf of the plaintiff, and the engineer in charge of the train which caused the injury, sworn in behalf of the defendant, was to the effect that it was cloudy, misty, foggy, and smoky, and that the engineer couldn't have seen the car and the plaintiff a distance of more than 50 feet. The cloudy, misty, foggy, and smoky condition existing at the time the injury occurred prevented the engineer from seeing the plaintiff in time to avoid the accident. When the engine came out of the cut and around the curve onto the straight stretch, it was running at the usual rate of speed of about 35 or 40 miles per hour, but, due to its close proximity to the hand car at the time its presence was discovered, it was impossible to stop the train in time to prevent striking the hand car, although the brakes were applied and the engineer did everything in his power, when the emergency arose, to avoid injuring the plaintiff. It follows, from what has been said, that the plaintiff was guilty of no negligence in the operation of its train.

[3] It is insisted, however, that the defendant's foreman was negligent "in ordering plaintiff to remove the lever car from the track, as the train was so close to it," and that the plaintiff was injured while in the line of his duty, under the orders and in the immediate presence of the "boss" to whose orders he was subject. While it is true that a servant is bound to obey a command, when given as such, by one occupying the relation of vice principal to the master, if it pertains to the duties of the servant's employment, and does not involve a violation of the law, and if the act required is not one which is of itself so obviously dangerous that no person of ordinary prudence could be expected to perform it; still even the direct and immediate order of the master will not justify a servant in rashly exposing himself to a known and obvious danger; and if, in compliance with the command in such cases, the servant be injured, he cannot recover of the master therefor. *Whiters v. Mallory S. S. Co.*, 23 Ga. App. 47, 97 S. E. 453; *International Cotton Mills v. Webb*, 22 Ga. App. 309, 96 S. E. 16. Thus granting, for the sake of the argument, that the foreman was negligent in ordering the plaintiff to remove the lever car at the time and place that he did, the order was negligent only by reason of the close proximity of the approaching train, and this fact was, according to the plaintiff's own testimony, known to and plainly observable by him. In the case of *Charleston, etc., Ry. Co. v. Sylvestre*, supra, this court held that under the federal Employers' Liability Act the employe, not only assumes the ordinary risks and hazards of his occupation, but also those defects and risks which are known to him, or which

are plainly observable, although due to the master's negligence. And in *Gila Valley Ry. Co. v. Hall*, 232 U. S. 94, 34 Sup. Ct. 229, 58 L. Ed. 521, the United States Supreme Court held that an employé "is not to be treated as assuming the risks arising from a defect that is attributable to the employer's negligence, *until the employé becomes aware of such defect, or unless it is so plainly observable that he may be presumed to have known of it.* [Italics ours.] In order to charge an employé with the assumption of risk attributable to a defect due to the employer's negligence it must appear, not only that he knew (or is presumed to have known) of the defect, \* \* \* but that he knew it endangered his safety; or else such danger must have been so obvious that an ordinarily prudent person under the circumstances would have appreciated it." See, also, *Cincinnati, N. O. & T. P. Ry. Co. v. Thompson*, 236 Fed. 1, 149 C. O. A. 211. Thus it is impossible to hold, under the facts as disclosed by the record in this case, that the plaintiff did not know and appreciate the obvious danger incident to remaining upon the track in the face of an on-coming locomotive, whose gleaming headlight was staring him in the face. We are compelled to say that he assumed the risk which occasioned his injury.

While constrained to hold as we do, we at the same time feel that the purpose and conduct of the plaintiff in continuing his desperate attempt to remove the hand car from the track, in order to prevent a collision such as might imperil many passengers and others, was both fearless and highly commendable; but the law, unfortunately for the plaintiff, places upon him, and not upon the company, the risk incident to his courageous act.

Judgment reversed.

WADE, C. J., and LUKE, J., concur.

(24 Ga. App. 122)

WHITE v. STATE. (No. 10488.)

(Court of Appeals of Georgia, Division No. 2.  
July 22, 1919.)

(Syllabus by the Court.)

CRIMINAL LAW §823(1)—HOMICIDE §101  
—STATUTES—INSTRUCTIONS—NEW TRIAL—  
CURE OF ERROR.

"The law embraced in section 73 of the Penal Code of 1910 does not qualify or limit the law of justifiable homicide as laid down in sections 70 and 71 of that Code. The section first mentioned applies exclusively to cases of self-defense from danger to life arising during the progress of a fight wherein both parties had been at fault. The other two sections are applicable when the homicide is committed in good faith to prevent the perpetration of any of the offenses mentioned in section 70, or

under the fears of a reasonable man that such an offense will be perpetrated, unless the person who is actually or apparently about to commit it be slain. Instructions as to these two separate branches of the law of justifiable homicide should not be so given as to confuse the one with the other."

(a) "Where an erroneous rule of law is given to the jury on a material issue in the case, and is of such a nature as is calculated to mislead them, a new trial will be granted, notwithstanding the correct rule may have been announced in other portions of the charge."

Broyles, P. J., dissenting.

Error from Superior Court, Butts County;  
W. E. H. Searcy, Jr., Judge.

Charlie White was convicted of voluntary manslaughter, a new trial was denied, and he brings error. Reversed.

H. M. Fletcher, of Jackson, for plaintiff in error.

E. M. Owen, Sol. Gen., of Zebulon, and  
W. E. Watkins, of Jackson, for the State.

BLOODWORTH, J. Charlie White was indicted for murder and convicted of voluntary manslaughter, and, complaining of the overruling of the motion for new trial, has brought his case to this court for review.

The trial judge charged the jury in part as follows:

"Justifiable homicide, so far as the definition is applicable to this case, is the killing of a human being in self-defense or defense of habitation or property, against one who manifestly intends or endeavors by violence or surprise to commit a felony on either. If a person kill another in his defense, it must appear that the danger was so urgent and pressing, at the time of the killing, that, in order to save his own life, the killing of the other was absolutely necessary; and it must appear, also, that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given. I charge you that the expression 'felony,' as used here, means an offense for which the offender, if convicted, would be liable to be punished by death or imprisonment in penitentiary. The law provides that justifiable homicide is the killing of a human being in self-defense, or in defense of habitation, property, or person, against one who manifestly intends or endeavors by violence or surprise to commit a felony on either. The bare fear of any of these offenses, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances at the time were sufficient to excite the fears of a reasonable man, and that the party killing really acted under the influence of these fears, and not in a spirit of revenge."

The first ground of the amendment to the motion for new trial complains that this charge is error for the reason hereinafter stated. In a note to this ground the trial judge

says that section 73 of the Penal Code was given in charge at the request of counsel for the defendant. This being true, the defendant could not complain that section 73 was given in charge; but he can complain that it was given in such connection as to confuse "the defense of justifiable homicide under the fears of a reasonable man, based upon the provisions of the two related sections 70 and 71 of the Criminal Code, with the defense of absolute necessity to kill in order to save one's life, which is contained in section 73 of said Code," and this is the reason assigned why the charge is erroneous.

Under repeated rulings of our Supreme Court, we think this point is well taken, even though in our opinion the facts demanded that section 73 be given in charge to the jury. The first headnote of the decision in *Pugh v. State*, 114 Ga. 16, 39 S. E. 875, is as follows:

"The law embraced in section 73 of the Penal Code does not qualify or limit the law of justifiable homicide as contained in sections 70 and 71. While the law embodied in sections 70 and 71, as well as that embodied in section 73, may both be properly given in the same case, the provisions of the different sections should not be charged in such a way as to leave the impression upon the jury that they are both applicable to the same state of facts."

In *Franklin v. State*, 146 Ga. 42, 90 S. E. 481, Mr. Justice Beck said:

"It was proper in this case to give sections 70, 71, and 73 of the Penal Code in charge to the jury, but section 73 should not have been charged in such a way as to make it likely that the provisions of that section would be confused in the minds of the jury with the provisions of sections 70 and 71. It is true that the judge told the jury that the provisions of section 73 were to be kept distinct from the provisions of sections 70 and 71; but that is not sufficient. How could a layman be expected to keep the provisions of section 73 and of the other sections referred to distinct, without instructions as to the case in which the principles of section 73 are applicable? In the case of *Pryer v. State*, 128 Ga. 28, 57 S. E. 93, it is said: 'We would suggest that it would avoid much confusion if, where it is proper to give in charge section 73 of the Penal Code, the presiding judge would give the jury some instruction as to cases in which it is applicable, instead of \* \* \* charging it immediately after sections 70 and 71, without any explanation.' Section 73 is applicable only in the cases of mutual combat, as has been repeatedly ruled, and the jury ought to be so informed in appropriate instructions, or at least, the jury should be told in what cases the provisions of section 73 are applicable. Otherwise the inevitable tendency is to confuse that section with the provisions of sections 70 and 71, where all three of the sections are given. *Warrick v. State*, 125 Ga. 133, 141, 53 S. E. 1027."

In *Ragland v. State*, 111 Ga. 216, 36 S. E. 684, Mr. Justice Little said:

"It is justifiable homicide, under our law, for one to kill another who is manifestly intending or endeavoring by violence or surprise to commit a felony on his person, and this is true without regard to the grade of felony; and it is not a correct proposition of law that, when one kills another to prevent the commission of a felony on his person, the danger must be so urgent and pressing at the time of the killing that, in order to save his own life, the killing of the other was necessary. On the contrary, it is only necessary to be shown that the circumstances were sufficient to excite the fears of a reasonable man that such felony was about to be committed upon him, in order to justify the homicide. Otherwise, a woman who killed a man to prevent the rape of her person, or one who slew a burglar to prevent the burglary of his home, would not be justifiable. In neither of these cases was the life of the slayer involved, but in each a felony was about to be committed. A person in this state may kill another for other purposes than to save his own life, and be justified, if he do so to prevent any felony from being committed on his habitation, person, or property; his defense is complete when to a jury it appears that the circumstances were sufficient to excite the fears of a reasonable man that a felony was about to be committed, and that he killed to prevent its commission. The latter part of the charge as given applies only to cases of homicide where the parties had previously been engaged in mutual combat. *Powell v. State*, 101 Ga. 9 [29 S. E. 309, 65 Am. St. Rep. 277]; *Stubbs v. State*, 110 Ga. [916, 36 S. E. 200]. It is doubtless true that the Presiding Judge recognized these distinctions; but, inasmuch as the two principles enunciated in his charge are directly coupled together, without a distinction having been drawn, the jury might have understood, from the charge as set out in the ground of the motion, that, while it was justifiable for one to kill another to prevent the commission of a felony on his person, it must at the same time appear that the danger was so urgent and pressing at the time of the killing that it was necessary for the slayer to take the life of the deceased, in order to save his own life. This is not and has never been the law."

See, also, *White v. State*, 147 Ga. 378 (5), 383 (5), 94 S. E. 222; *Pryer v. State*, 128 Ga. 28, 57 S. E. 93; *Smith v. State*, 119 Ga. 564, 46 S. E. 846 (3); *Jordan v. State*, 117 Ga. 405, 43 S. E. 747 (2); *Powell v. State*, 101 Ga. 11 (6), 22 (6, 7), 29 S. E. 309, 65 Am. St. Rep. 277.

From the charge given in the instant case, the jury might have concluded that the provisions of sections 70 and 71 and of section 73 were applicable to the same state of facts. In *Nunn v. State*, 14 Ga. App. 699, 82 S. E. 58, Judge Roan says:

"It is impossible to tell which portion of the charge the jury applied to the evidence when arriving at its verdict—the law as laid down by section 73, read to them by the court without comment, or the latter part of the charge, whereby the court seemingly recalled the instructions given on this section. For this reason the latter portion of the court's charge, while it is correct law in the abstract, is in

direct conflict with the letter of the law embodied in section 73 of the Penal Code, and it does not operate to modify the law as laid down in that section, any more than the law as laid down in that section modifies the latter portion of the charge. It would be well for the trial judges, in giving in charge section 73 of the Penal Code where it is applicable, to instruct the jury, in immediate connection therewith, under what circumstances it is applicable. In this way such confusion can be avoided. See *Powell v. State*, 101 Ga. 23, 29 S. E. 309, 65 Am. St. Rep. 277; *Pugh v. State*, supra; *Warwick v. State*, 125 Ga. 141, 53 S. E. 1027; *Pryer v. State*, 128 Ga. 28, 57 S. E. 93; *Lightsy v. State*, 2 Ga. App. 442, 58 S. E. 686; *Holland v. State*, 3 Ga. App. 465, 60 S. E. 205; *McAllister v. State*, 7 Ga. App. 541, 67 S. E. 221."

Even though the judge, after giving in charge to the jury erroneous instructions, did give to the jury a correct charge, he did not withdraw the erroneous charge, or state to the jury that it was erroneous.

"Where an erroneous instruction is given on a material issue, the error is not rendered harmless by a subsequent statement of the judge that he has given the correct rule in another part of his charge. He must make it plain and clear to the jury that the first instruction was incorrect and is expressly retracted, and that the subsequent statement is correct and is substituted for the incorrect one; and it must appear, therefore, that the jury could not have been misled or confused by the two inconsistent statements." *Pelham Mfg. Co. v. Powell*, 6 Ga. App. 309, 64 S. E. 1117 (4).

See *Mayor & Council of Madison v. Bearden*, 22 Ga. App. 378, 96 S. E. 572, and cases cited; *Central of Ga. Ry. Co. v. Deas*, 22 Ga. App. 428, 96 S. E. 267.

"The jury must take the whole charge as the law, and it is not for them to select one part to the exclusion of another, nor to decide whether one part cures or qualifies another, without being instructed so to do by the judge." *Savannah, Florida & Western Ry. Co. v. Hatcher*, 118 Ga. 273, 45 S. E. 239.

Because of this error in the charge, we think a new trial should be ordered. On account of this direction, it is unnecessary to consider other allegations of error.

Judgment reversed.

STEPHENS, J., concurs.

BROYLES, P. J. (dissenting). The reason why it is generally reversible error for the court to charge sections 70, 71, and 73 of the Penal Code together, without proper explanation is that the jury may be misled into thinking that, even though the defendant may have killed the deceased under the fears of a reasonable man that a felony was about to be committed on his person, the killing would not be justifiable unless it appeared to him that the danger was so urgent

and pressing at the time of the killing that, in order to save his own life, the killing of the other was absolutely necessary. In the instant case I do not see how the jury could have been so misled; for, after charging the above three Code sections (and all three were applicable), the jury were clearly and correctly instructed, several times, that, if the circumstances were sufficient to excite the fears of a reasonable man that a felony was about to be committed on him, the killing would be justifiable and the defendant should be acquitted. Immediately after the excerpt from the charge complained of the court charged as follows:

"The fears of a person should be the fears of a reasonable man—one reasonably courageous, reasonably self-possessed, not those of a coward. If the circumstances were sufficient to excite the fears of a reasonable man that a felony was about to be inflicted upon him, then the killing would be presumed to be the result of such fears, and he would be justifiable. If the jury have a reasonable doubt as to whether the circumstances were sufficient to excite the fears of a reasonable man, then the killing would be justifiable. The killing is not justifiable because one feels that he has reason to fear that he will be injured, without regard to the character of the injury some person is about to inflict upon him. If the assailant intended or endeavored to commit a misdemeanor or a trespass only upon the person, the killing of such person would be voluntary manslaughter. But if he intended to commit a felonious assault, then the killing would be justifiable. If the circumstances are not such as to excite the fears of a reasonable man that he is in any danger at all, and when he is in no danger he shot and killed another with malice, then such killing would be murder. If the circumstances were sufficient to excite the fears of a reasonable man that an injury was about to be inflicted upon him less than a felony, under those circumstances such a killing would be voluntary manslaughter. When the circumstances are sufficient to excite the fears of a reasonable man that a felony is about to be inflicted upon him, and under those circumstances he kills another, then the killing would be justifiable. In order to justify the killing on the ground that the accused acted under the fears of a reasonable man that a felony was about to be inflicted upon him, it must appear that there was real or apparent danger sufficient to justify the belief that a felony was about to be inflicted upon him. If the circumstances surrounding the defendant at the time, as they appeared to him at that time, situated as he was, were sufficient to excite the fears of a reasonable man that there was real or apparent danger that a felony was about to be inflicted upon him, and he acted under the influence of these fears, and not in a spirit of revenge, and killed another, then such killing would be justifiable."

And the very last part of the charge is as follows:

"If you do not believe he is guilty of either offense [murder or voluntary manslaughter], or have reasonable doubt of it, or if you find he was justified in doing whatever he did do,

or that he acted under the fear of a reasonable man that a felony was about to be inflicted upon him, or if you have a reasonable doubt of the guilt of the accused of either offense named, it would be your duty to acquit him, and the form of your verdict would be: 'We, the jury, find the defendant not guilty.'"

In my opinion, in the light of the entire charge, the excerpt from the charge complained of did not mislead the jury into thinking that, if the accused killed the deceased under the fears of a reasonable man that a felony was about to be committed upon him, the killing would nevertheless not be justifiable, unless it appeared to him that the danger was so urgent and pressing that, in order to save his own life, the killing of the other was absolutely necessary.

I think the judgment should be affirmed.

(24 Ga. App. 1)

**HORSLEY v. McLEOD et al.** (No. 10152.)

(Court of Appeals of Georgia, Division No. 2.  
May 16, 1919.)

*(Syllabus by the Court.)*

**PLEADING**  $\S$ 354(2)—**ACTION FOR BROKER'S COMMISSIONS—STRIKING OUT PLEA—SUFFICIENCY.**

Plaintiff, a real estate dealer, sued the defendants, landowners, on a plain and unambiguous written contract for commissions for selling a tract of land. Defendants admitted signing the contract, but pleaded that it was procured by fraud, and the sale made by the plaintiff, not under the written contract, but under a previous verbal one. A demurrer to the plea was filed, and the following order passed: "It is ordered and adjudged that said demurrer be, and the same is, sustained in so far as the allegations as to fraud in obtaining the contract sued upon, the same being held insufficient; but as to the allegations touching another or a verbal contract, the same is allowed." In *Ware v. Ware & Harper*, 20 Ga. App. 202, 92 S. E. 961, the court said: "The defendant admitted the execution of the contract which is the basis of this suit, and filed a plea of fraud in its procurement. The defendant could read and write, and there was no trick, artifice, or fraud practiced upon him which prevented him from reading the contract. The relation between the parties was that of landowner and real estate agent employed for the purpose of negotiating a sale of the land. In respect to the services to be rendered by the real estate agent, a relation of confidence existed between the owner and the agent. In respect to the compensation to be paid to the agent by the owner, the parties dealt at arm's length. There is nothing in the evidence to take this case out of the general rule that parole evidence will not be received to add to, vary, or dispute the plain and unambiguous terms of a written contract." Under this ruling the court erred in not striking the entire plea. This error rendered the further

proceedings nugatory. See *Sloan v. Farmers' Bank*, 20 Ga. App. 123, 125, 126, 127, 92 S. E. 893, and cases cited.

Error from City Court of Dawson; M. C. Edwards, Judge.

Action by J. A. Horsley against J. L. McLeod and others. Demurrer to defendants' plea was sustained, and plaintiff brings error. Reversed.

R. R. Marlin and Yeomans & Wilkinson, all of Dawson, for plaintiff in error.

R. R. Jones, of Dawson, for defendants in error.

**BLOODWORTH, J.** Judgment reversed.

**BROYLES, P. J., and STEPHENS, J.,** concur.

(24 Ga. App. 148)

**NEAL v. STATE.** (No. 10271.)

(Court of Appeals of Georgia, Division No. 2.  
July 23, 1919.)

*(Syllabus by the Court.)*

**CRIMINAL LAW**  $\S$ 1172(2)—**APPEAL AND ERROR—REVIEW—HARMLESS ERROR.**

The court did not err in refusing to grant a new trial.

Stephens, J., dissenting.

Error from Superior Court, Glascock County; B. F. Walker, Judge.

James Neal was convicted of violating the prohibition law, and he brings error. Affirmed.

M. L. Felts, of Warrenton, for plaintiff in error.

R. C. Norman, Sol. Gen., of Washington, Ga., for the State.

**BROYLES, P. J.** The indictment contained two counts. The first count charged the defendant with the offense of manufacturing alcoholic liquors. The second count charged him with knowingly permitting apparatus for the distilling and manufacturing of intoxicating liquors to be located on his premises. He was convicted on both counts. The court instructed the jury, in substance, that if the evidence showed that such apparatus was found on premises "possessed or controlled" by the defendant, the state made a prima facie case, and that would entitle the state to a verdict in its favor unless the defendant showed that the apparatus was there without his knowledge. This charge was excepted to.

Conceding, but not deciding, that this charge was erroneous, it does not require a new trial, under the facts of the case. The

uncontradicted evidence, even eliminating all of the testimony of the witness Charlie Lewis, whom the defendant attempted to impeach, clearly showed that a complete distillery for the manufacture of intoxicating liquors was located on the defendant's premises with his knowledge, and with, at least, his implied consent. This was established by the unimpeached evidence of the sheriff of the county, who testified to incriminatory admissions made to him by the defendant, which admissions, under the particular facts of the case, amounted to a confession of his guilt of the offense charged in the second count. This testimony of the sheriff was not contradicted by any other evidence, nor even by the defendant in his statement to the jury. Under these circumstances a verdict of guilty under the second count of the indictment was demanded, and the alleged error in the charge, if error, was harmless.

There was ample evidence to authorize the defendant's conviction under the first count of the indictment, and no error in the charge as to this count is complained of.

The remaining special grounds of the motion for a new trial are without merit. The court did not err in overruling the motion for a new trial.

Judgment affirmed.

BLOODWORTH, J., concurs.

STEPHENS, J. (dissenting). I cannot concur with the majority of the court in the conclusion that the defendant's conviction was demanded. As I understand the evidence, there was an issue of fact for the jury as to whether or not the defendant had knowledge of the existence of a still upon his premises. While his statement is long and argumentative and full of irrelevancies, it can be construed only as a denial of such knowledge. He stated this (in referring to the branch on which the still was found):

"It's a thick branch. I never had my foot in it before until this still was found, and I didn't know anybody else ever did. As I stated about this, I don't know anything about the spring and I have no occasion to visit my branch, and have no occasion to know of a still in there."

He further said:

"I ask, you, gentlemen, to direct your attention to the fact that I have no opportunity to be away from the office; that I have been there with a two-man job since they claim this distilling on my place. I don't know who it was. I never knew it at the time. I only discovered that since."

This clearly and unmistakably amounted to a denial upon the part of the defendant of any knowledge whatsoever as to the existence of a still upon his premises. The jury

had a right to believe this statement in preference to the sworn testimony. This certainly made an issue of fact for the jury's determination. Conceding, however, that the defendant may have, in an extrajudicial confession, admitted knowledge of the existence of a still upon his premises, such admission cannot be said to eliminate from the consideration of the jury the issue as to the knowledge of the existence of this still made by the defendant's denial in his statement. Where the defendant neither in his statement nor by testimony, denies an alleged extrajudicial confession, I hardly think it can be said that such undenied confession can be considered by the court as proof of guilt and as eliminating the issue. It is a fundamental doctrine of criminal law that—

"Confessions of guilt should be received with great caution. A confession alone, uncorroborated by other evidence, will not justify a conviction." Penal Code, § 1081.

What degree of corroboration will warrant an inference of guilt is essentially a jury question. Even though there be no issue as to the fact of a confession having been made and as to the fact of corroborative circumstances, the inferences to be drawn from these undisputed facts are peculiarly for the jury. "Confession is the means of proof, and not proof." Wigmore's Principles of Judicial Proof, 538. It cannot be said, as a universal rule, in every case where the facts are undisputed, that certain fixed and invariable inferences must be drawn from these facts. On a trial for murder all of the facts may be undisputed, yet the jury is left free to infer from these undisputed facts either malice or reasonable fears, i. e., murder or justifiable homicide.

Besides, the "incriminatory admissions made to [the sheriff] by the defendant, which admissions," in the language of the majority of the court, "under the particular facts of this case, amounted to a confession of his guilt of the offense charged," are, I respectfully submit, no more than "incriminatory admissions." The sheriff testified:

"I would consider it [the still] located on Mr. Neal's premises, because he told me he knew it was there. He told me that the Sunday we were there. He said he knew who operated it, and he said he would tell me if I would guess. I guessed A. L. Bales, and he said A. L. Bales don't run it. He said he knew all about it. I don't know—I don't remember that he told me how many times he had been down there. The question that come up—the question about the gun came up, and he said it was his gun and he loaned it to a man that was in the business and he was sorry he did, and I asked him if he would tell me who that man was. He told me he knew about it. He said he wasn't having anything to do with it himself. I don't know that he told me that he gave his consent. No, sir; he didn't tell me who operated it. I

can't remember that he told me that it was his farm; we talked about the farm and the place."

However damaging to the defendant his statement to the sheriff may have been, it did not amount to a confession of the crime charged. A confession must consist in an admission of all the elements constituting the offense, and not an admission of only a part of the essential elements of the offense.

"Unless the statement of the defendant is broad enough to comprehend every essential element necessary to make out a case against him, it cannot be said to be a confession of guilt. \* \* \* Incriminating statements, to be the equivalent of a confession of guilt, must be so comprehensive as to include every act necessary to be proved by the prosecution in order to establish the defendant's guilt." *Owens v. State*, 120 Ga. 296, 298, 299, 48 S. E. 21, 22.

"A confession, in criminal law, is a voluntary statement made by the person charged with the commission of a crime or misdemeanor, communicated to another person, wherein he acknowledges himself to be guilty of the offense charged, and disclosing the circumstances of the act and the share and participation he had in it." *Black's Law Dictionary*.

"A confession is a person's admission or declaration of an agency or participation in a crime, and is restricted to admissions of guilt." 3 Am. & Eng. Enc. Law, 439.

The statement of the sheriff tended to establish by way of admission knowledge only of the existence of the still on the part of the defendant. The statement contained no admission of the entire offense charged; the offense being to "knowingly permit or allow" a still upon one's premises. Nothing which the defendant said to the sheriff admitted that the defendant "permitted" or "allowed" a still upon his premises, nor did it admit that defendant possessed or controlled the premises. The evidence of the sheriff therefore established no more than a mere inculpatory admission on the part of the defendant. Such an admission, says the Supreme Court in *Covington v. State*, 79 Ga. 687, 690, 7 S. E. 153, 155, in the language of Judge Bleckley—

"is not direct or \* \* \* positive evidence of guilt, but it belongs to circumstantial evidence; the admitted facts being circumstances proved by the prisoner's admissions, instead of being proved by some witness who was present when these facts transpired."

The evidence having clearly made an issue as to the defendant's guilt or innocence, and the charge of the court excepted to having necessarily controlled the verdict and being an erroneous statement of the law, the verdict should be set aside and a new trial granted.

The defendant was indicted under two counts. One charged him with distilling and manufacturing prohibited liquors, and

the other charged him with knowingly permitting, having, and possessing distilling apparatus on his premises. He was convicted on both counts. Section 22 of the act approved March 28, 1917 (Acts Ex. Sess. 1917, p. 18), making it unlawful for any one "to knowingly permit or allow any one to have or possess or locate on his premises any apparatus for the distilling or manufacturing of the liquors and beverages specified in this article," provides that—

"When any such apparatus is found or discovered upon said premises the same shall be prima facie evidence that the person in *actual possession* had knowledge of the existence of the same, \* \* \* the burden of proof in all cases being upon the person in *actual possession* to show the want of knowledge of the existence of such apparatus on his premises." (*Italics mine.*)

The evidence in this case showed that a distilling apparatus was found upon the premises of the defendant, upon which lived defendant's tenant or cropper; the defendant himself not living upon the premises, but controlling the same as landlord and visiting the same daily. Defendant in his statement, however, stated that the tenant had been on the place two years, and superintended the entire farm just as if it were his (the tenant's). The judge charged the jury as follows:

"The burden is upon the state to show that the apparatus was upon the premises or property possessed or controlled by the defendant, and if the state shows that to your satisfaction, and beyond a reasonable doubt, or that there was apparatus for making these liquors or beverages, as enumerated and set out in the section of the law read to you, on the premises in possession and control of the defendant, then the state has made out a prima facie case under the law, and, stopping there, the state would be entitled under the law to have a verdict in their favor; unless the defendant shows to you that such apparatus was there without his knowledge. The burden to show that he had no knowledge of the existence of such apparatus on his premises is upon him, and not upon the state."

This charge of the court was error, in that it instructed the jury that when such distilling apparatus was found upon premises "possessed or controlled" by the defendant the state had made a prima facie case which would "entitle" it to a verdict in its favor. One who possesses or controls premises is not necessarily the one in actual possession, in the sense in which the term is used in this act. The expression "actual possession" means possession in fact; an actual and immediate occupancy of the premises. In 1 Words & Phrases (2d Series) p. 97, "actual possession" is defined as follows:

"'Actual possession' of land consists in subjecting it to the will and dominion of the owner."

cupant, and must be evidenced by those things which are essential to its beneficial use. \* \* \* 'Actual possession' means possession in fact, effected by actual entry upon the premises and actual occupancy. \* \* \* It is necessary that the possession must be actual, etc. 'Actual' means real, visible. \* \* \* Actual possession is the same as *pedis possessio* or *pedis positio*, and these mean a foothold on the land, an actual entry, a possession in fact, a standing upon it, an occupation of it, as a real, demonstrative act done. It is the contrary of a possession in law, which follows in the wake of title."

"Actual possession exists where the thing is in the immediate occupancy of the party. Constructive is that which exists in contemplation of law, without actual personal occupation." *Brown v. Volkening*, 64 N. Y. 76, 80.

The term "actual possession" as used in a penal statute of Texas, providing that any person leaving the dead carcass or body of any horse, etc., which died in the actual possession of such person, in any public road, or within 50 yards thereof, shall be fined, etc., applies to cases where the animal dies while it is actually being used by the owner; that is, in his manual possession at the time of its death. *Ogg v. State*, 48 Tex. Cr. R. 231, 87 S. W. 348.

Since the law places the burden of showing absence of knowledge of the existence of a still upon the one in "actual possession" of the premises upon which the still was found, it must necessarily follow that "actual possession," in the sense here used, means such close proximity to the premises as will reasonably lead to the inference that the party in possession had knowledge of the existence of the still. Such knowledge could justly be imputed to one in actual possession, *pedis possessio*, whereas it could not justly be imputed to one who merely owned the premises and had control thereof, but lived elsewhere. It will be seen, therefore, that where premises are immediately occupied by a tenant or cropper who actually lives thereon, and the owner or landlord, as the defendant in this case, does not live thereon, although such owner or landlord may be in control of the premises as owner, such control of the premises is not the actual possession in the sense of this act. The owner may not live upon the premises, and yet, from the particular circumstances, such as going over the place daily and inspecting it, etc., it may be inferred that he had knowledge of the existence of a distilling apparatus thereon. This inference, would not arise, however, from the fact that he controlled the place, but would arise from all of the facts and circumstances of the particular case going to show knowledge on the part of the defendant. The statute makes it unlawful for the owner of the premises, whether he lives thereon or not, to allow distilling apparatus thereon; but the statute

makes actual possession, and not ownership or control, *prima facie* evidence of knowledge of the existence of the still on the premises. Ownership or control alone are not sufficient, without more, to authorize the inference that the owner knew of the existence of a still on his premises.

Where, in a criminal case, a *prima facie* case for the state is made, a verdict of guilty is not demanded. A *prima facie* case merely authorizes the jury to find a verdict of guilty under the evidence. It is therefore error for the court to charge the jury that a *prima facie* case under this act "entitled" the state to a verdict. The possession of distilling apparatus upon the premises of the defendant does not, as a matter of law, demand the defendant's conviction. Such possession merely authorizes the jury to convict the party in actual possession of the premises. It is not a presumption of law, but is a presumption of fact. See the authorities collected and referred to in *Holliday v. State*, 23 Ga. App. 400, 98 S. E. 386; *State v. Wilkerson*, 164 N. C. 431, 79 S. E. 888.

I deem it unnecessary here to touch upon the grounds of the motion for a new trial based upon newly discovered evidence, and upon the manner in which the jury was drawn.

I am of the opinion that the judgment should be reversed.

(24 Ga. App. 75)

H. T. ARMINGTON & SONS v. STATE.  
(No. 9915.)

(Court of Appeals of Georgia, Division No. 1.  
July 17, 1919.)

(Syllabus by the Court.)

INTOXICATING LIQUORS — 250 — SALES — 465  
— VEHICLES USED IN ILLEGAL TRANSPORTATION — RESERVATION OF TITLE — RECORDATION OF CONTRACT — CONDEMNATION OF VEHICLES — EVIDENCE — SUFFICIENCY.

In a statutory proceeding to condemn a vehicle illegally employed in the transportation of intoxicating liquors, where the owner of the vehicle had conditionally sold it to the party engaged in the illegal transaction, but under the terms of the contract had reserved title in himself until full payment of the purchase price should be made, the mere fact that the contract had not been recorded would not defeat the seller's claim of title under his reservation. Moreover, in this case, a careful examination of the record fails to disclose sufficient evidence to authorize the judgment rendered by the trial judge, who by agreement heard the case without the intervention of a jury, since the proof failed to show that the automobile was at the time of seizure being used for the purpose and in the manner prohibited by the statute, as alleged in the petition to condemn.

Error from City Court of Macon; Du Pont Guerrey, Judge.



Petition by the State to condemn a vehicle illegally employed in the transportation of intoxicating liquors, wherein H. T. Armington & Sons intervened. Judgment for the State, and interveners bring error. Reversed.

On May 4, 1918, a police officer of the city of Macon seized a certain Buick automobile which contained 150 or 175 pints of whisky. At the time the automobile was seized, it was located near a vacant house, and not upon a public highway. No one was in possession of the automobile, nor had the officer seen any one driving it; but he had noticed its tracks leading from a public highway to the place where it was found. After seizing the automobile the officer reported the fact to the solicitor of the city court of Macon, and on May 7, 1918, proceedings were instituted in the court under the provisions of section 20 of the act of 1917 (Acts Ex. Sess. 1917, p. 16) for the purpose of condemning and forfeiting to the state the automobile so seized. The identity of the owner of the automobile not being known, advertisement was made pursuant to the statute. On May 13, 1918, H. T. Armington & Sons, a business concern of Jacksonville, Fla. (whether a corporation or partnership not being disclosed), interposed an intervention wherein it set up that on January 31, 1918, it had in Duval county, Fla., sold the automobile and delivered possession thereof to one J. B. Bryant, taking from him a conditional sale contract wherein title to the automobile was retained in H. T. Armington & Sons until payment of the full purchase price by Bryant; that there remained unpaid the sum of \$568.13; and that any use of the automobile in violation of the law was without the knowledge or consent of the respondent. Upon the trial of the case the officer who made the seizure testified:

"I am a police officer of the city of Macon, and as such have power and authority to make arrests. On the 4th day of May, 1918, I seized the automobile in controversy in this county. I guess there must have been between 150 and 175 pints of whisky in it, contained in pint bottles. Nobody was in possession of the automobile. I do not know who had been in possession of it. The whisky was in the back of the automobile. \* \* \* I have seen a man named J. B. Bryant in possession of this automobile at occasional intervals for the past three or four months. \* \* \* When I seized the automobile it was not on a public highway of this state, but was close to a vacant house. I could see the tracks of the automobile going from the public highway to where the automobile stopped. I did not see the automobile when it was driven there, and do not know how long it had been standing there."

Another witness for the state testified that he had examined the automobile, and that it was worth \$1,000.

H. R. Howell, sworn in behalf of the respondent, testified that he was sales manager

for H. T. Armington & Sons, and that he was familiar with the transaction in which the automobile was sold by the respondent to Bryant under a title retention contract, upon which contract his name appeared as a witness; that he conducted the sale on January 31, 1918, and that since that time he had had charge of collecting the installments due under the contract, and that the credits entered upon the back thereof represented the payments received by him for the respondent, and that there was a balance due of \$568.13 under the contract; that the respondent had no knowledge that any one was using or had used the automobile for violating the prohibition law of the state of Georgia, or for transporting whisky or any intoxicating beverage, contrary to the laws of Georgia, and did not know that the automobile had ever been carried from Duval county, Fla., in violation of the terms of the contract of purchase; that if Bryan or any one else used the automobile for that purpose, or carried it out of Duval county, Fla., it was without the knowledge or consent of the respondent in this case. The respondent then introduced in evidence the title retention contract (which, however, had never been recorded), whereby the respondent retained title to the automobile in controversy until the full purchase price had been paid therefor by Bryan.

The judge of the city court, acting by consent as both court and jury, found in favor of the state, and entered up the following judgment:

"The court having found for the state, it is considered and adjudged that the claim of title [to] one Six Buick automobile, motor No. 162135, by the respondents, Armington & Sons, be and the same is hereby denied and disallowed, and that the state may further proceed as in such cases provided by law."

To the verdict and judgment thus rendered the respondent excepted, upon the grounds that "said verdict and judgment is contrary to law, contrary to evidence, and without any evidence to support it."

Walter De Fore and Jas. C. Estes, both of Macon, for plaintiff in error.

Will Gunn, Sol., of Macon, for defendant in error.

JENKINS, J. (after stating the facts as above). The respondents claimed title to the automobile in controversy under a title retention contract executed in the state of Florida, and which had never been recorded, and set up in their intervention that under the statutes of Florida it was not necessary that such a contract be recorded in order to be valid as against all parties. Such seems to be the law of Florida, for the Supreme Court of that state, in *Campbell Co. v. Walker*, 22 Fla. 412, 1 South. 59, held as follows:

"1. An agreement in writing to sell personal property, the title to which is reserved by the seller until the purchase money is paid by the buyer, is a conditional sale, and does not vest title in the buyer until the performance of the condition, to wit, the payment of the purchase money, notwithstanding that, at the time of making said agreement, possession of the property is delivered by the seller to the purchaser.

"2. Neither the act of the Legislature of January 30, 1838, nor of January 8, 1853 (McClell. Dig. p. 765, §§ 1, 2), requires such an instrument to be recorded."

"4. An agreement, such as is described in the first headnote, is valid, as against subsequent creditors and bona fide purchasers for valuable consideration, without notice."

This case was cited and followed in *American Process Co. v. Florida White Pressed Brick Co.*, 56 Fla. 116, 47 South. 942 (2), 16 Ann. Cas. 1064. And in Georgia the fact that such a title retention contract has not been recorded will not defeat the claim of title based thereon by a respondent in a proceeding of this sort. See *Shrouder v. Sweat*, 148 Ga. 378, 96 S. E. 881; *Whites v. State*, 23 Ga. App. 174, 98 S. E. 171. The trial court, therefore, erred in finding and adjudging that the claim of title of the respondent in this case to the automobile in controversy be "denied and disallowed."

Furthermore, the petition to condemn alleges that the automobile in question was "a vehicle and conveyance used on the public roads and private ways of said state, in said county, and at the time said automobile was seized said automobile was being used in conveying between 150 and 175 pints of whisky, contained in pint bottles; said whisky being liquors and beverages the sale and possession of which is prohibited by law." The portion of section 20 of the act of 1917 material to a consideration of this case is as follows:

"All vehicles and conveyances of every kind and description which are used on any of the public roads or private ways of this state . . . in conveying any liquors or beverages, the sale or possession of which is prohibited by law, shall be seized by any sheriff or other arresting officer, who shall report the same to the solicitor of the county, city or superior court having jurisdiction in the county where the seizure was made, whose duty it shall be within ten days from the time he received said notice to institute condemnation proceedings in said court

by petition, a copy of which shall be served upon the owner or lessee if known, and if the owner or lessee is unknown, notice of such proceedings shall be published once a week for two weeks in the newspaper in which the sheriff's advertisements are published. If no defense is filed within 30 days from the filing of the petition, judgment by default shall be entered by the court at chambers, otherwise the case shall proceed as other civil cases in said court. Should it appear upon the trial of the case that said vehicle, conveyance, boat or vessel was so used with the knowledge of the owner or lessee, the same shall be sold by order of the court after such advertisement as the court may direct."

In our opinion it is altogether possible that the vehicle had been, and even more probably would soon have been, used in an illegal manner upon the highways of this state; but the statute, being summary in its nature, must be strictly construed (*Phillips v. Stapleton*, 23 Ga. App. 303, 97 S. E. 885), and after a careful examination of the evidence we are of the opinion that the evidence as we find it is legally insufficient to authorize the judgment rendered, and that it failed to show that the automobile had been or was being used upon the highways for the purpose and in the manner prohibited by the statute. The sum total of the evidence of the officer who made the seizure is to the effect that the automobile, when found, was not upon a public highway or a private way, but near a vacant house, and that he had not seen when or by whom it had been placed there, but that when thus found it contained between 150 and 175 pints of whisky. Thus it was not shown that the automobile was "used" on any of the "public roads or private ways" of this state "in conveying" any of the prohibited liquors. While the officer did testify that he saw where the tracks of the automobile led from a public highway to the place where it was found near a vacant house, it is not shown that while on the public highway it contained the whisky found therein. It is just as reasonable to presume that it did not, and that it was brought there for the purpose of receiving the whisky at that point, to be later conveyed to some other point. If so, the seizure was premature. The verdict and judgment, being thus without evidence to support it, is therefore contrary to law.

Judgment reversed.

WADE, C. J., and LUKE, J., concur.

(24 Ga. App. 110)

**SCOGGINS v. STATE (two cases).**  
(Nos. 10517, 10518.)(Court of Appeals of Georgia, Division No. 2.  
July 17, 1919.)*(Syllabus by the Court.)***CRIMINAL LAW — 977(3)—SENTENCE — IMPOSITION OF SENTENCE AT SUBSEQUENT TERM.**

At the January Term, 1918, of the superior court of Floyd County, M. E. Scoggins was convicted of voluntary manslaughter. A motion for new trial was overruled, and on February 1, 1919, the judgment was affirmed by this court. See *Scoggins v. State*, 23 Ga. App. 366, 98 S. E. 240. No sentence was pronounced against the defendant during the term at which he was convicted. On April 14, 1919, during a regular term of the court, the judge had the defendant brought before him, and when the defendant was asked if he had anything to say why sentence should not be passed upon him, he filed objections, the substance of which is that, the term of the court at which a verdict was rendered having expired, the court had "no right, power, or jurisdiction to pronounce or enter any sentence or judgment against this defendant." The court overruled the objections and sentenced the defendant to a term of years in the penitentiary, "to which ruling, refusing to consider said objections, and to which sentence, the defendant then and there excepted." In a separate bill of exceptions the defendant assigned error on the overruling of a motion in arrest of judgment, based on the same ground.

A case involving the same question as is here raised is that of *Darsey v. State*. In that case the accused was convicted of voluntary manslaughter in January, 1911, but no sentence was then imposed. The case was carried to the Supreme Court of this state (see 136 Ga. 501, 71 S. E. 661, where many of the facts are set out), then to the Supreme Court of the United States (231 U. S. 741, 34 Sup. Ct. 318, 58 L. Ed. 462). The rulings of both of these courts were adverse to the defendant. Finally, in February, 1915, sentence was for the first time imposed, and the same point was then and there urged against the judge imposing sentence as is insisted upon in the instant case. The case then came to this court, and this court held that "that portion of the plea of former jeopardy which set up that a previous verdict of involuntary manslaughter was a good and legal verdict, and that it still stands against the defendant, having been sustained by the court, it was not error for the court to order that the former verdict be established by the solicitor general, and to sentence the defendant under this verdict," and that "the accused will not be heard to complain of the long delay in this case (three or four years) from the rendition of the first verdict to the sentence of the court, where the principal cause of the delay was the appealing of this case by the defendant to the Supreme Court of this state and to the Supreme Court of the United States." *Darsey v. State*, 17 Ga. App. 280, 86 S. E. 781 (2, 3). Here is a definite and distinct ruling that it was not error for the court to sentence the defendant under the verdict, although more than four years had

elapsed between the date of the verdict and the time of imposing sentence. (The record in the *Darsey* Case shows, further, that one judge presided at the time of the verdict and a different judge imposed the sentence.)

Under the foregoing rulings, there is no merit in the exceptions now under consideration, and on each bill of exceptions the judgment must be affirmed.

Error from Superior Court, Floyd County; Moses Wright, Judge.

M. E. Scoggins was convicted of manslaughter, a new trial was denied and he brings error. Affirmed.

M. B. Eubanks and W. H. Ennis, both of Rome, for plaintiff in error.

C. H. Porter, Sol. Gen., and W. B. Mebane, both of Rome, and E. S. Taylor, of Summer-ville, for the State.

BLOODWORTH, J. Affirmed.

BROYLES, P. J., and STEPHENS, J., concur.

(24 Ga. App. 130)

**CAMPBELL v. STATE. (No. 10527.)**(Court of Appeals of Georgia, Division No. 2.  
July 22, 1919.)*(Syllabus by the Court.)***1. CRIMINAL LAW — 589(5)—JURY — 116—CONTINUANCE — GROUNDS — DISQUALIFICATION OF JURORS—JURY CHALLENGE.**

In the motion for a new trial it is alleged that the court erred in refusing to continue the case and to furnish the defendant's counsel "with a list of 24 jurors that had not tried Mrs. Campbell" (his wife); that on the day before the day of his trial she was tried in two cases for cruelty to children at a certain orphan's home, and he was charged with assault and battery on an inmate of the said home; that "there were only 36 jurors impaneled at that time in Cobb superior court; that 24 of these jurors had tried a case against defendant's wife, 12 in one case and 12 in another; and that this did not leave 24 jurors for defendant to strike an impartial jury from." *Held:*

(a) Granting that some of the jurors in attendance on the court were disqualified to try the accused, this would not be a good ground for a continuance of the case. *Humphries v. State*, 100 Ga. 260, 28 S. E. 25 (2); *Sutton v. State*, 18 Ga. App. 28, 88 S. E. 744.

(b) If the objection urged against the jurors was cause for challenge at all, it should have been made to the polls. *Schnell v. State*, 92 Ga. 459, 17 S. E. 966; *Bryan v. State*, 124 Ga. 79, 80, 52 S. E. 298, and cases cited; *Coleman v. State*, 141 Ga. 731 (1), 732 (1), 82 S. E. 228, and cases cited; *Throckmorton v. State*, 23 Ga. App. 112, 97 S. E. 664. The judge complied with the request of counsel for the accused and allowed the jurors to be examined on their *voire dire*.

## 2. CRIMINAL LAW — 929 — NEW TRIAL — GROUNDS—MISCONDUCT OF BAILIFF—CUSTODY OF JUROR.

It is assigned as error that "while the jury was considering this case one of the bailiffs told a juror, while they were at breakfast, 'that they had tried C. C. Campbell [the defendant] while this jury was out, in another case, and had turned him a loose.'" It is insisted that "this communication was unlawful and illegal, and prejudicial to the rights of defendant." The oath which the law of this state prescribes for bailiffs who have charge of juries during the trial of cases provides that they shall make no communication to the jury except by leave of the court. Had the bailiff in this case not overlooked his oath, he would not have communicated to the jury the fact that the accused had been acquitted in the other case. However, we cannot see how this conduct of the bailiff could have resulted in any ill effects to the accused. We cannot conceive that a jury of 12 upright and intelligent men would violate their oaths, and be led into the error of rendering a verdict contrary to the facts, simply because a jury in another case against the same defendant had acquitted him. Suppose the verdict first rendered had been returned before the jury in the second case had been stricken, could it be said that the jurors in the courtroom were disqualified simply because they knew that the accused had been acquitted in the first case tried? Surely not. We do not think the trial judge abused his discretion in overruling this ground of the motion for a new trial.

## 3. CRIMINAL LAW — 913(4) — NEW TRIAL — GROUNDS—EXCESSIVE SENTENCE.

It is insisted that a new trial should be granted because "the sentence in this case of 12 months in the state farm is excessive." "An assignment of error, in a motion for new trial, that a sentence within the limits fixed by law, is excessive, and too harsh under the facts and circumstances of the case, presents no reason for interference by the \* \* \* court." *McCollough v. State*, 11 Ga. App. 612(6), 76 S. E. 393. See, also, *Truitt v. State*, 124 Ga. 657, 52 S. E. 890. *Weldon v. State*, 21 Ga. App. 332, 94 S. E. 327 (9); *McLeod v. State*, 22 Ga. App. 241, 95 S. E. 934 (4).

## 4. CRIMINAL LAW — 1158(1) — REVIEW — QUESTIONS OF FACT.

There is some evidence to support the verdict. "This court, by the constitutional amendment creating it, is limited in jurisdiction to the correction of errors of law alone, and therefore has no power to grant a new trial on the ground that the verdict is strongly contrary to the weight of the evidence, if there is any evidence at all to support it." *Edge v. Thomas*, 9 Ga. App. 559, 71 S. E. 875; *Toole v. Jones*, 19 Ga. App. 24, 90 S. E. 732; *Cook v. McMurry*, 19 Ga. App. 491, 91 S. E. 785.

Error from Superior Court, Cobb County; N. A. Morris, Judge.

C. C. Campbell was convicted of an offense, and he brings error. Affirmed.

C. M. Dobbs and Herbert Clay, both of Marietta, for plaintiff in error.

Jno. T. Dorsey, Sol. Gen., of Marietta, and Wm. Butt, of Blue Ridge, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., and STEPHENS, J. concur.

(24 Ga. App. 111)

MUNDAY v. STATE. (No. 10565.)

(Court of Appeals of Georgia, Division No. 2,  
July 19, 1919.)

(Syllabus by the Court.)

BAIL — 79(1) — FORFEITURE — ESCAPE — CONVICTION OF OTHER OFFENSE.

Under the principle underlying the ruling in *Cooper v. Brown*, 10 Ga. App. 730, 73 S. E. 1101, where a defendant has been convicted of a criminal offense, and has filed a bill of exceptions and given bond for his appearance to abide the final judgment in the case, and pending the hearing of the writ of error he is convicted of another criminal offense and sentenced to the chain gang, from which he escapes, the bond given in the first case becomes functus officio, and the obligation of the sureties is annulled. It follows that the defendant is a fugitive from justice, not only in the latter case, but in the first one, and the bill of exceptions will be dismissed, unless the defendant gives himself up to the officers of the law within 30 days from the time the case was submitted to this court. *Madden v. State*, 70 Ga. 383; *Osborn v. State*, 70 Ga. 731; *Gentry v. State*, 91 Ga. 689, 17 S. E. 956.

Error from Superior Court, Morgan County; J. B. Park, Judge.

Arch Munday was convicted of an offense, and he brings error. Writ dismissed.

Allen & Pottle, of Milledgeville, for plaintiff in error.

Doyle Campbell, Sol. Gen., of Monticello, for the State.

BROYLES, P. J. Writ of error dismissed.

BLOODWORTH and STEPHENS, JJ., concur.

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(24 Ga. App. 141)

**HARDY v. STATE.** (No. 10563.)(Court of Appeals of Georgia, Division No. 2  
July 23, 1919.)*(Syllabus by the Court.)***CRIMINAL LAW**  $\S$ 1156(2)—**HOMICIDE**  $\S$ 142  
(7), 257(8)—**ASSAULT WITH INTENT TO KILL**  
—**EVIDENCE—PROOF OF DEADLY CHARACTER**  
OF WEAPON—**NEW TRIAL—DISCRETION OF**  
**COURT.**

The plaintiff in error was convicted of assault with intent to murder. In the brief filed by his attorney it is insisted that the evidence does not show that the knife used was a weapon likely to produce death, and that the evidence also fails to show malice or intent to kill, and therefore the judgment is without evidence to support it, and should be set aside. The motion for a new trial contains the general grounds only. It is true that, "when it is charged in the indictment that the assault was made with a weapon likely to produce death, the character of the weapon enters into a description of the offense, and must be proved like any other essential feature" (*Paschal v. State*, 125 Ga. 280, 54 S. E. 172), yet in the decision from which the statement quoted above is taken it is said: "Under the indictment it was necessary to prove that the knife with which the assault was made was a weapon likely to produce death. This allegation might have been established by direct proof as to the character of the weapon, by an exhibition of it to the jury, or by evidence as to the nature of the wound, or other evidence such as would warrant the jury in finding that the instrument was one calculated to produce death." (Italics ours.) *Mathews v. State*, 104 Ga. 499, 30 S. E. 727; *Paschal v. State*, 68 Ga. 818. In *Mathews v. State*, supra, the Supreme Court said: "In order to convict the accused, under the indictment, it was necessary to prove that the instrument with which the assault was made was a 'weapon likely to produce death.' This may be shown by direct or circumstantial evidence, but must be proved." The person assaulted swore on the trial of this case: "I saw Tom Hardy on or about the 29th of July, 1917, at the depot in Pendergrass. He was messing with my wife, and I said, 'Tommie, you quit messing with my wife;' and he jumped up and cut me with a pocket knife and run off. He cut me awful bad. I will let you see for yourselves. (Exhibits neck.) Like to have killed me. I laid in eight months not able to do nothing. \* \* \* After he cut me I could not hold my head straight to save my life. If I had held my head straight I would have bled to death before the doctor got there."

In *Nelson v. State*, 4 Ga. App. 223, 60 S. E. 1072, the first and second headnotes are as follows: "The lethal character of the weapon used in making an assault may be inferred from the effect and nature of the wound inflicted." "The intent to kill may be shown by the use of a deadly weapon in a manner likely to produce death." Applying these principles to the evidence in this case, including an inspection of the wound by the jury, we think there was proof enough to "justify an inference by the jury that the knife used was in truth a dead-

ly weapon," and to show that it was used in a "manner likely to produce death," and that this, in connection with the other evidence in the case, was sufficient to authorize the jury to infer malice and intent to kill. "There being evidence tending to show the guilt of the accused, the jury having believed it, as shown by their finding him guilty, and the trial judge being satisfied therewith, this court cannot say that he abused the discretion vested in him by law to grant or refuse new trials." *Allen v. State*, 91 Ga. 189, 16 S. E. 980.

Error from Superior Court, Jackson County; A. J. Cobb, Judge.

Tom Hardy was convicted of assault with intent to murder, and he brings error. Affirmed.

J. S. Ayers, of Jefferson, for plaintiff in error.

W. O. Dean, Sol. Gen., of Monroe, for the State.

**BLOODWORTH, J.** Judgment affirmed.

**BROYLES, P. J., and STEPHENS, J.,** concur.

(24 Ga. App. 159)

**BYERS v. STATE** (No. 10382.)(Court of Appeals of Georgia, Division No. 2  
July 23, 1919.)*(Syllabus by the Court.)***CRIMINAL LAW**  $\S$ 938(3), 942(1), 1064(1)—  
**NEW TRIAL—GROUNDS—NEWLY DISCOVERED**  
**EVIDENCE—MOTION—SUFFICIENCY—**  
**IMPEACHING EVIDENCE.**

The only ground of the motion for a new trial that is insisted upon in the brief of plaintiff in error relates to alleged newly discovered evidence. The record shows that this alleged newly discovered evidence is that of witnesses who testified against plaintiff in error in the investigation before a United States commissioner in the presence of the plaintiff in error, and therefore can in no sense be "newly discovered evidence." The mere fact that the defendant "did not know of its relevancy and importance" will not avail him. *Fleming v. State*, 21 Ga. App. 188, 93 S. E. 1012(1); *Adams v. State*, 22 Ga. App. 252, 95 S. E. 877 (3); *Rachels v. State*, 22 Ga. App. 649, 96 S. E. 1045(1). In his affidavit attached to the motion for a new trial it is not stated that he "did not know of the existence of such evidence before the trial, and that the same could not have been discovered by the exercise of ordinary diligence." Civ. Code 1910, § 6086. Hence this ground of the motion should not be considered by this court. Moreover, this alleged newly discovered evidence is merely impeaching in its nature and "it is a sound and well-settled rule that a new trial will not be granted on the ground of newly discovered testimony, if the only object of the evidence be to impeach the character or credit of a witness. Where one has been convicted of a crime, on false testimony,

and witnesses have subsequently been discovered, who can prove that testimony false, it is better that redress should be sought in executive clemency than that the court by granting a new trial should violate a general rule essential to the pure and certain administration of justice." *Levinig v. State*, 13 Ga. 513 (1-2).

Error from Superior Court, Putnam County; J. B. Park, Judge.

Proceeding between Mose Byers and the State. A determination adverse to Byers was rendered, and he brings error. Affirmed.

R. C. Jenkins and S. T. Wingfield, both of Eatonton, for plaintiff in error.

Doyle Campbell, Sol. Gen., of Monticello, for the State.

STEPHENS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(24 Ga. App. 93)

SOUTHERN RY. CO. v. CAGLE. (No. 10238.)

(Court of Appeals of Georgia, Division No. 1. July 17, 1919.)

(Syllabus by the Court.)

1. WATERS AND WATER COURSES ⇨78, 87—DIVERSION OR DIMINUTION OF WATER—RIGHTS OF LOWER OWNER—QUESTIONS FOR JURY.

The right which a riparian owner of land adjacent to a nonnavigable stream has to a reasonable use and consumption of its water does not include the right to use, divert, or diminish the supply so as materially and unreasonably to interfere with the rights and uses of a lower owner. Primarily, each has the same and a common right to the natural and undisturbed flow of the stream, subject only to such detention or diminution as may be occasioned by a reasonable use by others. Whether in a given instance such use shall be taken as reasonable or unreasonable is a question to be determined by the jury upon the particular facts of the case, including, among other things, the size and character of the stream, and the uses to which it is subservient. *White v. East Lake Land Co.*, 96 Ga. 415, 23 S. E. 393, 51 Am. St. Rep. 141.

2. DIVERSION OF WATERS.

The petition, as amended, seeking specified damages because of the alleged unreasonable diversion of water on the part of the defendant, whereby the earnings of the plaintiff's mill property were diminished, set forth a cause of action. The exceptions taken to the overruling of the special grounds of demurrer are

without merit. The charge of the court is without material error. It cannot be said that the amount of the verdict, though in our opinion liberal, is altogether without evidence to support it.

Error from Superior Court, Hall County; J. B. Jones, Judge.

Action by T. C. Cagle against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Edgar A. Neely, of Atlanta, J. O. Adams and Ed Quillian, both of Gainesville, and C. R. Faulkner, of Bellton, for plaintiff in error.

JENKINS, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(24 Ga. App. 67)

STONE v. STATE. (No. 10598.)

(Court of Appeals of Georgia, Division No. 2. July 10, 1919.)

(Syllabus by the Court.)

1. BASTARDS ⇨50—ALLEGATIONS OF PATER-NITY—SUFFICIENCY.

An accusation under section 682 of the Penal Code 1910, charging the offense of bastardy, which fails to allege distinctly that the defendant is the father of a bastard child, is fatally defective. A recital in the accusation that the prosecutrix had made an affidavit before a justice of the peace that the defendant was the father of a bastard child, does not amount to an allegation that the defendant is the father of such child. *Locke v. State*, 3 Ga. 534; *Hudson v. State*, 104 Ga. 723, 30 S. E. 947.

2. MOTION IN ARREST OF JUDGMENT.

The motion in arrest of judgment should have been sustained.

Error from City Court of Baxley; H. J. Lawrence, Judge.

Leonard Stone was convicted of bastardy and he brings error. Reversed.

Padgett & Watson, of Baxley, for plaintiff in error.

C. H. Parker, Sol., and J. B. Moore, both of Baxley, for the State.

STEPHENS, J. Judgment reversed.

BROYLES, P. J., and BLOODWORTH, J., concur.

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(24 Ga. App. 67)

**LOUISVILLE & N. R. CO. v. STEWART.**  
(No. 10205.)(Court of Appeals of Georgia, Division No. 2.  
July 16, 1919.)*(Syllabus by the Court.)***CARRIERS  $\S$ 69(3)—CARRIAGE OF FREIGHT—  
ACTIONS FOR SHORTAGE—BURDEN OF PROOF.**

This was a suit to recover the value of an alleged shortage in a carload shipment of rags; the shortage being the difference in the alleged weight of the rags at the time of their delivery to the defendant carrier and the weight of the rags when delivered to the consignee. In this case there was no presumption against the railroad company, but the plaintiff had the burden of affirmatively proving his case. The evidence as to how many pounds of rags were actually loaded in the car is too vague and uncertain to support a recovery for the plaintiff, and the court erred in overruling the motion for a new trial.

Error from Superior Court, Gordon County; M. C. Tarver, Judge.

Action by Jim Stewart against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Tye, Peebles & Tye, of Atlanta, O. N. Starr, of Calhoun, and D. W. Blair, of Marietta, for plaintiff in error.

A. L. Henson and J. G. B. Erwin, Jr., both of Calhoun, and M. B. Eubanks, of Rome, for defendant in error.

STEPHENS, J. Judgment reversed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(24 Ga. App. 85)

**VICKERS v. ROBINSON et al.** (No. 10002.)(Court of Appeals of Georgia, Division No. 1.  
July 17, 1919.)*(Syllabus by the Court.)***1. LANDLORD AND TENANT  $\S$ 296(2), 305(2)—  
DISTRESS PROCEEDINGS—DEFENSES—JURIS-  
DICTION OF COURT.**

"The relation of landlord and tenant, either by express contract or by legal implication, is an essential basis of a distress warrant." *Hearn v. Huff*, 6 Ga. App. 56, 64 S. E. 298. Where, therefore, a counter affidavit denies in terms of the statute that the sum distrained for is due, and specially denies that the relation of landlord and tenant exists, it sets up a sufficient defense to the proceeding by distress warrant. But where, as in this case, the distress warrant is returnable to a court without jurisdiction to grant affirmative equitable relief, and, by way of denying the relation of landlord and tenant, the counter affidavit further sets up the full terms of the alleged con-

tract of purchase, and the defendants specially pray "that the court will enforce their said contract of purchase against the said plaintiff in distress warrant, and that a verdict of the jury and a decree of the court may be framed in the premises, providing for and requiring said plaintiff in said distress warrant to stand to, abide by, and carry out the said contract of sale of the aforesaid described tract of land to these defendants in distress warrant," it is error to overrule a timely motion by the plaintiff to strike this prayer, on the ground that it seeks relief beyond the jurisdiction of the trial court to grant. *Butler v. Holmes*, 128 Ga. 333, 57 S. E. 715.

**2. DISTRESS PROCEEDINGS.**

The error pointed out above renders all subsequent proceedings in the trial court nugatory.

Error from City Court of Wrightsville; B. B. Blount, Judge.

Proceeding by T. E. Vickers against Newton Robinson, Sr., and others. Judgment adverse to plaintiff was rendered, and he brings error. Reversed.

A. L. Hatcher and B. H. Moye, both of Wrightsville, and B. T. Rawlings, of Sandersville, for plaintiff in error.

E. L. Stephens and Faircloth & Claxton, all of Wrightsville, for defendants in error.

LUKE, J. Judgment reversed.

WADE, C. J., and JENKINS, J., concur.

(24 Ga. App. 9)

**BANK OF COMMERCE v. PHILLIPS.**  
(No. 10046.)(Court of Appeals of Georgia, Division No. 1.  
June 12, 1919. Rehearing Denied  
July 17, 1919.)*(Syllabus by the Court.)***PARTNERSHIP  $\S$ 128, 218(3)—AUTHORITY OF  
PARTNER — EXECUTION OF PARTNERSHIP  
NOTES.**

The court did not err in directing a verdict for the defendant.

Error from Superior Court, Tift County; R. Eve, Judge.

Action by the Bank of Commerce against T. E. Phillips. Judgment for defendant on a directed verdict, and plaintiff brings error. Affirmed.

Shackleford & Shackleford, of Tampa, Fla., O. M. Smith, of Valdosta, and Fulwood & Hargrett, of Tifton, for plaintiff in error.  
J. S. Ridgill, of Tifton, and E. K. Wilcox, of Valdosta, for defendant in error.

LUKE, J. In the plaintiff's petition it is alleged that the defendant is a member of

"Gardner Lumber Company," a firm composed of the defendant and Robinson. It is conceded that the note sued was executed in the name of "Gardner Lumber Company, by Robinson," for the purchase of certain shares of stock in a corporation, and the stock certificate was attached to the note as collateral security. It is further conceded that the note sued on was a Florida contract, and the issues raised by the pleadings were to be tried according to the law of Florida. The evidence was undisputed that the giving of the note was without the knowledge or consent of the defendant, and not necessary to the conduct of the business of the partnership, "Gardner Lumber Company," which was engaged in the saw mill business at Gardner, Fla. The contract of partnership was in evidence, and by none of its terms was authority given to the partner Robinson to execute the note of the partnership or to create debts other than were necessary to the conduct of the business. Necessarily the partner Robinson must have been acting within the scope of the partnership, or the other partner, the defendant here, must have known of the transaction or by some act ratified the execution of the note, in order for the plaintiff to recover against him. In *Lanier v. McCabe*, 2 Fla. 32, 48 Am. Rep. 173, the Supreme Court held:

"Where several persons formed an association, for the purpose of establishing and putting in operation a steam sawmill, one of the parties cannot issue notes in the name of the company, which shall bind the other members of the company, except the authority be given by the articles of their association or otherwise. The partnership must be in a trade or concern to which the issuing or transfer of bills is necessary or usual, otherwise a copartner will not be liable for the act of his partner, unless he give express authority."

See, also, *Chandler v. Sherman*, 16 Fla. 99.

While ordinarily every partner is a general and authorized agent of the firm, his power to act as such agent must be within the scope of the partnership business.

No article of partnership authorized the execution of the note sued on. The note was given without the knowledge or consent of the defendant, and when knowledge came to him that the note had been given (which, according to the evidence, was when he received notice of intention to sue), he denied liability. In the evidence there was nothing to show such a course of dealings as would authorize or ratify the execution of the note, and, there being no proof that the purchase of the stock for which the note was given was necessary to the conduct of the business of the partnership, it was not error to direct a verdict for the defendant.

Judgment affirmed.

WADE, C. J., and JENKINS, J., concur.

(24 Ga. App. 155)

KELLEY et al. v. STATE. (No. 10548.)

(Court of Appeals of Georgia, Division No. 2.  
July 23, 1919.)

*(Syllabus by the Court.)*

1. INDICTMENT AND INFORMATION  $\Leftrightarrow$  191(5)—  
CONVICTION OF OFFENSE INCLUDED IN  
CHARGE — LARCENY AFTER TRUST—SIMPLE  
LARCENY.

The same transaction may constitute both larceny after trust and simple larceny. In such a case the jury can convict the accused of either offense.

2. LARCENY  $\Leftrightarrow$  3(2) — SIMPLE LARCENY —  
FALSE PRETENSES.

If a person obtains possession of the property of another under the false pretense of a bailment, with intent to appropriate the property to his own use, and the owner intends to part with the possession only of the property, the possession is obtained unlawfully, and the subsequent appropriation in pursuance of the original intent is simple larceny.

Error from Superior Court, Fulton County; John D. Humphries, Judge.

Albert Kelley and others were convicted of larceny, and they bring error. Affirmed.

H. A. Allen, Tillou Von Nunes, and W. I. Heyward, all of Atlanta, for plaintiffs in error.

Jno. A. Boykin, Sol. Gen., and E. A. Stephens, both of Atlanta, for the State.

BROYLES, P. J. The controlling question in this case is whether the defendants were guilty of simple larceny as charged and convicted, or whether they were guilty of larceny after trust only. It is contended by their counsel that under the evidence adduced the only offense of which they could have been legally convicted was larceny after trust. Both of the defendants were employed by the firm of Cefalu & Co., engaged in the "green grocery" business. One of the defendants, Hampton, was employed by the firm about 8 o'clock on the morning of January 31, 1919, to drive their delivery wagon. After making one delivery to a local hotel he returned to the store with the mule and wagon. About 10:30 o'clock on the same morning he was again intrusted with the mule and wagon and sent out to deliver other groceries. This time he did not return to the store, and the mule and wagon were not sent back. About 1:30 o'clock in the afternoon of the same day the other defendant, Kelley, rode up on the mule to the stable of a horse and mule dealer in Atlanta and offered to sell the mule for \$15, but finally agreed to take \$5 for it. The dealer, without the knowledge of Kelley, had the police telephoned for, and attempted to keep Kelley there by conversa-



tion and by delay in paying him the money. Kelley's suspicions were aroused, however, and before the police arrived he ran and attempted to escape, but was caught by the dealer and was turned over to the police when they arrived. Kelley told the police that he had left the other defendant, Hampton, "up the street a little ways," and that he and Hampton had decided to sell the mule and get money to leave on that night.

[1] 1. It is well settled that the same transaction may constitute both larceny after trust and simple larceny, and that in such a case the jury can convict the accused of either offense. *Martin v. State*, 123 Ga. 478, 51 S. E. 334, and authorities cited; *Bryant v. State*, 8 Ga. App. 389, 69 S. E. 121 (2).

[2] 2. Where a person obtains possession of the property of another, under the false pretense of a bailment, with intent to appropriate the property to his own use, and the owner intends to part with the possession only of the property, the possession is obtained unlawfully, and the subsequent appropriation of the property in pursuance of the original intent is simple larceny. *Martin v. State*, supra, and authorities cited.

The intent with which an act is done is peculiarly a question of fact for determination by the jury; and although a finding by the jury that the accused had the intent to commit the crime charged may be supported by evidence which is exceedingly weak and unsatisfactory, the verdict will not be set aside on that ground. *Johnson v. State*, 9 Ga. App. 406, 71 S. E. 507 (3).

Under the foregoing rulings we think that the facts of the instant case authorized the jury to find that when the defendant Hampton obtained possession of the mule and wagon to make the second trip for his employers he had formed the intent to appropriate the property to his own use, and that the other defendant, Kelley, conspired with him, and that they were both guilty of simple larceny.

Judgment affirmed.

**BLOODWORTH and STEPHENS, JJ.,** concur.

**STEPHENS, J.** (specially concurring). I concur in the judgment of affirmance on the ground that, under the law of Georgia:

"Horse stealing shall be denominated simple larceny. \* \* \* The offense shall, in all cases, be charged as simple larceny, but the indictment shall designate the nature, character and sex of the animal, and give some other description by which its identity may be ascertained." Penal Code, §§ 153, 154.

The indictment in this case charges the defendant with simple larceny for that he "did wrongfully, fraudulently, and privately

take, steal, and carry away with intent to steal the same one sorrel horse mule and wagon, of the value of \$100," etc. The evidence showed that the defendants were guilty of horse stealing, and therefore supported the indictment.

The excerpts from the charge of the court, if error, were harmless.

(24 Ga. App. 64)

**SLATON et al. v. HINMAN.** (No. 10444.)

(Court of Appeals of Georgia, Division No. 2.  
July 3, 1919.)

(Syllabus by the Court.)

**1. PLEADING**  $\S$  332—**BILL OF PARTICULARS**—**AMENDMENTS.**

Where in a suit upon an account a bill of particulars is not attached, and a demand therefor is made by the defendant, and subsequently, by amendment allowed, a bill of particulars is set out, this amendment need not be served upon the defendant; and the plaintiff does not lose a term of the court because the bill of particulars was not attached in the first instance to the account sued on. Section 6269 of the Civil Code of 1910 has been superseded by section 5623 thereof. *Moore v. Hendrix*, 144 Ga. 646, 87 S. E. 915 (2); *Rea v. McGahee*, 12 Ga. App. 326, 77 S. E. 204.

**2. TIME OF RENDITION OF JUDGMENT.**

It does not affirmatively appear from the petition for certiorari and the answer thereto that the original judgment in favor of the plaintiff was not rendered at the proper term of the court.

**3. EXECUTION**  $\S$  166 — **AFFIDAVIT OF ILLEGALITY—EXISTENCE OF OTHER REMEDY.**

"An affidavit of illegality cannot be used as a substitute for certiorari or other appellate procedure. If the affiant was regularly served with process or voluntarily appeared and pleaded in the main suit, he cannot by his affidavit of illegality assail the judgment because of mere errors of law which took place on the trial." *Arnold-Forrest Horse & Mule Co. v. Fleeman*, 9 Ga. App. 483, 71 S. E. 766 (1).

**4. AFFIDAVIT OF ILLEGALITY.**

Under the above rulings the trial judge did not err in dismissing the affidavit of illegality.

**5. CERTIORARI**  $\S$  70(4) — **REVIEW—ASSIGNMENT OF ERRORS.**

The bill of exceptions contains no assignment of error upon the judgment of the superior court dismissing the traverse to the answer to the petition for certiorari. That judgment, accordingly, will be conclusively presumed to be correct.

**6. PETITION FOR CERTIORARI.**

The judge of the superior court did not err in overruling the certiorari.

Error from Superior Court, Fulton County:  
**W. D. Ellis, Judge.**

Proceedings between G. A. Slaton and others and T. P. Hinman. Judgment adverse to Slaton was rendered, and he brings error. Affirmed.

W. A. James, of Atlanta, for plaintiff in error.

Harry W. Belfor, of Atlanta, for defendant in error.

BROYLES, P. J. Judgment affirmed.

BLOODWORTH, J., concurs.

STEPHENS, J. (specially concurring). In my opinion a decision of the matters embraced in paragraphs 1 and 2 of the decision in this case is not necessary to a proper determination of the case. I concur in the judgment of affirmance upon the grounds stated in the other paragraphs.

(24 Ga. App. 94)

WEYMAN v. MAYNARD et al. (No. 10243.)

(Court of Appeals of Georgia, Division No. 1.  
July 17, 1919.)

(Syllabus by the Court.)

**1. NEGLIGENCE — 113(1), 136(14)—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY—DEMURRER.**

Ordinarily questions of negligence are such as lie peculiarly within the province of the jury to determine; but where by the allegations of the petition itself it clearly appears that the plaintiff, by the exercise of ordinary care, could have readily avoided the consequences flowing from the defendant's negligence, the petition is subject to demurrer, since, "If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover." Civ. Code 1910, § 4428; Ball v. Walsh, 137 Ga. 350, 73 S. E. 585.

**2. LANDLORD AND TENANT — 162, 164(1, 7)—CONDITION OF PREMISES—LATENT DEFECTS—NOTICE—LIABILITY OF LANDLORD.**

It is ordinarily the duty of a landlord to turn over the rented property to the tenant in a condition reasonably safe and suited for the purposes intended. If, at the time of the renting, latent and dangerous defects exist, of which the tenant does not then have or does not acquire actual knowledge prior to the time of the resulting injury, then the landlord is liable to the tenant for damages naturally flowing from his exposure to the risks resulting from such unknown defects. If, however, prior to the time of the injury the defects were actually known to the tenant, or were so plainly observable that the tenant must necessarily have had the same and equal opportunity as the landlord of discovering and understanding them, with full opportunity of notifying the landlord thereof prior to the time of the damage or injury, then, before the landlord would be liable

in damages to the tenant for such naturally resulting injuries, it must appear that notice had first been given him of such defects. Henley v. Brockman, 124 Ga. 1059, 53 S. E. 672 (5); Driver v. Maxwell, 56 Ga. 11(2); White v. Montgomery, 58 Ga. 204; Ocean Steamship Co. v. Hamilton, 112 Ga. 901, 903, 38 S. E. 204; Stack v. Harris, 111 Ga. 149, 150, 36 S. E. 615.

**3. LANDLORD AND TENANT — 169(3)—INJURY TO TENANT—SUFFICIENCY OF PETITION.**

Applying the foregoing principles of law to the instant case there could be no valid recovery under the allegations contained in the petition, and the demurrer thereto should have been sustained. Certain other legal principles also appear to be involved, which we think might likewise bar a recovery, but which it is not thought necessary to formulate.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Mrs. J. W. Maynard and others against S. T. Weyman. Demurrer to petition overruled, and defendant brings error. Reversed.

Mrs. J. W. Maynard brought her action against S. T. Weyman and another for damages arising from personal injuries; the allegations of the petition as to this defendant being substantially as follows: That prior to August 27, 1917, plaintiff's husband, J. W. Maynard, and her brother-in-law, L. W. Whitley, entered into an agreement with the defendant whereby they were to jointly rent from the defendant, for the use of themselves and their families, the house and lot known as 570 Central avenue, Atlanta, Ga., and in pursuance of this agreement took possession of the house on the date above named; that a few hours after the plaintiff and her family and that of her sister moved into the residence, two employes of the Atlanta Gaslight Company called at said residence (presumably at the request of the plaintiff) for the purpose of installing gas meters, connecting up and testing the gas fixtures, and turning on the gas for use by plaintiff and the other residents of said house; that plaintiff and her sister requested said employes to make a careful examination of all the gas fixtures and connections in the house; that shortly after the employes of the gas company had finished their work of installing gas meters, testing and connecting up the gas fixtures and connections, and left the house, the plaintiff discovered that the bathroom was completely filled with gas which had escaped and was then escaping through a hole in the ceiling, and discovered further that the entire bathroom gas fixture was lying, entirely disconnected, in the bathtub; that thereupon the plaintiff, with the assistance of a stranger who had come into the house to aid her, threw open the door and window of the bathroom, in order that the

gas might escape therefrom, and that within a few minutes thereafter the stranger succeeded in connecting the gas fixture with the hole in the wall, thus stopping the leakage of gas therefrom. It is further alleged that about 30 minutes later the stranger who had come voluntarily to the assistance of the plaintiff and the other residents of the house stood upon a box in the middle of the bathroom, while plaintiff stood within about 10 feet of him and in the doorway between the bathroom and the adjoining hall, and struck a match for the purpose of testing the connection between the gas pipe or fixture and the hole in the wall, and was extending his hand in the direction of the hole or wall connection, when suddenly and unexpectedly there was an explosion and a flame which spread over the entire bathroom and into the doorway of the hall adjoining the bathroom where the plaintiff was standing at the time, burning and injuring her as described.

Plaintiff alleged that the defendant was negligent in the following particulars: (a) In failing to have the house in a tenantable condition, and in a safe and suitable condition for use and occupancy as a residence by the plaintiff and the other persons residing there; (b) in failing to have all gas fixtures in said house safely, securely, and properly connected up, so that the gas, when turned on, would not escape therefrom.

The defendant demurred to the petition upon the following grounds: (1) It set forth no cause of action against the defendant; (2) it fails to allege that the plaintiff gave notice to the defendant of the repairs alleged to be necessary, nor does plaintiff show that she was herself not guilty of such negligence as would preclude her right to recover damages of this defendant; (3) it appears from the allegations thereof that the alleged defects were patent and were known to plaintiff, and unknown to this defendant, but petitioner fails to allege any knowledge on the part of this defendant, or that she gave this defendant notice of such defects; (4) the allegations of the petition clearly disclose that the plaintiff, by the use of ordinary care, could have avoided the consequences to herself caused by said alleged negligence. The trial court, after hearing argument of counsel, passed an order overruling the demurrer, and to this order and judgment the defendant excepts.

Robt. C. & Philip H. Alston and Blair Foster, all of Atlanta, for plaintiff in error.

Dorsey, Shelton & Dorsey and Smith, Hammond & Smith, all of Atlanta, for defendants in error.

JENKINS, J. Judgment reversed.

WADE, C. J., and LUKE, J., concur.

(24 Ga. App. 112)

SULLIVAN et al. v. CURLING. (No. 9737.)

(Court of Appeals of Georgia, Division No. 2.  
July 22, 1919.)

(Syllabus by the Court.)

1. ASSIGNMENTS ⇐24(1)—PARTNERSHIP ⇐296(1) — DISSOLUTION — ASSIGNMENT OF RIGHT OF ACTION — PARTIES — JOINDER — TORTS.

"A chose in action arising from a tort is assignable where it involves, directly or indirectly, a right of property."

(a) "Where a partnership is dissolved and one partner assigns to the other all of his right, title, and interest in and to the assets of the partnership, the assignee may institute and maintain an action against such tort-feasor for the entire damage sustained by the partnership. The assignor is not a proper party plaintiff to the suit, nor is it proper that the suit be brought in the names of both partners for the use of the assignee."

2. SUFFICIENCY OF PETITION.

The petition was not subject to general demurrer.

3. PARTNERSHIP ⇐296(2) — DISSOLUTION — ASSIGNMENTS OF INTEREST IN ASSETS — PLEADING—SUFFICIENCY.

"An allegation in a petition by one member of a partnership that the other member thereof sold out to the plaintiff 'all of his right, title, and interest in and to the assets of said partnership, plaintiff having operated the business since the date of said sale under a trade-name, and being the sole and exclusive owner of all of the assets of the firm,' is a sufficient allegation of assignment of a chose in action, in the absence of an appropriate special demurrer, and as against a general demurrer that 'plaintiff's petition sets forth no cause of action which would authorize a judgment against defendant.'"

(a) The above allegation in the plaintiff's petition was not attacked by an appropriate special demurrer.

4. SUFFICIENCY OF PETITION.

The petition as amended was not subject to any of the special grounds of the demurrer interposed.

5. APPEAL AND ERROR ⇐1078(1), 1079—ASSIGNMENTS OF ERROR—SUFFICIENCY—ARGUMENT.

An assignment of error not argued in the brief of counsel for the plaintiff in error will be treated as abandoned. A mere reference to such an assignment, with the statement that it is not abandoned but insisted upon, will not be considered as an argument. "Courts of review have the right to expect assistance from counsel by citation of authority or argument." *Youmans v. Moore*, 11 Ga. App. 66, 74 S. E. 710; *Muse v. Hall*, 18 Ga. App. 651, 90 S. E. 222; *James v. Boyett*, 19 Ga. App. 157, 91 S. E. 219; *Barfield Music House v. Harris*, 20 Ga. App. 42, 92 S. E. 402. In the instant case the only reference to the first five grounds of the amendment to the motion for a new trial

is as follows: "We contend that the court committed error in overruling the assignments of error contained in the fourth, fifth, sixth, seventh, and eighth grounds of the amendment to the motion for a new trial, for the reasons set out in each ground thereof, and we invite the attention of the court to each ground thereof." Under the above ruling these grounds will be treated as abandoned.

**6. TRIAL — 259(1) — INSTRUCTIONS — GIVING UNDUE PROMINENCE TO CONTENTIONS OF ONE PARTY.**

"While it is undoubtedly true that the contentions of the plaintiff were stated more at length than those of the defendant, it cannot be inferred from this fact that undue stress was laid upon, or undue prominence given to, the contentions of the former. In the first place, the contentions, so far as appear from the pleadings of the plaintiff, are set forth fully and distinctly in his petition, properly paragraphed, and the defendant contented itself, as it had a right to do, with a bare denial of the allegations of the petition. If the plaintiff's case required a full, definite, and affirmative allegation of certain facts, and the defense to the cause of action as stated rests upon a mere denial of the allegations in the petition, and the trial judge sums up the contentions of both parties by a fair statement of the material allegations in the petition, and then states that these allegations are denied by the defendant, how can it be said that he has failed to state the contentions of either party?" *Macon, Dublin & Savannah R. Co. v. Joyner*, 129 Ga. 684, 59 S. E. 903. Under this ruling, and the facts of the instant case, the charge of the court stated the contentions of the parties fairly and with sufficient fullness and clearness. If the defendants had desired a more elaborate statement of their contentions a timely written request therefor should have been offered.

**7. SUFFICIENCY OF INSTRUCTIONS.**

The reference in the charge to the defense of the defendants was sufficiently full, in the absence of a timely written request for more detailed instructions thereon.

**8. SUFFICIENCY OF EVIDENCE.**

The verdict was authorized by the evidence, and the court did not err in overruling the motion for a new trial.

Error from City Court of Hazlehurst; Gordon Knox, Judge.

Proceedings between W. R. Sullivan, receiver, and others and H. B. Curling. A determination adverse to the receiver was rendered, and he brings error. Affirmed.

J. W. Quincey and L. E. Heath, both of Douglas, and J. Mark Wilcox and S. D. Dell, both of Hazlehurst, for plaintiff in error.

McDonald & Willingham, of Douglas, and Newton Gaskins, of Hazlehurst, for defendants in error.

**BROYLES, P. J.** Certain questions in this case were certified to the Supreme Court, and in answer thereto that court

ruled as set forth in the first three headnotes, with the exception of 3 (a). See the entire opinion of the Supreme Court in *Sullivan v. Curling*, 99 S. E. 533, rendered May 14, 1919.

Judgment affirmed.

**BLOODWORTH, J.**, concurs.

**STEPHENS, J.**, concurs dubitante.

(24 Ga. App. 71)

**BUCK v. PEOPLE'S BANK OF JACKSONVILLE.** (No. 10432.)

(Court of Appeals of Georgia, Division No. 2. July 16, 1919.)

(*Syllabus by the Court.*)

**DISMISSAL OF PETITION.**

The petition was not subject to either the general or special ground of the demurrer interposed, and the court erred in sustaining the demurrer and in dismissing the petition.

Error from City Court of Tifton; J. H. Price, Judge.

Action by E. A. Buck against the People's Bank of Jacksonville. Demurrer to petition sustained, and petition dismissed, and plaintiff brings error. Reversed.

R. D. Smith, of Tifton, for plaintiff in error.

J. S. Ridgill, of Tifton, for defendant in error.

**BROYLES, P. J.** Judgment reversed.

**BLOODWORTH and STEPHENS, JJ.**, concur.

(24 Ga. App. 108)

**BOHANNON v. POAGE.** (No. 10510.)

(Court of Appeals of Georgia, Division No. 1. July 17, 1919.)

(*Syllabus by the Court.*)

**1. LANDLORD AND TENANT — 308(2)—DISTRESS WARRANT PROCEEDINGS—ADMISSIBILITY OF EVIDENCE.**

On the trial of an issue raised by counter affidavit to a distress warrant, where the plaintiff testified to a positive agreement as to rental and fixed definitely the amount of rent to be paid, it was not error to refuse to admit his testimony as to what would be a reasonable rental value of the premises rented. The assignment of error in the motion for a new trial does not show that this testimony was offered merely to corroborate other evidence of the plaintiff.

**2. MOTION FOR NEW TRIAL.**

The evidence, though conflicting, authorized the verdict, which has the approval of the

trial judge, and for no reason assigned did the court err in overruling the motion for a new trial.

Error from City Court of Newnan; W. A. Post, Judge.

Proceedings on distress warrant between W. R. Bohannon and W. M. Poage, with counter affidavit. Judgment for the latter, motion for new trial overruled, and the former brings error. Affirmed.

A. H. Freeman, of Newnan, for plaintiff in error.

W. G. Post, of Newnan, for defendant in error.

LUKE, J. Judgment affirmed.

WADE, C. J., and JENKINS, J., concur.

(24 Ga. App. 7)

**BURNEY v. MAYOR AND COUNCIL OF CITY OF BOSTON.** (No. 9936.)

(Court of Appeals of Georgia, Division No. 1. June 12, 1919. On Motion for Rehearing, July 17, 1919.)

(Syllabus by the Court.)

**1. MUNICIPAL CORPORATIONS §155—REMOVAL OF OFFICERS—INCIDENTAL POWERS.**

"A municipal corporation has an incidental power to institute proceedings against, and remove from office for misconduct, all corporate officers, though the power to do so be not expressly given by the charter of such corporation." Mayor, etc., of Savannah v. Grayson, 104 Ga. 105, 30 S. E. 693 (3).

**2. MUNICIPAL CORPORATIONS §159(1, 4), 160—REMOVAL OF OFFICERS—NATURE OF PROCEEDINGS—CONCLUSIVENESS OF JUDGMENT—NECESSITY OF NOTICE.**

In such cases, the governing authorities may act either judicially or ministerially. Where a municipal official, as in this case, is the incumbent of an office established by law with a prescribed tenure, and is not merely an appointee holding at the pleasure of the governing power, in order that the act of removal may have the force and effect of a judgment it is a necessary prerequisite that notice shall first have been given to the delinquent official of the grounds or cause for his removal and opportunity for a hearing granted him thereon. Coleman v. Glenn, 103 Ga. 458, 30 S. E. 297, 68 Am. St. Rep. 108; Edge v. Holcomb, 135 Ga. 765, 768, 70 S. E. 644; Wright v. Gamble, 136 Ga. 376, 71 S. E. 795, 35 L. R. A. (N. S.) 866, Ann. Cas. 1912C, 372. Where the power of removal is thus exercised judicially, the judgment so rendered is generally conclusive upon the removed officer, unless it is subsequently set aside. Queen v. Atlanta, 59 Ga. 318; Mayor and Aldermen of Savannah v. Monroe, 22 Ga. App. 285, 96 S. E. 500.

**3. MUNICIPAL CORPORATIONS §159(1)—REMOVAL OF OFFICERS—PROCEDURE.**

In such a proceeding, where the governing authorities act judicially, if there be an ordinance prescribing the form of procedure, the terms thereof must be adhered to and followed. 2 Dillon on Municipal Corporations (5th Ed.) §§ 467, 468.

**4. MUNICIPAL CORPORATIONS §159(5), 183 (3)—REMOVAL OF OFFICERS—COPY OF CHARGES.**

Where the ordinances relating to this subject provide that "For any neglect or violation of duty, the marshal and collector shall be liable, on conviction [italics ours], to a fine not exceeding fifty dollars, suspension or expulsion, or a fine and either of the other penalties, in the discretion of the mayor and council," and that, "If any officer charged with any offense shall request it, he shall be furnished with a copy of the charges against him, and, if he desires to make a defense, may appear before the mayor and council in person, or by attorney, and show cause, if any he can, why he should not be punished," reference is had by the terms of the ordinance itself to the furnishing of pending charges, in order that such official can, if he desires, appear and make his defense. It does not have reference to the mere furnishing of a statement of the procedure and the grounds thereof of an action which has already been taken.

**5. MUNICIPAL CORPORATIONS §160—REMOVAL OF OFFICERS—SUMMARY PROCEEDINGS—EFFECT OF DETERMINATION.**

Under the undisputed facts disclosed by the pleadings and the evidence in this case, the proceeding taken by the municipal authorities against the delinquent marshal was ministerial only; and where, thus acting ministerially, the governing authorities summarily suspend or discharge such an official for dereliction in his duties, without prior notice given or opportunity for him to be heard, the procedure has nothing of the binding force and effect of a judgment, and is not conclusive upon the suspended or discharged official. Oliver v. Americus, 69 Ga. 165.

**6. MUNICIPAL CORPORATIONS §162(5)—REMOVAL OF OFFICERS—SUIT FOR SALARY—NECESSITY OF REINSTATEMENT.**

In such a case the official who, by virtue of the exercise of the ministerial powers of the governing authorities, has thus been summarily suspended or discharged, not being concluded, is authorized in this state, unless such right has been waived, to bring his suit against the municipality for his wages or salary, without first having been reinstated. Oliver v. Americus, 69 Ga. 165, 169; Davis v. Mayor and Council of Cordele, 115 Ga. 770, 771, 42 S. E. 63. The rule in certain other jurisdictions seems to be different; some courts holding that reinstatement by a competent legal tribunal in direct proceedings taken for that purpose is always a condition precedent to such right of recovery, even though the act of removal be purely ministerial; these holdings being to the effect that title to office cannot be tried in an action to recover the salary incident thereto. See 28 Cyc. 450, § 13 (d); 19 R. C. L. 941, § 241; Selby

v. City of Portland, 14 Or. 243, 12 Pac. 377, 58 Am. Rep. 307.

7. MUNICIPAL CORPORATIONS —156, 162(5), 165—REMOVAL OF OFFICERS—SUITS FOR SALARY—DEFENSES—QUESTIONS FOR JURY.

If an official who has been duly elected to and who has qualified in an office, the tenure of which is fixed by statute, should be removed from office, not by virtue of a judicial proceeding taken for such purpose with notice first given, but summarily and by virtue only of the exercise of the inherent ministerial powers of the governing authorities, he is prima facie still entitled to the emoluments of the office, and upon his bringing suit therefor it is the right and privilege of the municipality to defend such action by setting up and proving either of the two following grounds of defense: (1) The existence of any ground or cause whatever such as would justify the act of removal; or (2) in the event no such reason can be actually made to appear, it is still permissible to show as a ground of defense that the action of the governing authorities was nevertheless taken in good faith, and that the salary of the office has in the meantime been thus paid to a de facto officer. Whether the governing authorities had justifiable cause for their action, and, if not, whether the reasons existing were such as to authorize a finding that the acts of removal and the subsequent payment of the salary to a de facto officer were arbitrarily taken, or proceeded in good faith, are usually issues of fact to be determined by the jury. Thus, in a suit by such an official who has been thus removed, if the evidence is in conflict as to whether there was actual ground or cause for removal, it would be reversible error for the court to charge, without qualification, that—

"Even if his removal is illegal, such officer cannot recover against the city for salary during the period when his office was filled and his salary paid to another appointee." *Mattox v. Board of Education*, 148 Ga. 577, 97 S. E. 532.

But since in this case the plaintiff himself admits that he refused to levy certain executions issued by the city, without showing by the record or even contending that they were void upon their face, it must be taken that the authorities had sufficient ground for removal, and consequently the question of good faith does not enter. *Gladden v. Cobb*, 73 Ga. 235, 6 S. E. 161; *Singer Co. v. Barnett*, 76 Ga. 377; *Wilbur v. Stokes*, 117 Ga. 545, 43 S. E. 856.

Error from City Court of Thomasville; W. H. Hammond, Judge.

Action by W. W. Burney against the Mayor and Council of the city of Boston. Judgment for defendant, and plaintiff brings error. Affirmed.

Titus, Dekle & Hopkins, of Thomasville, for plaintiff in error.

Clifford E. Hay, of Thomasville, for defendant in error.

JENKINS, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

On Motion for Rehearing.

JENKINS, J. Whether the executions issued by the city would have been void upon their face had they shown that they were issued in whole or in part for amounts due the city for lights and water, fixtures, and appliances, including bathtubs, etc., need not be considered by this court. Although the city *fi. fas.* which the marshal refused to execute do not appear in the record, still the undisputed evidence is to the effect that they did not show upon their face what constituted the items covered by the amounts stated therein, and it therefore affirmatively appears that the executions were not void upon their face for this reason.

Had the question of good faith on the part of the municipal authorities been in fact involved, then the excerpt from the charge quoted in paragraph 8 of the decision would have been reversible error, upon exceptions having been taken pointing out that the court failed to qualify the same to the effect that such action, if taken without sufficient cause, in order to afford protection to the city, must have been taken in good faith. However, irrespective of the fact that we do not consider the question of good faith to be involved in this case, the exception as actually taken to the portion of the charge complained of assigns error solely upon the ground that the charge as thus given was erroneous for the reason that, where a de jure officer has been illegally removed, the payment of the salary to a de facto officer could not defeat the de jure officer's right thereto, whereas, under the ruling recently announced by the Supreme Court in *Mattox v. Board of Education*, *supra*, such is not the law when such action is taken in good faith, even though without sufficient cause. The motion for a new trial makes no assignment of error based upon the failure of the court to thus qualify the charge excepted to in accordance with the rule thus stated.

Motion for rehearing denied.

(24 Ga. App. 138)

**CAMPBELL v. STATE. (No. 10553.)**(Court of Appeals of Georgia, Division No. 2.  
July 23, 1919.)*(Syllabus by the Court.)***1. CRIMINAL LAW §1091(10) — APPEAL AND ERROR—REVIEW—EXCEPTIONS—SUFFICIENCY.**

The bill of exceptions containing no assignment of error upon the judgment overruling the demurrer to the indictment, nor upon the exceptions pendente lite complaining of such judgment, the exceptions pendente lite cannot be considered by this court.

**2. CRIMINAL LAW §659—NEW TRIAL—GROUNDS—CONDUCT OF AUDIENCE.**

Under the facts of the case the court did not err in refusing to declare a mistrial because of loud and general applause in the courtroom during the trial.

**3. CRIMINAL LAW §670—APPEAL—ASSIGNMENTS OF ERROR—SUFFICIENCY.**

This court and the Supreme Court have repeatedly ruled that an assignment of error based upon the refusal of the court to allow a witness for the movant to answer a certain question will not be considered, where it does not appear that the trial judge was at the time apprised of what answer was expected from the witness. This ruling disposes of the second and third special grounds of the motion for a new trial.

**4. CRIMINAL LAW §1064(1)—REVIEW—MOTIONS FOR NEW TRIAL.**

Under repeated rulings of this court and of the Supreme Court, a ground of a motion for a new trial which complains of the exclusion of documentary evidence will not be considered, unless such evidence is set forth in the ground or attached thereto as an exhibit. Under this ruling the fourth special ground of the motion for a new trial will not be considered.

**5. SUFFICIENCY OF EVIDENCE.**

The evidence amply authorized, if it did not demand, the verdict, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Cobb County;  
N. A. Morris, Judge.

N. V. Campbell was convicted of an offense, and she brings error. Affirmed.

C. M. Dobbs and Herbert Clay, both of Marietta, for plaintiff in error.

Jno. T. Dorsey, Sol. Gen., of Marietta, and Wm. Butt, of Blue Ridge, for the State.

**BROYLES, P. J.** [1-5] The second head-note alone needs elaboration. While a little girl, a witness for the state, was being cross-examined, the defendant's counsel propounded to her the following question: "Where do little girls go when they burn little girls?"

The witness answered: "They don't go nowhere if anybody has told them to do it that is bigger than they are." This answer was followed by loud and general applause in the crowded courtroom. The applause consisted in the clapping of hands and the stamping of feet, and the court immediately called for order. Counsel for the defense at once moved for a mistrial. The court, before allowing counsel to complete his motion, sent the jury to their room, and after they had retired, and while counsel for the defendant was still standing for the purpose of completing his motion, "cautioned and warned the audience that he would not stand for any more applause, or any more disorder of any kind, and that he would fine the first one guilty of either, and would, if necessary, clear the courtroom." Counsel for the defense then completed his motion for a mistrial, which the court overruled. The jury were then brought back, and the court instructed them as follows:

"Gentlemen of the jury, you couldn't help but observe the applause in the courtroom when this witness answered the last question asked her. Now, you must not be influenced in any manner, shape, or form by that applause. You must not let that influence your finding one way or the other; you must not be influenced in any way by it. You are trying this case on the evidence adduced on the trial of the case, and the statement of the defendant, if she makes one, and under the rules of law the court will give you in charge, and don't let that applause influence you one way or the other. I especially charge you and want to impress upon you that it is your duty to disregard that and not let it have any influence on your mind one way or the other, in making your verdict in the case when finally submitted under the charge of the court."

Under the foregoing facts, and especially since the verdict against the defendant is overwhelmingly supported by the evidence, we do not think this ground of the motion for a new trial requires a reversal of the judgment below. It does not appear that the applause was a demonstration against the defendant. In fact, the circumstances would indicate that it was merely an approval of the ready, witty, and logical answer given by the little witness to the question propounded by defendant's counsel. There was merely a clapping of hands and a stamping of feet. No threats of any kind were made against the defendant, and it does not appear that this applause was liable to intimidate or to prejudice the jury into returning a verdict against the defendant. In this respect the instant case is easily distinguished from the Woolfolk Case, 81 Ga. 551, 8 S. E. 724, and the other cases cited by counsel for the plaintiff in error. Under the circumstances we think the prompt rebuke to the demonstrators by the judge, and his immediate and careful

caution to the jury to disregard the applause, was sufficient.

Judgment affirmed.

BLOODWORTH and STEPHENS, JJ.,  
concur.

(24 Ga. App. 137)

CAMPBELL v. STATE. (No. 10526.)

(Court of Appeals of Georgia, Division No. 2.  
July 23, 1919.)

(Syllabus by the Court.)

#### SUFFICIENCY OF EVIDENCE.

The verdict was amply authorized by the evidence, and no ground of the motion for a new trial shows cause for a reversal of the judgment below.

Error from Superior Court, Cobb County;  
N. A. Morris, Judge.

Proceeding between N. V. Campbell and the State. A decision adverse to Campbell was rendered, and she brings error. Affirmed.

C. M. Dobbs and Herbert Clay, both of Marietta, for plaintiff in error.

Jno. T. Dorsey, Sol. Gen., of Marietta, and Wm. Butt, of Blue Ridge, for the State.

BROYLES, P. J. Judgment affirmed.

BLOODWORTH and STEPHENS, JJ.,  
concur.

(24 Ga. App. 162)

PENDLEY v. PAGA MINING CO.  
(No. 10111.)

(Court of Appeals of Georgia, Division No. 2.  
Aug. 7, 1919.)

(Syllabus by the Court.)

#### NONSUIT.

The nonsuit in this case was properly granted.

Error from Superior Court, Bartow County; M. C. Tarver, Judge.

Action by W. O. Pendley against the Paga Mining Company. Judgment of nonsuit, and plaintiff brings error. Affirmed.

Colquitt & Conyers, of Atlanta, and A. W. Fite, of Cartersville, for plaintiff in error.

Neel, Finley & Neel, of Cartersville, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., and STEPHENS, J.,  
concur.

(24 Ga. App. 65)

WASHINGTON v. STATE. (No. 10266.)

(Court of Appeals of Georgia, Division No. 2.  
July 10, 1919.)

(Syllabus by the Court.)

#### 1. GAMING §98(2)—CONVICTION—EVIDENCE.

Evidence that the defendant and others were seen at a secluded spot in the woods, sitting around in a circle, where cards were being dealt by one of them to the others, although he was not seen with any cards in his hands and was not seen to handle any money, and that upon the approach of the officers he and the others ran, leaving money and cards upon the ground, was sufficient to authorize the defendant's conviction of playing and betting for money at a game played with cards, and the trial judge did not err in charging the jury as set out in the first ground of the amendment to the motion for a new trial. *Frost v. State*, 120 Ga. 311, 47 S. E. 901.

#### 2. CRIMINAL LAW §538(3)—CONFESSION.

Evidence that the defendant, after he had been indicted for gaming, stated that he played in the game on the date alleged in the indictment, and that "they had a good pot and left some on the ground," and that he was gambling on this occasion, and was going to plead guilty, was ample evidence of a confession. *Abrams v. State*, 121 Ga. 170, 48 S. E. 965 (5).

#### 3. CRIMINAL LAW §698(1), 828 — CONFESSIONS—VOLUNTARY CHARACTER—CHARGE.

Where evidence of a confession is offered by the state in a criminal case, and there is no objection thereto by the defendant upon the ground that the alleged confession was not voluntarily made, it is admissible as a voluntary confession. *Eberhart v. State*, 47 Ga. 598; *Alford v. State*, 137 Ga. 458, 73 S. E. 375 (4).

(a) While charging upon the weight to be given confessions, a failure on the part of the trial judge to charge the jury that they would not be authorized to consider such an alleged confession unless freely and voluntarily made was not error, in the absence of a timely written request so to charge. See, in this connection, *Pierce v. State*, 132 Ga. 27, 63 S. E. 792.

#### 4. CRIMINAL LAW §822(4), 823(2)—CHARGE—EXPRESSION OF OPINION.

To determine whether an expression in an excerpt from the charge of the court is an expression or intimation of opinion on the part of the trial judge as to what has or has not been proved, it is proper, in a doubtful case, to construe the expression in connection with the entire charge, and where the trial judge elsewhere in his charge, in ample and unmistakable language, tells the jury that the particular matter about which it is claimed he has expressed an opinion as to its having been proved is an issue in the case, such expression will not be construed as an expression or intimation of opinion on the facts. *Hanvey v. State*, 68 Ga. 615; *Moon v. State*, 68 Ga. 697.

(a) Upon the trial of one charged with the offense of playing and betting for money at a game played with cards, where the trial judge, as in this case, in his charge to the jury uses



the following language: "And if you further find that they were engaged in playing cards, and that one of the party was heard to remark, 'About \$5,' that is insisted was done in the game"—the expression "that is insisted was done in the game" is not subject to the exception that it amounted to an expression of opinion on the part of the trial judge that there had been a game, when the judge, elsewhere in his charge to the jury, expressly told them that whether or not there had been a game was an issue of fact for them to determine.

#### 5. SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict and judgment.

Error from City Court of Newnan; W. A. Post, Judge.

R. E. Washington was convicted of gaming, and he brings error. Affirmed.

A. H. Freeman, of Newnan, for plaintiff in error.

W. L. Stallings, Sol., of Newnan, for the State.

STEPHENS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(24 Ga. App. 63)

MILLS v. STATE. (No. 10253.)

(Court of Appeals of Georgia, Division No. 2. July 16, 1919.)

(Syllabus by the Court.)

#### 1. HOMICIDE §83—PARTICIPATION—DEGREE.

"Presence and participation in the act of killing a human being is not evidence of consent and concurrence in the perpetration of the act, by a defendant charged with aiding and abetting in the killing, unless he had a felonious design or participated in the felonious design of the person killing.

(a) "If the person charged with murder in the first degree, commit the assault on the deceased with a deadly weapon, but his intention to assault him with a deadly weapon was unknown to the person charged in the same indictment as principal in the second degree and he intended to participate in an assault and battery only,

and in no design to kill, he is guilty of manslaughter only.

(b) "If a man charged in an indictment as principal in the second degree is connected with the act of killing, but is not connected with the intention to kill, and does not know that the person killing intended to use a deadly weapon in making an assault, he is guilty of manslaughter." Brown v. State, 28 Ga. 200 (4-6); 1 Chitty, Criminal Law, 258.

#### 2. HOMICIDE §255(2) — VOLUNTARY MANSLAUGHTER—EVIDENCE.

The evidence, while conflicting, authorized the inference that the defendant participated in the act of killing committed by the actual perpetrator of the homicide, but did not participate in the latter's intent to kill. The verdict of voluntary manslaughter was therefore authorized by the evidence.

#### 3. HOMICIDE §340(4) — HARMLESS ERROR — DEGREE OF HOMICIDE.

The conviction in this case being for voluntary manslaughter only, it was not harmful to the accused for the trial judge to refuse to charge, as requested, that, "Even if one was present at the commission of a crime and mentally approved or consented to same, yet if that consent was unknown to the person committing the crime, the one so mentally approving could not be held guilty as a principal." The defendant having been convicted of voluntary manslaughter, the jury must necessarily have found that he was not guilty of consent and approval, and the failure to charge as requested, even if it could be considered as error, was harmless. Land v. State, 11 Ga. App. 761, 76 S. E. 78 (2).

#### 4. REQUESTED CHARGES.

The other request to charge was fully covered by the general charge.

Error from Superior Court, Montgomery County; E. D. Graham, Judge.

Ella Mills was convicted of voluntary manslaughter, and she brings error. Affirmed.

A. C. Saffold, of Vidalia, and Eschol Graham, of McRae, for plaintiff in error.

W. A. Wooten, Sol. Gen., of Eastman, for the State.

STEPHENS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

§ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(149 Ga. 302)

## SAVANNAH BANK &amp; TRUST CO. v. McQUEEN et al. (No. 1113.)

(Supreme Court of Georgia. Aug. 6, 1919.)

(Syllabus by the Court.)

1. INJUNCTION  $\S$ 26(3) — PROSECUTION OF ACTION—SUFFICIENCY OF PETITION.

An equitable petition was filed in the superior court of Chatham county, Ga., by a manufacturer of naval stores residing in Liberty county, Ga., against a bank in Savannah, Ga., and a railroad company and a tanking company and the sheriff of the county. Among other things, the following was alleged in substance: Plaintiff, in the course of his dealing with a factor in the city of Savannah, consigned certain rosin and spirits of turpentine over the line of the defendant railroad company to the factor to whom bills of lading were sent. The factor was directed to "tank" the spirits of turpentine and hold that and the rosin for petitioner. The factor "tanked" the spirits of turpentine and received receipts from the tanking company therefor, and without plaintiff's knowledge or consent transferred both the rosin and spirits of turpentine to the bank as collateral security for his individual debt by assigning the bills of lading and tank receipts. The bank had notice that in attempting to secure a loan on the rosin and spirits of turpentine the factor was acting as an agent and not as an owner of the property, and the bank did not, by reason of the transfer to it, acquire any title to or interest in the rosin and spirits of turpentine, except in subordination to petitioner's title. The bank instituted bail trover suits in the city court of Savannah against the tanking company for the spirits of turpentine and the railroad company for the rosin, and the sheriff was about to take possession of the property. Plaintiff owed the factor a stated amount on account of advancements made on the consignments, which amount he "is ready, able, and willing to pay . . . at any time on the surrender to him of" the spirits of turpentine and rosin. The prayers were for injunction, etc., and that plaintiff's title to the property be set up by decree of the court, and that possession thereof be surrendered to him. The factor was not made a party to the suit. The bank demurred on general and special grounds and answered. The demurrer as amended was overruled. The case was submitted to a jury, and a verdict returned as follows: "We, the jury, find that the plaintiff is the true owner of the described personal property, subject to the payment of (\$938.41) to the Producers' Naval Stores Company (the factor) and to such further amounts as may be due by McQueen to the Atlantic Coast Line Railroad Company and the National Tank & Export Company for their charges on all said goods, and that the Savannah Bank & Trust Company be perpetually enjoined from prosecuting its suit in the city court of Savannah against the Atlantic Coast Line Railroad Company and the National Tank & Export Company." Upon this verdict a decree was rendered. The bank excepted to the judgment overruling the demurrer and to the decree based on the verdict and to the judgment denying a motion for new trial. *Held*:

The petition alleged a cause of action against the bank and was not subject to general demurrer or any of the grounds of special demurrer. *First National Bank of Macon v. Nelson*, 38 Ga. 391, 95 Am. Dec. 400 (1); *Seago v. Pomeroy*, 46 Ga. 227, 231; *Cummings v. McDade*, 118 Ga. 614, 45 S. E. 479.

(a) There was no special demurrer on the ground that there was no absolute tender of the amount admitted to be due the factor, and no ruling is made on the question of whether such a tender was necessary.

(b) The request to overrule on review the case of *Bank of Macon v. Nelson*, 38 Ga. 391, 95 Am. Dec. 400, is denied.

2. CUSTOMS AND USAGES  $\S$ 22—CHARGE—KNOWLEDGE.

The judge charged: "The bank further contends that, under a custom alleged to be generally recognized as prevailing in the city of Savannah, the factor had the right to pledge the rosin and spirits. I charge you that, if McQueen (the plaintiff) were a nonresident of Savannah at the time the goods were consigned to the factor, the alleged custom would not become, by implication, a part of the contract between the consignor and the consignee, unless there is proof that the custom alleged to prevail in Savannah was known to McQueen. If you find that the custom alleged is a mere local custom or business usage in a particular city, it is not binding except upon those who have recognized it in their dealings. The custom of the business or trade shall be binding only when it is of such universal practice as to justify the conclusion that it became, by implication, a part of the contract." *Held*, that the charge was not erroneous on the ground that the jury was instructed that the alleged custom would not be binding upon McQueen unless he had actual knowledge of it. *Bacon Fruit Co. v. Blessing*, 122 Ga. 369, 50 S. E. 139; *McCall v. Herrin*, 118 Ga. 522, 45 S. E. 442; *Hendricks v. Middlebrooks*, 118 Ga. 137, 44 S. E. 835; *Horan v. Strachan*, 86 Ga. 416, 12 S. E. 678, 22 Am. St. Rep. 471; *Miller v. Moore*, 83 Ga. 692, 10 S. E. 360, 6 L. R. A. 374, 20 Am. St. Rep. 329; *American Sugar Co. v. McGhee*, 96 Ga. 27, 21 S. E. 383 (2); *Kelly v. Kauffman*, 92 Ga. 105, 18 S. E. 363 (3); *Chateaugay Ore Co. v. Blake*, 144 U. S. 476, 12 Sup. Ct. 731, 36 L. Ed. 510; *Clark on Contracts* (3d Ed.) 496, § 217; 17 *Corpus Juris*, 454, § 15. The request to review and overrule the Georgia decision just cited is denied.

## 3. CHARGE.

The charge was not erroneous for any reason assigned.

4. TRIAL  $\S$ 343 — VERDICT — CONSTRUCTION.

Construing the verdict in the light of the pleadings, the factor (the Producers' Naval Stores Company) not being a party, and the petition against the bank alleging a willingness to pay the amount admitted to be due the factor upon surrender of the goods, the requirement of the verdict that plaintiff should pay to the Producers' Naval Stores Company a stated sum as a condition to his recovery is to be

construed as requiring such payment to be made to the bank.

#### 5. MOTION FOR NEW TRIAL.

None of the grounds of the motion for new trial shows cause for reversal.

#### 6. FORM OF DECREE.

It is directed that a decree be entered, and that it be so molded as to provide that the amount to be paid by the plaintiff on account of his indebtedness to the Producers' Naval Stores Company be paid to the bank.

#### 7. COSTS $\Leftrightarrow$ 234—PREVAILING PARTY.

The plaintiff in error having procured a substantial modification of the judgment of the trial court, it is ordered that he recover the costs.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Suit by N. McQueen and others against the Savannah Bank & Trust Company and others. Judgment for plaintiffs, motion for new trial denied, and defendant Savannah Bank & Trust Company brings error. Affirmed, with direction.

Wm. L. Clay, of Savannah, for plaintiff in error.

Hitch & Denmark, Osborne, Lawrence & Abrahams, and Adams & Adams, all of Savannah, for defendants in error.

ATKINSON, J. Judgment affirmed, with direction. All the Justices concur.

(24 Ga. App. 80)

#### WATKINS v. WOODBERY et al. (No. 9856.)

(Court of Appeals of Georgia, Division No. 1.  
July 17, 1919.)

*(Syllabus by the Court.)*

#### 1. DISMISSAL OF BILL OF EXCEPTIONS.

Under the rulings made by this court in *Arnold v. Water Power Mining Co.*, 22 Ga. App. 504, 96 S. E. 343 (1), and by the Supreme Court in the same case, on certiorari, 99 S. E. 382, the motion to dismiss the bill of exceptions in this case is overruled.

#### 2. APPEAL AND ERROR $\Leftrightarrow$ 1050(2)—HARMLESS ERROR—IMMATERIAL EVIDENCE.

The first assignment of error in the bill of exceptions, complaining of the admission of certain evidence upon the ground that it was immaterial and irrelevant, is without merit, since the evidence admitted was relevant to show the history of the transaction involved; but, even if immaterial, its admission is not shown to have been harmful. Unless a reasonable likelihood of a prejudicial effect appears, the admission of evidence merely immaterial will not authorize the setting aside of a verdict and the grant of a new trial. Ar-

*mour Fertilizer Works v. Dwight*, 22 Ga. App. 144, 95 S. E. 746 (3).

#### 3. CONTRIBUTION $\Leftrightarrow$ 9(6)—EVIDENCE—ADMISSIBILITY.

The assignments of error as to the exclusion of certain testimony are without merit. Whether one of the plaintiffs in a suit for contribution may have in point of fact procured from one of the joint makers of the notes, other than the defendant, the amount contributed by him towards the discharge of the joint obligations, by giving to that joint maker his personal note therefor, and whether that note has ever been paid, are matters resting solely between the plaintiff and the one from whom he borrowed the money thus contributed. So far as the defendant here is concerned, the original joint obligations have been discharged, and he is no longer liable thereon, and whether the plaintiff borrowed the amount contributed by him, and, if so, whether it has ever been repaid to the one from whom it was borrowed, are questions with which the defendant has no concern. *Larson v. Slette*, 125 Minn. 267, 146 N. W. 1094, L. R. A. 1915A, 898, and note; *Hillas v. Fuller* (Sup.) 143 N. Y. Supp. 15; 13 C. J. 823, § 5, note 32 (e); *Miller v. Perkerson*, 128 Ga. 465, 57 S. E. 787 (3). The questions which the court refused to permit the witness to answer were propounded merely for the purpose of showing that the note given by the plaintiff for the money borrowed and contributed by him towards the discharge of the original joint obligations had never been paid, and not that the plaintiff had not actually contributed towards the discharge thereof the amount alleged.

#### 4. CONTRIBUTION $\Leftrightarrow$ 9(6)—EVIDENCE—ADMISSIBILITY.

The other excluded evidence offered by the defendant, tending to show an indebtedness upon the part of one of the plaintiffs to one of the banks for whose benefit the original joint obligations were incurred, was immaterial to the issues involved under the pleadings, and the court did not err in excluding it.

#### 5. BILLS AND NOTES $\Leftrightarrow$ 96—CONTRIBUTION $\Leftrightarrow$ 4—EVIDENCE $\Leftrightarrow$ 589—CONSTRUCTION OF TESTIMONY—ACCOMMODATION PARTIES—CONSIDERATION—CONTRIBUTION.

Under the well-settled rule that, in a case where the plaintiff's or the defendant's testimony is contradictory in itself, vague, or equivocal, it must be construed most strongly against him (*Bussey v. Grantham*, 23 Ga. App. —, 99 S. E. 236), the evidence in this case demanded a verdict in favor of the plaintiffs, and the court did not err in so directing.

Error from Superior Court, Gilmer County; N. A. Morris, Judge.

Action by W. H. Woodbery and others against E. W. Watkins. Judgment for plaintiffs, and defendant brings error. Affirmed. See, also, 96 S. E. 338.

A. H. Burtz, of Ellijay, and D. W. Blair, of Marietta, for plaintiff in error.

Wm. Butt, of Blue Ridge, and Tye, Peebles & Tye, of Atlanta, for defendants in error.

JENKINS, J. [1-5] It is only the fifth headnote which is thought to require elaboration. Sam Tate, W. H. Woodbery, and E. W. Butt brought suit against E. W. Watkins, alleging that the plaintiffs, together with the defendant, were joint makers of certain notes; that the plaintiffs, together with all the other makers except Watkins, had paid off the notes, while Watkins had paid nothing, and that by reason of these facts Watkins was liable to the plaintiffs in designated sums by way of reimbursement and contribution. Watkins admitted signing the notes, but denied liability thereon, alleging that he had never received any consideration, and alleged that he signed the notes at the solicitation of the plaintiffs, and with the understanding then had between him and the plaintiffs that "he was not to be liable" thereon, and that he was a mere accommodation maker or indorser. The present suit proceeded in the names of Woodbery and Butt only, it having been previously disposed of as to the plaintiff Tate. The record shows the four certain banks in North Georgia and one in Tennessee, among them being the North Georgia National Bank of Blue Ridge, Ga., and the Gilmer County Bank of Ellijay, Ga., were, in the fall of 1911, about to fail. The defendant was at the time a director and stockholder of the North Georgia National Bank, president of the Gilmer County Bank, and also a depositor. The plaintiffs and the defendant, together with 13 other persons, executed two notes, each dated November 1, 1911, one for \$75,000 and the other for \$25,000, for the purpose of raising money to preserve the solvency of these banks. The \$100,000 was thus raised, and was used for the benefit of each of the five banks. This \$100,000 indebtedness, evidenced by the two notes mentioned above, was renewed from time to time, by the giving of renewal notes, and finally payment was made of the last renewal notes, which were each joint and several notes, and each signed by said 16 persons, Watkins, the defendant, being one. To the payment of the \$100,000 each of the 16 persons contributed, with the exception of the defendant, who has paid nothing. The contributions made by some of the 15 were quite small, three of them being insolvent. Tate paid \$35,538.88, Woodbery \$25,000, and Butt \$11,000. These three were the only persons of the 15 who paid more than would have been their proportionate share, and they brought suit against Watkins for contribution. No question as to misjoinder of parties plaintiff was raised, and, as already stated, the case had been disposed of as to the plaintiff Tate, and this trial involved only the amounts claimed by Woodbery and Butt, being \$1,445.58 and \$278.91, respectively. At the conclusion of the introduction of the testimony the court, upon motion, directed a verdict in favor of the plaintiffs, and the defendant excepted.

That the plaintiffs, if entitled to recover at all, are entitled to the amounts claimed by them respectively is not questioned; the contention of the defendant being that he was merely an accommodation maker or indorser, that he received none of the consideration, and that he was induced to sign the notes by the representations of the plaintiffs that he would never have them to pay or be called upon to pay them. The fact that the banks for whom the money was borrowed (of one of which the defendant was a stockholder and director, and of another of which he was president and a depositor) received the money thus borrowed is undisputed. The defendant's plea of failure of consideration is therefore not supported by the evidence. Granting, for the sake of the argument only, that the defendant was merely an accommodation maker or indorser, when accommodation parties get for and through another the exact consideration which they contemplate it is the same as if they receive it themselves, and a plea of want of consideration is not good. *Farrar v. Bank of New York*, 90 Ga. 333, 17 S. E. 87. This leaves only the defense that the defendant was induced to sign the notes by the representations of the plaintiffs that he would never have the notes to pay.

Were this a suit against the defendant upon the notes themselves by the payees thereof, the defendant having admitted signing the unconditional promissory notes, and the undisputed evidence showing that he received the consideration contemplated at the time he signed them, the plea of the defendant, attempting to set up such a promise on the part of the payees, would constitute no valid defense to the action, for it would amount to nothing more than an effort to vary the terms of the unconditional written promise to pay, by setting up a contemporaneous parol agreement contrary thereto, with no allegation that such an understanding was omitted from the notes by fraud, accident, or mistake. See *Boynton v. Twitty*, 53 Ga. 214; *Hirsch v. Oliver*, 91 Ga. 554, 18 S. E. 354; *Byrd v. Marietta Fertilizer Co.*, 127 Ga. 30, 56 S. E. 86; *Proctor v. Royster Guano Co.*, 21 Ga. App. 617, 94 S. E. 821 (3); *Rheney v. Anderson*, 22 Ga. App. 417, 96 S. E. 217. But in a suit for contribution from his co-obligors by one who has paid the joint obligation, the right of contribution does not rest on the original contract, and the note thus paid is not the basis of the action for contribution. The right of action has no strict connection with the promissory notes, but arises out of the relation created thereby on a common obligation, and the contract implied therefrom of discharging the common obligation equally. The co-obligor's right of action for contribution arises at the time he parts with his money in discharging, in whole or in part, the joint liability, and the note may afford

evidence of the sum of money advanced by the paying co-obligor, and afford a basis for determining the aliquot portion thereof for which the defendant may be liable by reason of his implied promise to pay. *Sherling v. Long*, 122 Ga. 797, 50 S. E. 935; *Hall v. Harris*, 6 Ga. App. 822, 65 S. E. 1086; *McLin v. Harvey*, 8 Ga. App. 360, 69 S. E. 123. There is no contention or issue made upon the proposition that the plea of the defendant, setting up a parol understanding to the effect that the defendant signed the notes by virtue and by reason of the verbal warranties and assurances of the plaintiffs that no injury or loss would accrue thereon, falls to set forth a good defense to the suit for contribution; and, without passing upon this proposition, which is not raised, direction is given to the case upon the ground that the evidence given in behalf of defendant was insufficient to sustain his plea as made.

As to the plaintiff Butt, there was absolutely no evidence to sustain the plea. As to the plaintiff Woodbery, while the defendant testified that Woodbery said to him, "Now you will never have a cent of it to pay, never even be called on," and, "But for the statement of Mr. Woodbery that I wouldn't be called on to pay these notes, I would not have signed them," and though he further testified, and in the same connection, "What caused me to sign these original two notes for \$25,000 and \$75,000 each was representations made by general talk and representations made by Mr. Woodbery. \* \* \* As to inducements held out by Mr. Woodbery that induced me to sign these notes, Mr. Woodbery was addressing a crowd in the hall of the banking building, and I was very slow about signing, in fact I wasn't signing, he said, 'Now you will never have a cent of it to pay, never even be called on.' There were several in the room, I don't remember just who and when he said that. We had done quite a heap of talking about it heretofore, and it was understood that if we could get enough signers to make \$100,000 for the purpose of taking care of the situation that we wouldn't have anything to pay, that it was only a matter of accommodation, that the banks would go on and make the interest, keep the interest paid as long as those banks wanted to carry it, and then the banks would pay it. That was the general talk among the directors [of whom defendant was one] generally. Then Mr. Woodbery, in order as I thought to convince me, says, 'You will never have a cent of that to pay—you will not even be called on to pay'—he further testified, "I couldn't say just who was present when Mr. Woodbery made these representations to me, but I think a good many of the directors were there. That was my idea, but I won't undertake to say just who. I think Mr. Tate was there, and I know several others. The talk

and general supposition was that they thought they wouldn't have to pay these notes, as I suggested, the way Mr. Woodbery made the statement."

It will thus be seen that, taking the defendant's own testimony, which is vague and equivocal, and construing it most strongly against him, as we must, it is not shown that the statement of Woodbery was a positive assurance or guaranty, but it appears to have been merely a statement of his opinion, based upon the assumption that the banks themselves would be enabled to repay the money thus borrowed. It follows, therefore, that unless the money was paid by the banks, the signers of the notes must have known that they would be liable therefor, and must have so understood at the time the notes were signed. Furthermore, all this testimony as to these representations has reference to the time when the defendant signed the two original notes. The defendant does not claim that any such representations were made at the time he signed the renewal notes, the payment of which is the basis of the present suit, but, to the contrary, he testifies:

"I signed the renewals just anywhere—most of them up here. After I had signed one I thoroughly understood a renewal was quite necessary, because I was in for the money anyhow."

It is thus shown that at the time the defendant signed the renewal notes, no representations were made to him by the plaintiff Woodbery, but, so far as appears from the record, they were signed voluntarily by the defendant. See, in this connection, *McKee v. Hurst & Co.*, 21 Ga. App. 571, 94 S. E. 886 (3). In our opinion the defendant failed to prove his defense as made, and the trial court properly directed a verdict in favor of the plaintiffs.

Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(24 Ga. App. 114)

FARM v. STATE. (No. 10371.)

(Court of Appeals of Georgia, Division No. 2  
July 22, 1919.)

(Syllabus by the Court.)

1. BURGLARY  $\Leftrightarrow$  18—BREAKING AND ENTERING RAILROAD CAR—SUFFICIENCY OF INDICTMENT.

An indictment charging a violation of the statutory crime codified in section 181 of the Penal Code of 1910 is sufficiently definite when the indictment is as follows: Did then and there, unlawfully and with force and arms, break and enter a railroad car in the possession of the Georgia Northern Railway Company at Boston, Ga., in said county, with intent to steal goods, wares, and freight in said

car being, and, after breaking, did steal therefrom goods and freight, to wit, 2 caddies of chewing tobacco and 11 sacks of flour, the same being freight consigned to Massey Mercantile Company, Barwick, Ga." It "states the offense in the terms and language of this Code," and "so plainly that the nature of the offense charged may be easily understood by the jury." Pen. Code 1910, § 954; *Camp v. State*, 3 Ga. 417 (1). The indictment meets all the objects in requiring particularity in setting out the offense. *Wingard v. State*, 13 Ga. 396, 400 (2).

## 2. BURGLARY $\Leftrightarrow$ 23—BREAKING AND ENTERING RAILROAD CAR—DESCRIPTION OF GOODS.

When an indictment under section 181 of the Penal Code of 1910 alleges that the accused "did then and there, unlawfully and with force and arms, break and enter a railroad car \* \* \* with intent to steal goods, wares, and freight in said car being," "no description, value, or ownership of any goods intended to be stolen need be alleged." *Boyd v. State*, 4 Ga. App. 273, 61 S. E. 134 (1); *Lanier v. State*, 76 Ga. 304 (1-a).

## 3. BURGLARY $\Leftrightarrow$ 22—BREAKING AND ENTERING RAILROAD CAR—INDICTMENT—OWNERSHIP.

Under the ruling in *Gilbert v. State*, 116 Ga. 819, 43 S. E. 47 (1), an indictment which charges that the accused did, "unlawfully and with force and arms, break and enter a railroad car in the possession of the Georgia Northern Railway Company," sufficiently alleges the ownership of the car to have been in such company. See *Waters v. State*, 15 Ga. App. 342, 83 S. E. 200 (1); *Markham v. State*, 25 Ga. 52 (1).

## 4. MOTION FOR NEW TRIAL—DEMURRER TO INDICTMENT.

Under the above rulings there is no merit in any of the grounds of the amendment to the motion for new trial, and the demurrer to the indictment and the motion in arrest of judgment were properly overruled.

## 5. SUFFICIENCY OF EVIDENCE.

There was evidence to support the verdict.

Error from Superior Court, Thomas County; W. E. Thomes, Judge.

Sol Farm was convicted of breaking and entering a car with intent to steal and stealing therefrom. His motions for a new trial and in arrest of judgment were overruled, and he brings error. Affirmed.

Titus, Dekle & Hopkins, of Thomasville, for plaintiff in error.

C. E. Hay, Sol. Gen., of Thomasville, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., and STEPHENS, J., concur.

(24 Ga. App. 108)

## JENKINS v. LOWREY. (No. 10493.)

(Court of Appeals of Georgia, Division No. 1.  
July 17, 1919.)

(Syllabus by the Court.)

## BILLS AND NOTES $\Leftrightarrow$ 537(8)—DIRECTED VERDICT—EVIDENCE.

Jenkins was sued on a promissory note, and admitted a prima facie case and pleaded payment. The evidence wholly failed to show payment as pleaded, and it was not error for the court to direct a verdict for the plaintiff.

Error from City Court of Waynesboro; W. H. Davis, Judge.

Action by W. P. Lowrey for use, etc., against Otis Jenkins. Judgment for plaintiff upon a directed verdict, and defendant brings error. Affirmed.

E. V. Heath, of Waynesboro, for plaintiff in error.

Frank Hardeman, of Louisville, for defendant in error.

LUKE, J. Judgment affirmed.

WADE, C. J., and JENKINS, J., concur.

(24 Ga. App. 75)

## DUNCAN v. STATE. (No. 9894.)

(Court of Appeals of Georgia, Division No. 1.  
July 17, 1919.)

(Syllabus by the Court.)

## INTOXICATING LIQUORS $\Leftrightarrow$ 250—CONDEMNATION OF VEHICLE—ACQUITTAL—EVIDENCE.

In a proceeding under the act of 1917 (Ga. Laws, Ex. Sess. 1917, p. 16) to condemn a vehicle for carrying intoxicating liquor, a verdict of acquittal, founded on the alleged illegal possession of the liquor by the defendant, was admissible as evidence in his behalf, and the court erred in excluding it. See *Duncan v. State*, 99 S. E. 612, decided June 14, 1918.

## 2. MOTION FOR NEW TRIAL.

The grounds of the motion for a new trial not dealt with above are without merit.

Error from Superior Court, Gwinnett County; Andrew J. Cobb, Judge.

Proceeding by the State against L. H. Duncan, to forfeit an automobile used in illegally transporting intoxicating liquors. From a judgment for the State, Duncan brought error, and the Court of Appeals certified questions. Reversed in conformity to answer of Supreme Court (99 S. E. 612).

G. F. Kelley, of Lawrenceville, for plaintiff in error.

LUKE, J. Judgment reversed.

WADE, C. J., and JENKINS, J., concur.

(24 Ga. App. 75)

**DUNCAN v. STATE.** (No. 9895.)(Court of Appeals of Georgia, Division No. 1.  
July 17, 1919.)*(Syllabus by the Court.)***1. INTOXICATING LIQUORS**  $\Leftrightarrow$  251—**CONDEMNATION OF VEHICLE — CLAIM—EVIDENCE—ACQUITTAL OF DEFENDANT.**

Under the ruling of the Supreme Court in the case of *Duncan v. State*, 99 S. E. 612, decided June 14, 1919, that where a third person interposes a claim to a vehicle seized under the act of 1917 (Ga. Laws, Ex. Sess. 1917, p. 16), providing for the forfeiture of any vehicle in which spirituous liquors are carried on any public road or private way in this state, "the general rule is that the verdict of acquittal [of the defendant], though based on the same transaction, is inadmissible," in favor of the claimant, the court in this case did not err in refusing to admit in evidence the indictment against the defendant and the verdict of not guilty thereon.

**2. MOTION FOR NEW TRIAL.**

The grounds of the motion for a new trial not dealt with above are without substantial merit.

Error from Superior Court, Gwinnett County; Andrew J. Cobb, Judge.

Proceeding by the State against Mrs. Mattie Duncan, to forfeit an automobile used in illegally transporting intoxicating liquors. Judgment entered conforming to the affirmative answer of the Supreme Court (99 S. E. 612) to a question certified by the Court of Appeals.

G. F. Kelley, of Lawrenceville, for plaintiff in error.

LUKE, J. Judgment affirmed.

WADE, C. J., and JENKINS, J., concur.

(24 Ga. App. 158)

**PARKER v. STATE.** (No. 10596.)(Court of Appeals of Georgia, Division No. 2.  
July 23, 1919.)*(Syllabus by the Court.)***INTOXICATING LIQUORS**  $\Leftrightarrow$  236(1)—**PROSECUTION FOR ILLEGAL MANUFACTURE—EVIDENCE—SUFFICIENCY.**

Conceding, but not deciding, that the lard can found in the defendant's house was an apparatus for the distilling and manufacturing of whisky, within the meaning of section 22 of the act of the General Assembly approved March 28, 1917 (Acts 1917 [Ex. Sess.], p. 18), the undisputed evidence showed that the lard can had been brought to the house and left there in the defendant's absence, and had been there only a

few hours when found by the officers, and that although the defendant was present in the house when it was found, he had not been told and did not know of its presence. It follows that his conviction was unauthorized, and the court erred in overruling his motion for a new trial.

Error from Superior Court, Glascock County; B. F. Walker, Judge.

Son Parker was convicted of violating the prohibition laws, and he brings error. Reversed.

E. B. Rogers, of Gibson, for plaintiff in error.

R. C. Norman, Sol. Gen., of Washington, Ga., for the State.

BROYLES, P. J. Judgment reversed.

BLOODWORTH and STEPHENS, JJ. concur.

(24 Ga. App. 167)

**BURNS v. LONG et al.****LONG et al. v. BURNS.**

(Nos. 10199, 10200.)

(Court of Appeals of Georgia, Division No. 2.  
Aug. 7, 1919.)*(Syllabus by the Court.)***APPEAL AND ERROR**  $\Leftrightarrow$  1005(1)—**QUESTIONS OF FACT—APPROVAL OF VERDICT—REVIEW.**

There is no error requiring the grant of a new trial in any of the rulings on the rejection of evidence as complained of in the amendment to the motion for new trial in grounds 1, 2, and 3; nor in failing to instruct as complained of in ground 4; nor in charging the jury as complained of in ground 5. On questions of fact the jurors are the final arbiters. The trial judge approved their finding in this case, and this court will not interfere.

Error from Superior Court, Carroll County; J. R. Terrell, Judge.

Action between J. M. Burns, survivor, and B. M. Long and others, administrators. Judgment for the latter, and the former brings error, and the latter take a cross-bill of exceptions. Affirmed on main bill of exceptions, and cross-bill dismissed.

S. Holderness and Leon Hood, both of Carrollton, for plaintiff in error.

Buford Boykin, S. C. Boykin, and Raymond Robinson, all of Carrollton, for defendant in error.

BLOODWORTH, J. Judgment affirmed on main bill of exceptions; cross-bill dismissed.

BROYLES, P. J., and STEPHENS, J., concur.

(24 Ga. App. 162)

**PENDLEY v. COHUTTA BANKING CO.**  
(No. 10129.)(Court of Appeals of Georgia, Division No. 2.  
Aug. 7, 1918.)*(Syllabus by the Court.)***DIRECTED VERDICT.**

The court did not err in directing a verdict for the plaintiff.

Error from Superior Court, Murray County; M. C. Tarver, Judge.

Action by the Cohutta Banking Company against Wm. Pendley. Judgment for plaintiff upon a directed verdict, and defendant brings error. Affirmed.

Wm. E. Mann, of Dalton, for plaintiff in error.

C. N. King, of Chatsworth, and W. C. Martin and F. K. McCutchen, both of Dalton, for defendant in error.

**BLOODWORTH, J.** Judgment affirmed.

**BROYLES, P. J., and STEPHENS, J.,** concur.

(24 Ga. App. 140)

**CAUTHEN v. STATE.** (No. 10559.)(Court of Appeals of Georgia, Division No. 2.  
July 23, 1919.)*(Syllabus by the Court.)***1. CRIMINAL LAW** ¶942(1)—**NEW TRIAL—NEWLY DISCOVERED EVIDENCE.**

"The newly discovered evidence was merely impeaching in its character and does not constitute sufficient cause for a new trial." *McCroty v. State*, 11 Ga. App. 788, 78 S. E. 163 (7); *Moreland v. State*, 134 Ga. 268, 67 S. E. 804 (2).

**2. CRIMINAL LAW** ¶922(7)—**NEW TRIAL—GROUNDS—FAILURE TO CHARGE—NECESSITY OF REQUEST.**

Complaint is made that the court failed to charge "the law of confessions." "This ground of the amendment to the motion for a new trial is without merit, since it is well settled that, even if the evidence authorizes a charge on the law of confessions, the failure to instruct the jury on that subject, in the absence of an appropriate written request so to do, is not cause for a new trial." *McArthur v. State*, 19 Ga. App. 747, 92 S. E. 234 (2), and cases cited.

**3. CRIMINAL LAW** ¶828 — **INSTRUCTIONS — CIRCUMSTANTIAL EVIDENCE.**

As the state introduced a confession—direct evidence—as well as circumstantial evidence, the court did not err, in the absence of a timely written request, in failing to charge the jury the law of circumstantial evidence as embodied in Pen. Code 1910, § 1010. *Horton*

*v. State*, 21 Ga. App. 120 (2), 121, 93 S. E. 1012, and cases cited.

**4. CRIMINAL LAW** ¶1160—**APPEAL AND ERROR—REVIEW—SUFFICIENCY OF EVIDENCE.**

The other grounds of the amendment to the motion for new trial are without merit, there is evidence to support the verdict, which has the approval of the trial judge, and this court cannot interfere.

Error from Superior Court, Pike County; W. E. H. Searcy, Jr., Judge.

Emmett Cauthen was convicted of an offense, and he brings error. Affirmed.

Frank L. Adams, of Zebulon, for plaintiff in error.

E. M. Owen, Sol. Gen., of Zebulon, for the State.

**BLOODWORTH, J.** Judgment affirmed.

**BROYLES, P. J., and STEPHENS, J.,** concur.

(24 Ga. App. 74)

**WHITE v. STATE.** (No. 10512.)(Court of Appeals of Georgia, Division No. 2.  
July 18, 1919.)*(Syllabus by the Court.)***1. LANDLORD AND TENANT** ¶253(1)—**CRIMINAL PROSECUTIONS FOR DEFRAUDING LANDLORD—SALE OF CROPS.**

Before a tenant can legally be convicted, under sections 720 and 721 of the Penal Code of 1910, of defrauding his landlord, it must appear from the evidence that the sale of the crops by the tenant was without the consent of the landlord, that loss to the landlord resulted from the sale, and that the tenant made the sale with intent to defraud the landlord. Unless all three of these essential elements of the offense are shown, the defendant's conviction is unauthorized. *Morrison v. State*, 111 Ga. 642, 36 S. E. 902; *Reece v. State*, 5 Ga. App. 663, 63 S. E. 670; *Thompson v. State*, 12 Ga. App. 201, 76 S. E. 1072.

**2. CONVICTION FOR DEFAULTING LANDLORD—EVIDENCE.**

Under the above ruling, and the facts of the instant case as disclosed by the record, the defendant's conviction was unauthorized, and the court erred in refusing to grant a new trial.

**3. AMENDMENT TO MOTION FOR NEW TRIAL.**

It is unnecessary to consider the amendment to the motion for a new trial.

Error from City Court of Carrollton; Jas. Beall, Judge.

L. W. White was convicted of defrauding his landlord, and he brings error. Reversed.

John M. Moore, of Villa Rica, and Boykin & Boykin, of Carrollton, for plaintiff in error.



Willis Smith, Sol., of Carrollton, for the State.

**BROYLES, P. J.** Judgment reversed.

**BLOODWORTH and STEPHENS, JJ.,** concur.

(24 Ga. App. 163)

**PILGRIM HEALTH & LIFE INS. CO. et al.**  
v. **McINTOSH.** (No. 10139.)

(Court of Appeals of Georgia, Division No. 2.  
Aug. 7, 1919.)

*(Syllabus by the Court.)*

**1. MOTION FOR NEW TRIAL.**

The first second, and fifth grounds of the motion for new trial are but amplifications of the general grounds.

**2. AMENDED MOTION FOR NEW TRIAL.**

There is no merit in the fourth ground of the amendment to the motion for new trial.

**3. TRIAL  $\Leftrightarrow$  252(6)—ABSTRACT INSTRUCTION—REFUSAL.**

The storm center of the case is around the third ground of the amendment to the motion for a new trial, which complains of the refusal of the court to give certain requested instructions to the jury. In the order overruling the motion for a new trial the judge said in reference to this request: "The question on this motion is this: Did the court err in refusing to give the request set out in the third ground of the amended motion for new trial? As an abstract proposition the statement that, 'where agency is shown by proof of the relative situation of the parties, the agency is established no further than is necessary for the discharge of the duties ordinarily belonging to it; is correct. In fact, it is an excerpt from the decision in *Wilde v. L. & N. Ry. Co.*, 118 Ga. 309 [42 S. E. 525]. I refused to give it, because I decided it to be inapplicable to the case as made, and calculated to mislead. It is elementary law that corporations are liable for the acts of their servants while such servants are engaged in the business of their principal. In the instant case the life insurance company was a corporation. Singfield, a witness for the defense, testified that 'he was the manager of the defendant company at Savannah, and instructed Perry to swear out the warrant.' Perry, a witness for the defense, testified that he was 'bookkeeper' for the company, and, 'under instructions from Singfield, swore out the warrant against McIntosh.' 'Singfield is the manager for the company for the Savannah district, and was in charge of the Savannah office.' The foundation of the warrant against the plaintiff was the wrongful conversion by him, as an employé of the company, of money belonging to the company which had been intrusted to him. Singfield, as manager, instructed Perry, the bookkeeper, to take out the warrant against McIntosh. Singfield was engaged, when he gave this instruction, in the business of his principal. The term "manager," as applied to a private

corporation, indicates one who has the general direction and control of the affairs. . . . implies agency, control, and presumptively authority to bind the corporation.' [*American Investment Co. v. Cable Co.*] 4 Ga. App. 103 [60 S. E. 1037]. No issue was raised in the pleading, evidence, or argument as to the authority of Singfield. There was no denial that he was the manager for the Savannah district. The legal presumption is that he, as manager, had the authority to bind the company. There was not the slightest suggestion that he did not have the authority. I take it to be true that the court should not give in charge abstract principles of law, unless they are adjusted to one or more issues in the case. There was no issue to which the request was adapted." We agree with the learned judge in the conclusion reached by him in reference to this request to charge.

**4. VERDICT.**

The motion for a new trial points out no error of law, the trial judge sustained the verdict, and we sustain him.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Action by C. H. McIntosh against the Pilgrim Health & Life Insurance Company and others. Judgment for plaintiff, motion for new trial denied, and defendants bring error. Affirmed.

Geo. W. Owens, of Savannah, for plaintiffs in error.

Shelby Myrick, of Savannah, for defendant in error.

**BLOODWORTH, J.** Judgment affirmed.

**BROYLES, P. J., and STEPHENS, J.,** concur.

(24 Ga. App. 73)

**DONALSON v. STATE** (No. 10450.)

(Court of Appeals of Georgia, Division No. 2.  
July 16, 1919.)

*(Syllabus by the Court.)*

**1. WEAPONS  $\Leftrightarrow$  12—CARRYING PISTOL—CONSTRUCTION OF STATUTE.**

The statute prohibiting any one from carrying, outside of his own home or place of business, a pistol without first obtaining a license from the ordinary of the county in which he resides (*Acts 1910, p. 134; Park's Ann. Pen. Code, §§ 348a, 348b*), when properly construed as a whole, means that, where one gives the required bond and secures a license to carry a pistol, he is authorized thereby to carry only the identical pistol for which the license is issued. While this is true, and while the act requires the ordinary granting the license to keep a record of the name of the person taking out the license, the name of the maker of the pistol to be carried, and the caliber and number of the pistol, the act does not require that these facts (except, of course, the name of the person to whom the license is issued) shall ap-

pear in the license itself or in any certificate from the ordinary that he has issued such a license.

**2. WEAPONS §12, 17(3)—LICENSE—DEFENSE—PAROL EVIDENCE.**

Where, upon the trial of one charged with carrying a pistol outside of his own home or place of business, the defendant tendered in evidence a license from the ordinary of his home county authorizing the defendant to carry a 38-caliber S. & W. pistol, and also offered in evidence a certificate from the ordinary that he had issued this license, and the evidence showed that the pistol which the defendant was charged with carrying was a 38-caliber pistol of Smith & Wesson make, it was error for the court to exclude the license and the ordinary's certificate. This documentary evidence, while not presenting a complete defense, in that it failed to show the number of the pistol which the defendant was licensed to carry, and therefore did not affirmatively establish that he was authorized under the license to carry the identical pistol which he was charged with carrying, was nevertheless admissible as a link in his chain of defense. Under such circumstances, he would have the right, if he could do so, to prove by parol testimony, or by his statement (provided the jury saw fit to believe it), that the pistol he was charged with carrying was the same pistol referred to in the license.

**3. EXCLUSION OF EVIDENCE.**

The error in excluding the documentary evidence referred to above requires a new trial of the case.

Error from City Court of Miller County;  
W. T. Geer, Judge.

J. B. Donalson was convicted of carrying a pistol without first having obtained a license from the ordinary of the county in which he resided, and he brings error. Reversed.

P. D. Rich, of Colquitt, for plaintiff in error.

N. L. Stapleton, Sol., of Colquitt, for the State.

BROYLES, P. J. Judgment reversed.

BLOODWORTH and STEPHENS, JJ., concur.

(24 Ga. App. 92)

THORNTON v. HORTON. (No. 10084.)

(Court of Appeals of Georgia, Division No. 1.  
July 17, 1919.)

(Syllabus by the Court.)

**1. HOMESTEAD §216—SALE OF PROPERTY—RECOVERY.**

The evidence of the plaintiff tended to prove every material allegation of her petition. The court, therefore, erred in granting a nonsuit.

(Additional Syllabus by Editorial Staff.)

**2. HOMESTEAD §212—POSSESSION—RIGHT OF ACTION.**

The beneficiary of a homestead, taken out by her husband, had such an interest in property purchased with proceeds of a homestead, and therefore homestead property, that she might bring an action against any one in possession holding adversely to her under a purchase of the property at a foreclosure of a third person's chattel mortgage thereof.

**3. HOMESTEAD §216—POSSESSION—RIGHT OF ACTION.**

That plaintiff's husband and the head of the family was at a chattel mortgage foreclosure sale of a horse purchased with proceeds of the homestead, and claimed a part of the money arising from the sale, was no ground for nonsuiting plaintiff in her bail trover action against purchaser at such sale.

Error from Superior Court, Taylor County;  
G. H. Howard, Judge.

Bail trover action by Mrs. M. E. Thornton against G. O. Horton. Judgment of nonsuit, and plaintiff brings error. Reversed.

C. W. Foy, of Butler, for plaintiff in error.

Jule Felton, of Montezuma, for defendant in error.

LUKE, J. [1] R. B. Thornton mortgaged a certain described horse to the First National Bank of Reynolds. The mortgage was foreclosed, and at a "short-order" sale the horse was sold to one Horton for \$100. The proceeds of the short-order sale were claimed by J. H. Thornton, the father of R. B. Thornton, under a mortgage *li. fa.* in his favor, and he was successful in obtaining a portion of the money arising from the sale. Thereafter his wife brought this suit, a bail trover action, to recover the horse. At the close of the evidence introduced in behalf of the plaintiff, a nonsuit was granted, on motion of the defendant, and this is complained of in the bill of exceptions.

The evidence showed that the defendant was in possession of the property described in the suit, and that demand was made of him for the property, and he refused to deliver it. The evidence also established the value of the property, and the value of the hire. There was parol evidence, unobjected to, that the property belonged to the plaintiff by virtue of a homestead taken out by her husband, and that the property was sold by E. J. Pool, a constable, who was put on notice before the sale that it was homestead property.

In view of this proof, we think the court erred in granting a nonsuit. Civil Code (1910) § 3377, provides that property may be set aside as a homestead, and shall not be subject to any levy and sale. The evidence shows that the property in dispute was pur-

chased with the proceeds of a homestead, and was therefore homestead property. "Land paid for with homestead land is homestead property." *Broome v. Davis*, 87 Ga. 584, 13 S. E. 749. See, also, *Johnson v. Redwine*, 105 Ga. 449, 453, 33 S. E. 676; *Taylor v. James*, 109 Ga. 327, 334, 34 S. E. 674; *Johnson v. Thomason*, 120 Ga. 534, 48 S. E. 137.

[2] In the case of *Taylor v. James*, 109 Ga. 327, 336, 34 S. E. 674, 677, it is said:

"The beneficiaries of the homestead, however, have such an interest in the property that they may bring an action" against any one "who is in possession holding adversely to them."

See, also, *Eve v. Cross*, 76 Ga. 693.

These cases are authority for the proposition that the plaintiff had the right to bring this suit in her name, as she was a beneficiary under the homestead taken out by her husband.

[3] We can see no reason why the nonsuit was granted, unless it was on the idea that J. H. Thornton, the husband of the plaintiff and the head of the family, was at the judicial sale and claimed a portion of the money arising from the sale of the property sought to be recovered in this trover suit. In *Phillips v. Taber*, 83 Ga. 565, 10 S. E. 270 (4a), it is said:

"It could be recovered by the plaintiff as the head of the family, though he was present at the sale and received the surplus from the sheriff."

To sum up the whole matter, it appears to us that this suit could be maintained by the plaintiff, since she was a beneficiary under the homestead; that there could have been no legal sale of the property which was purchased with the proceeds of a homestead, and consequently no legal title passed, there being, of course, no proof that the sale was made under any of the exceptions to the general rule.

Judgment reversed.

WADE, C. J., and JENKINS, J., concur.

(24 Ga. App. 167)

TOWLER v. STATE. (No. 10609.)

(Court of Appeals of Georgia, Division No. 2.  
Aug. 7, 1919.)

(Syllabus by the Court.)

1. CRIMINAL LAW §826 — REQUESTED CHARGE—CONSIDERATION ON APPEAL.

This court cannot consider exceptions to the refusal of the trial judge to comply with a written request to charge, unless it is made to appear that it was tendered to the court before the jury retired to consider the case. *Seaboard Air Line Ry. v. Barrow*, 18 Ga. App. 261, 89 S. E. 383 (4). In the instant case it is not shown that the written request to charge was so tendered.

2. CRIMINAL LAW §564(3)—VENUE—CIRCUMSTANTIAL EVIDENCE.

The venue can be established by circumstantial, as well as direct, evidence. *Dumas v. State*, 62 Ga. 59 (4).

3. CRIMINAL LAW §564(1) — VENUE — SUFFICIENCY OF EVIDENCE.

Evidence as to the venue, though slight, is sufficient where there is no conflicting evidence. *Johnson v. State*, 62 Ga. 300 (1), 301; *Porter v. State*, 76 Ga. 658 (2), 660. In the instant case, under the above rulings, the evidence as to the venue was sufficient.

4. CRIMINAL LAW §1159(4) — INTENT — FINDING OF JURY—REVIEW.

The intent with which an act is done is peculiarly a question of fact for determination by the jury, and, although a finding by the jury that the accused had the intent to commit the crime charged may be supported by evidence which is exceedingly weak and unsatisfactory, the verdict will not be set aside on that ground. *Johnson v. State*, 9 Ga. App. 409, 71 S. E. 507 (3). In the instant case the evidence as to whether the defendant had the intent to commit an assault with intent to rape, or had the intent to commit fornication merely, is weak and not altogether satisfactory; but under the ruling just cited, and especially when the tender years of the little girl involved are considered, the verdict, having been approved by the trial judge, will not be set aside.

Error from Superior Court, Gwinnett County; Andrew J. Cobb, Judge.

Dink Towler was convicted of an assault with intent to rape, and he brings error. Affirmed.

G. F. Kelley and W. L. Nix, both of Lawrenceville, for plaintiff in error.

W. O. Dean, Sol. Gen., of Monroe, and N. L. Hutchins, of Lawrenceville, for the State.

BROYLES, P. J. Judgment affirmed.

BLOODWORTH and STEPHENS JJ., concur.

(24 Ga. App. 91)

CASEY v. OWENS. (No. 10063.)

(Court of Appeals of Georgia, Division No. 1.  
July 17, 1919.)

(Syllabus by the Court.)

1. DEMURRER.

The various grounds of the demurrer are without substantial merit, and the trial judge did not err in overruling the same.

2. BILLS AND NOTES §498—TRIAL §253 (10)—DEFENSE — BURDEN OF PROOF—FLORIDA STATUTES.

The court erred in charging the jury that, "under the statute of the state of Florida which the defendant has pleaded as a defense to the note sued upon, the burden is upon the defendant to show by a preponderance of the evidence that notice of dishonor of the note sued upon was not given to him. Placing such no-

tice in the mails for transmission to him within the time required by the statute so pleaded would be a sufficient compliance with the law as to notice." Under the laws of the state of Florida pleaded by the defendant, when a person not otherwise a party to an instrument places thereon his signature in blank before delivery, he is liable as an indorser; and before an indorser can be held liable on a note it is necessary that notice of dishonor by the maker be given him. The burden was therefore on the plaintiff to establish that notice of dishonor was given the defendant, and the charge complained of, having placed this burden on the defendant, was such error as to require a reversal. See in this connection the following cases, in which a Georgia statute similar to the Florida statute was construed: *Allen v. Ga. Nat. Bank*, 60 Ga. 347; *Apple v. Lesser*, 93 Ga. 749, 21 S. E. 171.

(a) The uncontradicted testimony of the defendant that notice of dishonor was never received by him was sufficient proof under the Florida law; and the charge complained of was subject to the criticism that it conveyed to the jury the impression that the defendant must prove not only that he never received notice of dishonor, but that such notice was never mailed him—a burden impossible to carry unless he made the plaintiff a witness for himself.

### 3. REVERSIBLE ERROR.

No other reversible error appears from the motion for a new trial.

Error from Superior Court, Camden County; J. P. Highsmith, Judge.

Action by L. L. Owens against Thomas Casey. Judgment for plaintiff, motion for new trial denied, and defendant brings error. Reversed.

Emmett McElreath, of Kingsland, and Jas. T. Vocelle, of St. Marys, for plaintiff in error.

S. C. Townsend, of St. Marys, for defendant in error.

WADE, C. J. Judgment reversed.

JENKINS and LUKE, JJ., concur.

(24 Ga. App. 106)

ROBINSON v. McCOMMONS-THOMPSON-BOSWELL CO. (No. 10281.)

(Court of Appeals of Georgia, Division No. 1. July 17, 1919.)

### (Syllabus by the Court.)

#### 1. APPEAL AND ERROR — 843(2) — EXCEPTION TO REFUSAL TO NONSUIT—REVIEW.

This was a suit upon an account, brought by McCommons-Thompson-Boswell Company against Philip Robinson. The defendant in his answer denied indebtedness, and for further plea alleged that he never purchased or authorized any one to purchase for him any of the articles in the account sued on; that some time prior to the date of the first item he borrowed a stated sum of money for the purpose of pay-

ing cash for all purchases made by him; that "he informed plaintiffs of this, and expressly told some member of their firm, in the presence of their then bookkeeper [named], that he would pay cash for everything in future, and instructed them to charge nothing to him, and told them that if after this anything was charged to him he would not be responsible for nor pay for the same." Upon the trial of the case the manager of the plaintiff company testified that the account sued on was past due, true, and correct; that he had asked the defendant if he would not pay the account; that he did not then have the account with him, but had a memorandum of the amount, and that the defendant promised to pay the same several times; that the defendant, his wife, and their two minor children bought the articles sued for in the account. The defendant testified substantially to the facts alleged in his plea and answer, and denied that he had ever promised to pay the account, but further testified that he could not point out a single item of the account that he, his wife, and family did not receive and get the benefit of. There was no evidence that any of the items of the account were not necessities suitable to the condition and habits of life of the defendant's wife and family. *Held*:

"An exception based upon the refusal of the court to award a nonsuit will not be considered, where, subsequently thereto, the case is submitted to the jury, and, a verdict being rendered against the defendant, a motion for a new trial is made which presents the complaint that the verdict is contrary to the evidence, and without evidence to support it." *Dudley v. Isler*, 21 Ga. App. 615, 94 S. E. 827 (1).

#### 2. HUSBAND AND WIFE — 232(1) — NECESSARIES—WIFE'S POWER TO CONTRACT—PRESUMPTION.

Cohabitation and joint use of the goods purchased is presumptive evidence of the wife's authority to contract, and it is for the husband to rebut the presumption by showing that the goods were supplied under such circumstances that he is not bound to pay for them. Such presumption can only be rebutted by positive and unequivocal evidence that the articles furnished were, not necessities, or that the seller had either actual or constructive notice of an allowance to the wife by the husband, either permanent or temporary, sufficient to enable her to procure necessities without obtaining them upon her husband's credit. *Civ. Code* 1910, § 2996; *Connerat v. Goldsmith*, 6 Ga. 14; *Mitchell v. Treanor*, 11 Ga. 324, 56 Am. Dec. 421; *Green v. Coast Line R. Co.*, 97 Ga. 15, 35, 24 S. E. 814, 33 L. R. A. 806, 54 Am. St. Rep. 379; *Adler v. Morrison*, 15 Ga. App. 139, 82 S. E. 783. The court did not err, therefore, in giving in charge to the jury the section of the Code cited above, and for the same reason the third special ground of the motion for a new trial is without merit.

#### 3. EVIDENCE — 376(13)—BOOKS OF ACCOUNT—CORROBORATION.

The books of account of any merchant doing a regular business and keeping daily entries thereof may be admitted in evidence in corroboration of his testimony as to the correctness of such accounts, upon proof being made by his customers that he usually kept correct books,

even though no proof is made that no clerk was kept, or that he was unable to testify (Civ. Code 1910, § 5769, subd. 3; *Shields v. Carter*, 22 Ga. App. 507, 509, 96 S. E. 330), and in this case the trial judge did not abuse his discretion in allowing the plaintiff to introduce its books of account in evidence after both sides had closed and argument commenced. *Wooten v. Solomon*, 139 Ga. 433, 77 S. E. 375; *Watson v. Barnes*, 125 Ga. 733, 54 S. E. 723 (2).

#### 4. SUFFICIENCY OF EVIDENCE.

There was sufficient evidence to authorize the verdict, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Greene County; J. B. Park, Judge.

Suit by the McCommons-Thompson-Boswell Company against Phillip Robinson. Judgment for plaintiff, motion for a new trial overruled, and defendant brings error. Affirmed.

F. B. Shipp, of Greensboro, for plaintiff in error.

Noel P. Park, of Greensboro, for defendant in error.

JENKINS, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(24 Ga. App. 132)

TANNER et al. v. STATE. (No. 10549.)

(Court of Appeals of Georgia, Division No. 2. July 22, 1919.)

(Syllabus by the Court.)

#### 1. CRIMINAL LAW — § 878(2) — ROBBERY BY FORCE—CONSTRUCTION OF VERDICT.

Where an indictment charges robbery by force and robbery by intimidation, and a general verdict of guilty is returned, it will be construed as a verdict finding defendant guilty of the graver offense, robbery by force.

#### 2. ROBBERY — § 6, 7—"ACTUAL FORCE"—"INTIMIDATION."

"Actual force," in our definition of 'robbery,' implies personal violence. If there is any injury done to the person, or if there is a struggle to retain possession of the property, before it is taken, it is the force of our Penal Code."

(a) "'Intimidation,' in our Code, is the same with 'putting in fear' at common law, and is constructive force."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Actual Force; Intimidation.]

(Additional Syllabus by Editorial Staff.)

#### 3. ROBBERY — § 24(5)—FORCE—EVIDENCE.

Evidence that the two defendants conspired to rob a certain person, and that one defendant put a pistol in his face and commanded him

to hold up his hands, and that after he held up his hands the other defendant, without the consent of such person, took money from his pockets, did not show a "robbery by force."

Error from Superior Court, Fulton County; John D. Humphries, Judge.

John Tanner and another were convicted of robbery, their motion for a new trial was denied, and they bring error. Reversed.

H. A. Allen, Ernest G. Bentley, W. C. Cousins, and W. I. Heyward, all of Atlanta, for plaintiffs in error.

John A. Boykin, Sol. Gen., and E. A. Stephens, both of Atlanta, for the State.

BLOODWORTH, J. The evidence in this case shows that the accused, Tanner and Washington, conspired to rob Smith, and, with no one else except the three present, Washington put a pistol "right in" the face of Smith, commanded him to hold up his hands, and, while his hands were up, Tanner, without the consent of Smith, put his hands in the pockets of Smith and took therefrom money belonging to Smith. The indictment charged Tanner and Washington with robbery "by force and intimidation." There was a general verdict of guilty. A motion for a new trial was overruled, and the movants excepted. It was insisted that this verdict should be "construed as a verdict finding the defendants guilty of the graver offense, to wit, robbery by force," and "that this verdict was not supported by the evidence, and was, therefore, contrary to law."

[1] 1. We agree with both of these contentions. In *Moran v. State*, 125 Ga. 35, 53 S. E. 806, the Supreme Court said:

"There was a general verdict of guilty, which would be applied to that count in the indictment which charged robbery by force."

In *Story v. State*, 12 Ga. App. 644, 645, 77 S. E. 914, 915, this court said:

"It is well settled, of course, that robbery by force and robbery by intimidation, being each merely different grades of the same offense, may be joined in the same count, and that the defendant may be convicted of either, according to the proof. *Long v. State*, 12 Ga. 293; *Fanning v. State*, 66 Ga. 167; *Lampkin v. State*, 87 Ga. 516, 13 S. E. 523. It is equally well settled that, where the indictment is of this character, and a general verdict of guilty is returned, it will be construed to be a verdict finding the defendant guilty of the graver offense, to wit, robbery by force. *Harris v. State*, 1 Ga. App. 136, 57 S. E. 937, and citations."

These decisions settle the first insistence of the plaintiffs in error.

[2, 3] 2. Is there any evidence to show robbery by force? No. The salient facts of the case are set out above. These facts show the "intimidation," but not the "force" contemplated by our statute. Judge Powell, speak-

ing for this court in *Johnson v. State*, 1 Ga. App. 730, 57 S. E. 1056, said:

"The 'force,' in our definition, is the same as the 'violence' of the common-law definition; and the 'intimidation' in ours is synonymous with the 'putting in fear' in the common law."

The ninth and tenth headnotes of the decision in the case of *Long v. State*, 12 Ga. 294, are as follows:

"(9) 'Actual force,' in our definition of 'robbery,' implies personal violence. If there is any injury done to the person, or if there is a struggle to retain possession of the property, before it is taken, it is the force of our Penal Code.

"(10) 'Intimidation,' in our Code, is the same with 'putting in fear' at common law, and is constructive force. When a party is put in fear of an injury to his person or his property, or to his character, by a charge of an unnatural crime, it is robbery by intimidation."

While the twelfth headnote in that case is as follows:

"If the transaction be attended with such circumstances of terror, such threatening, by word or gesture, as in common experience are likely to create an apprehension of danger, and to induce a man to part with his property for the safety of his person, he is put in fear of his person, and it is robbery,"

It must be borne in mind that—

"At common law it is held that, if property is taken by either of these means, against the will of the party, such taking will be robbery. At common law, therefore, there was but one offense, and fear was held to be constructive violence." *Long v. State*, supra, 12 Ga. 315.

Hence the robbery referred to in the twelfth headnote just quoted from the *Long* Case would, under our law, be robbery by intimidation. In discussing the definition of robbery in our Code, Judge Nisbet in that case (12 Ga. pp. 314, 315) said:

"Does the Code make two offenses? We think not, but creates one offense, to wit, robbery, and makes two grades of that offense—one robbery by force, which is the highest grade, and punishable with the longest term of imprisonment in the penitentiary; and the other robbery by intimidation, which is the lower grade, and punished with a shorter term of imprisonment. It defines robbery thus: 'Robbery is the wrongful, fraudulent, and violent taking of money, goods, or chattels, from the person of another, by force or intimidation, without the consent of the owner.' Prince, 678. The offense is single; and it is robbery if committed by force, and not the less robbery when perpetrated by intimidation. Force is the ruling element in the offense. When the Code speaks of force, it means actual violence; and when it speaks of intimidation, it still means force, not actual and direct, but exerted upon the person robbed by operating upon his fears—the fear of injury to his person, or property, or character. The law considers, however, that actual violence is attended with more immediate and se-

rious consequences than violence by intimidation; and therefore it is that a distinction is made in the punishment. The former constitutes the offense with greater enormity. The offense, I conclude, is single, for the reason stated, and the element of force is necessary to constitute it in either case. It was so considered at common law."

The brief of the solicitor general in the instant case says:

"Ours is the usual case, and exactly like the case of *Harris v. State*, 1 Ga. App. 136, 57 S. E. 937 (2)."

The *Harris* Case is distinguished from this case by the fact that in that case, while one of the conspirators, at the point of a pistol, forced the person robbed to stand still and hold up his hands, the other seized him and went through his pockets and took his money. The fact that in the *Harris* Case the person robbed was seized adds the element of force not found in this case. In the *Harris* Case the two persons were acting together, and the force of one was the force of the other, as the intimidation by one was intimidation by the other. In that case it was properly held that—

"These joint acts are sufficient to constitute the crime of robbery both by force and by intimidation."

For lack of evidence to show force in this case, the court erred in refusing a new trial. See *Barksdale v. State* (No. 10387), 100 S. E. 45, this day decided.

It is unnecessary to pass specifically on the assignments of error in the amendment to the motion for a new trial.

Judgment reversed.

BROYLES, P. J., and STEPHENS, J., concur.

(24 Ga. App. 115)

BARKSDALE v. STATE. (No. 10387.)

(Court of Appeals of Georgia, Division No. 2.  
July 22, 1919.)

(Syllabus by the Court.)

# 1. CRIMINAL LAW — 878(2)—ROBBERY BY FORCE—CONSTRUCTION OF VERDICT.

Where one is indicted for the offense of robbery by force as well as by intimidation, a general verdict of guilty will be applied to the count in the indictment charging robbery by force, since the latter is the higher grade of the offense. *Moran v. State*, 125 Ga. 35, 53 S. E. 806.

# 2. ROBBERY — 6—ROBBERY BY "FORCE"—EVIDENCE.

"Force," in the sense in which it is used in defining the offense of robbery, consists in personal violence or that degree of force that is necessary to remove articles so attached to the person or clothing as to create resistance, how-

ever slight. 2 Bishop's Criminal Law, § 1167. In the absence of any evidence of such "force," the verdict finding the defendant guilty of robbery by force is without evidence to support it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Force.]

### 3. ROBBERY ⚡24(5)—ROBBERY BY FORCE—INTIMIDATION.

Evidence that the defendant held a pistol in a threatening and intimidating manner over the victim of an alleged robbery, while his confederates ran their hands through the pockets of the victim, and without violence relieved the latter of his money and other loose valuables unattached to the person or clothing, authorizes a conviction of robbery by intimidation, but not of robbery by force; such robbery having been accomplished without "force." See *Tanner v. State*, 24 Ga. App. —, 100 S. E. 44.

### 4. ASSIGNMENT OF ERROR.

The assignment of error upon an excerpt from the charge of the court contained in the only ground of the amendment to the motion for a new trial is without merit.

### 5. SUFFICIENCY OF EVIDENCE.

The verdict is without evidence to support it, and the court erred in overruling the motion for a new trial.

Error from Superior Court, Fulton County; John D. Humphries, Judge.

J. B. Barksdale was convicted of robbery by force, his motion for a new trial was denied, and he brings error. Reversed.

Fred E. Harrison, H. A. Allen, and W. I. Heyward, all of Atlanta, for plaintiff in error.

John A. Boykin, Sol. Gen., and E. A. Stephens, both of Atlanta, for the State.

STEPHENS, J. Judgment reversed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(24 Ga. App. 86)

ROY v. GEORGIA R. & BANKING CO. et al.  
(No. 10037.)

(Court of Appeals of Georgia, Division No. 1.  
July 17, 1919.)

*(Syllabus by the Court.)*

#### 1. DEMURRER—DIRECTED VERDICT.

The court erred in sustaining demurrers to the plaintiff's amended petition, and in thereafter directing a verdict for the defendants.

*(Additional Syllabus by Editorial Staff.)*

#### 2. RELEASE ⚡28(1) — COVENANT NOT TO SUE—CONSTRUCTION.

A covenant not to sue one jointly liable will not release any one other than the one with whom the covenant is entered into.

### 3. REFORMATION OF INSTRUMENTS ⚡16—ACCIDENT, MISTAKE, OR FRAUD.

Where by accident, mistake, or fraud a writing does not speak the truth, it may be reformed and corrected and be made to speak the truth.

### 4. REFORMATION OF INSTRUMENTS ⚡44, 46—EVIDENCE—ORIGINAL WRITING—QUESTION FOR JURY.

Defendants may introduce in evidence the original writing as well as other competent evidence by way of attack on the reformed and alleged corrected covenant not to sue, making a question for jury as to whether plaintiff released, as pleaded by defendant, or merely covenanted not to sue.

Error from City Court of Madison; K. S. Anderson, Judge.

Action by Mrs. A. G. Roy against the Georgia Railroad & Banking Company and others. Demurrers to plaintiff's amended petition sustained, and verdict directed for defendants, and plaintiff brings error. Reversed.

Percy Middlebrooks, of Madison, and Sam'l H. Sibley, of Union Point, for plaintiff in error.

McDaniel & Black, of Atlanta, and Cumming & Harper, of Augusta, for defendants in error.

LUKE, J. The plaintiff in this case has had a long and no doubt an anxious fight with those who she claims have by their negligence damaged her. This court in *Roy v. Georgia Railroad & Banking Co.*, 17 Ga. App. 34, 86 S. E. 328, gave her hope by determining her suit to be good as against demurrer, in so far as several of the defendants were pleaded liable. When her case in due course came on for trial, the defendants amended their defenses and claimed that she had released a joint tort-feasor by entering into the following agreement:

"In consideration of the sum of two hundred fifty (\$250) dollars received by me this 2d day of October, 1913, I hereby release and discharge Empire Cotton Oil Company, Madison, Ga., of and from any and all claims which I now have or may have hereafter by reason of personal injuries sustained by my son, J. A. Roy, resulting in his death on or about the 11th day of September, 1913, or of any cause, matter, or thing whatsoever. Witness my hand and seal. Release. Mrs. A. G. Roy [L. S.] C. L. C. Thomas, Witness, Madison, Ga. P. B. Speed, Jr., Witness, Madison, Ga."

Demurrers to the pleas were overruled, and the plaintiff offered an amendment to her petition, in which amendment she alleged that her agreement and receipt to Empire Cotton Oil Company, while purporting to be a release, was in fact not a release, for the reason that neither she nor the Empire Cotton Oil Company ever regarded the death of

her son as due to any negligence of his employer, the Empire Cotton Oil Company, and that the money received by her as evidenced by her written receipt was but a gratuity, and not an effort to release or sell her claim, and at most was only a covenant not to sue; and in the amendment she sought a reformation of the receipt given so as to make it speak the truth. Demurrers to the amendment were sustained. She then filed a petition in the superior court, praying the aid of equity, to the end that the receipt be reformed, modified, and molded so as to speak the truth and not be such a release as would defeat her remedy against the others she was suing for the tort committed. In the meantime the Empire Cotton Oil Company agreed with her contention, and in lieu of the first writing the following writing was entered into as a reformation of the first:

"Whereas, on October 2, 1913, Mrs. A. G. Roy gave to Empire Cotton Oil Company a paper in words as follows: 'In consideration of two hundred and fifty dollars (\$250) received by me this 2d day of October, 1913, I hereby release and discharge Empire Cotton Oil Company, Madison, Ga., of and from any and all claims which I now have or may have hereafter by reason of personal injuries sustained by my son, J. A. Roy, resulting in his death on or about the 11th day of September, 1913, or of any cause, matter, or thing whatsoever. Witness my hand and seal. Release. Mrs. A. G. Roy. C. L. C. Thomas, Witness. P. B. Speed, Jr., Witness.' And whereas, at said time it was not considered that said Empire Cotton Oil Company was liable to Mrs. A. G. Roy in the premises, nor was it the purpose of either party to appraise her injury or satisfy the same, but it was the purpose of the Empire Cotton Oil Company to pay her said sum in the nature of a gratuity, asking only that she agree not to sue or hold said Empire Cotton Oil Company responsible, and an agreement having the effect of relieving said Empire Cotton Oil Company from any suit by Mrs. Roy without affecting her right to hold others responsible for her son's death that might be responsible therefor was intended by both parties, but by accident and mistake of both parties, as to the legal effect and operation of the words used, the language above quoted was used, which it is now claimed operates to release the persons really responsible, if any persons are responsible:

"Now, in consideration of the premises, and in voluntary reformation of said instrument to express the true intent of the parties thereto, the same is made to read as follows: 'In consideration of two hundred and fifty dollars (\$250) received by me this 2d day of October, 1913, I hereby agree not to sue Empire Cotton Oil Company, Madison, Ga., on account of any or all claims which I may have or may hereafter have against it by reason of personal injuries sustained by my son, J. A. Roy, resulting in his death on or about September 11, 1913, or any other matter or thing whatsoever, not relieving or releasing any other person who may be liable therefor. Witness our hands and seals this August 8, 1916. Empire Cotton

Oil Co., by H. E. Watkins, Vice Pres. [L. S.] Mrs. A. G. Roy. [L. S.] M. E. Keller, Secty. Empire Cotton Oil Co. [Corporate Seal].'"

This branch of her cause then by due course was determined by the Supreme Court, and in the decision of that court (147 Ga. 349, 94 S. E. 218) it was said:

"The plaintiff applied to the Empire Cotton Oil Company for a voluntary reformation of the contract, and that company promptly executed an instrument in conformity with the alleged intentions of the parties to the original contract of release, which the plaintiff alleges was a mere agreement not to sue or hold the Empire Company responsible. The contract as thus reformed was duly pleaded in the city court, and the plea was rejected. The case now stands for trial in the city court of Madison. At that stage of the litigation the plaintiff filed an equitable petition in the superior court, seeking: (1) To enjoin the defendants from interposing the alleged release as a defense in the city court of Madison; (2) that the release be reformed 'as against the railway companies, in accordance with the voluntary reformation thereof by the Empire Cotton Oil Company'; (3) that the controversy pending in the city court of Madison be tried and determined in the superior court of Morgan county, and that plaintiff have a general judgment against the defendants. While the Empire Cotton Oil Company is named as one of the defendants in the equitable petition, no relief of any kind is prayed against that company. The petition specifically alleges that the Empire Company has voluntarily reformed the instrument. The defendants filed demurrers and answers attacking the petition for failure to state a cause of action. They also denied the jurisdiction of the court, on the ground that neither of the defendants against whom substantial relief is prayed is domiciled in Morgan county, one company having its domicile in Richmond county, and the others being nonresidents of the state, with no office or agent in Morgan county.

"The primary purpose of the equitable proceeding is to reform the release. Without this it is manifest, and indeed must be conceded, that the suit would be barren and purposeless; for in other respects it can be tried as favorably to the plaintiff in the tribunal first selected as in the last. Without reformation the paper would be as fatal to the recovery in the one court as in the other; and therefore, unless the reformation can be had, there is no basis for the equitable jurisdiction of the superior court. The paper having been voluntarily reformed already in accordance with the original intention of the parties, a court of equity could do no more than has been done. It would be a vain thing for a court of equity to solemnly decree that third parties must do that which has been voluntarily done. A court of equity cannot adjudicate what shall be the effect of a contract as to third persons who took no part in executing the same, by decreeing a reformation as to them. The railroad companies were not parties to the alleged release. It is so alleged in the petition. It was a paper executed between the plaintiff and the Empire Cotton Oil Company. Reformation can go no further than to insert what was by mistake omitted,



or to strike what was by mistake unintentionally included in the original paper. Therefore there is nothing for a court of equity to do. What effect the change in the contract as made by the plaintiff and the Empire Cotton Oil Company in their voluntary reformation will have upon the other defendants is to be determined upon the trial of the case."

The cause came on again for trial, and by amendment the reformed writing was pleaded by the plaintiff, and by her construed to be not such a release as would defeat her right to recover her alleged damages against the defendants.

[1-4] A covenant not to sue one jointly liable will not serve to release any one other than the one with whom the covenant not to sue is entered into. Where by accident, mistake, or fraud a writing does not speak the truth, it may be reformed and corrected so that it may be made to speak the truth. In this case the defendants may introduce in evidence the original writing as well as such other evidence as may be competent by way of attack on the reformed and alleged corrected covenant not to sue, and it is for the jury to say, under appropriate instructions from the court, whether the plaintiff in fact did release as pleaded by the defendant, or whether she merely entered into a covenant not to sue. Viewing the case as we do, we are of the opinion that it was not error to overrule the demurrers to the defendants' answer, and that it was error for the court to sustain the demurrer to the plaintiff's amended petition. In other words, the plaintiff may attack the release pleaded by the defendant, and the defendants may attack the alleged reformed writing by the introduction of the writings themselves, and such other evidence as may be admissible, for the discovery of the truth.

The court having struck the plaintiff's amendment to her petition wherein she pleaded the reformation of the original receipt, and by such order made it impossible for her to recover, and the judgment of this court being that the sustaining of the demurrer to her amendment was error, everything occurring thereafter was nugatory, and the question raised by the Southern Railway Company and the Virginia & Southwestern Railway Company as to their release by reason of a stipulation in the record as to their liability as determined by the law of this case upon the former adjudication upon the question of the merits of the petition is not now passed upon. For the reason that the court erred in sustaining the demurrers to the plaintiff's amended petition, the judgment of the court in directing a verdict for the defendants is reversed.

Judgment reversed.

WADE, C. J., and JENKINS, J., concur.

(24 Ga. App. 168)

GEORGIA SOUTHERN & F. RY. CO. v.  
CORY. (No. 9080.)

(Court of Appeals of Georgia, Division No. 1.  
Aug. 13, 1919.)

(Syllabus by the Court.)

VACATING ORDER TO CONFORM TO DECISION  
OF SUPREME COURT.

This case (22 Ga. App. 424, 96 S. E. 335) was carried by writ of certiorari to the Supreme Court, and that court made the following rulings: "A railway company over whose road a passenger train, including a sleeping car, is operated, is liable for damages which are the approximate results of negligence on the part of the employees in charge of the sleeping car in failing to notify a passenger occupant thereof of the train's arrival at his destination. This is true, though the company may not own the sleeping car or the train, since those having them in charge become its agents and employees as to duties due such passenger while the train is being operated over its road. Where the passenger in the sleeping car had no notice of the train's arrival at his destination, he being ignorant of this fact by reason of the darkness of the night, and the train, together with the sleeping car occupied by him, at that place, in accordance with its regular course and schedule, but without his knowledge, switched from the line of road over which he held passage onto the line of road of another and different company, and, after being transported for some 20 miles over its road he was required by its conductor and the conductor of the sleeping car to leave the train during the night, in freezing weather, at a small station, where he was unable to secure accommodation, by reason whereof he contracted an illness which caused him much physical pain and mental anguish, held: (a) The company over whose line he held passage and traveled to his destination was not liable in damages for his illness, for the reason that it was not the proximate result of such company's negligence in failing to notify him of arrival at his destination. (b) There were no aggravating circumstances in failing to give notice of arrival at the destination, so as to authorize a recovery of exemplary or punitive damages. (c) Nor were damages for loss of time and expense incurred by reason of being carried, without notice, beyond the destination, recoverable, when not specially sued for, nor the amounts claimed therefor specifically set forth. (d) The petition set forth cause for recovery of nominal damages." (For full opinion of the Supreme Court, see 149 Ga. —, 99 S. E. 881.)

Under the latter ruling the petition set forth facts which authorized a recovery of only nominal damages on account of the alleged negligence of the defendant company in failing to notify the plaintiff of the approach of the train to his destination; and the ruling of this court on this question having been reversed in so far as it relates to damages other than nominal, the judgment originally entered by the Court of Appeals is vacated, and the judgment of the Supreme Court is made the judgment of this court.

Error from City Court of Tifton; J. H. Price, Judge.

Action by Reid Corry against the Georgia Southern & Florida Railway Company. A judgment for plaintiff was affirmed by the Court of Appeals (22 Ga. App. 424, 96 S. E. 335), and defendant brought error to the Supreme Court. Affirmed in part, and reversed in part, in conformity to the judgment of the Supreme Court (99 S. E. 881).

J. E. Hall, Guyton Parks, and Chas. J. Bloch, all of Macon, and R. D. Smith, of Tifton, for plaintiff in error.

J. S. Ridgill and B. C. Williford, both of Tifton, for defendant in error.

WADE, C. J. Judgment affirmed in part, and reversed in part.

JENKINS and LUKE, JJ., concur.

(24 Ga. App. 164)

MELVIN v. ASKEW. (No. 10162.)

(Court of Appeals of Georgia, Division No. 2.  
Aug. 7, 1919.)

(*Syllabus by the Court.*)

ATTACHMENT ¶249 — EVIDENCE ¶472(1)  
—NEW TRIAL ¶39, 41(2), 125 — TRIAL  
¶260(1)—CHARGE OF COURT—VERBAL IN-  
ACCURACIES—RESIDENCE—MOTION FOR NEW  
TRIAL—PROVINCE OF JURY.

There is some evidence to support the verdict, which is approved by the trial judge. The motion for new trial points out no error of law, and was properly overruled.

Error from Superior Court, Calhoun County; W. M. Harrell, Judge.

Attachment proceeding by B. H. Askew against B. T. Melvin, administrator, with affidavit of illegality by defendant. Judgment adverse to the illegality, motion for new trial overruled, and defendant brings error. Affirmed.

W. I. Geer, of Colquitt, for plaintiff in error.

E. B. Askew, of Moultrie, and Pope & Bennett, of Albany, for defendant in error.

BLOODWORTH, J. An attachment was levied and an affidavit of illegality filed containing a number of grounds. When this case was before the Supreme Court (see 144 Ga. 348, 353, 87 S. E. 278, 280, where the facts are set out), that court said: "There were 24 grounds of the affidavit of illegality. Some contained repetitions in various forms of the matters above discussed. Some included in one ground reference to several matters. None of them were meritorious, ex-

cept in so far as they attacked the judgment for want of jurisdiction in Calhoun superior court to render it. All the rest of the allegations, except those relative to the subject of jurisdiction, should be stricken (including the plea filed after judgment), and direction is given accordingly." The issue raised by the ground of illegality not eliminated by the Supreme Court was submitted to a jury, the verdict was adverse to the illegality, a motion for a new trial was filed and overruled, and the movant excepted.

1. The first ground of the amendment to the motion for a new trial complains that the judge erred in stating the contentions of defendant and telling the jury that the execution was proceeding illegally "for the reason that the superior court of Calhoun county, from which said execution was issued, did not have jurisdiction of the defendants E. E. Stone and L. V. Stone, against whom said execution issued as principals, for the reason that said defendants nor either of them are residents of Calhoun county, Georgia, but that they are residents of Dublin, Laurens county, Georgia"; whereas the affidavit of illegality alleged that the defendants *at the time of the institution of the suit*, the levy of the attachment, were residents of Laurens county, Georgia. (Italics ours.) The use of the word "are" by the judge in the above quotation from the charge was only a slip of the tongue, and could not have misled the jury. They had out with them the pleadings, which showed the contentions of the parties. "Verbal inaccuracies in the charge, not calculated to mislead or obscure the meaning of the court, will not require a new trial." *Savannah, Augusta & Northern Ry. Co. v. Williams*, 133 Ga. 679, 66 S. E. 942 (2); *Cochran v. State*, 9 Ga. App. 824, 72 S. E. 281 (2). Besides, the judge charged the jury: "I charge you further that you may take into consideration all the facts and circumstances in this case, to determine where their domicile was at the time this suit was brought," and "on the other hand, if you should believe from the evidence in the case that E. E. Stone and L. V. Stone did not reside in Calhoun county at the time this suit was instituted or brought, but that they resided in Laurens county or at some other place, then and in that event you will find in favor of the defendants."

2. Under the facts of this case it was not error harmful to the plaintiff in error for the judge to give in charge to the jury that portion of section 2182 of the Civil Code of 1910 of which complaint is made in ground 2 of the amendment to the motion for a new trial.

3. Error is assigned on the following instruction:

"If you believe there is any evidence in this case as to their having registered in Calhoun county, Georgia (and it is contended by the

plaintiff in this case that they did register and that they voted in this county), if there is any evidence of their having voted and registered in this county, I charge you that would be a circumstance that the jury might consider as to determining the domicile of the defendants."

In this we see no error.

4. The principles embraced in the requests to charge contained in grounds 4 to 10, inclusive of the motion for a new trial, so far as correct, pertinent, and applicable, were sufficiently covered by the charge given.

5. Even if the evidence complained of in the eleventh ground of the motion for a new trial, that the defendants stated that they voted in a certain election "down here," was improperly admitted, the error was not of sufficient gravity to require the grant of a new trial. Evidence in practically the same language from another witness was admitted without objection, and there was no denial by the defendant of the correctness of the statement. Besides, every ground of a motion for a new trial must be complete within itself and without reference to other parts of the record; and it would be necessary to refer to the evidence to ascertain where "down here" is, and the year in which the election referred to took place.

6. The court did not err in refusing to exclude the testimony complained of in the twelfth ground of the motion for new trial, for the reasons alleged.

7. The thirteenth and fourteenth grounds of the motion for a new trial are without merit. It is not for a witness to say whether or not other witnesses testified truthfully or falsely; that is for the jury to determine.

8. There is some evidence to support the verdict, which has the approval of the trial judge, no error of law is pointed out, and the judgment is affirmed.

BROYLES, P. J., and STEPHENS, J., concur.

(24 Ga. App. 35)

DAVIS v. STATE. (No. 10383.)

(Court of Appeals of Georgia, Division No. 2.  
June 27, 1919. Rehearing Denied July 16,  
1919.)

(Syllabus by the Court.)

# 1. MOTION FOR NEW TRIAL.

The first, second, third, and fourth special grounds (the two latter grounds being erroneously numbered sixth and seventh) of the motion for a new trial, complaining of the admission of evidence, are too indefinite and incomplete within themselves to be considered by this court.

# 2. LARCENY §77(4) — RECENT POSSESSION — CHARGE.

It was not error to charge the jury as follows: "Now, I charge you the law concerning

the recent possession: Where a larceny is shown to have been committed, that is to say, where the principal fact that a larceny has been committed and a person is found to have been in the recent possession of the goods that were stolen, why that possession creates a presumption of fact which would authorize the jury to convict, if the possession isn't satisfactorily explained to the jury. It is not a presumption of law, but a presumption of fact." This charge was substantially correct, and in immediate connection therewith the judge charged as follows: "[This presumption of fact] may be rebutted by any explanation which may be presented to the jury consistent with innocence that the jury may believe. Of course, where the explanation is made consistent with innocence and the jury believes it, the fact that a person is in possession of it is no presumption that he is the person who stole the property alleged to have been stolen. Now, you are the judges of the fact of the recent possession and of the explanation of that possession; that is a question for you to determine, and the truthfulness of the explanation and all of those things are questions for you to determine. As I said awhile ago, if you believe from the evidence and the explanation, if you believe that that explanation was consistent with innocence, and you believe that explanation, if it is satisfactory to you, why then you would not be authorized to find a verdict of guilty in the case. If you are not entirely satisfied as to the explanation, you may consider that explanation along with the other testimony in the case on the question of a reasonable doubt." *Holliday v. State*, 23 Ga. App. 400, 98 S. E. 386, and authorities there cited.

# 3. CRIMINAL LAW §761(9) — CHARGE — ASSUMPTION OF FACTS — STATUTE.

Complaint is made of the following charge: "All of those questions are for you to determine, but if the explanation made is consistent with the hypothesis of innocence, or with innocence, if you believe it to be true, why you wouldn't be authorized to find a verdict of guilty on the fact that he was found in the recent possession of the property shown to have been stolen." Under the facts of the case, conceding that the judge in this charge assumed that the cow (the subject-matter of the larceny charged) had been stolen, a new trial is not required, since this fact was established by the undisputed evidence, and not denied, but virtually treated as true, by the defendant in his statement to the jury. The undisputed evidence showed that the prosecutor's cow had been stolen by some one, and that shortly thereafter it was found in the possession of the defendant, and there was nothing in the defendant's statement to dispute this evidence; but his defense rested solely upon the contention that he did not participate in the theft, but had bought the cow, not knowing that it was stolen property.

Under these circumstances the provisions of the so-called "dumb act" (Pen. Code 1910, § 1058; Civ. Code 1910, § 4863) were not violated by the judge in assuming that the property had been stolen by some one before it came into the defendant's possession. *Marshall v. Morris*, 16 Ga. 368; *Springfield v. State*, 125 Ga. 281, 54 S. E. 172; *Robinson v. State*, 129 Ga. 336, 58 S. E. 842; *Georgia, Florida & Alabama Ry.*

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Co. v. Jernigan, 128 Ga. 501, 57 S. E. 791; Jones v. State, 130 Ga. 274, 60 S. E. 840; Taylor v. State, 135 Ga. 622, 70 S. E. 237 (8); Callahan v. State, 14 Ga. App. 442, 81 S. E. 380 (2); Wilson v. State, 15 Ga. App. 632, 84 S. E. 81 (5); Sistrunk v. State, 18 Ga. App. 42, 88 S. E. 796 (5); Gallaher v. State, 22 Ga. App. 640, 97 S. E. 97.

#### 4. CRIMINAL LAW §784(4, 7)—CIRCUMSTANTIAL EVIDENCE—CHARGE.

"While in every criminal case, where it is sought to show the guilt of the defendant by circumstantial evidence alone, the jury should be instructed and cautioned that he should not be convicted on circumstantial evidence, unless the proven facts exclude every possible reasonable hypothesis save the guilt of the defendant, still it is immaterial what language is employed to convey this instruction. If all possible hypotheses arising from the circumstantial evidence which are favorable to the defendant be presented in concrete statement to the jury, and the jury are told that if they believe any one of these hypotheses the defendant should be acquitted, the principle above referred to would be sufficiently presented. And where, as in the present case, only two inferences can be drawn from the evidence—the one of innocence, and the other of guilt—and the hypothesis consistent with innocence is fully and fairly stated to the jury, and the jury are instructed that if they are satisfied that the hypothesis consistent with innocence is true, or if they have a reasonable doubt as to its truth, the defendant should be acquitted, the rule above stated is substantially complied with." Mangum v. State, 5 Ga. App. 445, 63 S. E. 543 (2); Barrow v. State, 80 Ga. 191, 5 S. E. 64 (3); Richards v. State, 102 Ga. 569, 27 S. E. 726; Jones v. State, 105 Ga. 649, 31 S. E. 574; Bush v. State, 23 Ga. App. 126, 97 S. E. 554; Reynolds v. State, 23 Ga. App. 369, 98 S. E. 246. Especially is this true where the judge fully instructs the jury upon the subjects of a reasonable doubt and the presumption of innocence.

#### 5. SUFFICIENCY OF EVIDENCE.

The verdict was authorized by the evidence, and the court did not err in overruling the motion for a new trial.

Stephens, J., dissenting.

Error from Superior Court, Liberty County; W. W. Sheppard, Judge.

T. Y. Davis was convicted of larceny, his motion for new trial was overruled, and he brings error. Affirmed.

O. C. Darsey, of Hinesville, and Jas. R. Thomas, of Jesup, for plaintiff in error.

J. Saxton Daniel, Sol. Gen., of Claxton, for the State.

BROYLES, P. J. Judgment affirmed.

BLOODWORTH, J., concurs.

STEPHENS, J. (dissenting). The defendant was tried for the larceny of a cow. The state relied for a conviction upon the recent possession by the defendant, unsatisfactorily

ly explained, of the cow alleged and claimed to have been stolen. Among other things, the defendant, in his motion for a new trial, excepted to an alleged expression of opinion upon the facts by the trial judge, which the defendant contends necessitates the granting of a new trial. The excerpt complained of is as follows:

"All of those questions are for you to determine, but if the explanation made is consistent with the hypothesis of innocence, or with innocence, if you believe it to be true, why you wouldn't be authorized to find a verdict of guilty on the fact that he was found in the recent possession of the property shown to have been stolen."

It is contended that this charge was error, in that the judge stated as a fact that the property was shown to have been stolen, and also stated as a fact that the property alleged to have been stolen was in fact found in the possession of the defendant.

While it is true, as Judge Bleckley says in Yarborough v. State, 86 Ga. 396, 12 S. E. 650 (2), that "to declare the law applicable to a given state of facts is no expression or intimation of opinion as to whether any of the facts referred to do or do not exist in the case on trial," yet "when the charge of the court assumes certain things as facts, and is in such shape as to intimate to the jury what the judge believes the evidence to be, and that they made defendant guilty, a new trial will be granted." Whitley v. State, 38 Ga. 50 (4). To ascertain the true meaning of this excerpt, and to determine whether or not the expression referred to amounts to an expression of opinion, it is necessary to consider it in connection with the entire charge, and particularly with reference to all of that part of the charge dealing with presumption of guilt arising from recent unsatisfactorily explained possession of the property alleged to have been stolen. That the entire charge may be considered in properly arriving at the construction of the excerpt complained of is a sound principle of hermeneutics. See in this connection Hanvey v. State, 68 Ga. 615; Moon v. State, 68 Ga. 697. The only conclusion that can be drawn from a consideration of the entire charge is that the trial judge expressed and intimated, in the excerpt complained of, an opinion on the facts as claimed by the defendant. The other portions of the charge shedding light upon this question are as follows:

"Now, the defendant in this case, gentlemen, sets up in his defense that the particular cow alleged in this indictment was purchased by him from one John Johnson, and that his connection with that cow came about in that way; in other words, the question of the recent possession of property shown to have been stolen, the defendant accounts for this possession by showing or undertaking to show that his possession and connection with it came about by buying it from an-

other party. Now, I charge you the law concerning the recent possession: Where a larceny is shown to have been committed, that is to say, where the principal fact that a larceny has been committed, and a person is found to have been in the recent possession of the goods that were stolen, why that possession creates a presumption of fact which would authorize the jury to convict, if the possession is not satisfactorily explained to the jury. \* \* \* Where the explanation is made consistent with innocence and the jury believe it, the fact that a person is in possession of it is no presumption that he is the person who stole the property alleged to have been stolen. Now, you are the judges of the fact of the recent possession and of the explanation of that possession; that is a question for you to determine, and the truthfulness of the explanation and all of those things are questions for you to determine. \* \* \* If you believe from the evidence and the explanation, if you believe that that explanation was consistent with innocence, and if you believe that explanation, if it is satisfactory to you, why then you would not be authorized to find a verdict of guilty in this case. If you are not entirely satisfied as to the explanation, you may consider that explanation along with the other testimony in the case on the question of a reasonable doubt, and give the testimony such weight in determining the guilt or the innocence of the prisoner at the bar, beyond a reasonable doubt. [Here follows the excerpt complained of.] All of these questions are for you to determine; but if the explanation made is consistent with the hypothesis of innocence, or with innocence, if you believe it to be true, why you wouldn't be authorized to find a verdict of guilty on the fact that he was found in the recent possession of the property shown to have been stolen. If, on the other hand, you do not believe that the explanation is the truth of the case, why then the recent possession of the goods shown to have been stolen would be a circumstance from which you would be authorized under the law to infer guilt, if not satisfactorily explained. \* \* \* Now, gentlemen, in your consideration of this case, you are to look to the allegations in the indictment, and if you find that the defendant, T. Y. Davis, in the county of Liberty and state of Georgia, on the 1st day of April, 1917, or within four years prior to the date this indictment was found—I say you are to look to the indictment and evidence, and find, beyond a reasonable doubt, that T. Y. Davis, in the county of Liberty and state of Georgia, on the date alleged in the indictment, or within four years prior to the finding of the bill of indictment, unlawfully, wrongfully, and fraudulently took and carried away, with intent to steal it, one yellow butt-headed cow of the value of \$25, or some other value, the property of H. D. Quinnip, if you find all of these facts to exist under the evidence, beyond a reasonable doubt, why then, gentlemen of the jury, it would be your duty to find the defendant guilty, but if under the evidence and law as given you in charge you find that the defendant has satisfactorily explained his connection with it, you would not be authorized to find the defendant guilty. If, after considering all the facts and circumstances of the case, you have a reasonable doubt of his guilt, it would be your duty to give him the benefit of the doubt and acquit him. You may retire." (Italics mine.)

Nowhere did the judge submit to the jury the issue whether or not the cow had been stolen. This was a most essential fact in the case. It was the corpus delicti. While the failure of the judge to so charge is not complained of, it is to be considered in determining what impression the charge must have made upon the jury, and as demonstrating the fact that the whole tenor of the charge assumed that the cow in question had, as a matter of fact, been stolen, and the jury could but infer that the judge was of the opinion that the cow in question had, as a matter of fact, been stolen. As evidence that the charge eliminated from the jury's consideration of any issue as to whether or not the cow in question had been stolen, and narrowed the consideration of the case to the question of recent possession, attention is called to the final expression in the charge before the jury retired, in which the judge stated:

*"If, under the evidence and the law as given you in charge, you find that the defendant has satisfactorily explained his connection with it [With what? Necessarily the stolen cow], you would not be authorized to find the defendant guilty."* (Italics mine.)

As to what constitutes an expression of opinion on the facts, see the following from the opinion of Judge Bleckley, in *Kinnebrew v. State*, 80 Ga. 232, 239, 5 S. E. 56, 59:

*"No doubt there is danger of intimating an opinion, or of leading the jury to think that an opinion is intimated, though the purpose be only to discriminate between legal and logical sufficiency; and this danger is not lessened, but rather increased, by the fact that in most instances the one kind of sufficiency exists wherever the other does. But danger is no interdict on duty, and a charge is not erroneous for pointing out that the jury are authorized to infer one thus and so from another thus and so, provided they believe from the evidence that the first thus and so is established, and provided they further believe that the second thus and so is a reasonable and proper inference to be drawn from the first."* (Italics mine.)

See, also, *Pitts v. State*, 15 Ga. App. 436, 83 S. E. 673 (2); *Henderson v. State*, 14 Ga. App. 672, 82 S. E. 61; *Davis v. State*, 91 Ga. 167, 17 S. E. 292 (2); *Holtzendorff v. De Renne*, 129 Ga. 226, 58 S. E. 710; *Rawls v. State*, 97 Ga. 186, 22 S. E. 529; *Kettles v. State*, 145 Ga. 6, 88 S. E. 197 (3).

While the defendant's main line of defense was that he bought the cow in question from some one other than the alleged owner, and in his statement to the jury, he confined himself largely to this issue, and did not expressly deny that the cow had been stolen as alleged, it is contended here that his failure thus to deny the allegation of the theft of the cow amounted to an admission on his part of the alleged larceny as a matter of

fact, and, that, if the trial judge intimated or expressed an opinion as to the truth of such allegation, it was harmless and the defendant cannot now complain. This contention is untenable. When the trial judge in his charge to the jury expresses an opinion on what has or has not been proved, it is mandatory on this court to set the verdict aside, regardless of any view which we may entertain as to the harmless effect of the charge. Penal Code, § 1058; *Phillips v. Williams*, 39 Ga. 597. While it has been held that the inhibition upon the trial judge expressing or intimating an opinion upon the facts applies only to incidents where the alleged fact is in dispute and about which the parties are at issue, it has been held that in a criminal case, even though the testimony offered in behalf of conviction is undisputed and uncontradicted by other testimony, every allegation in the indictment and the evidence offered in support of it are put in issue by the defendant's plea of not guilty. In determining whether the parties are at issue upon any alleged fact, the rule in criminal cases is different from that in civil cases, due to the differences in pleading and other fundamental differences between the two classes of cases. In a criminal case the defendant's plea of not guilty denies every allegation in the indictment against him, as well as the case made under the evidence, though uncontradicted by other testimony. The defendant is presumed to be innocent, and this presumption remains with him throughout the trial. His plea of not guilty and this presumption of innocence, therefore, continue throughout the entire trial to challenge and deny the case of the state alleged in the indictment and made by the evidence. Where there is no admission in *judicio* an issue of fact is made upon every allegation in the indictment and the evidence offered to sustain it. In *Phillips v. State*, 131 Ga. 426, 62 S. E. 239, it was held:

"The defendant's plea of not guilty put in issue every material allegation in the bill of indictment charging him with the offense of murder."

In *Cooper v. State*, 2 Ga. App. 730, 59 S. E. 20, it was held that—

"A plea of not guilty, by one accused of crime, is an express contention on his part antagonistic to every fact necessary to be proved by the state in order to establish his guilt; and unless the accused admits one or more of the facts which it devolves upon the state to prove, such fact must be established by evidence. To assume that an important fact in the case on trial has been admitted, and to so instruct the jury when no such admission has been made, is reversible error."

In *Southern Express Co. v. State*, 1 Ga. App. 700, 58 S. E. 67, it was held that—

"To assume in a criminal case that the testimony for the state is the truth, though such testimony be not contradicted by evidence for the defendant, and to charge the jury that such testimony is the truth and that there is no contention to the contrary, is violative of section 4334 of the Civil Code [Civil Code (1910) § 4863; Penal Code, § 1058], and demands a new trial. The plea of not guilty, filed by the defendant, is a contention on his part as to every material and essential fact necessary to establish his guilt, and implies a denial of every such fact."

In the case of *Young v. State*, 125 Ga. 584, 54 S. E. 82 (5), the accused made a statement in which he in so many words admitted that there had been a homicide, making no reference, however, either by way of admission or denial, to the manner in which such homicide was committed, but resting his defense solely upon an alibi. The Supreme Court in that case held that—

"The indictment having alleged that the deceased was murdered by the use of a gun, these were material and essential averments, and the defendant's plea of not guilty put both of them in issue. There was nothing in the evidence or the prisoner's statement, nor was there any admission by his counsel, which authorized a charge to the effect that the defendant's contention was that while there was a homicide, and while the deceased was killed with a gun and under circumstances which may show an unlawful killing, he was not the person who perpetrated the offense, and that he did not commit the homicide or fire the gun that killed the deceased, and that the jury would be relieved to some extent in their investigation of the questions that ordinarily arise in criminal cases. This charge requires a reversal."

From the opinion of the court beginning on page 587 of 125 Ga., on page 83 of 54 S. E., the following is taken:

"The court charged the jury as follows: 'His [defendant's] contention is that while there was a homicide, while Gus King was killed with a gun and under circumstances which may show it was an unlawful killing and was murder, that he was not the person that perpetrated the offense, that committed the homicide, that he did not fire the gun that took the life of Gus King; and you would be relieved to some extent in your investigation of the questions that ordinarily arise in criminal cases. There is no dispute in this case that the homicide was committed. There is no dispute that Gus King was killed, and killed with the gun, as charged in the bill of indictment. These facts are not disputed facts in this case. The main question for the determination of the jury in this case, the real question for your determination, relates to the identity of the person who took the life of Gus King. The question for your determination in this case is whether or not the defendant now on trial was the person that fired the gun, as charged in this indictment—that took the life of Gus King.' The defendant excepts to that charge, and assigns error

thereon, among other things, for the reason that there was no admission by the defendant or his counsel that the deceased was murdered, or killed with a gun or that it was an unlawful killing. There is nothing in the record which pretends that counsel for the accused admitted on the trial the things mentioned in the charge as not being in issue. The only words in the defendant's statement tending to admit those things are as follows: 'Anybody that knows directly how that man was killed, they killed him. \* \* \* Aug Hardy did not know that man was killed unless he killed him himself. \* \* \* It is impossible for me to tell how that man was killed.' The most that could be said of these words is that they could be construed into an admission that the defendant was killed. There is no admission that the killing was under such circumstances as to make the homicide murder, nor do they admit that the homicide was accomplished by the use of a gun. It was alleged, in the indictment, that the deceased was 'murdered' by the use of a 'gun.' These were material and essential averments in the indictment. The defendant's plea of not guilty put both of them in issue. Being placed in issue, there was no way to avoid the issue, except by withdrawal by the defendant personally, or by his counsel for him. There was no such withdrawal; and the court in so instructing the jury as to withdraw from them the determination of those issues committed error. The court may have been of the opinion that the evidence in the case was overwhelmingly against the defendant on these issues, but such would not have authorized him to withdraw the issues from consideration of the jury. If the court could withdraw these issues, there is no principle which would prevent the withdrawal of any other issue in the case. It may as well be said that all issues may be withdrawn, and that where the court thought the evidence demanded the conviction of the defendant, the court could direct a verdict of guilty. It will hardly be contended that this could be done in any criminal case, in the absence of a statute. Certainly it could not be in a felony case, with or without a statute."

While there was a dissent in the Young Case just referred to, the dissenting opinion called attention to the defendant's statement, wherein he said that "that man [meaning deceased] was killed; they killed him;" and in the opinion it was said that "the evidence, while circumstantial in its character, pointed to the accused as the perpetrator, with a certainty which authorized the verdict of the jury," and that "this is the third conviction of the defendant for the same offense."

In *Ryder v. State*, 100 Ga. 528, 28 S. E. 246 (9), 38 L. R. A. 721, 62 Am. St. Rep. 334, the Supreme Court held:

"The court in some of its instructions referred to the homicide as 'the act which the accused had committed,' and thus at least intimated an opinion that the killing was done by him; and although many of the requests to charge practically conceded that this was true, yet as it was not distinctly admitted that the

accused did commit the homicide, expressions embracing such language as that above quoted should not have been used."

While the charge there was held to be error, the court held that it was not sufficient to authorize the granting of a new trial, since counsel for the accused had, in a written request to charge, which was refused, sought to induce the trial judge to use the language complained of. See 100 Ga. 536, 28 S. E. 246, 38 L. R. A. 721, 62 Am. St. Rep. 334. The judgment was reversed, however. In that case, apparently, no statement was made by defendant. This fact, however, does not affect the principle of law invoked. The *Young* and *Ryder* Cases have never been overruled or departed from by the Supreme Court. The civil cases, for reasons already stated, are not authority upon this proposition. Besides the *Cases of Springfield*, *Robinson*, and *Taylor*, relied on in the majority opinion, are cases in which the defendant in his statement made some declaration that was equivalent to an admission of the alleged fact concerning which the trial judge was alleged to have expressed or intimated an opinion. See *Springfield v. State*, 125 Ga. 281, 54 S. E. 172; *Robinson v. State*, 129 Ga. 336, 58 S. E. 842; *Taylor v. State*, 135 Ga. 622, 70 S. E. 237. In *Jones v. State*, 130 Ga. 274, 60 S. E. 840, it was held that, as the defendant's own evidence proved a certain fact, he could not complain that the judge, in the charge to the jury, stated such fact as true. Here there was also a dissenting opinion. The reasoning contained in the dissenting opinion, on page 288 of 130 Ga., 60 S. E. 840, is, in my opinion, the better view.

There was nothing in defendant's statement in the case at bar that can be construed into an admission that the cow had been stolen. He did state something to the effect that he had some suspicion about the title to the cow when he bought it, but this can hardly be considered as admitting a larceny. Neither did the defendant's evidence prove a larceny. The instant case, therefore, does not fall within the ruling of the majority of the court in *Jones v. State*, supra.

Since there was an issue made by the pleadings, which was not removed by an admission upon the part of the defendant or his counsel, or defendant's evidence, upon the question whether or not the cow found in defendant's possession had been stolen, it was error for the trial judge to express or intimate an opinion upon this issue.

The defendant's conviction depended entirely upon circumstantial evidence. It necessarily depended upon the inference that he was the alleged thief, drawn from the circumstance, if true, that he was in the recent possession of a stolen cow, which

possession was unsatisfactorily explained by him. It was therefore error on the part of the trial judge to fail, even in the absence of a request, to charge the law relative to the degree of proof necessary to convict upon circumstantial evidence. *Kinard v. State*, 19 Ga. App. 624, 91 S. E. 941; *Harris v. State*, 18 Ga. App. 710, 90 S. E. 370. See my views upon this question and criticisms upon the cases relied on by the majority of the court expressed in *Reynolds v. State*, 23 Ga. App. 369, 98 S. E. 246. To authorize a conviction upon circumstantial evidence the evidence must "exclude every other reasonable hypothesis save that of the guilt of the accused." Penal Code, § 1010. Assuming that the trial judge, in every case where a conviction must depend entirely upon circumstantial evidence, whether the evidence convincingly establishes a defendant's guilt, or is weak and doubtful, fully complies with his duty in respect to charging the law relative to the degree of proof necessary to convict upon such evidence when he properly submits to the jury the law relative to all of the hypotheses of innocence, he failed in this case to submit to the jury the hypothesis of the defendant's innocence based upon the fact that no larceny at all had been proved. It is conceivable that a jury might be inclined for some reason to discredit the testimony of the sole witness relied upon by the state for a conviction, even though this testimony be disputed only by defendant's plea of not guilty, and not by other testimony, but would, upon the trial judge's intimation or assumption that the fact solely testified to by this witness was the truth, yield to this opinion out of implicit confidence in, and respect which the jury might have for, the trial judge and his ability, after long experience in the trial of cases, to correctly determine the truth of testimony and the credibility of witnesses. Under the *Mangum* and *Bush* Cases, cited by the majority of the court, it is stated that—

"If all possible hypotheses arising from the circumstantial evidence which are favorable to the defendant be presented in concrete statement to the jury, and the jury told that if they believe any one of these hypotheses the defendant should be acquitted, the principle above referred to—i. e., the law relative to circumstantial evidence—would be sufficiently presented."

In the present case all of the hypotheses favorable to the defendant were not presented, and the charge failed to measure up to the rule laid down in the *Mangum* and *Bush* Cases.

Without passing upon the other questions raised, I am of the opinion that, for the foregoing reasons, the judgment should be reversed, and a new trial granted.

(24 Ga. App. 56)

## HENDRIX v. STATE. (No. 10390.)

(Court of Appeals of Georgia, Division No. 2.  
July 3, 1919.)

(Syllabus by the Court.)

## 1. CRIMINAL LAW §775(2)—INTOXICATING LIQUORS §139 — POSSESSION — ALIBI — CHARGE.

Where one is indicted for having, controlling, and possessing prohibited liquors, and the evidence relied upon to convict is the finding of such liquors in the defendant's residence, it is not necessarily a complete defense to such charge that the defendant was not at his place of residence at the time such liquors were found, and had not been there since the time such liquors were placed in his residence. One may have, control, or possess liquor in violation of law, and at no time be present at the place of storage, or have such liquor in his physical possession. The trial judge, therefore, did not err in failing to charge the law relative to alibi as a defense, especially since the defendant made no request for such a charge.

## 2. CRIMINAL LAW §823(14), 828 — CIRCUMSTANTIAL EVIDENCE—CHARGE.

Conceding that the defendant's conviction depended entirely upon circumstantial evidence, the failure of the judge, in the absence of a timely written request, to charge the jury the precise language of section 1010 of the Penal Code, was not error. The judge presented in a concrete statement to the jury the only possible hypothesis arising from the evidence or from the defendant's statement which was consistent with his innocence, and instructed the jury that if they found this hypothesis to be true the defendant should be acquitted. The principle of the law of circumstantial evidence was sufficiently presented by these instructions.

## 3. CRIMINAL LAW §1178—MOTION FOR NEW TRIAL—ABANDONMENT OF GROUNDS.

The other special ground of the motion for a new trial, not being insisted upon either in the oral argument or in the brief of counsel for the plaintiff in error, will be treated as abandoned.

## 4. INTOXICATING LIQUORS §236(5)—UNLAWFUL POSSESSION—SUFFICIENCY OF EVIDENCE.

The evidence amply authorized the verdict, and the court did not err in refusing to grant a new trial.

Stephens, J., dissenting in part.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

P. M. Hendrix was convicted of unlawfully having, possessing, and controlling spirituous liquors, his motion for a new trial was denied, and he brings error. Affirmed.

Robt. L. Colding, of Savannah, for plaintiff in error.

Walter C. Hartridge, Sol. Gen., of Savannah, for the State.



STEPHENS, J. [1, 3, 4] The opinion of the majority of the court is as follows:

[2] "The second headnote alone needs elaboration. The defendant was tried and convicted of unlawfully having, controlling, and possessing spirituous liquors. The undisputed evidence showed that 188 pints of rye whisky were found in the defendant's private residence. When the whisky was found he was absent, but his wife was present in the house. The defendant and his wife resided in the lower apartment of an apartment house, and the evidence does not disclose that any one else lived there with them. A portion of this whisky was found in five suit cases. There were also three empty suit cases, and the remainder of the whisky was found standing upon the floor of the bathroom and upon the floor between the bathroom and the bedrooms. The whisky was found about 6:45 a. m. on the morning of October 7, 1918. A witness for the state testified that about 5 o'clock on the same morning he saw the defendant unloading upon the front porch of his residence the same suit cases found in the house. It is true that other evidence showed that at that hour the defendant was locked up in the police station. However, the jury were authorized to believe the testimony of that witness, or to believe that he was mistaken as to the time that he saw the defendant unloading the suit cases. But, even if the testimony of this witness be entirely eliminated, the remaining undisputed evidence in the case, as to the finding of 188 pints of whisky in the defendant's private residence, was sufficient to exclude every other reasonable hypothesis save that of the defendant's guilt.

"In this state the husband is recognized by law as the head of his family, and, where he and his wife reside together, the legal presumption is that the house and all the household effects, including any intoxicating liquors, belong to the husband as the head of the family. This presumption, of course, is rebuttable. *Young v. State*, 22 Ga. App. 111, 95 S. E. 478, and authorities cited. In the instant case there was no attempt, either by the introduction of evidence or by the defendant's statement, to rebut this presumption. It will be borne in mind that the defendant was not charged with or convicted of placing the whisky upon his front porch at 5 o'clock in the morning, or at any other time; he was only charged with, and convicted of, having, controlling, and possessing whisky. Upon the trial the defendant introduced no evidence, and his entire statement was as follows: 'Gentlemen, the statement that Mr. Coleman made is absolutely false. I was not at home at all that night, and know nothing at all about the whisky. Mr. Coleman claims that he saw me unloading the whisky at the house at 5 o'clock, at which time Lieut. Bentley will tell you I was under arrest at the police station. I think Lieut. Evers and Detective Murphy and Mr. Bentley will tell you that they would not believe that man on his oath. I know absolutely nothing about it at all.' Eliminating the evidence of the state's witness Coleman (who testified to seeing the defendant unload the suit cases upon his porch), which was not necessary to convict the defendant (in view of the undisputed evidence as to

the finding of the whisky in the defendant's residence), the only contention made in the defendant's statement, besides the immaterial statement that he was not at home that night, was that he knew nothing about the whisky being in his residence. In other words, the only hypothesis favorable to the accused, raised by the evidence and by the defendant's statement, was that he did not have, control, or possess the whisky found in his house. Upon this issue the court charged as follows: 'I charge you that if the proof satisfies you, beyond a reasonable doubt, that this defendant either had or procured or possessed spirituous liquors, or that he procured, commanded, aided, or abetted, or knowingly participated in having, controlling, or possessing spirituous liquors, he would be guilty of the crime charged. On the other hand, if he did not knowingly participate in having it, if he did not aid, or abet, or procure in having it, or if he did not have, control, or possess them, of course he would not be guilty.'

\* \* \* The issue for you to determine in this case is whether this defendant did have, or did he control, or did he possess, spirituous liquors. If, under the rules given you in charge, you come to the conclusion that he did have, or that he did control, or did possess, you should find the defendant guilty. If you do not so believe, it will be equally your duty to find him not guilty.'

"In *Mangum v. State*, 5 Ga. App. 445, 63 S. E. 543, paragraph 2 of the decision is as follows: 'While in every criminal case, where it is sought to show the guilt of the defendant by circumstantial evidence alone, the jury should be instructed and cautioned that he should not be convicted on circumstantial evidence, unless the proven facts exclude every possible reasonable hypothesis save the guilt of the defendant, still it is immaterial what language is employed to convey this instruction. If all possible hypotheses arising from the circumstantial evidence which are favorable to the defendant be presented in concrete statement to the jury, and the jury are told that if they believe any one of these hypotheses the defendant should be acquitted, the principle above referred to would be sufficiently presented. And where, as in the present case, only two inferences can be drawn from the evidence—the one of innocence, and the other of guilt—and the hypothesis consistent with innocence is fully and fairly stated to the jury, and the jury are instructed that if they are satisfied that the hypothesis consistent with innocence is true, or if they have a reasonable doubt as to its truth, the defendant should be acquitted, the rule above stated is substantially complied with.' See, also, to the same effect, *Barrow v. State*, 80 Ga. 191, 5 S. E. 64; *Richards v. State*, 102 Ga. 569, 27 S. E. 726; *Jones v. State*, 105 Ga. 649, 31 S. E. 574; *Bush v. State*, 23 Ga. App. 126, 97 S. E. 554; *Reynolds v. State*, 23 Ga. App. 369, 98 S. E. 246; *Davis v. State* (No. 10383, June 27, 1919), 99 S. E. 50. In the instant case the court also sufficiently charged upon the presumption of the defendant's innocence, and fully instructed the jury upon the subjects of reasonable doubt, and of the defendant's statement. It is our opinion that the court sufficiently presented in concrete form the sole hypothesis, favorable to the accused, arising from the evi-

dence or from the defendant's statement. Under the undisputed evidence in this case, leaving out entirely the evidence of the witness Coleman, the conviction of the defendant was clearly and convincingly proved, and the charge of the court as to the amount and character of proof requisite to the defendant's conviction was such as to leave no room for doubt that the verdict would have been the same, even if the court had, in the precise terms of the statute, stated to the jury that in order to warrant a verdict of guilty the evidence must not only be consistent with the guilt of the accused, but inconsistent with every other reasonable hypothesis. *Toler v. State*, 107 Ga. 682, 33 S. E. 629."

Speaking for myself alone, I concur in the first headnote, but dissent from the ruling announced in the second headnote. There is no direct evidence that defendant had, controlled, or possessed any liquors. He had, some time in the nighttime, come in an automobile from the railroad yards, under circumstances that were suspicious. He was seen later unloading from an automobile some suit cases onto the front porch of his residence; but there was no evidence as to the contents of these suit cases. That was necessarily left to inference from other circumstances. A few hours afterwards, and in defendant's absence, some of these identical suit cases were found, filled with intoxicating liquor, in his house. There is no direct proof that he knew of the presence of the liquor in his house, nor as to when it was placed there. It is only an inference, from the circumstance that it was his home, that he brought the liquor and deposited it there a few hours before it was found there in the suit cases which he had been seen unloading from the automobile. There is no direct proof that the suit cases, when they were unloaded, contained any liquor. This can only be inferred from the circumstances under which the car came from the railroad yards, and the finding of the liquor a few hours afterwards in the suit cases, after they had been deposited by the defendant himself upon the porch of his house. The conviction of the defendant, therefore, necessarily depended entirely upon circumstantial evidence (*Lewis v. State*, 6 Ga. App. 205, 64 S. E. 701), and unless the trial judge charged the law relative to the degree of proof necessary to convict upon such evidence, whether requested to do so or not, the conviction should be set aside (*Harden v. State*, 13 Ga. App. 34, 78 S. E. 681), unless it can be brought within the doctrine of *Barrow v. State*, 80 Ga. 191, 5 S. E. 64, and the authorities following it, relied upon by my colleagues in the majority opinion. I do not think that this doctrine is applicable here. See my views expressed in my dissenting opinions in *Reynolds v. State*, 23 Ga. App. 369, 98 S. E. 246, and *Davis v. State*, 24 Ga. App. —, 100 S. E. 50. The doctrine of the *Barrow Case*, and the authorities fol-

lowing it, applies only when the guilt of the accused, dependent upon circumstantial evidence, "is clearly and convincingly proved, and the charge as to the amount and character of proof requisite to a lawful conviction is such as to leave no room for doubt that the verdict would have been the same, even if the court had in terms stated to the jury that, in order to warrant a verdict of guilty, the evidence must not only be consistent with the guilt of the accused, but inconsistent with every other reasonable hypothesis." (Italics mine.) *Toler v. State*, 107 Ga. 682, 33 S. E. 629. It seems that where guilt is well established by circumstantial evidence, and it is apparent that another trial would not produce a different result, a charge which fully and liberally instructs the jury as to reasonable doubt and presumption of innocence fully measures up to the doctrine of the *Barrow Case*, supra, and the authorities following it.

As I understand it, the charge of the court now under consideration does not, in view of the facts of the case, measure up to the standard laid down by these authorities and relied upon by the majority of this court. While the evidence, taken most strongly against the defendant and in favor of the state, points rather strongly towards the defendant's guilt, yet, in view of the impeaching testimony and the defendant's contention that it is a case of mistaken identity, it cannot with certainty be said to "clearly and convincingly" prove the defendant's guilt (*Toler Case*, supra), or to "clearly show the guilt of the accused" (*Richards Case*, supra). See, also, *Jones v. State*, supra. Nor did the judge charge the jury that the defendant entered the trial with the presumption of innocence in his favor, and that this presumption remained until the state rebutted it by proof, and that if the state failed to do so he should be acquitted. *Barrow Case*, supra. The only reference made by the trial judge to the presumption of innocence was in these words:

"Every person accused of crime is presumed to be innocent until guilt is proven beyond a reasonable doubt."

This language was not as full and as ample as Georgia judges are accustomed to use in this connection, and did not measure up to the well-recognized legal standard. *Reddick v. State*, 11 Ga. App. 150, 74 S. E. 901; *Coffin v. United States*, 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481. It made no reference to a presumption of innocence remaining with the defendant throughout the entire trial. While I am not prepared to say that this omission should work a reversal of the judgment if properly excepted to, yet it certainly was not a very liberal and full instruction upon the law of presumption of innocence, and can hardly compensate for the trial judge's omission to specifically

charge the law relative to the degree of proof necessary to convict upon circumstantial evidence.

In the Bush Case, cited and relied upon in the majority opinion, it is held:

"While in every criminal case, where it is sought to show the guilt of the defendant by circumstantial evidence alone, the jury should be instructed and cautioned that he should not be convicted on circumstantial evidence, unless the proven facts exclude every possible reasonable hypothesis save the guilt of the defendant, still it is immaterial what language is employed to convey this instruction, if all possible hypotheses arising from the circumstantial evidence which are favorable to the defendant be presented in concrete statement to the jury, and the jury are told that if they believe any one of these hypotheses the defendant should be acquitted. This rule is substantially complied with where, as in the present case, only two inferences can be drawn from the evidence, the one of innocence and the other of guilt, and the hypothesis consistent with innocence is fully and fairly stated to the jury, and the jury are instructed that if they are satisfied that the hypothesis consistent with innocence is true, or if they have a reasonable doubt as to its truth, the defendant should be acquitted."

The ruling in *Reynolds v. State*, supra, was to the same effect. If the rule here stated by the Court of Appeals is in conflict with the rule laid down by the Supreme Court in the authorities cited by the majority of this court, it, of course, must yield to the higher authority. Be that as it may, the charge falls also to measure up to the standard laid down in the Mangum and Bush Cases, since "all the hypotheses arising from the circumstantial evidence which are favorable to the defendant" were not "presented in concrete statement to the jury." Several of the hypotheses favorable to the defendant's innocence were not presented in any form to the jury. It was an hypothesis consistent with innocence that the suit cases, when unloaded on defendant's porch, did not contain liquor. It was an hypothesis consistent with innocence that the defendant was not the person seen unloading the suit cases from the automobile. The defendant stated that he had not been at home that night. According to the police officer's testimony, the defendant was arrested prior to the time that the state's main witness testified that he saw the defendant unloading the suit cases, and must have been in jail at the time. It was an hypothesis consistent with innocence that the state's main witness did not speak the truth when he stated the time at which he saw defendant unloading the suit cases, this testimony having been contradicted by another witness, the police officer. It was an hypothesis consistent with innocence that the defendant, by reason of his absence from home, had no knowledge of the presence of liquor in his house. None of these hypotheses were specifically called to the jury's at-

tention. The law as to impeachment of witnesses was not charged. It being undisputed that the defendant was absent from home when the liquor was discovered there, it was absolutely essential to his guilt, predicated upon the fact that the liquor was found at his house, that he knew of its presence, and allowed it or caused it to be there, or to remain there after becoming aware that it was in his house. Nowhere did the judge charge that such guilty knowledge was essential to defendant's conviction. For these reasons I do not, after consideration of all the authorities, believe that the charge of the court, as applied to this case, measured up to the standard laid down in the authorities supra, which hold that the law relative to the degree of proof necessary to convict under circumstantial evidence was substantially given in charge.

I take it that, from all the authorities, the true rule is that, where a conviction depends entirely upon circumstantial evidence, the trial judge should, whether requested or not, give in charge to the jury the law relative to the degree of proof necessary to convict in such cases, viz.:

"To warrant a conviction on circumstantial evidence, the proved facts must not only be consistent with the hypothesis of guilt, but must exclude every other reasonable hypothesis save that of the guilt of the accused." Penal Code, § 1010.

But, where the judge fails to so charge, "such failure will not require another trial, when the guilt of the accused is clearly and convincingly proved, and the charge as to the amount and character of proof requisite to a lawful conviction is such as to leave no room for doubt that the verdict would have been the same, even if the court had in terms stated to the jury that, in order to warrant a verdict of guilty, the evidence must not only be consistent with the guilt of the accused, but inconsistent with every other reasonable hypothesis" (*Toler v. State*, supra); "such amount and character of proof" being outlined to the jury in ample instructions as to presumption of innocence, reasonable doubt, defendant's statement, etc. (*Barrow Case*, supra); or, irrespective of the strength of the testimony tending towards conviction, the law relative to conviction upon circumstantial evidence is sufficiently stated to the jury when their attention is sufficiently called to all issues made by the evidence and the law relative thereto is submitted in charge, and when every possible reasonable hypothesis of innocence deducible from the evidence is submitted in "concrete statement" to the jury, a total aggregate of single instances being equivalent to the whole. This rule is based upon the doctrine of harmless error and substantial compliance. Harmless error is often dangerous doctrine, and substantial compliance is often bad law. These

exceptions to the general rule should be cautiously applied.

For the above reasons, and without passing upon the other assignments of error, I think the conviction should be set aside and a new trial granted.

Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

STEPHENS, J., dissents.

(112 S. C. 234)

**SAVANNAH GUANO CO. v. FOGLE.**  
(No. 10250.)

(Supreme Court of South Carolina. July 15, 1919.)

**1. TRIAL §59(1)—INTRODUCTION OF WRITTEN INSTRUMENT—ORDER OF PROOF.**

Where defendant set up an instrument in his answer as a basis of counterclaim, plaintiff had the right to introduce it in anticipation of the defense, without recognizing it as a binding contract, to show that defendant had acknowledged in writing that such instrument was not to be a binding contract until approved by an executive officer of the plaintiff corporation, and that there had been no contract growing out of previous communications between the parties.

**2. EVIDENCE §441(1) — PAROL — ADMISSIBILITY.**

Where defendant set up an instrument in his answer as a basis of a counterclaim which contained a provision that it would not be a binding contract until approved by executive officer of plaintiff, and that there had not been a contract growing out of previous communications between the parties, and, upon proof that such contract had not been approved, undertook to shift his ground and prove a previous oral contract, testimony as to the previous oral contract was incompetent on the ground that the defendant had admitted that previous negotiations were merged in the proposed contract.

**3. PRINCIPAL AND AGENT §119(2) — AUTHORITY OF AGENT—BURDEN OF PROOF.**

The burden was on customer of a guano company to prove that a sales agent of the company was authorized to agree that the company would sell fertilizer to the customer if he would pay what money he could on note then due on fertilizer sold him the previous year, and that the company would carry the balance of the indebtedness for the prior year.

**4. SALES §19, 20—CONSIDERATION.**

Payment of a part of an existing debt for fertilizer previously bought was no consideration for a contract to sell the debtor more fertilizer.

**5. CONTRACTS §25 — AGREEMENT TO MAKE CONTRACT IN FUTURE.**

A party is not liable in damages for refusing to make a contract, even though he has promised to do so, when the terms of the contract have not been agreed upon.

Gary, C. J., dissenting.

Appeal from Common Pleas Circuit Court of Orangeburg County; W. H. Townsend, Judge.

Action by the Savannah Guano Company against B. T. Fogle. Judgment for plaintiff and defendant appeals. Affirmed.

Moss & Lide, of Orangeburg, and John F. Williams, of Aiken, for appellant.

E. B. Friday, of North, and Raysor & Summers, of Orangeburg, for respondent.

HYDRICK, J. The Chief Justice is mistaken in saying that plaintiff put in evidence the instrument which was relied upon by defendant as the basis of his counterclaim. The record shows that plaintiff introduced only the notes sued on. While the instrument was in plaintiff's possession, as explained in the opinion of the Chief Justice, and was carried to court and produced by plaintiff, the record shows that nothing was said about it until it was brought out on cross-examination of plaintiff's witnesses, and it appears in the record under the head of "Defendant's Exhibits."

[1-3] However, it is of no consequence whether it was put in evidence by plaintiff or defendant. For when defendant set up that instrument in his answer, as the basis of his counterclaim, plaintiff had the right to introduce it, in anticipation of the defense (however doubtful might be the policy of undertaking to disprove an adversary's case, in advance of his making out a prima facie case), without recognizing it as a binding contract, but merely to show that defendant had acknowledged in writing that it was not to be a binding contract until approved by an executive officer of the company, and that there had been no contract growing out of the previous communications, oral or written, between the parties. Subsequent events showed the wisdom of inserting that provision, for, although defendant sets it up as the basis of his counterclaim, when it became perfectly clear that it had not been approved by an executive officer of the company and defendant had been promptly notified, as he was, that it would not be approved, and was not, therefore, a contract, defendant undertook to shift his ground and prove a previous oral contract, and that is the testimony to which plaintiff's attorney (Mr. Friday) objected. The testimony was admitted, though it was subsequently ruled incompetent, on the ground that defendant had admitted that all previous negotiations were merged in the proposed contract, and therefore there was no other contract for the breach of which plaintiff was liable. That ruling was correct. But even if it should be conceded that defendant's testimony was competent to prove a previous contract, which was not merged in the written pro-

posals. It utterly fails to prove one. He says nothing more than that Mr. Condon, plaintiff's sales agent, told him in March that, if he would pay what money he could on the notes then due for the fertilizer sold him in 1914, he would sell him fertilizer for 1915, and carry the balance of the 1914 indebtedness, and that he promised to come back in a week or ten days and take his order for the fertilizer for 1915, but never did so. Was that a contract? Certainly not.

In the first place, though it appears that Mr. Condon was only a sales agent, there was not a particle of testimony tending to prove that he had any authority to make such an agreement, and clearly the burden was upon defendant to prove that he had such authority.

[4] Second, there was no consideration for it. Payment of a part of an existing debt then due was no consideration for the alleged contract, for in making the payment defendant did only what he was bound in morals and in law to do. He had no legal or moral right by withholding payment to attempt to coerce plaintiff into financing his speculation in holding his cotton for a better price. Plaintiff had furnished him the fertilizer to make the cotton, and it was his duty to pay the debt, when it became due, without regard to the price of cotton.

[5] Third, defendant's own testimony shows that there was no contract, but only a promise to make one. Can a party be mulcted in damages for refusing to make a contract, even though he has promised to do it, when the terms of the contract have not been agreed upon? Until the terms have been agreed upon, there can be no contract. Here no terms were specified or agreed to. The parties had not agreed as to the quantity of fertilizers to be furnished, the brand or quality, the price thereof, the time within which it should be furnished, or the time of payment, or the security to be given. Not a single element of a valid contract was proved.

Fourth, if all the necessary elements of such a contract had been proved, it would have been obnoxious to the statute of frauds, which says:

"No contract for the sale of any goods, wares and merchandise for the price of fifty dollars or upwards shall be allowed to be good except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereto lawfully authorized."

It follows that the judgment is right, and ought to be affirmed.  
Judgment affirmed.

WATTS, FRASER, and GAGE, JJ., concur.

GARY, C. J. (dissenting). This is an action upon two promissory notes. The defendant set up a counterclaim for damages alleged to have been sustained on account of the failure of the plaintiff to furnish certain fertilizers in accordance with the terms of the contract between the said parties. The appeal is from an order directing a verdict in favor of the plaintiff.

The plaintiff introduced in evidence the following instrument of writing:

"7. This contract, to be binding upon us, must be approved by one of the executive officers of this company. All previous communications between us, either written or verbal, with reference to the subject-matter of this contract, are hereby abrogated, and no statements or representations on your part, or of any agent of yours, or of any agent of ours, nor any modification of this agreement, shall be binding upon us, or either of us, unless the same shall be in writing duly accepted by you and approved by an executive officer of this company.

"For own use—You are to give us a security for the payment of this fertilizer, and also as security for the payment of your two notes, dated April 7, 1915, for \$196.50, due Sept. 15, 1915, and Oct. 1, 1915, for \$196.89, which are renewals of my 1914 notes, a lien on your crop of cotton and cotton seed to be planted by you on 50 acres of land, Goodland township, Orangeburg county, S. C., belonging to D. A. Thaxton and known as the Brodie place; this lien being subject to rental of \$100.00. Yours truly, Savannah Guano Co. [in print], per J. J. Conlon.

"Approved:

"To B. T. Fogle, Springfield, S. C.

"Savannah Guano Company, Savannah, Ga.

"I accept your contract on the terms set forth in the foregoing. [The above in duplicate.]

"B. T. Fogle."

When the said instrument was offered in evidence by the plaintiff, the name of B. T. Fogle was not on it, as this signature had been cut off by the plaintiff and returned to him, but the plaintiff kept the agreement.

The following is the testimony of the defendant B. T. Fogle, also the rulings of his honor the presiding judge:

"I operated a farm during 1914 and 1915 of about five horses, and bought fertilizer during the former year from the respondent, through his salesman Mr. Conlon; my entire transaction being with him, having given him my order, and the respondent having shipped the goods. I gave him a note for 1914. I made plenty of cotton, but could not get any sale for it, selling a few bales at 5 and 6 cents a pound. I tried to give him cotton for my account, but he refused it and came to see me, towards the end of the year. I had the cotton in the warehouse, and he told me that, if I would pay him what money I could from the sale of my cotton, he would sell me fertilizer for 1915 and carry the balance of my 1914 account. This arrangement was made before I paid him any money. Pursuant to this, and relying upon it, I paid him \$280 or \$240.

"Q. What was your arrangement with Mr. Conlon at that time? A. I told Mr. Conlon

that I would not be able to pay him the whole amount, but that I was going to pay him what I could, and he said to pay him what I could and he would carry the rest over, and furnish me fertilizer the next year.

"Mr. Friday. We object; I don't think that would be competent, unless he shows Mr. Conlon's connection with the company, and that he had authority to make these arrangements.

"The Court. He has shown that Mr. Conlon is a salesman.

"Mr. Friday. He is testifying here to an oral contract.

"Mr. Lide. Mr. Conlon was the only agent that he knew as representing the company. The question of agency would be a question for the jury.

"The Court. I think that question might be a question for the jury. The contract that you put in about the sale of fertilizer is a contract in writing.

"Mr. Summers. That is a contract in writing between the parties and would be competent.

"Q. When was this conversation with Mr. Conlon? A. That was in March.

"The Court. It seems to me that, when this agreement was reduced to writing, that would be the contract.

"Mr. Lide. The witness testified that he told Mr. Conlon that he would raise all the money that he could, and Mr. Conlon then said that he would let him have the fertilizer.

"The Court. I think that the contract was reduced to writing, and that is the only thing to be considered here. In that view the testimony would have to be excluded as incompetent. He says that this was in March before the written agreement, and all these agreements were done away with by the written contract.

"Mr. Lide. The point that we wanted to get at was that this April contract was the result of this agreement that they had in March.  
\* \* \*

"The Court. Whatever agreement they had was done away with and merged in this written contract. \* \* \*

"Mr. Williams. We want to show that he told him that he would sell him the fertilizer.

"The Court. I think that might tend to contradict the terms of the written contract."

At the conclusion of the testimony, his honor the presiding judge said:

"Mr. Foreman and gentlemen of the jury, a motion has been made in this case asking the court to direct a verdict on the ground that there are no issues of fact in the case which you are to pass upon. Under the view that I take of the testimony and evidence which has been introduced, there is only one conclusion to be drawn from the testimony as to the amount due by the defendant to the plaintiff upon the notes sued upon and the amount sued upon in these two notes is \$537.52. The right of the defendant to recover upon his counterclaim depends upon the construction placed by the court upon the written contract or order for sale of fertilizer dated April 13, 1915, and, under the view that I take of the case and of this contract, it is necessary for the defendant to show that this written order or contract was approved by one of the executive officers of the company before the defendant can recover upon

his counterclaim. I find no testimony in the case tending to show that this contract or order of April 13, 1915, was ever approved by any executive officer of the plaintiff company, and I therefore direct you to find a verdict for the plaintiff for the sum of \$522.13."

The defendant appealed upon the following exceptions:

First. "His honor erred, it is respectfully submitted, in ruling that conversations and negotiations leading up to the giving of the order for the fertilizer were inadmissible; whereas he should have held that they were not contradictory, and that they were pertinent, especially when the answer pleaded that the entire scheme on the part of the agents and representatives of the plaintiff was advised, for the purpose achieved, knowingly, and that such conduct was negligent, willful, and fraudulent, the cause of action presented in the counterclaim being not only for the failure to furnish the fertilizer, but based upon representations of the plaintiff's agents that the fertilizer would be furnished, the defendant was misled to his injury, appellant having contracted with the agent within the apparent scope of his authority for the fertilizer."

Second. "His honor erred, it is respectfully submitted, in holding that the oral contract merged into the written application, and that the oral agreement could not be established; whereas he should have held that the question of the oral agreement and the misrepresentation and deception as to the entire transaction were questions for the jury, and should have been submitted."

Third. "His honor erred, it is respectfully submitted, in directing a verdict on the ground that there was no testimony for the jury; whereas he should have submitted the case to the jury, and allowed them to pass upon the issues raised by the pleadings, especially so when the testimony developed the issues of waiver, fraud, and agency."

Mr. Friday, the plaintiff's attorney, interposed the following objection to the testimony of the plaintiff:

"We object. I don't think that would be competent unless he shows Mr. Conlon's connection with the company, and that he had authority to make these arrangements."

His honor the circuit judge did not sustain this objection, but excluded the testimony on the ground that whatever previous agreement the parties may have had was done away with and merged in the written contract. The written contract was introduced in evidence by the plaintiff, who made use of it for the purpose of destroying the previous agreement between the parties. The plaintiff thus recognized it as a binding and existing contract, thus enabling the defendant also to rely upon those provisions that conferred rights upon him. After the contract had subserved the plaintiff's purpose, the plaintiff could not change front and ask for a nonsuit, on the ground that it had not approved the contract, and that it was therefore a nullity.

When his honor the circuit judge reached the conclusion that the contract was without force and effect, the defendant had the right to rely upon the previous agreement unless there was some other objection to it.

For these reasons, I dissent.

(112 S. C. 250)

STATE v. LESESNE et al. (No. 10243.)

(Supreme Court of South Carolina. July 15, 1919.)

1. ASSAULT AND BATTERY  $\S$ 91 — COMMON DESIGN—SUFFICIENCY OF EVIDENCE.

Evidence that four defendants all attempted to escape when officers endeavored to arrest them for gambling, etc., held to sustain jury finding that defendants had formed a common design to escape before time one of their number committed an assault and battery on one of the officers.

2. CRIMINAL LAW  $\S$ 829(1)—REQUESTED INSTRUCTIONS.

Refusal of a requested instruction which was only a corollary of a proposition already charged, and which the court stated he thought was covered by other portions of his charge, held not reversible error.

Hydrick, J., dissenting.

Appeal from General Sessions Circuit Court of Sumter County; Thos. S. Sease, Judge.

Ben Lesesne, Mat Hannibal, John Richardson, and Cunningham White were convicted of assault and battery, and appeal. Appeal dismissed.

The following facts are set forth in the record:

The defendants, Ben Lesesne, Mat Hannibal, John Richardson, and Cunningham White were jointly indicted with one Harrison Price for assault and battery of a high and aggravated nature. On the night on which the indictment charges the crime was committed the five defendants named in the indictment were playing "skin," a negro card game, at the home of Harrison Prince, a few miles from Mayesville, in Sumter county. Three officers and three assistants raided the game. At the inception of the raid the light in the house was extinguished. All the occupants of the house were taken. The woman was not placed under arrest. It was then discovered that one of the officers, Mr. H. A. Boykin, had received a wound on the head, which the state charged was inflicted by a frying pan in the hands of the defendants. There was no evidence tending to establish who, if any one, struck Mr. Boykin. The frying pan was found on the floor near Mr. Boykin with a piece broken out, but witness-

es for the state testified that the break was an old one.

The house was surrounded. Mr. H. A. Boykin testified that he went to the front door; that a negro woman was sitting in the front door, and as he walked up the front step, they all made a break and ran; that he didn't know who broke first, but that the woman was sitting near him, and she blew the light out; that he ran in and caught hold of two negroes; that he was struck, but that he could not say whether by one of his captives. He testified:

"A. One of them hit me in the head with a pan, iron of some kind, a frying pan, and knocked me unconscious. Q. Could you tell whether one of the two negroes that you had your hand on? A. No, sir; I could not. Q. Was it in the dark? A. Yes, sir. Had a small fire in the fireplace, and he was standing between me and the fire, and when he hit me, he stooped down and picked it up by the fire."

Another officer, Mr. Bradley, testified that he met one negro at the door on the opposite side of the house and seized him; and that he caused a light to be made, and found one negro up on the wall at the side of the house, and another hid in the corner.

The defendants pleaded guilty in the magistrate's court at Mayesville to the charge of gambling, and four of them paid each a fine of \$30 and one \$20. Prior to the trial under the indictment in this action one of the defendants, Harrison Prince, pleaded guilty, and was sentenced to pay a fine of \$100 or serve three months at hard labor. The remaining four defendants, the respondents herein, entered pleas of not guilty, and the four being tried jointly, upon a verdict of guilty (their motion for new trial upon the grounds appearing in the exceptions being overruled) were sentenced each to pay a fine of \$200 or serve six months at hard labor. From this sentence all within due time gave notice of appeal.

At the close of the evidence for the state the defendants moved for a direction of verdict upon the grounds appearing in the exceptions. The motion was overruled.

All four of the defendants were sworn as witnesses. At the close of all the evidence the motion for direction of verdict was renewed upon the same grounds, and was again overruled.

His honor was requested to charge the jury as set forth in the exceptions. Whereupon he charged the jury in the language also set forth in the exceptions.

In his general charge his honor charged the following propositions:

"If you find that another person on that occasion did commit the assault and battery, and you find that one or more or all of these four defendants aided and abetted another person giving assistance in the assault and battery,

then they would be as guilty as the person who did it, whether the person is on trial at this term or not. If it has been proven beyond a reasonable doubt to you that these defendants acted in concert amongst themselves and in pursuance of a common design previously entered into to commit the offense alleged in the indictment, then all would be guilty."

The motion for new trial was made upon the grounds set forth in the exceptions, and was overruled.

The appellant's attorneys submitted that his honor, the circuit judge, erred in the following particulars:

I. In overruling appellants' motion for direction of verdict made upon the following grounds: That the defendants were jointly indicted as principals, and that there was no proof: (1) That any particular one of them committed the crime; or (2) that the crime was committed in the pursuance of any joint or common enterprise or undertaking.

II. In refusing to charge at the request of the defendants: "Is there anything further you wanted charged?"

"Mr. McLemore: I think we would be entitled to have them charged that, even where they might have been found to have been in a common undertaking or design, if any one or more of the defendants originally before the court departed from the common design or undertaking or enterprise, and formed his own independent design, and in pursuance of that independent design he did it, he alone would be responsible for his act.

"Court: I think that is covered by this proposition, Mr. McLemore, that is, if the offense alleged to have been committed started before the officers got there, being a misdemeanor and not a felony, the common design or common undertaking or enterprise that I have instructed about is directed solely to the proposition contained in this indictment, to wit, assault and battery. Take the record."

And if the language of his honor be considered a modification of the defendants' request, then it was error so to modify the request.

III. In overruling motion for new trial made upon the following grounds: (1) There is no evidence that the act charged in the indictment was committed by the defendants, or any of them. (2) There is no evidence that the act charged in the indictment was committed by the defendants, or any of them, or by any other person then and there present, in pursuance of any common undertaking or design entered into by them. (3) The defendants, it is respectfully submitted, were entitled to have the jury charged that if the defendants engaged in a common undertaking or design, and thereafter any one of them departed from the common plan, and in pursuance of his own design committed the act charged, then only such one so committing the act would be guilty thereof.

Lucian W. McLemore, of Sumter, for appellants.

Frank A. McLeod, Solicitor, of Sumter, for the State.

GARY, C. J. [1] Practically there are but two questions presented by the exceptions, the

first of which is whether there was any testimony from which a reasonable inference could be drawn by the jury that there was a common design on the part of the defendants to make their escape prior to the time when the assault and battery was committed.

It may be stated as a general proposition that, if parties are engaged at night in the commission of an unlawful enterprise common to them all, they will endeavor to escape arrest, provided there are reasonable grounds for supposing that their attempt may be successful. In such cases, the attempt to escape arrest may be regarded as incidental to the commission of the common and unlawful design.

In the case under consideration, however, there are facts from which a reasonable inference may be drawn that the defendants planned, before the officers appeared, to make their escape, in case of an attempted arrest. A negro woman was sitting at the front door apparently on guard, for she blew out the light. When the officer walked up the front step, all the defendants made a break and ran. The unanimity with which the defendants attempted to make their escape indicated either that they were obeying the impulse natural to them, or that they had planned to escape, before the arrests could be made by the officers.

The exceptions raising this question are overruled.

[2] The next question is whether his honor, the presiding judge, charged the jury as requested by the appellants' attorney. This question is raised by the second exception. His honor, the presiding judge, certainly did not, in express terms, refuse to charge the request. On the contrary, he stated that he thought it was covered by other parts of his charge. Furthermore, the request was but a corollary of the proposition, which he had already charged.

Appeal dismissed.

WATTS, FRASER, and GAGE, JJ., concur.

HYDRICK, J. (dissenting). I agree with the Chief Justice that the evidence is sufficient to warrant a reasonable inference that appellants were guilty of conspiracy to gamble and to avoid arrest by flight, if the officers of the law should come upon them while gambling. But that is not the issue to be decided. They were not indicted for a conspiracy to avoid arrest, if, indeed, that is indictable, but for assault and battery. The real issue, therefore, is whether proof of facts and circumstances which warrant an inference of a common design to avoid arrest for gambling by flight is sufficient to warrant the further inference of a common design to commit an assault and battery upon an officer who might attempt to arrest them; for upon that theory alone they were convicted,



since there is no evidence that either of them aided, abetted, or encouraged the one who actually committed the assault and battery, who was, no doubt, the one that pleaded guilty. The question, therefore, is, Can a conspiracy to commit an assault and battery be legally inferred from proof of a common purpose to avoid arrest by flight? I think it clear, on reason and authority, that it cannot. Bishop in his work on Criminal Law (section 634, vol. 1) says:

"Even where persons are unlawfully together, and by concurrent understanding are in the actual perpetration of some crime, if one of them of his sole volition, and not in pursuance of the main purpose, does a criminal thing in no way connected with what was mutually contemplated, he only is liable. Thus if, in England, poachers join in an attack on the gamekeeper, and leave him senseless, then, if one of them returns and steals his money, this one alone can be convicted of the robbery. So, if two have committed a larceny together, and one suddenly wounds an officer attempting to arrest both, the other one cannot be convicted of this wounding, unless the two had conspired, not only to steal, but to resist, also, with extreme violence any who might attempt to apprehend them."

Again:

"Sec. 635. If several are out committing a felony, and, on alarm, run different ways, and one to avoid being taken maims a pursuer, the others are not guilty parties in the mayhem."

At section 637, he says:

"If two combine to fight a third with fists, and death accidentally results from a blow inflicted by one, the other also is responsible for the homicide. But if the one resorts to a deadly weapon without the other's knowledge or consent, he only is then liable."

In *People v. Knapp*, 26 Mich. 112, Knapp was charged with the murder of a young woman on the following facts: He with several others carried deceased into a house owned by Knapp for immoral purposes. While there, she either fell or was thrown from a window, and sustained injuries from which she died. There was no testimony that Knapp himself did the act, and he was convicted on the theory that he was responsible for the conduct of those who did it. The

trial court charged the jury that, if defendants combined for the purpose of inducing the deceased to go into the house for immoral purposes, and, while there, in order to avoid arrest or exposure, threw her out of the window, without intending to kill her, it would be manslaughter, because they were engaged in an act against public morals, and unlawful; and refused to charge that, if the act was done, under the circumstances stated without the concurrence of Knapp, he should not be convicted; and, also refused to charge that if the parties attempted to escape, and one of them, without the knowledge or consent of the others, helped or threw deceased out of the window, then only the one who actually did the act is responsible. Upon this evidence and charge Knapp was convicted of manslaughter. On appeal, the Supreme Court reversed the conviction saying:

"The effect of these rulings was practically to hold that parties who have combined in a wrong purpose must be presumed, not only to combine in some way in escaping arrest, but also to be so far bound to each other as to be responsible severally for every act done by any of them during the escape.

"It is impossible to maintain such a doctrine. It is undoubtedly possible for parties to combine in order to make an escape effectual, but no such agreement can lawfully be inferred from a combination to do the original wrong. There can be no criminal responsibility for anything not fairly within the common enterprise, and which might be expected to happen if occasion should arise for any one to do it. In other words, the principle is quite analogous to that of agency, where the liability is measured by the express or implied authority. And the authorities are quite clear, and reasonable, which deny any liability for acts done in escaping which were not within any joint purpose or combination. *Rex v. Collison*, 4 C. & P. 565; *Reg. v. Howell*, 9 C. & P. 437; *Rex v. White, R. & R. 99*; 1 Bishop's Cr. L. (5th Ed.) §§ 633-642."

If appellants were lawfully convicted upon the evidence adduced, the necessary logical result is that, if the officer had been killed, appellants could have been convicted of murder. Would this court sustain a conviction of murder upon such evidence? If not, the judgment should be reversed.

See note to *People v. Lawrence*, 68 L. R. A. 193.

(84 W. Va. 190)

**CARLSBAD MFG. CO. et al. v. KELLEY**  
et al. (No. 3593.)(Supreme Court of Appeals of West Virginia.  
May 13, 1919. Rehearing Denied Sept. 17,  
1919.)*(Syllabus by the Court.)***1. FRAUDULENT CONVEYANCES** ⇨271(3), 278  
**(1)—RELATIONSHIP OF PARTIES—BURDEN OF PROOF.**

Generally the burden of proof rests on him who charges fraud, and not on him whose conduct is charged to be fraudulent. But where the transaction alleged to be fraudulent is between persons whose relationship by blood or marriage is so intimate as fairly to create the presumption of their susceptibility to influences prompting favoritism by the one towards the other, the burden of establishing freedom from fraud as against creditors shifts to him who is charged therewith.

**2. FRAUDULENT CONVEYANCES** ⇨104(3), 277  
**(3)—HUSBAND AND WIFE—TITLE IN NAME OF WIFE—PRESUMPTIONS.**

Where property is alleged to have been purchased by a wife during coverture, the burden is upon her to prove distinctly that she paid therefor with means not derived from her husband; and, in the absence of clear proof to that effect, the presumption is that it was acquired with his means and it is liable for his debts. But if she furnish evidence clearly showing that it was not acquired with her husband's means, it will not be liable for his debts.

**3. EQUITY** ⇨41—**CONTRACTS BETWEEN HUSBAND AND WIFE—EMPLOYMENT OF HUSBAND.**

The marital relation does not prevent the employment of the husband by the wife, upon a reasonable monthly salary, to assist in the management of a store which is her own separate property. But equity does not permit such an agreement or arrangement between them, when fraudulent, to operate to the prejudice of the creditors of either or both of them.

**4. EQUITY** ⇨46—**JURISDICTION.**

Generally, where a court of equity has once obtained jurisdiction of a cause, it will retain it for all purposes and administer complete relief. But in order to authorize relief obtainable in an action at law, some substantial ground must exist to confer equitable jurisdiction, and, if the pleadings or proof fail to establish a basis for such relief, a court of equity is without jurisdiction to award other relief by way of recovery upon a purely legal demand, unless it appears that the remedy at law is inadequate.

Appeal from Circuit Court, Randolph County.

Bill by the Carlsbad Manufacturing Company and others against J. M. Kelley and others. Decree for defendants, and plaintiffs appeal. Affirmed.

James A. Bent and E. A. Bowers, both of Elkins, for appellants.

Samuel T. Spears, of Elkins, for appellees.

LYNCH, J. The object sought by plaintiffs' original and amended bills and the petitions filed during the pendency of the cause was to set aside and annul as fraudulent certain transfers by the defendant Clarence Kelley of a stock of merchandise owned by him in 1908, and by him sold in bulk to John R. Crickard November 14th of the same year, and by Crickard to W. L. Snyder about nine months thereafter, and by Snyder to J. M. Kelley, the wife of Clarence, December 4, 1909, and a deed by Anna Swecker and E. E. Simmons conveying to J. M. Kelley a lot located at Valley Head, Randolph county, and one or two other lots or parcels of land sold but not conveyed to her by Mary and Harman Conrad at the same place, and to subject to sale the merchandise and lots, and apply the proceeds to the satisfaction of the debts of Clarence Kelley. The right to this relief the decree complained of upon this appeal by plaintiffs denied, and dismissed the bills, and with them the petitions.

Logically the first question presented for decision is whether the sale and transfer of the stock of merchandise to Crickard was fraudulent and void as to the creditors of Clarence Kelley. Whatever may have been his purpose and intention does not matter unless Crickard had knowledge or notice of such purpose and intention at the time of the transfer, or notice or knowledge of such facts and circumstances respecting it as would then indicate a wrongful intention on the part of Kelley towards his creditors. Respecting this intention, as later developed and made clear beyond question as regards the object of the sale and its effect upon the creditors, and the competency of Kelley to disregard his legal and moral obligation to them, there is no room to doubt, and hence it is unnecessary to attempt to relate in detail what he subsequently did to protect some of them, and failed to do to protect others whose claims were equally just and meritorious. This conduct on his part is not important or significant unless, as we have said, Crickard knew or wrongfully failed to ascertain the true status of the affairs of Kelley at the date of the transaction as regards the sale and transfer of the merchandise. The Bulk Sales Act of this state had not then been enacted. It was not passed and did not become effective until the year 1909. Section 3a, c. 74, Code (sec. 3832). Nothing concerning or chargeable to these transfers by Crickard to Snyder and Snyder to Mrs. Kelley appears in any manner warranting recourse to its provisions, except the \$900 note executed by Snyder to Crickard, and it is involved only indirectly in this controversy. And unless it appears that the transfers were made otherwise than upon

the payment of or agreement to pay a valuable consideration, and that the purchaser had notice of the fraudulent intent of his immediate grantor, nothing in that chapter, except the section respecting sales of merchandise in bulk in disregard of its provisions, can affect the title of such purchaser, according to section 1 of that chapter (sec. 3829).

This is the second suit involving the same transaction, in each of which the sales and transfers to Crickard, Snyder, and Mrs. Kelley were assailed as fraudulent, and to which the purchasers were parties, except that Crickard was brought in not by the original, but by the amended, bill filed in this suit, and in each of them he filed an elaborate and unequivocal answer, specifically and serially denying every allegation made therein in any wise affecting the bona fides of his connection with the acquisition of the property, his intent and purpose in acquiring it, and his lack of knowledge of any fraudulent design of Clarence Kelley. And in each case the court held valid and unimpeachable Crickard's purchase of the property. Although he did not testify as a witness in his own behalf or at all, notwithstanding the general replication to his answer, it was not necessary that he should do so, because no witness called by any other party to the suit spoke or was asked to speak a word tending in any degree to impeach the validity of the transfer to him, or in derogation of his business or financial ability, character, or integrity. The charges in any wise reflecting on him—and to sustain them no proof of any consequence was offered—are first, an obscure and virtually meaningless allegation in the pleadings that he had seen the ups and downs of the mercantile business at Valley Head; and, second, an alleged inadequacy of price, evidenced by the payment of \$4,500 for merchandise said to have been worth between \$8,000 and \$9,000, but the original cost of which was not proved to have been more than \$6,000, and from each of which unsustained charges we are asked to assume his participation in a scheme or design to defraud creditors. But granting the sufficiency and materiality of the charge respecting his previous business failures, Crickard, while confessing the misfortune, attributable, he says, to lack of experience, subsequently, according to the specific declarations of his answer, satisfied and discharged every liability so incurred. And as to the second charge, we cannot assume as inadequate the consideration paid for goods whose original cost the proof shows not to be in excess of \$6,000, the difference between them being explained by him as due to an allowance for depreciation and deterioration of the stock.

[1] Generally on him who charges fraud, and not on him whose conduct is charged to

be fraudulent, rests the burden of proof. 6 Michie, Enc. Dig. 659. Well-recognized exceptions to the general rule exist, it is true, in certain cases, as where the parties to a transaction charged to be fraudulent are susceptible of influence through sinister motives, as in dealings between kindred or persons standing in confidential relations to one another. But no such relationship or connection or sinister motives or invalidity due thereto appear anywhere in this case as regards Crickard. The \$4,500 paid for the merchandise he delivered to Kelley in money, and Kelley swears he received it and applied it to the liquidation of his debts and liabilities, reserving no part of it for his immediate personal use. What he did with the money did not in the least concern Crickard or tend to the impeachment of the transfer. No fact or circumstance proved tended to trace to the latter any information or notice sufficient to impute to him knowledge of any fraudulent intent of Kelley before or at the time the deal was consummated. If, as we have seen and hold, Crickard acquired an unimpeachable title to the stock of merchandise, he could and did make a valid sale thereof to Snyder, and the character and good faith of this transaction is assailed only by the pleadings, the allegations of which are supported by no proof whatsoever, nor was there any attempt to prove the fact to be as alleged.

[2] The important inquiry remaining for discussion and decision relates to the sale by Snyder to Mrs. Kelley. Between them there is some relationship, he being a half-brother of her father; but to her he owed no duty other than to deal justly and fairly with her. It was she, not he or her husband, or any other kindred of either, who first made the initial advancement to enter into the negotiations culminating in the purchase of the property. She and Snyder personally and alone dealt and treated with each other in regard to the sale, agreed upon the terms, amount, time, and manner of payment. The consideration was \$4,000, of which she paid \$2,500 in currency, and for the residue executed to him her personal notes, one for \$600, the other for \$900, both otherwise being unsecured, the first of which she paid before the institution of this suit, and the second of which he assigned to Crickard in lieu of the note held by the latter as evidence of a balance due him from Snyder on the sale to him by Crickard. This note remains unpaid.

No part of the consideration for the last transfer of the property is traced to the husband of the purchaser. Clearly he had no money and no means of acquiring it, no friends willing to loan him any, and no credit to permit him to borrow or procure indorsers therefor if he could in that manner obtain it. She seems to have had the charac-

ter and credit which he so grossly lacked. While his father, Albert Kelley, apparently did not deem his son worthy of confidence or assistance, or perhaps entertained a suspicion of the son's lack of ability or honesty, he did render material help and assistance to the son's wife in the transaction under investigation. To consummate it, he loaned her the amount of the cash payment to Snyder, took her note therefor, part of which she repaid, and the balance he bestowed upon her as a gift, perhaps because he discovered her ability to manage the property successfully, as she seems to have done. No one questioned Albert Kelley's financial ability to loan his daughter-in-law that amount of money, or that he made the loan, or that she executed to him her note therefor, and these matters the evidence clearly and unequivocally establishes. He owned timber land near Valley Head, and sold the timber standing thereon about the time he loaned Mrs. Kelley the money used by her in the purchase of the goods, and when he delivered that amount to her he had in the bank to his credit more than \$5,000, whether derived from the sale of the timber or from some other source, the evidence does not definitely show. The amount of the deposit in the bank to his credit is proved by Bing, the cashier, and his statement is not impeached, and doubtless could not be, and was not questioned. It is argued, but not proved, that the money so credited to the father belonged to the son; wherefore the latter, and not the former, thereby enabled Mrs. Kelley to acquire the property. If this were true, and the proof established the fact to be as stated, the argument would avail to support the charge of fraud. But the argument rests only upon mere suspicion, not upon proof, of which some might have been furnished if it existed. The failure to produce it warrants assumption of its nonexistence.

The other persons from whom Mrs. Kelley borrowed money either to purchase the property or to meet the expense incurred in its management bear undisputed testimony to support these transactions, and credit her with repaying them, in whole or in part, according to her undertaking in that regard, and express no dissatisfaction with the result.

[3] As indicative of ownership, appellants emphasize in argument the joint participation by the Kelleys in the conduct and management of the store. As regards this claim the proof is equally clear and satisfactory. Clarence Kelley's connection therewith is that of an employé upon a monthly salary which is shown not to exceed the amount paid for a like service in the same community under similar circumstances at that time. The legal right of a wife so to employ her husband upon the payment of a reasonable compensation seems no longer a contro-

verted legal proposition. *Trapnell v. Conklyn*, 37 W. Va. 242, 16 S. E. 570, 38 Am. St. Rep. 30; *Board of Education v. Mitchell*, 40 W. Va. 431, 21 S. E. 1017. The only qualification is that such an agreement or arrangement between them will not be permitted to operate to the prejudice of the creditors of either or both of them. *Boggess v. Richards' Adm'r*, 39 W. Va. 567, 20 S. E. 599, 26 L. R. A. 537, 45 Am. St. Rep. 938. The mere employment, though upon a fairly compensatory monthly salary, in this case \$50, does not suffice to cast suspicion upon the validity of Snyder's transfer to Mrs. Kelley. Besides, the greater part of the payment was devoted to the maintenance of the household expenses, according to undisputed proof.

This, as we have said, is the second suit involving the property of Clarence Kelley, and the final decree in the first of the two is relied on as showing a former adjudication of all matters in issue in this litigation. Whether the decree foreclosed the right to prosecute this suit we deem it unnecessary to decide, in view of the conclusion clearly indicated by what has already been said upon the merits of the cause.

Counsel for the claimants also complain of the failure to decree against Clarence Kelley the debts contracted by him with McCrea Mills Company, duly verified, which, with interest from the date they became due and payable, aggregate \$597.01. The inclusion of this debt in the decree of dismissal was not asked for in the court below. Whether the lower court erred in dismissing that claim depends upon the further question whether, after holding insufficient the proof of fraud, the charge which alone conferred authority to hear the cause and determine the rights of the parties in reference thereto, there still remains jurisdiction sufficient to warrant relief not within the contemplation of the parties when the suit was brought. Their right to relief depended upon an adjudication of the issue involving the fraudulent character of the transactions in controversy. The adjudication against them upon that question obviously terminated the litigation and effected an exhaustion of the powers of that tribunal to take further steps in the cause. The same limitation applies to this court. As was said in *Home Gas Co. v. Mannington Window Glass Co.*, 63 W. Va. 266, 274, 61 S. E. 329, 332: "The ultimate end of the case here, as it should have been in the circuit court, is to adjudge the plaintiff not entitled to the relief prayed for, the fraud alleged not having been proven, and to dismiss the bill." Virtually the same thing was said in *Amick v. Ellis*, 53 W. Va. 421, 44 S. E. 257, a suit to enforce specific performance of an unacknowledged contract for the sale of the separate real estate of a married woman, performed in part by the

plaintiff, who asked in the alternative for repayment of the money received by her. The language there used was: "We cannot apply the rule [the rule contended for here] that, having jurisdiction for one purpose, full relief or alternative relief will be given. There is jurisdiction neither to compel a deed nor for [the payment of] money." While cases may be found holding otherwise upon the same subject, the preponderance of opinion upholds the view herein expressed, and, as sometimes stated, "where a case for relief in equity fails, a court of equity is without jurisdiction to award other relief by way of disposing of the entire controversy, unless, indeed, it appears that the remedy at law will be inadequate. Otherwise, as the courts have frequently pointed out, a litigant, by a pretended claim for equitable relief, might deprive his opponent of advantages incident to an action at law." *Johnston, etc., Bros. v. Bunn*, 108 Va. 490, 62 S. E. 341, holds to the contrary; but the annotation to the case, found in 19 L. R. A. (N. S.) 1064, uses the language above quoted and cites numerous authorities to the same effect.

[4] The case of *Evans v. Kelley*, 49 W. Va. 181, 38 S. E. 497, seems to announce a contrary doctrine. Point 3 of the syllabus is: "Equity having acquired jurisdiction of a cause for one purpose, although the relief sought be finally denied, any relief, legal or equitable, justified by the pleadings and tending to end litigation between the parties, will be granted." To support that conclusion the opinion cites *Walters v. Bank*, 76 Va. 12; *Hotchkiss v. Plaster Co.*, 41 W. Va. 361, 23 S. E. 576; 11 Am. & Eng. Enc. Law (2d Ed.) 201. The Virginia cases adopt the minority rule, as we have seen, and are not in consonance with the countervailing weight of authority on the subject. There are but two cases cited in 11 Am. & Eng. Enc. Law, supra, for the doctrine therein stated, and *Hotchkiss v. Plaster Co.*, supra, reiterates only the well-established rule; inapplicable here, that when equity has jurisdiction for one purpose, the court will determine all matters involved in the litigation, unless some good reason for not doing so is made to appear. That case, therefore, is not an authority for the proposition stated in *Evans v. Kelley*, supra. Besides, our later decisions, cited, adhere to the principle heretofore announced, and virtually, though not expressly, overrule that case. While not directly in point, the recent decision of this court in *Deming National Bank v. Baker*, 98 S. E. 438, affords another illustration of this rule, and accords with the generally expressed opinion of the legal authorities dealings with the subject. 10 R. C. L. p. 372; 16 Cyc. 111.

What has been said renders unnecessary the expression of an opinion upon other questions discussed by counsel. Perceiving no error, we affirm the decree.

(84 W. Va. 204)

WATRING v. GIBSON et al. (No. 3633.)

(Supreme Court of Appeals of West Virginia.  
May 13, 1919. Rehearing Denied  
Sept. 17, 1919.)

(Syllabus by the Court.)

1. LOGS AND LOGGING ⇨3(15)—SALE OF TIMBER—MISTAKE OR FRAUD—RECOVERY OF MONEY PAID.

Equity has jurisdiction of a suit by the purchaser to recover back a portion of the purchase money paid to the vendor for timber on a boundary of land, estimated to be a certain number of feet stumpage, when such estimate is much more than the actual quantity, and the mistake was caused by the false representations of the vendor, or his agent, respecting the acreage of the boundary.

2. HUSBAND AND WIFE ⇨138(10)—PRINCIPAL AND AGENT ⇨115(1)—AGENT'S REPRESENTATION—LIABILITY OF PRINCIPAL—MARRIED WOMEN.

A principal is bound by representations as to existing facts, made by his agent, in regard to a transaction intrusted to him; and this rule applies to the transactions of an agent for a married woman, respecting those matters concerning which married women are permitted by law to contract.

3. HUSBAND AND WIFE ⇨137(1), 138(9)—HUSBAND'S AGENCY FOR WIFE—AGENT'S FRAUDULENT REPRESENTATIONS.

The marital relation does not prevent a husband from acting as agent for his wife, and when she permits him to act as her agent in negotiating a sale of her separate real estate and afterwards signs and acknowledges a written contract in pursuance thereof, in the execution of which he joins, and she receives the consideration therefor, she is bound by the fraudulent representations of her agent respecting the acreage and is liable to account to the purchaser for the shortage.

4. HUSBAND AND WIFE ⇨138(8)—HUSBAND'S AGENCY FOR WIFE—FRAUDULENT REPRESENTATIONS—LIABILITY.

Where a married woman receives the consideration which a purchaser of her property has been induced to pay, in reliance upon the fraudulent representations of her agent, equity will not permit her to retain the benefits thereof and repudiate the liability arising out of such fraudulent representations of her agent, even though she did not authorize the agent to make them.

5. JUDGMENT ⇨622(2)—SET-OFF AND COUNTERCLAIM ⇨15—TRESPASS ON THE CASE—MERGER AND BAR.

Where the vendor of certain kinds of growing timber brings an action of trespass on the

case against the purchaser for the cutting of certain other kinds, not included in the contract of sale, the purchaser is not thereby estopped from suing in equity to recover back part of the purchase money, paid on account of false representations by the vendor or his agent, on the truth of which the purchaser relied and was thereby induced to buy. The matters averred in the bill cannot be offset against such action at law nor pleaded in defense thereof.

**6. APPEAL AND ERROR §162(1)—PAYMENT OF DECREE—ASSIGNMENT OF ERROR.**

A party to a cause, who has paid a money decree against him, cannot, after the cause has been appealed by the opposite party, cross-assign as error the rendering of such decree.

*(Additional Syllabus by Editorial Staff.)*

**7. APPEAL AND ERROR §162(2)—ACCEPTANCE OF BENEFITS OF DECREE—APPEAL FROM DENIAL OF SPECIAL RELIEF—WAIVER.**

Although a plaintiff has accepted the benefit of that part of the decree in his favor, he may appeal from that part of it denying the special relief prayed for, where decree expressly provides that acceptance of amount decreed shall not prejudice right of appeal, as such provision prevents application of doctrine of waiver, which might otherwise defeat his right of appeal.

Appeal from Circuit Court, Randolph County.

Suit in equity by S. H. Watring against Virginia S. Gibson and husband, to recover for shortage in quantity of standing timber paid for, and to enjoin defendant's action at law. Decree for defendant as to shortage, and for plaintiff against defendant Virginia S. Gibson, and plaintiff appeals. Decree denying relief on account of shortage reversed, and decree entered for complainant, and otherwise affirmed.

Samuel T. Spears, of Elkins, for appellant.  
Leroy See, of Elkins, and A. M. Cunningham, of Parsons, for appellees.

**WILLIAMS, J.** This suit in equity was brought by S. H. Watring against Virginia S. Gibson and J. A. Gibson, her husband, to recover back \$1,125 of the purchase price paid Virginia S. Gibson for standing timber, on account of a shortage in the quantity purchased and paid for, and to enjoin her from prosecuting an action at law, brought against this plaintiff to recover damages for cutting dead timber, which was interspersed with the green timber purchased, but which was not included in the terms of the contract of sale.

The contract bearing date April 22, 1915, was signed, sealed, and acknowledged by both Mrs. Gibson and her husband and showed a sale of "all the green hemlock and spruce timber 10 inches and over in diameter standing and being on that certain tract of

land containing 410 acres," at the price of \$3 per M feet stumpage. It gave the location of the tract and the terms of payment, which have been fully complied with and are not now material, the entire sum paid for the timber being \$4,500, determined upon the basis of an estimated stumpage of 1,500,000 feet. The stumpage was not ascertained when the contract was signed, but it was therein provided that it should be determined in the following manner: Each party was to select an estimator and these two an umpire, in case they failed to agree, who were to make the estimate "in the tree according to the standard rule of lumbermen, and said estimate to be final and complete and to constitute the basis of settlement." Only a comparatively small portion of the 410-acre tract had any green spruce or hemlock on it, and it formed a practically contiguous boundary, irregular in shape, fringed and interspersed with dead, standing spruce and hemlock, and with fallen trees of the same kind that had been blown down by windstorms. All the negotiations and transactions concerning the sale and ascertainment of the stumpage were had between plaintiff and J. A. Gibson, who acted for and on behalf of his wife. All she did was to sign and acknowledge the contract in her own proper person, and receive the purchase money, either directly from the purchaser or through her husband as her agent. Plaintiff and J. A. Gibson each selected an estimator, and all four of them went upon the ground, and the two estimators proceeded to make their estimate in the following manner: They marked off an acre in what they considered the heaviest timbered part of the boundary and another acre in the lightest timbered part of it, estimated the quantity of timber on each of these acres, and took one-half the sum of the two as being a fair average of the quantity per acre on the timbered boundary. They did not, however, measure or determine in any manner the number of acres in the boundary, but both of them swear they relied on the representations made to them at the time by J. A. Gibson, that he had measured the green timbered boundary and found it contained 60 acres, and that they relied on his representations as being true, and ascertained the stumpage on the entire boundary by multiplying the estimated stumpage of one acre, 25,000 feet, by 60. Oscar Latt, the estimator selected by plaintiff, says he agreed the quantity was 1,500,000, "only if there was 60 acres." George Phares, estimator selected by Gibson, swears Mr. Latt remarked two or three times to Mr. Gibson, or in his presence, that he did not think there were 60 acres, and that Mr. Gibson said "him and some one else, I don't remember who, had run across one end and down one side, and figured up what was in it, 60 or 61 acres." He further says: "We

didn't know anything about it ourselves, we were going by what Mr. Gibson said about the number of acres." Plaintiff's own testimony is to the same effect. After the timber had been paid for on the supposition that the boundary was 60 acres, and after all, or nearly all, of the timber had been cut, and before bringing this suit, plaintiff procured an accurate survey of the boundary to be made by a surveyor and learned thereby that it contained but 45 acres.

Three and a half acres of dead, standing timber was included in the boundary, which Gibson told plaintiff and the estimators they might include with the green timber, and they say they did include it in making the average of 25,000 feet per acre. Plaintiff cut and manufactured this dead timber, and it was to recover for this trespass that Mrs. Gibson brought the action at law which plaintiff prayed to have enjoined. On final hearing upon bill, answer, replication, and depositions of numerous witnesses, the court entered a decree refusing to grant plaintiff any relief on account of shortage in the acreage, for the reason, stated in a written opinion printed with the record, that the court was of the opinion Mrs. Gibson should not be held responsible for the representations of her husband as to the number of acres in the boundary, notwithstanding the learned chancellor found the fact, "established by the proof," to be that Gibson had made such declarations. In addition thereto, both the estimators swear they did not estimate the acreage, did not know what the boundary contained, and relied on the statement of Gibson as true, and determined the quantity of timber on the whole boundary accordingly. Plaintiff's testimony is to the same effect, that no measurements were made by the estimators to ascertain the acreage, and that Gibson stated several times that the boundary of green timber contained 60 or 61 acres. In view of the established fact that Gibson did represent that he and another man had measured the boundary and found it contained 60 or 61 acres, and the undisputed testimony of the surveyor, who afterwards surveyed it, that it contained only 45 acres, considered in connection with the uncontradicted testimony of the estimators, to the effect that they relied on Mr. Gibson's statement as true and made their estimate accordingly, we think the court erred in denying plaintiff relief on account of the shortage. However, the court decreed plaintiff a recovery of \$834.96 on account of the dead timber which Gibson had assumed to authorize him to cut and which had been included in the estimate, because he had paid Mrs. Gibson for it, and the court had refused to enjoin her from suing to recover the value of it, in effect, holding she had a right to recover on the ground that it was not included in the description of the timber sold, and that standing timber, whether living or dead, was a

part of Mrs. Gibson's land, which could be disposed of only in the manner provided by the statute regulating the disposition of lands of married women, in which views we are inclined to think the court was entirely correct. But these questions are not involved in this appeal, and are not among those decided in this opinion. Neither do they affect the question to be decided, which is whether plaintiff has a right to recover back a part of the purchase price on account of a shortage in the estimated quantity of timber, caused by the fraudulent representations of the vendor's agent as to the acreage in the timber boundary.

[7] Although plaintiff has accepted the benefit of that part of the decree in his favor, he may, nevertheless, appeal from that part of it denying the special relief prayed for, because the decree expressly provides that his acceptance of the amount decreed him should not prejudice his right of appeal in respect of his claim to reimbursement on account of shortage in acreage. The saving provision of the decree prevents the application of the doctrine of waiver which might otherwise defeat his right of appeal, as was the case in *McKain v. Mullen*, 65 W. Va. 558, 64 S. E. 829, 29 L. R. A. (N. S.) 1, 131 Am. St. Rep. 964, 17 Ann. Cas. 634, discussed also in *Eakin v. Eakin*, 98 S. E. 608.

[1] The bill seeks to recover back money which plaintiff was induced to pay because of the fraudulent representations made by defendant's husband and agent, on the truth of which he relied and was thereby misled, the very kind of a wrong that a court of equity delights to correct, notwithstanding courts of law may furnish a concurrent remedy. See numerous cases cited in 6 Encyc. Dig. Va. & W. Va. Cases, 476.

Where a vendee has been induced, by the false and fraudulent representations of the vendor or his agent, to accept a conveyance for land, and afterwards discovers it contains a materially less quantity than represented, equity will give relief by abating the purchase price, or rescinding the contract and restoring the parties to their former status. *Crislip v. Cain*, 19 W. Va. 438; *Smith v. White*, 71 W. Va. 639, 78 S. E. 378, 48 L. R. A. (N. S.) 623.

[2-4] The marital relation does not prevent a husband from acting as agent in the management of his wife's property. *Trapnell v. Conklyn*, 37 W. Va. 242, 16 S. E. 570, 38 Am. St. Rep. 30. No rule of law is better settled and more universally applied than the rule which holds a principal bound by the declarations and representations as to matters of fact, not mere expressions of opinion, made by his agent respecting a transaction intrusted to him. *Nutter v. Brown*, 51 W. Va. 598, 42 S. E. 661. "Where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will bind the principal,

where made at the same time and constituting a part of the *res gestæ*." *Coyle v. B. & O. R. R. Co.*, 11 W. Va. 94. This rule applies to married women respecting those matters concerning which they are authorized by law to contract. Mrs. Gibson could sell and convey her timber by deed, acknowledged by her, her husband joining therein, and did dispose of her timber in that manner. She would also be liable for any fraudulent representations made by her in respect thereto. 2 Bishop's Law of Married Women, § 490; 21 Cyc. 1425. The fraudulent representations of which plaintiff complains were made by Mrs. Gibson's husband while acting as her agent, after the written contract had been fully executed by her, and were made in her interest for the purpose of increasing the amount of money she was to receive under the contract, and must, therefore, be regarded as having been made by herself. 21 Cyc. 1425. It does not appear that she authorized him to make those statements, or that she even knew he had made them, before receiving the money for the timber. Still she cannot be permitted to retain the benefits of the contract, procured for her by her husband, and at the same time repudiate any liability arising out of his fraudulent conduct in relation thereto. *Dewing v. Hutton*, 48 W. Va. 576, 37 S. E. 670; *Quarg v. Scher*, 136 Cal. 406, 69 Pac. 96; *Knappen v. Freeman*, 47 Minn. 491, 50 N. W. 533; *Keith v. Keith*, 26 Kan. 26; and *Adams v. Mills*, 60 N. Y. 533. All these cases, except *Dewing v. Hutton*, are cases in which the husband acted as agent for his wife. See, also, *Danser v. Johnsons*, 25 W. Va. 380.

[5] Having held her husband out as her agent in negotiating the sale of her timber, and having signed and acknowledged a written contract therefor, executed in the manner provided by law for the sale of married women's real estate, and having received the benefits thereof, she is estopped to deny his agency. 13 R. C. L. 1169.

Counsel for defendant cross-assign the following errors in their brief:

First, they insist plaintiff should have litigated the matters set up in his bill, in defense of the action at law which he asked to have enjoined. That was an action of trespass on the case for cutting timber, an action

foreign to the contract, and while the matters complained of in the bill might have formed the basis of an action at law, either in tort for the deceit, or in assumpsit for money had and received, still our procedure does not admit of set-off in an action of tort; hence they could not have been litigated in defense of that action.

Second, in not sustaining the demurrer in its entirety to the plaintiff's bill. At a term previous to the one at which the final decree was rendered, the court sustained the demurrer to the bill in so far only as it prayed for an order enjoining prosecution of the action at law. The bill is clearly good in respect to the other relief prayed for.

[6] The third cross-assignment of error relates to the decree against Mrs. Gibson for the repayment of the money, paid on account of the dead timber not included in the written contract of sale. The decree in that respect was clearly right. She could not be permitted to retain the money actually paid for the timber, and at the same time recover for the trespass committed in cutting it; that would be unjust and inequitable. But, even if the decree in that respect were erroneous, defendant, by paying plaintiff the amount decreed him on that account, has waived her right to appeal. Payment ended the litigation in respect to that claim.

The decree gave plaintiff a recovery against Mrs. Gibson for \$834.96 on account of the dead timber, which had been included in the estimate of green timber, for the whole of which, both green and dead, plaintiff had paid \$4,500. Mrs. Gibson should have credit for the amount decreed against her, thus reducing the amount which plaintiff actually paid for the green timber, on the estimated boundary, to \$3,665.04, one-fourth of which he is entitled to recover back from her, as the shortage of 15 acres is one-fourth of the acreage which Gibson had represented in the boundary.

In so far as the decree appealed from denies plaintiff relief on account of the shortage in the estimated amount of timber, it will be reversed, and a decree entered here in his favor for the sum of \$916.26, with interest thereon from April 22, 1915, and in all other respects the decree will be affirmed, with costs to appellant.



(149 Ga. 220)

**GLEATON v. WRIGHT et ux. (No. 1201.)**(Supreme Court of Georgia. July 16, 1919.  
Rehearing Denied Sept. 5, 1919.)*(Syllabus by the Court.)***1. VENDOR AND PURCHASER ⇨226(2), 231(1)  
—"BONA FIDE PURCHASER"—EQUITY RULE  
—STATUTES—RECORDED BOND FOR TITLE—  
UNRECORDED SENIOR DEED.**

Under the rule in equity, to constitute one a bona fide purchaser in the full sense, three conditions must concur: He must pay the purchase money, or at least place himself in a position where he is in all events bound to pay the purchase money; he must get title; and he must pay the purchase money and get title before notice of the rights of third persons.

(a) The rule in equity is applicable in the construction of the act of 1900 (Acts 1900, p. 68; Civil Code 1910, § 4213 et seq.), providing for the registry of bonds for title. The primary intent and purpose of the act was to give notice to all persons dealing with the obligor, from the date of the filing of the bond, "of the interest and equity of the holder of such bond in the property therein described," so that any one acquiring a lien on or title to the property after the filing of the bond would take the property subject to the interest and equity of the obligee in the bond.

(b) The obligee in a recorded bond is protected to the extent of purchase money actually paid before notice of the rights of a grantee in a senior unrecorded deed from the obligor in the bond. The recorded bond for title does not take priority over the unrecorded senior deed to the extent of the entire estate purchased.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bona Fide Purchaser.]

**2. DIRECTED VERDICT — CANCELLATION OF DEED.**

Under the pleadings and evidence, the court did not err in directing a verdict for the defendants.

*(Additional Syllabus by Editorial Staff.)***3. VENDOR AND PURCHASER ⇨226(2)—BOND FOR TITLE—"DEED."**

A bond for title is not a "deed," within the meaning of Civ. Code 1910, § 4198, providing that a deed may be recorded at any time.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Deed.]

Error from Superior Court, Worth County; R. Eve, Judge.

Suit by M. M. Gleaton against G. R. Wright and wife. Directed verdict for defendants, and plaintiff accepts and brings error. Affirmed.

On October 31, 1902, Mary D. Harris, in consideration of \$390, conveyed to G. R. Wright the north half of lot of land No.

222 in the fourteenth district of Worth county. On December 12, 1902, G. R. Wright, in consideration of love and affection, conveyed the same land to Mrs. G. R. Wright, his wife. The deed was properly executed and attested, but was not recorded. Eight years after the execution and delivery of the deed from Wright to Mrs. Wright, Wright executed and delivered to M. M. Gleaton, the plaintiff, a bond for title to the land; Gleaton paying \$25 in cash, and giving his note to Wright for the balance of \$2,175, payable at a future date, to wit, 2 months and 28 days after the date of the bond. The bond for title was attested as a deed and admitted to record. Wright and his wife lived upon the land at the time of the execution and delivery of the bond for title to Gleaton. When the note given by Gleaton to Wright matured, the latter went to the home of Wright for the purpose of paying the note. He was then advised by Mrs. Wright that she was the owner of the land, and that her husband had no authority to make a sale of the same. (According to the plaintiff's testimony he made a tender of the purchase money before he received knowledge of Mrs. Wright's claim.) Mr. Wright was not at home, but a short time thereafter Gleaton tendered to Wright \$2,175, according to the terms of the bond for title. Wright declined to accept the money, and stated to Gleaton that title to the land was in Mrs. Wright, and that she refused to ratify the sale made by him to Gleaton and refused to convey the land. Gleaton filed suit against Mr. and Mrs. Wright, praying for specific performance of the contract, and for the cancellation of the deed made by Wright to Mrs. Wright. There was no alternative prayer for damages. Upon the trial of the case it appeared that at the time of the execution and delivery of the bond for title Gleaton had no notice or knowledge of Mrs. Wright's claim to the land. It also appeared that the mother of Mrs. Wright furnished and paid for Mrs. Wright a part of the purchase price of the land in controversy. The note given by Gleaton to Wright was never transferred to any person. Both the note and the \$25, with interest, were tendered to the plaintiff before the beginning of the trial of the case, and as a continuing offer both were, under the order of the presiding judge, deposited for the plaintiff with the clerk of the court. At the conclusion of the evidence the court directed a verdict for the defendants, and the plaintiff excepted.

J. H. Tipton, of Sylvester, and Pope & Bennet, of Albany, for plaintiff in error.

Perry & Williamson and Mark Tison, all of Sylvester, for defendants in error.

⇨ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

GEORGE, J. [1] Mr. and Mrs. Wright (husband and wife) were in the actual possession of the land in controversy. The record title was in the husband. Presumptively he was the owner of the land. He offered to sell, and executed to the plaintiff in error his bond for title, conditioned to convey the land upon the payment of the agreed purchase price. Mrs. Wright's possession did not constitute notice, under section 4528 of the Civil Code, of her right and title to the land. *Austin v. Southern Home Building & Loan Association*, 122 Ga. 439, 50 S. E. 382; *Dix v. Wilkinson*, 149 Ga. —, 99 S. E. 437. The plaintiff in error did not have actual notice of Mrs. Wright's deed to the land at the time of the execution and delivery to him of the bond for title. The question presented, therefore, is whether, under our registry laws, a subsequent purchaser of land under a recorded bond for title, who has made a partial payment, without notice, actual or constructive, of a prior unrecorded deed, acquires title superior to the title of the grantee in the deed.

[3] It is insisted that a bond for title is a deed within the meaning of section 4198 of our Code; the contention being that a bond for title is a "deed of bargain and sale," vesting the holder of the bond with the ownership of the land, subject only to the payment of the balance of the purchase money, and that the holder in the instant case was a "purchaser without notice" of Mrs. Wright's deed. Section 4198 of the Civil Code provides that a deed may be recorded at any time, "but such deed loses its priority over a subsequent recorded deed from the same vendor, taken without notice of the existence of the first." In a sense a bond for title "under seal," and executed with the formality prescribed for the execution of a deed to land, is "a deed of bargain and sale." See *Allen v. Holding*, 29 Ga. 485, 489; *Latham v. Inman*, 88 Ga. 505, 514, 15 S. E. 8. It is not, however, a deed within the meaning of section 4198 of the Code. It is said, however, that the act of 1900 (Acts 1900, p. 68; Civil Code, § 4213 et seq.), providing for the registry of bonds for title, placed them on the same footing as deeds, and therefore that the rights of the plaintiff under his recorded bond for title were the same as though he had procured a deed, instead of a bond for title. The part of the act of 1900 material here is as follows:

"Bonds for title to land or any interest therein shall, when executed with the formality now prescribed for the execution of deeds to land, be admissible to record in the county where the property therein described is located. Such record shall, from the date of filing, be notice of the interest and equity of the holder of such bond in the property therein described."

Prior to this act there was no law in this state authorizing the recording of bonds for titles. *Veverly v. Burke*, 9 Ga. 440 (1), 54 Am. Dec. 351; *Powell's Actions for Land*, § 279. The primary intent and purpose of the act, where the vendor remained in possession, was to give notice to any and all persons dealing with the vendor or obligor, from the date of the filing of the bond, of the interest and equity of the obligee in the particular property, so that any one acquiring a lien on or title to the property after the filing of the bond would take such property subject to the interest and equities of the obligee in the bond. The act did not change the legal status of bona fide purchasers. Whatever may be the rule elsewhere, in this state a senior unrecorded deed, taken for value, loses its priority over a junior recorded deed from the same vendor, when the junior deed is taken without knowledge or notice of the senior deed. Civil Code 1910, § 4198; *Wadley Lumber Co. v. Lott*, 130 Ga. 135 (2), 139-141, 60 S. E. 836; *Payton v. Payton*, 143 Ga. 486, 97 S. E. 69. Our recording acts, being "in derogation of the rights of property," are construed strictly. *Hackney v. Rome*, 33 Ga. 231, 234. Under the facts in this case, Mrs. Wright's deed is not a voluntary conveyance; in order to give the bond for title priority over her deed, the plaintiff in error must occupy the position of a bona fide purchaser for value. Unquestionably he is a bona fide purchaser, so far as the cash payment of \$25 is concerned. His note, given for practically the full purchase price of the property, was never transferred, but was tendered to him on the trial of the case.

Equity regards the plaintiff in error as having a property right from the moment of his contract; but in order for him to be considered a bona fide purchaser in the full sense three conditions must concur: He must pay the purchase money; he must get title; and he must pay all the purchase money and get title before notice of the rights of the grantee in the unrecorded deed. *Clark's Equity*, § 85. This is the doctrine announced by this court and sustained by the weight of authority. In *Donalson v. Thomason*, 137 Ga. 848, 851, 74 S. E. 762, 763, Presiding Justice Evans, speaking for the court, said:

"It is a rule in equity that a bona fide purchaser without notice, to be entitled to protection, must be so, not only at the time of the contract or conveyance, but until the purchase money is actually paid. \* \* \* A partial payment of the purchase money before notice, although not sufficient to invest the vendee with the character of a bona fide purchaser as regards the entire estate purchased, will entitle him to invoke the aid of the equitable principle that he who asks equity must do equity and reimburse the amount actually paid."

The Georgia cases cited in support of this doctrine are *Phinzy v. Few*, 19 Ga. 66, *Mackey v. Bowles*, 98 Ga. 733, 25 S. E. 881, and *Carter v. Pinckard*, 68 Ga. 817. In *Losey v. Simpson*, 11 N. J. Eq. 246 (4), the rule is stated as follows:

"Actual payment of the purchase money is, in general, necessary to the character of a bona fide purchaser for a valuable consideration, and the giving of a security, or executing an obligation for payment, will not be sufficient."

Had Wright transferred the note given by the plaintiff in error to an innocent purchaser for value, so that the plaintiff in error would in all events have been compellable to pay the note, he would have occupied the position of a bona fide purchaser for value. The rule of equity discussed above is the rule at law, and is applicable in the construction of our registry acts. It is not sufficient that the plaintiff in error made his contract to purchase without notice of Mrs. Wright's title to the land. He must have paid the purchase money without notice of her deed. Whether the tender by him of the balance of the purchase money was made before or after notice of Mrs. Wright's deed is, in our view of the matter, immaterial. The fact is that he has not paid the purchase money and that he has knowledge of Mrs. Wright's deed. Equity will not permit him to better his condition by the tender or the payment of the purchase money after actual notice of Mrs. Wright's deed. The tender of his note, together with the \$25 cash payment, with interest on the latter, is the full relief to which the plaintiff in error was entitled, under the evidence in this case. It must be borne in mind that this is not a case of competition between a junior recorded bond for title and a senior unrecorded bond; the common obligor remaining in possession.

[2] No question of estoppel is involved under the facts in the record. It unequivocally appears from the evidence that Mrs. Wright knew nothing of the transaction between the plaintiff in error and her husband and did not ratify the same. The jury would not have been authorized to find that Mrs. Wright never accepted the deed from her husband. A contrary finding was demanded. Nor was the plaintiff entitled to have damages against either of the defendants. The suit was simply one for specific performance. There was no alternative prayer, and the evidence did not authorize a verdict for damages against either of the defendants. There was no error in directing a verdict for the defendants.

Judgment affirmed.

All the Justices concur.

(24 Ga. App. 115)

WOOD et al. v. CITY OF ROME. (No. 10422.)

(Court of Appeals of Georgia, Division 2.  
July 22, 1919.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS ~~§~~ 536—PAVING ASSESSMENT—AFFIDAVIT OF ILLEGALITY—CONSTRUCTION—SUFFICIENCY.

When the affidavit of illegality is construed as a whole, and most strongly (as it must be) against the pleader, the facts therein stated show by clear implication that some amount must be due from the affiants to the city of Rome for the paving of the street upon which their property abutted; and, it not being alleged therein that such amount had been paid or tendered, the affidavit of illegality was properly dismissed on the general demurrer interposed. See *Laws Ga. 1909*, p. 1317, § 71 (e). This is true, although it is alleged in the affidavit that "no part of the sum for which said fi. fa. was issued is due," and it is "expressly denied" that deponents are "legally chargeable with any portion of the cost of said pavement." These allegations, in the light of the affidavit as a whole and the facts therein stated, are mere conclusions of the affiants, and are without any basis of fact to rest upon. See, in this connection, *Hardwick v. Dalton*, 140 Ga. 633, 79 S. E. 553; *Burns v. Atlanta*, 22 Ga. App. 381, 96 S. E. 11; s. c. (affirmed) 148 Ga. 549, 97 S. E. 536.

(a) The conclusion of the affiants that no amount is due cannot be supported by the fact stated in the affidavit that their property has been damaged in an amount larger than the amount of the fi. fa. against them by a change of grade in the street. This is "merely an attempt to set up an unliquidated demand against a judgment demand," and this could not be done in the affidavit of illegality in this case. *Hawkins v. County of Sumter*, 57 Ga. 166; *Leavel v. Frey*, 133 Ga. 723, 66 S. E. 916.

2. AFFIDAVIT OF ILLEGALITY.

No ground of the affidavit of illegality was meritorious.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Proceeding on fi. fa. by the City of Rome against Mrs. M. A. Wood and others to enforce an assessment for street paving. Judgment for plaintiff, dismissing defendants' affidavit of illegality on general demurrer, and defendants bring error. Affirmed.

M. B. Eubanks, of Rome, for plaintiffs in error.

Max Meyerhardt, of Rome, for defendant in error.

BROYLES, P. J. Judgment affirmed.

BLOODWORTH and STEPHENS, JJ., concur.

(112 S. C. 340)

DRENNAN et al. v. BROWN et al.  
(No. 10227.)

(Supreme Court of South Carolina. July 14, 1919.)

**PLEADING** ¶8(15) — **CONCLUSIONS** — **FRAUD.**

A complaint charging fraud by name, but stating no facts from which fraud is inferable, held insufficient to confer equitable jurisdiction.

Appeal from Common Pleas Circuit Court of Richland County; W. H. Townsend, Judge.

Action by Sarah F. Drennan and others against Charles O. Brown and others. Judgment for defendants, and plaintiffs appeal. Appeal dismissed.

Barnard B. Evans and Henry F. Jennings, both of Columbia, for appellants.

Benet, Shand & McGowan, of Columbia, for respondents.

**GAGE, J.** The action is at law to recover the possession of 728 acres of land just out of Columbia, in Center township, and alleged by the complaint to be in the possession of the defendant. The defendant denied plaintiff's title, and set up title in himself by adverse possession.

There is no element in the pleadings which smacks of the jurisdiction of a court of equity. It is true the complaint charges fraud by name; but it states no facts from which fraud is inferable. The circuit court has heard the cause by consent, and found all the facts, and the law, of course, for the defendant. That is an end of the case.

The appeal is dismissed.

**GARY, C. J.,** and **WATTS** and **FRASER, JJ.,** concur.

**HYDRICK, J.,** did not sit.

(112 S. C. 230)

SOUTHERN STOVE WORKS v. CON-  
VERSE SAV. BANK. (No. 10230.)

(Supreme Court of South Carolina. July 14, 1919.)

**1. APPEAL AND ERROR** ¶110—**ORDERS AP-  
PEALABLE—GRANTING NEW TRIAL.**

An order granting a new trial upon ground that error had been committed in charge to jury is appealable.

**2. PAYMENT** ¶25 — **WHAT CONSTITUTES —  
BANK ENTRIES.**

Fact that a bank to which a check had been sent for collection charged the drawer with amount of check and credited such amount to account of its correspondent bank does not constitute a payment precluding bank from later

changing entry upon drawer's failure to pay the check.

Appeal from Common Pleas Circuit Court of Spartanburg County; Thos. S. Sease, Judge.

Action by the Southern Stove Works against the Converse Savings Bank. From an order granting a new trial after a verdict for plaintiff, plaintiff appeals. Affirmed.

The check in question was drawn by the Turner-Setzler Furniture Company in favor of plaintiff on defendant bank, deposited by plaintiff in the Old State National Bank of Evansville, Ind., and sent by that bank to defendant for collection.

A portion of the court's charge reads as follows:

"I charge you that a payment may be made by a check, a transfer of credits, as well as by cash, and if the defendant charged the account of the Turner-Setzler Furniture Company with the amount of the check and credited the account of its correspondent bank with the amount of the collection in good faith, that was a payment of the check so far as the payee is concerned, and the defendant could not relieve itself of its duty to remit the proceeds of the check simply by charging it off the account of the drawer and charging the amount off of the credit account of the correspondent bank. The defendant knew, or could have known, whether or not the drawer of the check had sufficient funds on deposit to pay the check when it was paid, if so paid. And after they paid said check or charged it against the account of the drawer and in favor of the account of its correspondent bank, that was a payment, and the defendant could not revoke it by afterwards changing its books or charging it off of the account."

**Cornelius Otts,** of Spartanburg, for appellant.

**Brown & Boyd,** of Spartanburg, for respondent.

**WATTS, J.** [1] This is an appeal from an order granting a new trial, after jury had found a verdict in favor of plaintiff, by his honor Judge Sease, who had tried the case. His honor based his order on the ground that he had committed error in his charge to the jury. He granted the order, not as a matter within his discretion, because he did not approve of the verdict, but on the ground that he had misdirected the jury as to the law of the case. This makes the matter appealable; and the sole question is: Did the judge err in stating to the jury the law applicable in the case? If he did, the case must be affirmed, and appeal dismissed.

[2] His honor committed error when he instructed the jury that payment and entry on the books were the same; he confused the jury when he instructed them that entry on the book of the bank of the item received from the collecting bank constituted payment

of the item. This was error, and practically amounted to a peremptory instruction to find for the plaintiff. It is the custom of the banks to make such entry that does not constitute payment. Such entry stands when the item is actually paid. When not paid or collected, the bank has the right to charge it off. When a check or draft is drawn and handed to the bank, the bank credits its customer with that amount. If the draft, check, or item is not collected or paid, the bank has the right to deduct it from the customer's account. The entry by the bank is simply one of convenience to keep the customer's account straight. The instruction of the court in this particular was erroneous. He repeatedly and erroneously charged the jury in this particular that entry on the book of the item received from the collecting bank constituted payment of the item. His honor confused the terms of payment and entry on the books being the same. When the check was entered on the books of the bank, and forwarded for collection, it was not a payment until actually paid. His honor erroneously instructed the jury and was right in setting aside the verdict rendered and granting a new trial.

Judgment affirmed.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

(178 N. C. 43)

Ex parte WARREN. (No. 13.)

(Supreme Court of North Carolina. Sept. 10, 1919.)

HABEAS CORPUS  $\Leftrightarrow$  113(12)—REVIEW—CUSTODY OF MINOR—BEST INTEREST OF CHILD.

In a habeas corpus proceeding to determine the custody of an infant, although under Revisal 1905, §§ 1762, 1765, respondents may have the right to custody under deed from the mother as natural guardian, yet, the court also having found on sufficient testimony that the best interest of the child requires that it remain with respondents, the judgment will be affirmed.

Appeal from Superior Court, Beaufort County; Devin, Judge.

Petition by Mattie Ethel Kearns in habeas corpus against Charlie Swain, to obtain the custody of Daisy Bell Warren, a minor. From a judgment denying the petition, petitioner appeals. Affirmed.

Ward & Grimes, of Washington, N. C., for appellant.

Small, MacLean, Bragaw & Rodman, of Washington, N. C., for appellee.

HOKE, J. It appears that, about 6 years ago, the petitioner, then Mattie Perry, resi-

dent of Nash and Pitt counties, about 15 years of age, gave birth to an illegitimate child, the subject of this controversy; that about 18 months after this birth, finding it difficult, owing to reputation and conduct, to obtain any suitable abiding place, she executed a written instrument, under seal, conveying to respondents, C. E. Swain and wife, now resident in Beaufort county, the right of control and natural guardianship, conditioned upon good treatment, until said child became 21 years of age; that about 6 or 7 months thereafter the petitioner, having removed to the city of Charlotte and procured employment, there intermarried with Mr. A. J. Kearns and has one child, now living, born of the marriage. At the hearing, and on competent testimony, the court finds the following facts as more directly relevant to the inquiry:

"That the petitioner, Mrs. Mattie Kearns, was before her marriage known by the name of Mattie Perry. That she was a woman of disreputable character and gave birth to an illegitimate child, the said Daisy Perry. That when the child was about a year old that petitioner was then working in the cotton mill in Greenville, but her conduct there was bad, and she was required to leave. Thereupon she went to this respondent, Mr. Charlie Swain, and gave him the custody of the said child until she should become 21 years of age, and executed in the presence of witnesses a paper writing setting out the fact of her having so renounced the custody of her child in favor of the said Swain, copy of which said paper is hereto attached. Said Swain at that time had only known petitioner a short time, and did not know her reputation, or that the child was illegitimate. Petitioner then left, and went to Smithfield, and from there to Charlotte. That at Charlotte she married her husband, A. J. Kearns, and seems to have since her marriage led a correct life, and there is no evidence of improper conduct upon her part since that time, except her conduct in Washington last summer, when she was seen riding on the handle bars of a bicycle with one Robert Satterthwaite. That the husband of said petitioner is a man of good character, and they are living in Charlotte in a good neighborhood and members of the church. Mr. Kearns earning a living as clerk in a store, and petitioner has borne two other children. That the respondents are now living in the county of Beaufort, about six miles from the town of Washington, in a good home, in a neighborhood where the surroundings are favorable, close to church and school, and that the respondent Swain is a man of good character, and well suited and qualified to nurture and rear the child. That the respondents have no children, their only child having died in infancy some years ago. That they love the said Daisy Perry as their own child, and state that they propose to adopt the said child formally and give her their name. That they have had the custody of the said child for about four years, the child being now about five years of age, and the ties of affection between them and the said

child have grown to be on both sides such as are usual between parent and child. And the court finds that the best interests of the child would be served by permitting the child to remain in the custody of the respondents."

It is fully recognized in this state that parents have prima facie the right of custody and control of their infant children, the father preferably, when both are equally worthy, and it is held also in several decisions, dealing directly with the question, that this parental right is not universal and absolute, but may and will be made to yield, when it is shown that the welfare and best interest of the child clearly requires it. In *re Means*, 178 N. C. 307, 97 S. E. 39; *Atkinson v. Downing*, 175 N. C. 244, 95 S. E. 487, this last case citing, among other authorities, *In re Mercer Fain*, 172 N. C. 790, 90 S. E. 928; *In re Alderman*, 157 N. C. 507, 73 S. E. 126, 39 L. R. A. (N. S.) 988; *In re Mary Jane Jones*, 153 N. C. 312, 69 S. E. 217, 138 Am. St. Rep. 670; *In re Turner*, 151 N. C. 474, 66 S. E. 431; *In re Samuel Parker*, 144 N. C. 170, 56 S. E. 878; *Newsome v. Bunch*, 144 N. C. 15, 56 S. E. 509; *Latham v. Ellis*, 116 N. C. 30, 20 S. E. 1012. In *Atkinson's Case*, the basic principle with the suggested limitation upon it, is stated as follows:

"The prima facie right of parents to the care and custody of their infant is a natural and substantive one, which will not be interfered with by the courts, unless the good of the child clearly requires it. While this parental right is fully recognized in this state, it is further held that the welfare of the child is also entitled to full consideration, and on especial facts may become controlling in the disposition of its custody."

The court having found upon sufficient testimony that the best interest of the child requires that it remain for the present in the care and custody of the respondents, on the record and in accord with the principles stated, we approve both the finding and the judgment thereon, and hold that the prayer of the petitioner has been properly denied. It may be that, under the correct interpretation of our statutes on the subject, Revisal, § 1762, conferring on a father, though a minor, the right of disposition of his infant and unmarried child by deed or will, etc., and section 1765, constituting the mother the natural guardian of her infant children, as between these parties, the strictly legal right of guardianship of this child rests with respondents under its mother's deed; but, without definite ruling on that question, we prefer to rest our decision on the facts found by his honor that the welfare and best interest of the child requires that it remain, for the present, where the deed of the mother has placed it, and where, according to the evidence and findings, in a comfortable home, it has a safe and sheltered life.

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

Affirmed.

(178 N. C. 3)

NEWBERN v. NEWBERN. (No. 15.)

(Supreme Court of North Carolina. Sept. 10, 1919.)

MORTGAGES  $\S$  608½ — CONVERTING DEED INTO MORTGAGE—FRAUDULENT REPRESENTATIONS—EVIDENCE.

An action to convert a deed absolute on its face, opening with the words "This deed," printed in extra large type, into a mortgage, where signed in defendant grantee's absence by plaintiff grantor, an educated, mature man, with full opportunity to examine, cannot be maintained without testimony showing mistake, undue influence, or positive misrepresentation, made and reasonably relied upon by plaintiff.

Appeal from Superior Court, Currituck County; Bond, Judge.

Action by A. B. Newbern against J. M. Newbern. From a judgment of nonsuit, plaintiff appeals. Affirmed.

The deed from plaintiff to defendant was dated September 1, 1904, was executed on August 24, 1904, and was recorded on September 20, 1904.

Thompson & Wilson and Meekins & McMullan, all of Elizabeth City, for appellant. Ehringhaus & Small and Aydlott, Simpson & Sawyer, all of Elizabeth City, and A. M. Simmons, of Currituck, for appellee.

CLARK, C. J. This was an action by the plaintiff against his brother to convert a deed absolute on its face into a mortgage. In the original complaint there was no allegation that the clause of redemption was omitted by mistake. The amended complaint alleges that "by mistake of the draftsman who drew this paper writing the clause of redemption was omitted therefrom," and "that by reason of the ignorance or the mutual mistake of the parties, or the mistake of the plaintiff and fraud or undue advantage of the defendant, the said clause of redemption was omitted from said writing."

There was testimony by the plaintiff that he and his brother had agreed that the defendant should loan him money in addition to sums already loaned, and that the defendant should be secured by a conveyance of the plaintiff's interest in the lands conveyed by the father to them and their other brothers in remainder after his life estate, and that this agreement was made in North Carolina on plaintiff's visit here, and that he afterwards returned to Oklahoma; where he was then residing and still resides; that thereafter the defendant sent the deed in

question to the plaintiff, inclosed in an envelope with a letter stating that it was a deed in trust drawn according to the agreement, and that the plaintiff and his wife executed the deed and returned it to the defendant. It was recorded immediately. This action was not begun until September 18, 1916.

The defendant denied these allegations, and also pleaded the laches of the plaintiff, as well as the 3 and 10 year statutes of limitations. The court directed a judgment of nonsuit. There was no evidence of a mutual mistake, nor of a mistake induced by fraud. It appears by the plaintiff's testimony that he was a man of education, having spent two years at Randolph-Macon College, and that at the time of signing the deed he was a man of maturity, and older than his brother, the defendant.

In *Taylor v. Edmunds*, 176 N. C. 328, 97 S. E. 43, the court said:

"The mere fact that a grantor who can read and write signs a deed does not necessarily conclude him from showing, as between himself and the grantee, that he was induced to sign by fraud on the part of the grantee, or that he was deceived and thrown off his guard by the grantee's false statements and assurances, designedly made at the time, and reasonably relied on by him."

There are many other cases to the same effect, but in all of them there is a clear statement that there must be evidence either of "fraud in the factum"—that is, an inducement to sign by "trick or device," such as placing the instrument along with several others, as in *Taylor v. Edmunds*, 176 N. C. 325, 97 S. E. 42—or evidence of positive misrepresentation designedly made and reasonably relied upon. In all other cases the negligence of the party signing the deed to read the same when he had opportunity to so do will bar the assertion of his equity. "*Vigilantibus non dormientibus æquitas subvenit.*" *Dellinger v. Gillespie*, 118 N. C. 737, 24 S. E. 538, and cases cited thereto in *Anno. Ed.* In this case, as in that, it may be said:

"It is plain that no deceit was practiced here. It was pure negligence in the defendant not to have read the contract. There it was before him, and there was no trick or device resorted to by the plaintiff to keep him from reading it."

In this instance, the defendant was not present, but, when the deed was signed, 2,000 miles away, and the plaintiff had full opportunity to examine it. It does not appear in the testimony that there was any positive misrepresentation made and reasonably relied upon by the plaintiff. The only evidence relied on is the plaintiff's testimony that in the letter in which the defendant sent the deed he stated that he "had inclosed the deed of trust drawn as per his agreement." He

did not produce such letter, and it appears from his testimony that he kept the paper in hand a week before signing. He was a man of education, and the opening words of the paper are "This deed," printed in extra large type.

"In order to correct a deed which is absolute on its face, and to convert it into a security for debt, it must be alleged and proven that the clause of redemption was omitted by reason of ignorance, mistake, fraud, or undue advantage," and the intention must be established by proof, not merely of declarations, but of facts, dehors the deed, inconsistent with the idea of an absolute purchase. *Sowell v. Barrett*, 45 N. C. 50, citing *Streator v. Jones*, 10 N. C. 423, and *Kelly v. Bryan*, 41 N. C. 283, and saying that "otherwise titles evidenced by solemn deeds would be at all times exposed to the slippery memory of witnesses." To the same effect is *Brown v. Carson*, 45 N. C. 274, and the citations to that case, and to *Kelly v. Bryan*, *supra*, in the *Anno. Ed.*; also the most recent cases, *Newton v. Clark*, 174 N. C. 393, 93 S. E. 951, and *Williamson v. Rabon*, 177 N. C. 303, 98 S. E. 830, which are hereby cited and reaffirmed.

The judgment of nonsuit is affirmed.

(178 N. C. 5)  
**ROUGHTON v. DUNCAN et al.** (No. 16.)

(Supreme Court of North Carolina. Sept. 10, 1919.)

**PARTITION**  **49—PARTIES—INTERVENTION—TIME.**

In an action for partition of lands and accounting by defendant for timber cut therefrom, where an order restraining the cutting of the timber was modified, and the purchaser of the timber directed to pay money for same into court, it was proper to allow another party claiming paramount title to the land to intervene and assert his rights.

Appeal from Superior Court, Tyrrell County; Devin, Judge.

Action by A. W. Roughton against B. F. Duncan and others, in which B. F. Spruill intervened. From a judgment in part for intervener, plaintiff excepted and appealed. Affirmed.

This action was instituted on the 27th day of June, 1916, to have a sale for partition of the lands described in the complaint and to compel an accounting by the defendant of the timber cut from the said lands. The plaintiff alleged that he was the owner of a three-fifths undivided interest in the said lands, and that the defendant was the owner of the remaining two-fifths interest. At the time summons issued a temporary restraining order was also issued, enjoining the de-

defendant from further cutting upon said lands. At that time the original defendants, Duncan and Pritchard, were in actual adverse possession of the said lands, claiming title thereto; the latter cutting the timber under a contract with the former, and delivering the same, also under contract, to the Southern Roller Stave & Heading Company. On July 20, 1916, the cause coming on again to be heard, the restraining order was modified by consent so as to permit the defendants to continue cutting upon the condition that the money for the timber cut, both before and after the institution of the action, be paid by said company into the hands of the clerk of the superior court of Tyrrell county to await the determination of the action. Under the terms of this order the following payments were made to the said clerk by the said company:

August 14, 1916.....	\$124 85
September 12, 1916.....	82 41
September 28, 1916.....	4 31
October 30, 1916.....	119 07

At November term, 1916, one B. F. Spruill, son-in-law of Duncan, upon his own ex parte application made upon affidavit stating that he claimed to be owner of the locus in quo, and asking to be made a party defendant, was permitted by the court to intervene and become a party defendant to said suit. On September 10, 1917, Spruill filed a pleading, in which it appeared that he claimed to own the lands, in hostility to both plaintiff and defendant, upon an alleged paramount and independent title. At October special term, 1917, and at November term, 1917, orders were made in the cause, allowing "time to amend pleadings." At spring term, 1918, of said court, Spruill having failed to amend his pleading so as to allege any cause of action connected with either the plaintiff or defendant, plaintiff after due notice moved to strike out the order of the court allowing Spruill to intervene, and also to strike out the pleading filed by Spruill in consequence of such order. Motion denied, and plaintiff excepted. Upon the trial Spruill, intervener, introduced a chain of paper title deraigned from the state, and vesting in Spruill on August 2, 1916, by deed from John L. Roper Lumber Company.

At the conclusion of the intervener's testimony, and also at the conclusion of the whole evidence, plaintiff moved for judgment as of nonsuit. Motion denied, and plaintiff excepted. Judgment rendered as appears in the record, to which plaintiff excepted and appealed to the Supreme Court.

Meekins & McMullan, of Elizabeth City, for appellants.

Aydlett, Simpson & Sawyer, of Elizabeth City, and B. F. Duncan, for appellees.

Ehringhaus & Small, of Elizabeth City, for intervener.

ALLEN, J. The case of McNair v. Pope, 104 N. C. 351, 10 S. E. 252, is decisive against the plaintiff on both questions presented by the appeal. In that case the action was commenced in 1885 to establish a parol trust, and pending the action a receiver was appointed, who collected certain rents and profits from the land, which he held subject to the order of the court, and A. and W. McQueen were allowed to intervene for the purpose of claiming the rents and profits against both parties to the action under an agricultural lien executed in 1886, and it was held that "his honor very properly allowed A. and W. McQueen, the agricultural lienors, to intervene and assert their alleged rights in the fund held by the receiver," and that it was clear "that the lienors are entitled to be paid for any advances," etc.

Affirmed.

(178 N. C. 37)

ROANOKE R. & LUMBER CO. v. PRIVETTE. (No. 68.)

(Supreme Court of North Carolina. Sept. 10, 1919.)

1. TRIAL  $\S$  194(11)—INVADING PROVINCE OF JURY—INSTRUCTIONS ON EVIDENCE.

In suit for specific performance of a timber option, instructions equivalent to telling the jury that the evidence was uncontradicted that plaintiff was ready and willing to perform the option within 10 days, and that an extension of 15 days' time had been granted the plaintiff, where such contentions were controverted, were erroneous, as invading the province of the jury.

2. TENDER  $\S$  28—OFFER OF CHECK NOT LEGAL TENDER—WAIVER—BURDEN OF PROOF.

Check offered by plaintiff not being legal tender, unless defendant was willing to accept it in lieu of legal tender money, burden was on plaintiff to prove a waiver.

Appeal from Superior Court, Nash County; Bond, Judge.

Action by the Roanoke Railroad & Lumber Company against J. B. Privette. Judgment for plaintiff, and defendant appeals. Error.

Finch & Vaughan, of Nashville, W. H. Yarborough, Jr., of Louisburg, and J. S. Manning and J. Crawford Biggs, both of Raleigh, for appellant.

Austin & Davenport, of Nashville, Bunn & Spruill, of Rocky Mount, and Small, MacLean, Bragaw & Rodman, of Washington, N. C., for appellee.

CLARK, C. J. There are several assignments of error, but the defendant's brief presents but one, and that is sufficient for the



disposition of this appeal. The plaintiff sued for specific performance of an option dated March 14, 1917, alleging that within the time prescribed it offered to comply with the terms of the option, and that it was ready, able, and willing to do so. This was denied by the defendant.

The evidence is that it was verbally agreed that the plaintiff was to have an option for 10 days, and that plaintiff's agent, G. D. Taylor, prepared the option, and then read it to the defendant as if it was written for 10 days, but as a matter of fact he left the time blank, and after the option was signed and delivered he testified the defendant agreed to extend the time to 15 days. This is denied by the defendant. It is admitted by the plaintiff that the draftsman, Taylor, its agent, did not insert the 15 days in the option at the time, and it is not clear when it was done, but there is evidence that it was not till after this controversy arose. There was also evidence that Taylor read the option differently from what he had written in other respects. There was evidence on the part of the plaintiff that on March 24, 1917, within the 10 days, the plaintiff was able, ready, and willing to pay the money, and that it so notified the defendant. This is contradicted by evidence for the defendant.

There is also evidence on the part of the plaintiff tending to prove that on March 24th the plaintiff had not decided to take the land, for the plaintiff's witness, Rodman, testified that he went to Nash on March 24th to investigate the title, and plaintiff's witness, Taylor, who was its agent on the ground to secure options, and who prepared this option, wrote under date of March 26th to plaintiff's attorney, Rodman, just after the latter's trip of March 24th to Nash county, as follows:

"Dear Sir: Inclosed find plat of J. B. Privette's land, from which you can get proper description of the timber which we propose to buy from him, *provided, however, the company agrees to take it up. If they have agreed to make this purchase*, please let me have the deed as early as possible, as Mr. Privette appears to be impatient and dissatisfied."

Rodman testified that he went from Nash to Norfolk, and had a conference on March 26th with the company, and then went home to prepare the deed, and it was forwarded to Taylor, who presented it to the defendant for his signature, with check for \$17,500, on March 29th, but the defendant refused to accept the check or execute the deed, because the time limit of 10 days had then expired.

[1] The court charged the jury that "the second issue is, Was the plaintiff company at all times ready, able, and willing to comply with its part of the agreement as alleged in the complaint?" and further told them, "As to second issue, I say, if you believe the evidence in the case and find the facts to be as it tends to prove, your answer to the second issue ought to be 'yes.'" Plaintiff contends that there was a verbal extension of the option to 15 days, but this is denied by the defendant in his testimony, and the charge of the court was equivalent to telling the jury that the evidence was uncontradicted that the plaintiff was ready and willing to perform within the 10 days, yet the defendant testified that no tender or offer was made by that date, and Mr. Rodman was not sent there to make the examination of title till that date, and he did not make his report to the company till March 26th. Taylor's letter of March 26th is evidence that at that time he had received no instructions from the company to close the deal, and, so far as he knew, the company had not then decided to take the property. Under the evidence it was for the jury to say whether the company was ready and willing on March 24th to take the title. The charge of the Court was tantamount to telling the jury that the extension to 15 days had been agreed upon, though this was controverted. This was an invasion of the province of the jury.

[2] It must be noted that the check was not a legal tender, unless there had been evidence that the defendant was willing to accept a check in lieu of \$17,500 in legal tender money. The burden was on the plaintiff to prove a waiver.

Error.

(84 W. Va. 222)

STATE v. HAYMOND et al. (No. 3612.)

(Supreme Court of Appeals of West Virginia.  
May 20, 1919. Rehearing Denied Sept. 17,  
1919.)*(Syllabus by the Court.)***1. TAXATION — §855—DISPOSITION OF FORFEITED LAND—SUFFICIENCY OF POSSESSION.**

Actual and continuous possession of any part of any one of two or more contiguous tracts of land, forfeited to the state for nonentry for taxation and nonpayment of taxes, by a person claiming all of them under color of title, is a compliance with the requirements of section 8, art. 13, Constitution, and section 40, c. 81, Code (sec. 1099), as to the character of the possession.

**2. TAXATION — §852, 855—FORFEITED LANDS — CHARACTER OF POSSESSION — CONSTITUTIONAL AND STATUTORY PROVISIONS.**

In such case the former owner of the forfeited title has no legal or rightful possession, either actual or constructive. Wherefore the possession of one seeking the benefit of such title by transfer under said constitutional and statutory provisions need not be such as is required to work an ouster or a disseisin of such former owner; and, as between the state and the occupant claiming by possession and payment of taxes, the forfeited title passes by the permission of the former.

**3. TAXATION — §855 — FORFEITED LANDS — POSSESSION BY RAILROAD — CHARACTER OF POSSESSION.**

Possession of a railroad company by a tenant and its subsequent improvement of the land by construction of a culvert, roadbed, and temporary track, connecting in point of time with the previous possession by the tenant, suffices as to its character, for the purposes of the transfer provisions of the Constitution and statute, respecting forfeited land titles.

*(Additional Syllabus by Editorial Staff.)***4. APPEARANCE — §20—NOTICE—WAIVER.**

The function of process and notice being either to bring parties into court or afford them an opportunity to appear, a voluntary appearance in any proceeding amounts to a waiver of notice.

**5. REFERENCE — §65—NOTICE OF PROCEEDINGS.**

Lack of notice of the execution of an order of reference, constituting nothing more than a formal and harmless defect or irregularity, does not vitiate the report.

**6. APPEAL AND ERROR — §1044 — HARMLESS ERROR—DEFECT IN COMMISSIONER'S NOTICE—WAIVER.**

Total lack of notice being insufficient to impeach a commissioner's report, when harmless, a mere defect in a notice, waived by appearance and procedure under it, consisting of taking of full proof as if the notice had been perfect, is no ground for reversal of a decree founded upon the evidence.

Appeal from Circuit Court, Monongalia County.

Bill by the State of West Virginia, by the Commissioner of School Lands of Marion County, for the sale of land, with answer by Kate Preston Haymond and others, claiming a right to redeem and answers by J. Walter Barnes and others, by Harry Shaw, and by the Fairmont, Morgantown & Pittsburgh Railway Company. From a decree granting a redemption to Kate Preston Haymond and others, and denying all title and right of the other answering parties, the Fairmont, Morgantown & Pittsburgh Railway Company appeals. Reversed, and bill dismissed.

Henry S. Lively, of Fairmont, for appellant.  
M. L. Sturm, of Fairmont, for the State.  
James A. Meredith, of Fairmont, for appellees Haymond and others.

POFFENBARGER, J. The decree brought up by this appeal was entered in a suit instituted in the name of the state by the commissioner of school lands of Marion county, under the provisions of chapter 105 of the Code, for the sale of two small strips of land in the city of Fairmont, bordering on the Monongahela river, and described in the bill and proceedings as lot No. 1, containing .061 of an acre, and lot No. 2, containing .963 of an acre, as having been forfeited for nonentry and nonpayment of taxes in the names of the heirs of Jonathan H. Haymond. Kate Preston Haymond and other heirs of Jonathan H. Haymond appeared and filed their answer to the bill, admitting the forfeiture, claiming right in themselves to redeem, and praying permission so to do. J. Walter Barnes and others filed an answer, claiming right of redemption as to lot No. 1, by virtue of a deed executed by Jonathan H. Haymond, dated February 14, 1849. Harry Shaw filed an answer, in which he claimed himself and one B. G. Williams to have been former owners of part of lot No. 1, by possession and payment of taxes under a deed dated May 13, 1902, and executed by B. F. Gaskins and others, and himself and other persons to have been former owners of part of lot No. 2, by possession and payment of taxes under a deed executed by Benjamin G. Williams to L. C. Powell, trustee, bearing date May 8, 1902. He further avers that his part of lot No. 1 was acquired from him by condemnation proceedings by the Fairmont Morgantown & Pittsburgh Railway Company, in 1914, and that on September 1, 1905, he and his co-owners conveyed their part of lot No. 2, to said railroad company. The railroad company also filed an answer claiming title in itself, denying forfeiture, and praying dismissal of the bill. From a decree adjudging the title to have been forfeited in the name of the heirs of Jonathan H. Haymond, granting them permission to redeem the lands, and denying ti-

tle and right of redemption in any of the other defendants, the railroad company obtained this appeal.

By an order entered July 10, 1916, in the circuit court of Monongalia county, to which the cause had been transferred by an order previously entered in the circuit court of Marion county, it was referred to John Shriver, one of the commissioners in chancery of the circuit court of Monongalia county and also clerk of the circuit court of that county. He took none of the testimony, however, for it was taken before a notary public in the city of Fairmont, in his absence, by agreement of the parties. After the evidence had been taken and transmitted to him, he made a report, in which he found and held that the two tracts of land had been forfeited for non-entry and nonpayment of taxes and that the Haymond heirs were entitled to redeem them. The appellant filed seven exceptions to this report, the first four of which challenged the correctness of the commissioner's conclusions and findings, while the fifth and sixth attacked the report on special grounds, the taking of the testimony in the absence of the commissioner, and disqualification of the commissioner by reason of his incumbency of the office of clerk of the circuit court. The seventh was general and indefinite. Sustaining the sixth exception and also the seventh, on the ground of a defect in the commissioner's notice, the court set aside the report, but, upon the pleadings and evidence filed in the cause, reached conclusions and findings identical with those set forth in the commissioner's report, and decreed accordingly.

[4-6] The assignment of error based upon defectiveness of the commissioner's notice is not well taken. All of the evidence had been taken in the absence of the commissioner, under an agreement of the parties. The appellant had appeared, cross-examined witnesses, and taken its own proof as fully and completely as it could have done or would have done under the most formal and complete notice. The function of process and notice is either to bring parties into court, or afford them an opportunity to appear, and a voluntary appearance in any proceeding amounts to a waiver of notice. *State v. Thacker Coal & Coke Co.*, 49 W. Va. 140, 38 S. E. 539; *Mahany v. Kephart*, 15 W. Va. 609; *Harvey v. Skipwith*, 16 Grat. (Va.) 410. Lack of notice of the execution of an order of reference, constituting nothing more than a formal and harmless defect or irregularity, does not vitiate the report. *Taylor v. Dorr*, 43 W. Va. 351, 27 S. E. 317; *Gardner v. Field*, 5 Gray (Mass.) 600; *Kellogg v. Putnam*, 11 Mich. 344. Total lack of notice being insufficient to impeach a commissioner's report, when harmless, a mere defect in a notice, waived by appearance and procedure under it, consisting of the taking of full proof, as if the notice had been perfect, constitutes no ground for reversal of a decree founded upon the evidence.

Lot No. 1 is a triangular strip fronting on the river, not more than 30 or 40 feet wide at the northeastern end, pointed at the southwestern end, and crossed by a highway bridged over the river near the narrow end. It consists of bluff, river bank, and possibly a little beach, and has no visible building or structure on any part of it, save the bridge. Lot No. 2 is a narrow strip bordering on the river and similar in character to lot No. 1. At the northeastern end it is less than 100 feet wide, and at the other not more than 30. There is no structure of any kind on it, unless it be the ends of the wing walls of a culvert or bridge constructed over a small stream near the north end by the railroad company, and a few railroad ties and rails temporarily laid on part of it. Generally speaking, both lots have been used, for a half century or more, only as a dumping ground for refuse and garbage of various kinds. Numerous witnesses for the state and the Haymond heirs, well acquainted with the property for many years, some of them 50 or 60 years, say they have never seen any inclosure, use, or occupancy of it, indicative of ownership. One or two of them say there was a small house or shack on the larger tract for a while about the year 1863, but nobody knows under whose claim of title it was built or occupied.

The bill and the answer of the Haymond heirs proceed upon the theory that Haymond never parted with his title to the river front. Lot No. 2 lies between the river and the old road known as the mill road, back of which and on parts of the original Haymond tract, conveyed to divers people many years ago, there are numerous substantial improvements. One of these, known as the "Old Pottery Building" and recently demolished, was included in the deed from Powell, trustee, and others, to the railroad company. The Holt deed included two or three dwelling houses back of the mill road, which seem to be still standing and used. Back of lot No. 1 there are very substantial buildings, but they were not included in the railroad company's acquisitions. At least two deeds executed by Jonathan H. Haymond, one to John A. Gallahue, dated July 6, 1847, conveying land back of lot No. 2, and possibly within it, and another to Harrison and Elisha M. Hagans, dated August 12, 1847, and conveying land back of lot No. 1, if not part of lot No. 1 itself, made reservations respecting the river front. It is doubtful whether the deed to Gallahue reserved more than a mere easement, but the other clearly excepts a narrow strip of land adjoining the river. These reservations or exceptions, however, together with the real or apparent nonuse of the river front in lot No. 1 and the strip of land between the mill road and the river in lot No. 2, constitute the basis of the contention in favor of the state and the Haymond heirs.

The land in dispute has not been taxed in the name of Haymond or his heirs since some

time prior to the year 1872, and the Haymond title, if any remained undisposed of, has been forfeited for many years, and transferred to occupants under claim or color of title for the requisite periods of time, paying taxes for the requisite number of years, if such there were.

The railroad company holds a deed from John S. Scott, dated January 4, 1906, for the point of lot No. 1 above the bridge, and other land, constituting a single boundary. A small part of lot No. 1, lying northeast of the bridge, it obtained from Harry Shaw and B. G. Williams by a condemnation proceeding, in 1914, after long litigation. For the residue it holds a quitclaim deed, executed by Charles L. Barnes and dated October 21, 1905. By the same deed Barnes conveyed to it a part of lot No. 2 and several hundred lineal feet of additional river frontage adjoining lot No. 2 at the southern end thereof. Clyde S. Holt, by a deed dated September 9, 1905, and L. C. Powell, trustee, and others, by a deed dated September 1, 1905, conveyed the residue of lot No. 2 to the railroad company. Scott's paper title, going to "the river," begins with a deed from Smith Crane and others to William W. Scott, dated August 22, 1865, and there has been possession and payment of taxes, under it for a great many years, possibly from the date of the Crane deed. The Gaskins deed to B. G. Williams, dated May 13, 1902, and the deed from Williams to Shaw, dated January 2, 1903, conveyed a lot running from Water street to the river, and from 1902 until 1914 Williams and Shaw were admittedly in possession of all of it, except the narrow strip along the river, and paid taxes on the whole of it. Such use as they and Scott made of the steep bluff along the river and possibly a few feet on top of it was not conspicuous, and might not comply with the requirements of the law of adverse possession. The tracts or parcels conveyed, respectively, by Barnes, Holt, and Powell and others to the railroad company are all contiguous, and the Powell deed rightfully conveys land outside of lot No. 2, known as the "Old Pottery" property, of which the grantors of the railroad company had incontrovertible possession by a tenant, from the date of their purchase until that of their conveyance to the railroad company, and that company held such possession for the period of five or six years after the conveyance, collecting rent from the tenant. Besides, commencing in 1908 or 1909, it graded a roadbed and laid a temporary track for a considerable distance through that parcel of land and at least one other contiguous lot conveyed to it by the Holt deed. It also built a large concrete culvert on the property outside of lot No. 2. The work of construction was no doubt delayed by the railroad company's difficulty in obtaining title to the right of way through the Williams and Shaw lot. Soon after that obstacle was surmounted, this suit was commenced; the summons

having been made returnable to October rules, 1915. For some reason not clearly revealed, the work of construction ceased some years ago, but the evidence of it remains on the ground.

[1, 2] The strips and lots of land conveyed by Powell and others, Holt, and Barnes are all contiguous. They include all of lot No. 2, and extend beyond it to another strip conveyed to the railroad company by Jamison and Crowl, which connects with still another conveyed by Barnes, lying partly within and partly without lot No. 1, and adjoining the lot obtained from Williams and Shaw by the condemnation proceedings. This makes the Barnes lot within lot No. 1 contiguous. The actual possession of part of the land conveyed by Powell and others and one of the lots conveyed by Holt is regarded in law as actual possession of all of these contiguous tracts or lots. *Camden v. West Branch Lumber Co.*, 59 W. Va. 148, 53 S. E. 409; *State v. Harman*, 57 W. Va. 447, 463, 50 S. E. 828; *Overton v. Davison*, 1 Grat. (Va.) 212, 42 Am. Dec. 544; *Sharp v. Shenandoah Co.*, 100 Va. 34, 40 S. E. 103; *Rich v. Braxton*, 158 U. S. 375, 15 Sup. Ct. 1006, 39 L. Ed. 1022. Counsel for the state and for the Haymond heirs erroneously assume that the actual possession required by section 3 of article 13 of the Constitution and section 40 of chapter 31, of the Code (sec. 1099), as an element and condition of the transfer of forfeited land titles, must have all of the requisites of adverse possession, within the meaning of the law of disseisin and ouster. As to lands forfeited to the state for nonentry and nonpayment of taxes, or acquired in any such manner as to make them transferable under the Constitution and statute, there can be no such thing as adverse possession. *Lewis v. Yates*, 62 W. Va. 575, 59 S. E. 1073; *State v. Morgan*, 75 W. Va. 92, 83 S. E. 288; *State v. Harman*, 57 W. Va. 447, 50 S. E. 828; *State v. King*, 64 W. Va. 545, 63 S. E. 495; *Levasser v. Washburn*, 11 Grat. (Va.) 572; *Staats v. Board*, 10 Grat. (Va.) 400. As defined by the Constitution and the statute themselves, the requisites of possession for such purpose are only actuality and continuousness. Forfeiture vests title in the state, and the state cannot be disseised nor ousted by any kind of possession. Continued possession and payment of taxes by the former owner, after forfeiture, amounts to nothing. *Lewis v. Yates*, cited. Having occasioned the forfeiture, he cannot take the forfeited title by transfer. Constitution, art. 13, § 3; Code, c. 31, § 40 (sec. 1099). By actual and continuous possession and payment of taxes, one who has not caused the forfeiture may obtain the title from the state, not against her will, but agreeably to her will. He is invited and encouraged to comply with the conditions vesting the forfeited title in him. "For the present purpose, it is not a question of adverse possession under the statute of limitations." Judge Brannon, in *State v. Harman*, cited.

Even in the law of adverse possession, possession of one of two or more contiguous tracts is possession of all, subject to this qualification: That, in the case of conflicting paper title, the possession under the inferior title, to work an ouster, must be within the interlock, the land covered by both titles. *Camden v. West Branch Lumber Co.*, cited; *Overton v. Davisson*, cited. The authorities relied upon by counsel for the state and the Haymond heirs, in resistance of the effect of actual possession of one of several contiguous tracts, simply affirm and apply this qualification of the general rule. It has no application here, for the Haymond heirs had no title after the forfeiture. As they were no longer seised, there was nothing of which to disseise them, nor anything from which to oust them. Hence the actual possession of the occupants extended to the limits of their color of title, under the common-law rule as to possession in the absence of a conflict of titles, by permission of the state. Such also was the effect of possession above the mill road by occupants whose color of title included parts of the road and of the land between it and the river. The Scott title went to the river, and there was possession, accompanied by payment of taxes, for a great many years, vesting the forfeited Haymond title in the occupants to the full extent of their color of title. Williams and Shaw held possession and paid taxes under a deed going to the river for a period amply sufficient to vest the forfeited title in them, and their title to part of the land was acquired by the railroad company. From 1881 to about 1897, Thos. D. Harden occupied and used the "Old Pottery" property under deeds extending to the river. For the purpose of this litigation, that possession extended to the river. The decision cited for the proposition that a street or road between two tracts of land renders them non-contiguous, or denies the efficacy of a deed for both, as color of title, *Bailey v. Carleton*, 12 N. H. 9, 37 Am. Dec. 190, does not sustain it. Since a public road is no more than an easement, the tracts between which it runs are necessarily contiguous.

[3] Continuity of the possession of the railroad company is sufficiently established. Before January 1, 1900, it began the grading of its roadbed and afterwards laid a temporary track on it which still remains there, and the culvert constructed across the stream is a substantial structure. Both clearly indicate devotion of the property to railroad purposes. In addition to this, the corners, except at the river, are substantially marked, and, recently, conspicuous notices not to dump refuse on the river bank have been put up. Besides, they had possession of the property conveyed by Powell and others, through a tenant, Hentzy, for five years after the date of that deed, which period connects with the date of the grading and track laying.

The period of actual continuous possession of all the parcels, as herein defined, except the Scott and Williams and Shaw lots, has been amply sufficient, and the taxes thereon have been regularly paid. Scott and Williams and Shaw clearly had title by possession and payment of taxes, which the railroad company has acquired.

When this state of the title was shown, it was the duty of the trial court to dismiss the suit as to the parcels of land in question. Code, c. 105, § 6 (sec. 4438). Hence the decree complained of will be reversed, and the bill dismissed.

(84 W. Va. 227)

COWHERD v. FLEMING et al. (No. 3770.)

(Supreme Court of Appeals of West Virginia.  
May 13, 1919. Rehearing Denied Sept. 17,  
1919.)

*(Syllabus by the Court.)*

1. PERPETUITIES §4(12)—LIFE ESTATE AND REMAINDER—VESTING OF ESTATES.

By his will a testator gave, devised and bequeathed to his executors in trust for his daughter during her natural lifetime all his property real and personal, and provided that after her death whatever remained should go to his lawful heirs, manifestly intending his grandchildren, excepting those specifically named, and also provided that said estate should be held in trust by his executors for twenty-five years, and after eight years and not until then his daughter should be paid a certain sum per annum for the remainder of the trust period, after which period said property should "vest" in his daughter for her lifetime, and after her death whatever remained he willed, devised and bequeathed to those so designated as remaindermen. Properly construed the life estate and also the estate in remainder given by the will vested at the time of the testator's death and were not postponed except in possession beyond the period of the trust thereby created.

2. WILLS §457—INSTRUCTION—TECHNICAL WORDS.

The general rule that technical words are presumed to have been used in their technical sense does not control when considered in conjunction with other expressions of an instrument a different meaning was manifestly intended.

3. WILLS §448—CONSTRUCTION—AVOIDANCE OF INTESTACY—TECHNICAL WORDS.

If possible a will should be so interpreted as to avoid intestacy, and in such cases the context should control technical words, and not the words the context.

*(Additional Syllabus by Editorial Staff.)*

4. WILLS §449—PRESUMPTION AGAINST INTESTACY.

There is a presumption against intestacy, which aids general and indefinite language in a will; the presumption being that when a tes-

tator makes a will he intends to dispose of his whole estate, and if possible the will should be so interpreted as to avoid total or partial intestacy.

#### 5. WILLS ⇨629—VESTED REMAINDERS.

The law favors the vesting of estates, and when conditional the condition, when possible, will be construed as a condition subsequent, so as to immediately vest the estate.

#### 6. WILLS ⇨440—CONSTRUCTION.

Where the language of a will is clear, the courts have nothing to do but to carry it into effect.

#### Appeal from Circuit Court, Taylor County.

Bill by Carrie A. Cowherd against O. J. Fleming and others. From a decree for plaintiff, defendants appeal. Reversed, and bill dismissed.

Blue & McCabe, of Charleston, for appellants.

John L. Hechmer and J. Guy Allender, both of Grafton, for appellee.

MILLER, P. The executors of the will of the late Leonard Mallonee obtained this appeal from the decree below pronounced on the bill and their demurrer and answer thereto, adjudging said will to be void under the laws of the state, because violative of the rule against perpetuities, and that plaintiff being the sole surviving heir at law of decedent was entitled to the whole of said estate, and referring the cause to a commissioner to ascertain said estate and for a settlement of the accounts of appellants.

[1] The provisions of the will, including those regarded as voiding it under the ancient rule against restraints upon alienation and remote vestments of estates, are as follows:

"I give devise and bequeath to my said executors, in trust for my daughter Carrie A. Cowherd, during her life time, all of my property, real, personal, mixed, stocks, bonds, money, and all other property whatsoever, upon the condition hereinafter set out.

"I direct that said executors shall cause all of said property to remain intact as it shall be at my death, unless they shall agree that it is for the best interest of my estate that it, or some part of it, should be otherwise disposed of, in which case they are empowered to dispose of any part of it they shall think is to the best interest of my said estate; I also direct that my said executors shall have the power to invest any money which may come into their hands at the time of my death or at any time thereafter in such manner as they shall deem for the best interest of my estate, but I direct that all money belonging to said estate not so invested shall be deposited in the First National Bank of Grafton, West Virginia.

"I have heretofore advanced certain amounts of my estate in both money and property to my daughter Carrie A. Cowherd, and at my death

she will receive \$8,000 in life insurance which is payable to her; said advancements and said insurance I deem should be sufficient to support her comfortably for 8 years after my death; and I therefore direct that after eight years after my death, and not before the expiration of said eight years, my said executors shall pay to my said daughter, Carrie A. Cowherd, the sum of \$600.00 per year out of my said estate for a period of 17 years, making a total of 25 years after my death, after which 25 years said property shall vest in my said daughter for her life time; and after her death, whatever property remains I will, devise and bequeath to my lawful heirs and distributees other than my granddaughters Cornelia H. Cowherd, Katherine S. Cowherd and Carrie A. Cowherd, which three granddaughters shall take no part of my estate; but should my said daughter die within 25 years after my death, then said executors shall hold said estate intact in trust for my said heirs and distributees other than Cornelia H. Cowherd, Katherine S. Cowherd and Carrie A. Cowherd until the end of said period of 25 years, after which it shall vest in the said heirs and distributees other than Cornelia H. Cowherd, Katherine S. Cowherd and Carrie A. Cowherd."

We think it plainly apparent from these provisions of the will that the plan or scheme of the testator was to give his entire estate to his daughter Carrie, his only child, for life, with remainder to her children, erroneously described as his heirs, excepting the three granddaughters mentioned, but to be held by his executors in trust as provided, for twenty-five years, and for the reasons assigned, postponing possession and the full usufruct thereof for the period of the trust in any event. That the testator meant grandchildren when he made use of the words "my lawful heirs and distributees" is plainly manifest by the context, for he specifically excepts three granddaughters from the class of persons named as remaindermen. His intention is thus made clear; there is no room left for doubt or uncertainty.

That such was the plain purpose of the testator we do not see how there can be any doubt. Are the words employed in the will competent to work out this result and avoid the rule invoked against it? We think they are. The only argument presented against this construction is that by force of the words of the third paragraph quoted, "after which 25 years said property shall vest in my said daughter for her life time," and those following the provision conditioned on the death of the daughter within the period of the trust and the expiration thereof, namely, "after which it shall vest in the said heirs and distributees other than" etc., the testator thereby postponed vesting of the life estate in the daughter as well as the estate in the remainder beyond the period of a life in being and twenty-one years and ten months. But if,

as we may, we read the words of the third paragraph first quoted in connection with the first paragraph giving a life estate to Mrs. Cowherd, it is clear that the testator meant that the estate for life and the estate in remainder should both vest immediately on his death, but to postpone possession and full enjoyment during the period of the trust. So transposed the will would read:

"I give, devise and bequeath to my said executors, in trust for my daughter Carrie A. Cowherd during her life time all my property real, personal, mixed, stocks, bonds, money and all other property whatsoever, and after her death whatever property remains I will, devise and bequeath to my lawful heirs and distributees other than my granddaughters," etc.

Of course, if we should give to the word "vest" used in these clauses its strict technical meaning, contrary to the manifest purpose of the testator, the result might be different, but this would do violence to the plain intent of the testator.

[2, 3] The general rule invoked, that technical words are presumed to have been used in their technical sense, has very little, if any, application if when considered in conjunction with other expressions or provisions of the instrument a different meaning was manifestly intended. *Hinton v. Milburn's Ex'rs*, 23 W. Va. 166; *Baer v. Forbes*, 48 W. Va. 208, 36 S. E. 364; *Collins v. Feather*, 52 W. Va. 107, 43 S. E. 323, 61 L. R. A. 660, 94 Am. St. Rep. 912. And where as here the same word is used in several places in the instrument, it is to be understood in the same sense. *Tomlinson v. Nickell*, 24 W. Va. 148, 149. But, as this case holds, even this rule has its exceptions; that if a word having a technical meaning is accompanied by a context in a clause showing that the testator did not intend it to be understood in its technical sense, but when used in another clause in reference to a different subject unaccompanied by anything explanatory of it, it is to receive its technical meaning.

[4-6] There is a presumption against intestacy, and as our cases hold general and indefinite language in a will is aided by this presumption. The presumption is that when a testator makes a will he intends to dispose of his whole estate, and if possible the will should be so interpreted as to avoid total or partial intestacy. *Wildell Lumber*

*Co. v. Turk*, 75 W. Va. 26, 83 S. E. 83, and cases cited. The theory of the decree that by the provisions of the will vesting of both the life estate and the estate in remainder were postponed for twenty-five years, the period of the trust, does not well comport with the provision for payment by the trustees to Mrs. Cowherd after eight years of the sum of six hundred dollars per annum for the remainder of that period, nor with the clause providing that if then living she should come into full possession and control of the whole estate. Nor is it consistent with the plain gift of the life estate in the first paragraph, for the condition following limiting the enjoyment thereof for twenty-five years can in no way affect the vesting of the estate. There is here no restraint on the power of alienation of the estate given, so as to bring the devises and bequests within the rule, and there is a well defined and specific disposition by the testator of his whole estate. Shall we allow his will to be defeated by technical words, and render him intestate? The rule, as already indicated, is that in such cases the context will control the words, and not the words the context, where the context renders the meaning clear. *Hope Nat. Gas Co. v. Shriver*, 75 W. Va. 401, 83 S. E. 1011. The law favors vesting of estates, and when conditional, the condition when possible will be construed as a condition subsequent, so as to confer immediate vesting of the estate. *Suter v. Suter*, 68 W. Va. 690, 70 S. E. 705, Ann. Cas. 1912B, 405. Where the language of the will is as clear and certain as in this case, we have little need for calling into requisition rules of construction. In such cases the courts have nothing to do but to carry it into effect. *Couch v. Eastham*, 29 W. Va. 784, 3 S. E. 23.

What the rights of the remaindermen may be, as to the possession of the property devised to them, in the event of the death of the life tenant within the period of the trust created in the trustees, a contingency not now involved, we do not undertake to decide. That question we properly reserve as involving a condition which may never arise, and it should not be anticipated and concluded by this decision. *Prichard, Trustee, v. Prichard et al.*, 98 S. E. 877.

Our conclusion is to reverse the decree and dismiss the bill.

(84 W. Va. 139)

**McCLAIN v. MARIETTA TORPEDO CO.**  
(No. 3717.)(Supreme Court of Appeals of West Virginia.  
May 6, 1919. Dissenting Opinion May 20,  
1919. Rehearing Denied Sept. 17, 1919.)*(Syllabus by the Court.)***1. APPEAL AND ERROR — 1002—EXPLOSIVES  
— 10 — EVIDENCE — QUESTION FOR JURY —  
VERDICT.**

Where the testimony of witnesses in respect to the manner in which frozen nitroglycerine was being thawed, preparatory to shooting an oil well, which exploded, causing the death of plaintiff's intestate, one of such witnesses testifying that it exploded while suspended in a barrel of water into which a steam pipe was inserted and the steam turned on, which was admittedly negligent, and another, the expert who had charge of the nitroglycerine and was employed by defendant to shoot the well, testifying that he laid it carefully on the ground, and did not put it in the barrel, the question of negligence is for the jury to determine from the conflicting evidence and the physical results produced by the explosion; and, unless such physical results are of such conclusive character as to demonstrate the falsity of the testimony of one or the other of said witnesses, the verdict should not be disturbed.

**2. TRIAL — 27—DISCRETION OF TRIAL COURT  
— EXPERIMENT.**

The trial court may, within its discretion, grant or refuse permission to make an experiment in the presence of the jury, for the purpose of demonstrating the falsity of certain testimony.

**3. COMPANION CASE.**

The points of the syllabus in *Merrill v. Marietta Torpedo Co.*, 79 W. Va. 669, 92 S. E. 112, L. R. A. 1917F, 1043, approved.

Miller, P., dissenting.

Error to Circuit Court, Roane County.

Action by Estella F. McClain, administratrix, against the Marietta Torpedo Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Pendleton, Mathews & Bell, of Spencer, for plaintiff in error.

Thos. P. Ryan and H. C. Ferguson, both of Spencer, and Chas. E. Hogg, of Point Pleasant, for defendant in error.

**WILLIAMS, J.** Plaintiff, administratrix of her deceased husband, Clark R. McClain, recovered a judgment against the Marietta Torpedo Company in an action of trespass for negligently causing his death, and defendant brings error.

[1] His death was caused by the premature explosion of nitroglycerine at an oil well in Roane county, known as the Jacob Reynolds well No. 3, where defendant's agent, William Norris, had taken it for the purpose of shoot-

ing the well. It was the same accident by which Edward P. Merrill was injured, and for which he recovered a judgment against this same defendant, which was affirmed on writ of error to this court. *Merrill v. Marietta Torpedo Co.*, 79 W. Va. 669, 92 S. E. 112, L. R. A. 1917F, 1043.

Defendant is engaged in the manufacture of nitroglycerine and shooting oil wells, and employed William Norris as its agent to shoot wells. The facts and circumstances disclosed by the evidence in this case are very much the same as they were in the *Merrill Case*. Some additional facts, however, appear in this case that were not brought out in the other. Here a carefully prepared map was filed, showing the relative locations of the oil well derrick, boiler, engine, belt house walkway leading from the engine to the derrick; the 60-barrel water tank; the barrel of water in which plaintiff claims the nitroglycerine exploded, the place on the ground between the barrel and the tank where witness Norris swears he laid the cans containing the nitroglycerine and where defendant contends it exploded; Norris's wagon in which he hauled the nitroglycerine to the well; Merrill's position and the position of deceased's body immediately after the explosion, and other objects; and testimony tending to prove the ground was torn up by the force of the explosion between the barrel and the tank, that mud was spattered up on the derrick, and that Merrill, the chief witness for plaintiff, had made contradictory statements concerning the cause of the accident. Otherwise, the evidence in the two cases is not materially different.

The declaration contains a number of counts, some of them counting on the negligent manner in which defendant handled the nitroglycerine, without specifying any particular act of negligence causing it to explode. But the only count to sustain which any evidence was offered alleges that the specific act of negligence causing the injury was the suspending of two cans of frozen nitroglycerine, containing 8 quarts each, in a barrel of water into which one end of a steam pipe attached to the engine had been inserted, and then turning the steam in for the purpose of heating the water and thawing the nitroglycerine, so that it could be transferred from the cans into torpedoes and lowered into the well.

Only two eyewitnesses testify concerning the cause of the accident, Merrill for the plaintiff, and Norris for defendant, the former a well driller in the employ of the Ohio Fuel Oil Company, the owner of the well, and the latter the servant and agent of the Marietta Torpedo Company, who had contracted to shoot the well. These witnesses were not fellow servants, nor was deceased, who was a tool dresser employed by the Ohio



Fuel Oil Company, a fellow servant of Norris. Shortly after noon on March 30, 1914, Norris brought to the well, in a spring wagon, 40 quarts of nitroglycerine put up in cans of 8 quarts each. He unhitched his horses, tied them some distance away from the wagon, and left it standing in the road, above and not far from the engine house. Witness Merrill and deceased then got an oil barrel that had been used about the derrick, and placed it on the floor of the engine house at an opening in the wall, allowing a portion of the bottom of the barrel to rest on the board walk outside, which was on a level with the floor. Deceased assisted Norris in connecting a steam pipe to the grease cup of the engine, extending the pipe to a point above, and directly over, the barrel, and to this another joint leading down into and near the bottom of the barrel was attached, thus forming an ell. Merrill filled the barrel with water from the tank, and Norris then got some nails and drove them into the tops of the staves, for the purpose of suspending the cans in the water by means of strings tied to the handles of the cans. Up to this time there is no conflict in the testimony.

Norris swears, after the steam was turned into the barrel, that he went up to the wagon, got two cans of nitroglycerine and carried them down, one in each hand, to the engine house, and carefully laid them down on the ground between the barrel and the water tank; that he put his hand in the water to ascertain whether it was sufficiently heated, to thaw the nitroglycerine, and, finding that it was, told deceased to disconnect the steam pipe, and immediately returned to the wagon to get two more cans; that he was at the upper side of the wagon, facing the engine house, in the act of lifting the cans out when Merrill, who was then at the flywheel of the engine, endeavoring to attach the clamps that hold the reel used to let the measuring line down in the well in order to ascertain its depth, preparatory to lowering the nitroglycerine into it, asked witness on which side of the clamps the washers were intended to go; that witness replied to him to leave them as they were, and stooped to get an awl out of his tool box, with which to uncork the cans, and just as he raised up the explosion occurred; that the end of the engine house next to the wagon was open, and he could plainly see Merrill, but that a corner of the engine house obstructed his view of the barrel and the two cans which he had laid on the ground; that he did not then see McClain, but when he started to the wagon he left him in the act of disconnecting the steam pipe from the barrel with his hands; that he and McClain had connected it with their hands, and McClain was endeavoring to disconnect it in the same manner; that it could not have been more than two minutes after he started to the wagon before the explosion occurred, and that he did not put the

cans in the barrel, nor direct any one else to do so; and that they were not in it when he started back to the wagon.

On the other hand, Merrill swears he saw the cans in the barrel just before the explosion, and the steam pipe was still connected and the steam going into the barrel, causing the water to bubble up; that a moment before the explosion, when he was asking Norris about the clamps, deceased was standing on the opposite side of the engine from him, looking into a tool box. Witness Belt, for the plaintiff, says he was at the well just before the accident, passed by the barrel, and did not see the cans in it, nor did he see them on the ground. But he says he left five or six minutes before the explosion, and had gone 150 or 200 yards, walking up hill carrying a pretty heavy load, before it occurred. His evidence does not contradict either Merrill or Norris, and has no probative value on the vital question whether the nitroglycerine was in the barrel or on the ground when it exploded. There was time enough, after he left the engine house, for Norris to bring it from the wagon and either put it in the barrel or lay it on the ground and return to the wagon, which was only 50 or 60 feet away.

A number of witnesses, qualified by their experience in handling nitroglycerine to speak as experts, say the usual and approved method of thawing frozen nitroglycerine is to immerse it in water previously heated to 120° to 160° Fahrenheit; and, if Norris' testimony is true, he was preparing to thaw it in that manner. All of the experts say it is considered dangerous to thaw it by suspending it in cold water and then heating the water, or by allowing the steam to be discharged, creating a commotion in the water while the nitroglycerine is suspended in it.

A sharp and irreconcilable conflict exists between Norris and Merrill, and counsel for defendant insist that the testimony of the latter is overcome by the physical facts and conditions produced by the explosion, some of which are not disputed. Staves of the barrel, in which the explosion is alleged to have occurred, were sheared off by the force of the explosion, from the second hoop above the bottom, on the side next to the water tank, sloping up to the top on the opposite side, leaving the bottom apparently intact. This fact, they say, demonstrates the falsity of Merrill's testimony, because expert witnesses express the opinion that if 16 quarts of nitroglycerine had exploded in the barrel, it would have blown the barrel to pieces and torn up the platform upon which it rested. Three or four witnesses for defendant testified concerning an experiment witnessed by them a day or two before the trial. A pound and ten ounces, about a pint, of nitroglycerine was placed in a can, the can was then suspended in the same kind of a barrel, a common oil barrel, filled to within three inches of the top with water, and set upon a plat-

form, erected out of timbers of the same dimensions as those used in the floor of the engine house, and the nitroglycerine was exploded by means of a fuse and cap, and they say the barrel was blown to pieces, the timbers in the platform broken up, and only two or three small pieces of the barrel staves could be found. The expert witnesses also give it as their opinion that nitroglycerine will not explode automatically or spontaneously; that it must be exploded by some extraneous agency; that the explosion operates with equal force in all directions; and that, in their opinion, the explosion could not have taken place in the barrel, as Merrill says it did, without totally destroying the barrel. But it is not shown that these witnesses ever experimented with frozen nitroglycerine in a similar manner and under like circumstances to those which Merrill says existed here. If Merrill's testimony is true, the explosion occurred in the barrel, and was caused either by the water becoming too hot, or by the steam creating a commotion in the water and causing the cans to strike against each other or against the side of the barrel, and if it occurred in either way it would show negligence on the part of defendant's agent Norris, for it is proven, and not controverted, that that manner of thawing it is considered dangerous. Merrill says McClain was not at the barrel then, but was in the engine house on the farther side of the engine house from the barrel, and that he himself was at the flywheel of the engine, on the side next to the barrel. It must be admitted that the physical facts tend to contradict Merrill, but it cannot be said they are of such conclusive character as to outweigh his positive testimony. The results of an explosion of nitroglycerine are not always the same, and are not matters of such common experience and knowledge as to justify the conclusion, under the circumstances and conditions here shown to exist, that it could not possibly have exploded in the barrel without destroying it entirely. Explosions do not always produce uniform results, and the results produced in this instance were evidential facts for the jury to weigh and consider, along with the testimony of witnesses, and we cannot say they did not give them such probative value as in their judgment was proper. If the explosion did not take place as Merrill says it did, it is not accounted for in any manner shown by the record. For the space of two or three minutes preceding the explosion, according to Norris' testimony, after he laid the two cans down on the ground and returned to the wagon for more, he did not see McClain. Merrill places him farther from the barrel than himself, the instant before the explosion, and they were the only persons near it; and all the expert witnesses, none of whom are contradicted in that respect, say nitroglycerine will not ex-

plode spontaneously. If Norris' testimony is true, the manner in which he says he handled the nitroglycerine and was preparing to thaw it was very careful, according to the opinions of all the expert witnesses, including himself, and he has had many years' experience and says he has shot hundreds of wells. The jury has passed on the credibility of these two witnesses, and has considered the results of the explosion, affecting their credibility, and, in answer to certain interrogatories propounded to it by the court, at the request of defendant, has returned a special verdict, finding that Norris placed the nitroglycerine in the barrel after he and McClain had connected the steam pipes and before he returned to the wagon; that McClain and Norris made the steam pipe connections, and that it believed Norris told deceased to disconnect the pipe, but that it did not know whether deceased had attempted to disconnect the pipe or not, and did not know how far McClain was away from the nitroglycerine when it exploded, and did not believe the cans were on the ground. These special findings harmonize with the general verdict, and those questions which the jury were unable to answer are not essential to establish negligence on the part of defendant.

Two witnesses for defendant testify that Merrill, just after he came out of the hospital and before he brought his action against this defendant, said in their presence that he did not know how to account for the accident, unless McClain dropped a piece of pipe or a monkey-wrench on the cans. Merrill denies making this statement. A copy of the original declaration in Merrill's case was introduced for the purpose of showing that it was framed on a different theory of negligence from that averred in his amended declaration and in the declaration in this action, that the original declaration did not count upon negligence in suspending the cans in the barrel of water and then turning the steam into the barrel, but that it was thereafter amended so as to do so. This apparent inconsistency between Merrill's averments in his original declaration and his testimony is explained by witness Boggess, a member of the firm of Ryan & Boggess, who prepared the declaration. Boggess says Merrill's hearing was so much affected as a result of his injury that it was very difficult to communicate with him, and that he got most of the data from which the declaration was prepared from Merrill's brother. The jury considered all these matters offered to impeach the witness and has determined the facts upon the conflicting oral testimony, and the court has no right to disturb its finding in respect thereto.

Two or three witnesses say the ground seemed to be blown up between the barrel and the water tank, and one of them, O. F.

Bergwin, drilling foreman for the Ohio Fuel Oil Company, says he was not present when the explosion occurred, but came there a very short time afterwards on March 30th, and while working around the place stepped in a hole filled with mud and water, between the place where the water tank stood and where the barrel sat. But other witnesses, who came on the ground immediately after the explosion, say they did not see any hole, or notice that the ground had been torn up. The boards and timbers of the engine house and the staves of the water tank were scattered by the force of the explosion in every direction, only a few of the staves of the tank, on the side farthest from the point of the explosion, being left standing. Merrill, in an unconscious condition, and the body of deceased were found on the boardwalk leading from the engine house along by the belt shed to the derrick, about 25 feet from the barrel, Merrill being the farthest from the barrel. H. H. Robey, an undertaker, who prepared the body of deceased for burial, in describing the condition of his body says the head, left side, and left arm were mashed; that all the bones of the left arm were broken, and the head mashed into a pulp, but that the skin was not broken badly, and the face was not unrecognizable, and the legs and right arm were intact; that the left hand was in fair condition, but that from the wrist up to the shoulder the left arm was considerable lacerated. It is impossible to tell from the position of the body just where McClain was standing, and whether the explosion occurred in the barrel or on the ground, because the same result might have been produced by the explosion if it occurred at either of these points. It is difficult to explain, if McClain was standing where Merrill says he was, on the opposite side of the engine, how his body could have been thrown in the same direction that Merrill was. The jury may have concluded Merrill was mistaken as to the exact location of deceased at the instant of the explosion, or that his body might have been blown against some of the timbers of the shed and its course thereby deflected. But it is just as difficult to explain how the same force blew the timbers of the engine house and staves of the water tank in every direction, a fact not disputed. But all these are questions of fact for the jury, and, without invading their domain, the court cannot say their verdict is not supported by the evidence, or is even against the decided preponderance of the evidence; and hence we think the court properly overruled defendant's motion to set it aside and grant it a new trial.

The giving of eight instructions for the plaintiff and the refusal to give three for defendant, designated A, 2, and 13, are complained of. We have carefully considered these assignments, and do not think they show error. Defendant's instruction A was a peremptory

one. Nos. 2 and 13 relate to assumption of risk by deceased, if the jury should believe he voluntarily, or at Norris' request, undertook to assist him in the hazardous work of thawing the nitroglycerine. One, not a fellow servant, does not assume the risk of injury resulting from the negligence of another, and there was no error in refusing these instructions.

[2, 3] The court refused defendant's request to be permitted to demonstrate to the jury the effect produced by exploding a pint of nitroglycerine suspended in a barrel of water, and this is assigned as error. This experiment was intended to prove the falsity of Merrill's statement that the explosion took place in the barrel, by demonstrating that the barrel would have been thereby entirely destroyed. When an experiment is offered to be made for such purpose, the rule is that it must be performed under conditions similar to those governing the result to be proved or disproved (5 Ency. Evid. 483), and the court may have considered it impracticable to reproduce all the former conditions, within a reasonable time and during the progress of the trial. The frozen state of the nitroglycerine, the steam, forced into the water underneath the cans of nitroglycerine, causing the water to bubble up, may have caused the explosion to produce results variant from those that would have been produced if it had been exploded in some other manner. The allowance of such experimentation is within the discretion of the trial court. *State v. Smith*, 49 Conn. 376; *Polin v. State*, 14 Neb. 540, 16 N. W. 898; *Leonard v. South. Pac. R. R.*, 21 Or. 555, 28 Pac. 887, 15 L. R. A. 221; *Lake Erie & W. R. Co. v. Mugg*, 132 Ind. 168, 31 N. E. 564; *Smith v. St. Paul City R. R. Co.*, 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550; and 3 Jones on Evidence, § 410. However, the court permitted witnesses to testify in regard to the results of an experiment made a day or two before the trial, and there was certainly no abuse of discretion in refusing defendant's request to be allowed to repeat the experiment in the presence of the jury somewhere out of court.

This case is controlled by the principles announced in the Merrill Case, supra, and the judgment will be affirmed.

MILLER, P. (dissenting). I am unable to concur in the opinion of the court in this case. The only theory of negligence relied on at the trial was that the cans of glycerine were suspended in the water barrel and the steam negligently turned into the water, resulting in the explosion. The evidence shows that Merrill, the only witness offered to prove this alleged act of negligence, told a different story immediately after the accident, not only to his counsel but to one or two other witnesses, and the original decla-

## CARRIGAN v. DAVIS. (No. 3414.)

(Supreme Court of Appeals of West Virginia.  
Sept. 16, 1919.)*(Syllabus by the Court.)*1. DEEDS  $\S$ 68(1½) — CAPACITY TO MAKE DEED.

A person is mentally competent to make a conveyance of land if he knows the nature, character, and effect of his deed.

2. DEEDS  $\S$ 196(1, 2, 3)—BURDEN OF PROOF—FRAUD.

The presumption of law is in favor of the sanity and mental capacity of a grantor, and the person attacking his conveyance on the ground of his incapacity, or the exertion of undue influence over him in inducing him to make the deed, bears the burden of proof. One who charges fraud and undue influence must prove it.

3. INFANTS  $\S$ 57(1), 58(1)—LOAN TO INFANT—RATIFICATION BY CONVEYANCE—CONSIDERATION.

An infant's contracts are not void, but voidable at his election, and money loaned to an infant, whether to supply himself with necessities or not, is good consideration for a conveyance of land made after he attains his majority.

Appeal from Circuit Court, Marshall County.

Action by Charles E. Carrigan committee, against William Davis. Decree for plaintiff, and defendant appeals. Reversed, and bill dismissed.

J. Howard Holt, of Moundsville, for appellant.

Everett F. Moore, of Moundsville, and J. B. Allison, of Cameron, for appellee, relied on the following propositions and authorities in support thereof:

Whenever there exists between parties confidence on the one hand and influence on the other, from whatsoever cause they may spring, equity requires in all dealings between them the highest degree of a good faith on the part of him in whom the confidence is reposed. If a conveyance was executed in his favor, the burden rests upon him of proving that it was not procured by means of such confidence and influence. It is his duty before accepting it to see that the grantor has disinterested advice. *McClure v. Lewis*, 72 Mo. 314; *Revett v. Harvey*, 1 Sim. & St. 502; *Allore v. Jewell*, 94 U. S. 506, 24 L. Ed. 260. This rule is not limited to those well-recognized cases of confidence such as guardian and ward, attorney and client, etc., but the rule extends to all cases where the relation of confidence exists. *Huguenin v. Bascley*, 14 Vesey, 273; *Dent v. Bennett*, 4 My. & Cr. 269; *McCormick v. Malin*, 5 Blackf. (Ind.) 509; *Taylor v. Taylor*, 8 How. 183, 12 L. Ed. 1040; *Dingman v. Romine*, 141 Mo. 475, 42 S. W. 1087; *Moore v. Moore*, 56 Cal. 89; *Hall v. Knappenberger*, 97 Mo. 509, 11 S. W. 239, 10 Am. St. Rep. 337; *Tracey v. Sackett*, 1 Ohio St. 58, 59 Am. Dec. 610; *Whitehorn v. Hines*, 1 Munf. (15 Va.) 557; *Wilson v. Oldham*, 12 B. Mon. (Ky.) 55; *Pomeroy, Eq. Jur.* (3d Ed.) vol. 2, par. 947, and cases in note 3. Where

ration in the case was based on a different theory and a different statement of facts. Afterwards a new or amended declaration was filed. The original theory of the explosion was that McClain was at the water barrel adjusting some steam connections, and had accidentally dropped some tool or piece of pipe on the glycerine lying on the ground near the water barrel where Norris had placed it, causing the explosion. The new theory advanced in the amended declaration and by the evidence of Merrill on the trial was that Norris, who was engaged in assembling the cans at the derrick preparatory to shooting the well, had suspended in the water barrel the first cans brought and negligently turned on the steam and then proceeded to the wagon to bring up the other cans, a most improbable story I think, considering that he was an expert of many years experience in handling glycerine and shooting oil wells. Merrill's evidence on the trial was not only that the cans of glycerine had been so suspended in the barrel, but that McClain at the instant of the explosion was not at the water barrel, as he and Norris both originally agreed, but was at a tool box in the engine room on the side of the engine opposite the place where Merrill was at work.

This new theory that the cans of glycerine were so negligently suspended in the water barrel and that McClain was in the engine room at the time of the explosion, are flatly controverted by Norris, and disproven by every single physical fact apparent after the explosion and by every law of physical science, as well as by the actual test subsequently made under circumstances as nearly like those existing at the well as it was possible to make them. Little attempt is made in the opinion to reconcile these physical facts with the evidence of Merrill at the trial, except on the theory that strange results are often produced in such cases. It is impossible to account for the condition or position of McClain's body immediately after the accident, on the theory that he was at the place where Merrill located him. The opinion says that the body might have struck some part of the building and glanced off. No facts proven justify such a theory. The condition of the left side of his face and his left arm, bruised and mutilated as they were, can only be accounted for on the theory that McClain was at or near the barrel, where Norris says he was. The great hole in the ground immediately at the place where Norris says he laid the glycerine, the mud on the derrick, the position and condition of McClain's face and arm, the condition of the water barrel and other physical facts appearing immediately after the explosion, all show clearly that the cans of glycerine could not have been in the barrel when the explosion occurred. I would reverse the judgment.

persons from mental weakness are likely to be influenced by others, transactions entered into by such persons without independent advice will be set aside if there is any unfairness in them. *Harris v. Wamsley*, 41 Iowa, 671; *Allore v. Jewell*, supra; *Kilgore v. Cross* (C. C.) 1 Fed. 578; *Williams v. Williams*, 63 Md. 371. In *Ridgeway v. Herbert*, 150 Mo. 608, 51 S. W. 1040, 73 Am. St. Rep. 464, where an infant was dissipated and a spendthrift, and the purchaser a much older man, the court said "that the plaintiff knew beforehand how the money would be dissipated, and that the law would not justify that sort of dealing, and deeds so obtained will be set aside." The same rule is recognized in *Schuttler v. Brandfass*, 41 W. Va. 207, 23 S. E. 808, though applied to a different state of facts.

**WILLIAMS, J. Defendant, William Davis**, has appealed from two decrees of the circuit court of Marshall county, pronounced on the 20th of June, 1916, and the 28th of February, 1917, respectively, availing a conveyance to him of a tract of land by William G. Bole, made the 9th of October, 1913, the day Bole became 21 years of age. He was an only child and heir at law of his mother, from whom he inherited the land. His mother died about the year 1902, and his father about the year 1909. James D. Burley was appointed his guardian in 1902, and continued as such until he reached his majority, and the boy resided with his father until the latter's death. By means of a friendly suit the guardian sold the coal under the land, described by metes and bounds and as containing 69 acres and 125 poles. The fund derived therefrom, amounting to \$662.92, went into the guardian's hands. The expectation of coming into possession of this fund, when he should become of age, enabled the boy to obtain credit from a number of people, on his promise that he would then pay them. There was an oil and gas lease on the land, and the rentals in lieu of drilling amounted to \$120 per year. In his final settlement, apparently not yet approved by the court, the guardian charges himself with \$390 derived from this source, thus showing a sum in his hands to the credit of his ward, at the time he became of age, of \$671.25. On the 17th of January, 1914, on the order of his ward, the guardian turned over to C. A. Showacre, his attorney, the balance of this fund, after crediting himself with certain disbursements on his ward's account. The sum turned over to his ward's attorney is \$286.79. These facts are significant in considering the weight of evidence concerning Bole's alleged imbecility and incapacity, and whether the charge, that Davis exerted an undue influence over him and fraudulently induced him to convey his land to him, is sustained.

[1, 2] In the spring of 1913 Bole married a woman much older than himself by the name of Stella Patterson, and began housekeeping with her on his little farm. Soon thereafter he separated from her, charging her with adultery; and, being well acquainted with defendant Davis, he disclosed to him

his domestic troubles. Thereupon Davis advised him he had good ground for a divorce from his wife. Bole then consulted an attorney, who advised him that, as he had continued to cohabit with his wife after he knew of her guilty conduct, he thereby condoned the offense and could not obtain a divorce. This happened before he was of age. On the 21st of July, 1914, about nine months after he became of age, Charles E. Carrigan was appointed a committee for him on motion therefor made by his wife, Stella, to whom apparently he had shortly before become reconciled, and this suit was instituted by his committee on the 24th of the following August. The presumption of law is that, at the time Bole made the deed, he was sane, and his committee has the burden of proving otherwise. *Buckey v. Buckey*, 38 W. Va. 168, 18 S. E. 333; *Delaplain v. Grubb*, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 788; and *Eakin v. Hawkins*, 52 W. Va. 124, 43 S. E. 211. Bole understood and appreciated the nature, character and effect of the transaction, and that shows he had sufficient mental capacity to satisfy the rule of law. "Eccentricity of manner and mental weakness of the grantor which does not amount to imbecility are not sufficient to overthrow a deed in the absence of proof of fraud in its procurement." *Black v. Post*, 67 W. Va. 253, 67 S. E. 1072.

Plaintiff prays that the deed be canceled on two grounds: First, that his ward was non compos mentis and incapable of understanding such a transaction; and, second, that defendant exerted an undue influence over his ward, and induced him to make the deed by fraudulent and improper means. The depositions in the case make a voluminous record, over 700 pages. It is an unnecessary task which can serve no useful purpose to review in this opinion the conflicting testimony. Many witnesses have testified respecting Bole's mental capacity, and their opinions are diametrically opposed to one another. Two or three physicians and very many lay witnesses for the plaintiff swear, in their opinions, that he was not mentally capable of transacting business. But the doctors who so testified made no particular examination of him, and only a few of plaintiff's other witnesses had had personal transactions or dealings with him, and their opinions were based on general impressions received from conversations with the boy and from neighborhood rumors. On the other hand, many witnesses for defendant testified that he was as capable of understanding and appreciating the nature of a transaction as any one else. Dr. C. A. Wingerter, the only expert witness, a specialist in mental and nervous diseases with an experience of eight years or more, saw Bole on three occasions, and on two of them made a careful examination of him with a view of ascertaining whether he had any mental disease or was in any way abnormal. He examined him for two hours on

each occasion, and his opinion is that he had the capacity to understand the nature, character, and effect of business transactions, and that he was normal. The late distinguished judge below whose written opinion in the case is copied in brief of counsel for appellee, held that mental incompetency was not shown. On the contrary, he says:

"That brought to face a transaction he understands the act and what it means. \* \* \* He is not destitute of intelligence, but he is without judgment."

[3] However, the court annulled the deed on the ground that Davis had induced Bole to make it by fraudulent means and undue influences exerted over him. But we hardly think this conclusion is justified by the weight of the evidence. Before he became of age, Bole induced many persons to extend him credit on his promise of paying them out of the funds in the hands of his guardian when he became of age. He thereby deceived almost every one who is shown to have had any dealings with him. He made many such promises and kept none of them. Such conduct may indicate moral obliquity, but it certainly does not tend to prove mental incapacity. Concerning his dealings with Davis, he and Davis are the most important witnesses, and, as to the important transactions, the only witnesses. Bole first applied to Davis for money some time in March, 1913, telling him he was in need of clothing. Davis then let him have about \$10, and continued to advance sums of money to him after that time, varying in amounts, until some time in the month of October, 1913, on the faith of Bole's promise to pay him out of the fund in his guardian's hands when he became of age. Davis kept an itemized account of the money advanced to Bole, and, when evidenced by check, produces the checks indorsed by Bole, and when paid in cash produces Bole's receipts therefor. Bole swears he kept no account, and admits giving receipts to Davis, and when they were shown to him admitted the genuineness of his signature thereto, but denied recollection of many of the particular transactions. The court referred the cause to a commissioner to state an account of the sums of money advanced by Davis to Bole before he reached the age of 21, the amount advanced after that time, and how much advanced during either period was for necessities. The commissioner reported that Davis had advanced him \$323 before he became 21, to which he added \$13.23 for a suit of clothes as of October 6, 1913, and from the total deducted \$60 which he found Davis had collected on oil and gas rental checks which should have been turned over to Bole, thus leaving a balance of \$276.23 as the amount advanced in the first period, and reported \$295 advanced in the second period, from which he found there should be deducted \$106.79, the amount of Showacre's check for

the balance of the personal fund turned over to said Showacre as Bole's attorney, by J. D. Burley, his guardian, and collected by Davis, thus leaving \$188.21 as the amount actually advanced. Of the entire advancements he reported on \$79.23 was for necessities, \$14.23 before he became of age and \$65 afterwards.

If Bole was compos mentis, and we think the court below was right in concluding that he was, it is immaterial whether the money advanced was for necessities or not, or whether it was advanced before or after he became of age. Because, after coming of age, he could validate his contracts made during infancy, and his acknowledgment of the money received during infancy constituted a valuable consideration for the conveyance in the absence of fraud. An infant's contracts are not void, but voidable at his election. *Hobbs v. Hinton Foundry Co.*, 74 W. Va. 443, 82 S. E. 267, Ann. Cas. 1917D, 410; and *Blake v. Hollandsworth*, 71 W. Va. 387, 76 S. E. 814, 43 L. R. A. (N. S.) 714.

Bole tries to make it appear that Davis continually advanced him money to enable him to have a good time, in order that he might thereby subject him to his wily influence and procure his land for nothing or for a very small consideration. He swears Davis encouraged him to spend his money in having what he calls a "good time" with dissolute women. Davis denies this, and is supported in his denial by Bole's own letters written to Davis when Bole was in Canton, Ohio, pretending he was at work earning money. Davis does not claim to have paid all the consideration for the land before the time the deed was made; much of the money was paid afterward. Bole is convicted of lying by his own testimony, and is unworthy of belief. In fact, he admits he lied to his attorneys when he was indicted for arson. He was in Canton, Ohio, in the spring of 1914, and wrote to Davis a number of times for money. After Davis had sent him \$25 on two occasions he wrote him for more money, and tried to make Davis believe he was saving his money, by writing that he had deposited the \$50 in bank at 4 per cent. interest, that he was then employed on a job but would not get his pay for four weeks, that he needed some money to pay his board, and could not draw his money out of the bank, as it was deposited on time. This and other letters of similar character contradict the charge that Davis was encouraging him to spend his money in riotous living. Davis swears he had no idea of buying his land until after he had advanced him money, but that he expected the boy would repay him out of the fund he claimed he would receive from his guardian when he became of age, and did not learn until near the time he became of age that all his fund had been dissipated. Bole's guardian turned over only \$286.79 to his at-

torney Showacre, and the bulk of that was paid out by the latter in satisfaction of attorney fees for defending Bole on the indictment for arson. The house he was charged with burning was located on his own land and was filled with hay, a part of which belonged to a tenant who had farmed or lived on his place and whom he disliked. When the indictment was pending, he claimed he burned it accidentally by dropping a lighted cigarette in some combustible material. Upon investigating the evidence to sustain the charge, the prosecuting attorney was of the opinion that it was not sufficient to warrant a conviction, and nollied the case. In his testimony in this case Bole now admits he burned the building purposely because he was mad at his tenant. How is such a witness to be believed where it is to his interest to swear falsely? Davis swears that Bole first approached him with an offer to sell him his land about the time he became of age, and after Davis had learned that the fund in his guardian's hands had been nearly consumed and there was no chance of being repaid from that source, and that he bought the land as the only means of protecting himself. It is a rough, steep place, badly grown up in bushes, the fences in bad condition, with no buildings of any value on it, with the coal underlying it and mining privileges sold, and contains about 80 acres, only a small per centum of which is tillable. The nearest producing oil or gas well is  $1\frac{1}{2}$  or 2 miles distant. How long the lessee would continue to pay rental on the oil and gas lease was problematical, and whether the property contains oil or gas no one knows. The consideration recited in the deed is \$900, and Davis swears Bole fixed the price himself, and is corroborated by Bole's own statement made to Dr. Wingerter, who says that in one of his conversations with Bole he told him he went to Davis and offered to sell him the place, that the reason he gave for doing so was that Davis had at previous times befriended him, that he had determined to sell the farm, and, while he might have gotten a little more for it from some one else, still out of gratitude to Davis he wanted to give him any advantage that might accrue from the purchase. For some time before he sold his place and for several months thereafter, Bole lived separate and apart from his wife, who did not join in the deed. Some time before his committee was appointed, he apparently became reconciled to her, because the appointment was made on her motion, and he was present and did not resist the motion. In fact, he now says he thought he needed a committee. Davis swears, and this statement is not denied, that Bole and his wife first brought a suit against him, before the committee was appointed, that he was served with a summons in such suit. Apparently

that suit was discontinued or abandoned, and a committee thereafter appointed and the present suit brought in its stead.

It is not explained why his wife was not examined as a witness; but it appears from the testimony of J. E. Palmer, who knew Bole well, that, in a conversation with him about selling his farm, witness told him when he got his money it would not last long, that he would not work, and asked him, when he ran out of money, what he was going to do, and Bole replied that he would get Stell (meaning his wife) "to get the place back again and sell it again." In fairness to Bole's committee, it is proper to say he knew nothing about his ward's disposition and habits, and only consented to act as his committee at the request of the attorneys who appeared for his wife. Bole is shown by the record to be a lazy spendthrift, wholly untrustworthy and unreliable. He appears to be a moral degenerate, but he is certainly not proven to be an imbecile or lacking in mentality. Considering the time he went to school, he seems to have made fair progress; he says he studied geography, history, and reading in the fifth reader, and says he had taken up literature. His spelling is bad, and he fails to observe the rules of punctuation; but he writes and expresses himself fairly well. Some of the witnesses in describing his mental condition say it is a case of arrested development; that he is like a child; that his mind lacks proper education and training cannot be doubted, but he has a great amount of cunning, and has deceived many persons into lending him money and credit. Having determined that Bole was not an imbecile, or a lunatic, but that he was capable of appreciating the effect of what he did, we hardly see how the learned judge could reach the conclusion that he was duped and imposed on by Davis, and was unduly influenced to convey his land to him. Bole was shrewd enough to try to make it appear by his own testimony that he was under the influence and domination of Davis. He swears Davis would give him money, beer, and whisky, and would encourage him to associate with lewd women, and as he says, "have a good time." Davis denies this, and he is supported in his denial by Bole's letters to him. In those letters, importuning Davis for more money, he tried to create the impression on the latter's mind that he was working and saving his money. But it appears that, when he got employment, he never held the job longer than a few days at most. He tells a very romantic story of his engagement to marry a girl in Canton, Ohio, while he was living apart from his wife, which illustrates his capacity to deceive others. According to this story, he had bought a lot from the girl's brother, who was a real estate agent, paid \$25 on it, and had actually arranged to build a bungalow,

when the girl happened to discover that he was a married man, and, he says, he then lost little time in getting away in order to escape the anger of her brother. He is a self-convicted liar, and how the court could accept his version of the transaction with Davis we cannot understand. If his testimony is rejected, as we think it must be, there is no evidence to support the charges of fraud and undue influence. These charges are explicitly denied by the answer.

That the deed was executed on the very day Bole became of age casts no suspicion on the good faith of Davis, in view of the circumstances. Bole owed other people who were anxious to secure their money, and he knew that if they sued him his land would be sold and his basis of credit for the future would be gone; whereas, if he repaid Davis in full the money advanced during his minority, he would receive more from him in the future, until the whole consideration for the land was paid. Davis did not finish paying the purchase price until some time in the spring of 1914.

There is much conflict in the evidence respecting the actual value of the land. Some of the witnesses value it as high as \$2,000 or \$2,500. Their opinions, however, are based upon the assumption that there are 20 acres of coal yet unsold. This assumption appears to be erroneous. Other witnesses value it at \$800 to \$1,000, and some of them as high as \$1,200. Considering the location, rough and steep character and grown-up condition of the land, the facts that there are no buildings of any value on it, that the fences are nearly gone, that the oil and gas lease is liable to be surrendered at any time and therefore the rentals of uncertain duration, and that the land is incumbered with the contingent dower right of Bole's wife, it cannot be said that \$900 is such an inadequate price as to raise the presumption of fraud or undue influence. Witnesses well acquainted with the particular land, who appear to be good judges of land values, do not estimate it above \$1,200, and most of them not over \$1,000.

Davis swears that, on the 6th of March, 1914, he paid Bole \$75, the balance of the \$900, and took from him a receipt in full, and produced the receipt. Although Bole's recollection appears to be certain and clear as to most things, he professes not to recollect that transaction; he simply says:

"No, sir; I forget all about that day. I don't remember any conversation on that day, at all; it is a blank."

But he does not deny his signature to the receipt, and, when asked if it was, replied, "It might be."

Notwithstanding the burden of proof must

be borne by the plaintiff, the decided preponderance of the evidence is in favor of the defendant, which calls for a reversal of the two decrees of June 20, 1916, and February 28, 1917, respectively, and the dismissal of plaintiff's bill, and it will be so ordered.

#### On Rehearing.

After listening to exhaustive oral arguments by counsel for the respective parties and reading their briefs, and again carefully considering the evidence taken to sustain the contentions that plaintiff's ward was incapable of transacting business and was unduly influenced and defrauded of his property by the defendant, the court is satisfied that these charges are not borne out by the record. That Bole was not an imbecile or non compos mentis, but was able to deceive a number of other persons besides Davis and thereby secure credit, is abundantly proven. He was not so mentally defective as not to be able to transact business for himself. That he was morally crooked and irresponsible, and had little regard for the truth, when a falsehood would serve his purpose better, clearly appears. He was a spendthrift, and was able, while yet an infant, to deceive many persons and obtain credit upon his promises that, when he arrived at age and received his money from his guardian, he would pay them.

The contention of plaintiff's counsel that Davis deliberately set about to gain Bole's confidence by advancing him small sums of money, and then to defraud him out of his land, is not proven. Bole testified in his own behalf, and the intelligence revealed by his answers to questions shows that he had legal capacity. That his business judgment was not good may be true, but many persons, who could not even be suspected of want of legal capacity, are liable to the same criticism.

Davis swears he kept an accurate account of the money advanced to Bole, and presented an itemized account of the same, showing that he has paid him \$1,085, \$185 more than the price of the land. On the other hand, Bole admits he kept no account, does not know how much money he received, and denies some of Davis' charges. But every one of them is proven, either by Davis' checks to Bole, indorsed by the latter, or by receipts signed by Bole. In addition to the many receipts for small amounts, given at the time the money was advanced, Bole signed a receipt for \$900, on March 6, 1914, stating that it was in full of the price for the land.

Davis presents a receipt for \$150, advanced to Bole in May, 1913, which he says was money he let Bole have to buy stock for his farm at the time Bole married and went to housekeeping. Counsel for plaintiff contend that Bole's signature to that receipt is a forgery, and had the original record brought up in order to satisfy this court that their contention was right. We have carefully examined this receipt and Bole's signature thereto, compared it with his signature indorsed on checks payable to him, the genuineness of which is admitted, and are satisfied that his signature to the receipt in question is his genuine signature.

That defendant may not have kept his account in chronological order in his book of original entry is of little significance, in view of the receipts produced by him, signed by Bole, proving payments amounting to the full purchase price of the farm. We are therefore satisfied that no mistake was committed on the original hearing, and adopt the written opinion then prepared.



(149 Ga. 339)

**DUGGAR v. DUGGAR**, County Superintendent of Affairs. (No. 1218.)

(Supreme Court of Georgia. Sept. 3, 1919.)

*(Syllabus by the Court.)***1. COUNTIES ~~6~~—196(7)—COLLECTION OF TAXES—ANSWER—INJUNCTION.**

The petitioner, as a citizen and taxpayer of the county of Bryan, sought to have enjoined the collection of the county taxes levied for the year 1918, on the alleged ground that a portion of the four mills specified in item 9 of the levy, viz., "to pay for the support of the chain gang and for public roads of the county," was levied to pay the expense of the county chain gang incurred in the working of the public streets in the city of Pembroke, an incorporated city in that county. The petitioner alleged that the county had no authority to assess, levy, and collect taxes upon the property of the petitioner for the purpose of working and improving the roads and streets within the corporate limits of the city of Pembroke, and that the levy, which included the expense and cost of working the roads and streets within the corporate limits of the city during a specified portion of the year 1918, was excessive and illegal to the extent that it included such expense. The defendant, the superintendent of county affairs, charged with the duty of levying taxes for county purposes, demurred and answered. In his answer he admitted that the levy was made, "but that the same was for the purpose as therein stated, for expenses accruing in the year 1919; that the taxes for the year 1917 will pay, or nearly pay, the expenses of 1918." Upon the filing of the answer containing the averment above quoted, the plaintiff amended his petition by alleging:

"(1) That the levy set out in said petition is illegal, in that (a) it is exorbitant; (b) it is unnecessary, because the taxes of the year 1917 will pay or nearly pay the expenses of 1918.

"(2) Said levy is further illegal, in that it is not made for the year in which the expenses will be incurred, but is made in advance thereof.

"Wherefore he prays that said levy may be temporarily and perpetually enjoined and restrained."

Upon the interlocutory hearing, and in support of the amendment to the petition, the plaintiff introduced in evidence the defendant's answer. There was no offer to amend the answer, or to withdraw the averment therein, above quoted, and no evidence was introduced by the defendant upon the issues raised by the plaintiff's amendment to his petition. *Held*, construing the defendant's answer most strongly against him, the plaintiff was entitled to the injunction prayed. The court therefore erred in refusing the same.

Error from Superior Court, Bryan County; W. W. Sheppard, Judge.

Suit for injunction by O. M. Duggar against J. N. Duggar, Superintendent of Affairs of Bryan County. Judgment for de-

fendant, and plaintiff brings error. Reversed.

Geo. H. Richter, of Savannah, for plaintiff in error.

FISH, C. J. Judgment reversed. All the Justices concur.

(149 Ga. 333)

**SCOVILLE et al. v. LAMAR**. (No. 1175.)

(Supreme Court of Georgia. Sept. 3, 1919.)

*(Syllabus by the Court.)***1. EJECTMENT ~~6~~—64—DESCRIPTION OF PREMISES—SUFFICIENCY.**

It is essential to the maintenance of an action of ejectment that the premises alleged to have been demised be described with such certainty as that, in the event of a recovery by the plaintiff, a writ of possession issued upon the judgment and describing the premises as laid in the petition shall so identify the premises sued for as that the sheriff in the execution of the writ can deliver the possession in accordance with the mandate. *Harwell v. Foster*, 97 Ga. 264, 22 S. E. 994; *Hunter v. Bowen*, 137 Ga. 258, 78 S. E. 380; *Stringer v. Mitchell*, 141 Ga. 403, 81 S. E. 194.

**2. EJECTMENT ~~6~~—64—PETITION—DESCRIPTION—AREA OF LAND—DEMURRER.**

The only description of the land in the petition being: "Said tract or parcel of land is described as follows: 'The water and mill privileges on the Indian Springs Reserve, being approximately one acre of land in the southeast corner of said Indian Springs Reserve, said reserve being located in Indian Springs district of Butts county'"—the allegations do not furnish data by which the land in which the "privileges" are alleged to exist can be definitely located.

(a) The quantity of land is not stated exactly, but only "approximately," and the description could not be held sufficient under the principle of *Payton v. McPhaul*, 128 Ga. 510, 58 S. E. 50, 11 Ann. Cas. 163; *Phillips v. Paul*, 148 Ga. 104, 95 S. E. 969, and similar cases.

(b) The description of the land was too indefinite to be the basis of recovery by ejectment, and there was no error in dismissing the petition on general demurrer. See *Jackson v. May*, 16 Johns. (N. Y.) 184.

**3. QUESTION NOT DECIDED.**

The petition being fatally defective for reasons stated in the preceding notes, no ruling will be made on the question as to whether title to the alleged "water and mill privileges" on the tract of land referred to in the petition constitute such interest in the land as would support ejectment.

Error from Superior Court, Butts County; W. E. H. Searcy, Jr., Judge.

Ejectment by L. W. Scoville and others against W. D. Lamar. Petition dismissed on general demurrer, and plaintiffs bring error. Affirmed.

W. E. Watkins, of Jackson, for plaintiffs in error.

Hall & Grice, of Macon, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(149 Ga. 375)

JERNIGAN v. MANSFIELD. (No. 1230.)

(Supreme Court of Georgia. Sept. 5, 1919.)

*(Syllabus by the Court.)*

APPEAL AND ERROR ⇨1123—EVEN DIVISION OF JUSTICES—AFFIRMANCE BY OPERATION OF LAW.

This case came before the court upon a writ of error from the superior court of Early county, and the same being for a decision by a full bench of six justices, who are evenly divided in opinion on the controlling issue in the case, that is, whether the extrinsic evidence was sufficient to apply the description in the deed upon which the plaintiff relied to the particular land sued for, three of the Justices, Fish, C. J., Beck, P. J., and George, J., being of the opinion that it was, and three of the Justices, Atkinson, Hill, and Gilbert, JJ., being of the contrary opinion, it is considered and adjudged that the judgment of the court below stand affirmed by operation of law.

Error from Superior Court, Early County; W. C. Worrell, Judge.

Action between D. B. Jernigan and J. E. Mansfield. Judgment for the latter, and the former brings error. Affirmed by operation of law, upon an equal division of the Justices.

Park & Stone, of Blakely, for plaintiff in error.

Glessner & Collins, of Blakely, for defendant in error.

PER CURIAM. Judgment affirmed.

(149 Ga. 333)

WILLIAMS et al. v. HICKS. (No. 1196.)

(Supreme Court of Georgia. Sept. 3, 1919.)

*(Syllabus by the Court.)*

HABEAS CORPUS ⇨113(12)—CUSTODY OF CHILD—DISCRETION OF COURT—REVIEW.

This was a habeas corpus case, and the evidence upon the controlling issue being conflicting, the discretion of the court in awarding the minor child to the applicant will not be disturbed.

Error from Superior Court, Haralson County; A. L. Bartlett, Judge.

Habeas corpus by L. H. Hicks against J. S. Williams and others to obtain custody of an infant child. Custody awarded to plaintiff, and defendants bring error. Affirmed. See, also, 135 Ga. 433, 69 S. E. 547.

In March, 1918, L. H. Hicks brought his petition for habeas corpus against J. S. Williams and Mrs. Mollie Williams, his wife, to recover custody of the minor son of petitioner; the child then being about 13 or 14 years of age. In 1909, when the child was 3 years of age, Hicks brought his petition for habeas corpus against the same defendants, alleging that he had the right to the possession and custody of the child, and that the defendants were wrongfully withholding custody. When that petition came on for trial, in January, 1910, the court hearing the application refused to order the defendants to deliver custody of the child to the applicant. There was no express adjudication upon the issue raised in the answer of the defendants, wherein they had alleged that the applicant had lost parental control of the child, and had given the child and control over him to the defendants; but the court merely ruled that upon considering the evidence in the case it was adjudged that the custody of the infant child, William Hicks, should be awarded to the defendants, and it was also ordered that the child should not be carried beyond the jurisdiction of the court, and that, when he should have arrived at such age that he should enter school, this judgment might be reviewed, and the proper custody of the child reconsidered. It was expressly stated in the judgment that the same was not final. The judgment also made provision for the father's seeing the child at stated intervals. This judgment was excepted to by the applicant, and brought for review by writ of error to this court, and the judgment of the court below was affirmed. 135 Ga. 433, 69 S. E. 547. Again, in the year 1914, the plaintiff in the present case made application for the writ of habeas corpus to secure the custody of the same child; the same parties being named as defendants in this second application. When this application last referred to came on for hearing, after hearing evidence the court rendered judgment holding that, "upon a consideration of the law and facts as presented, I do not find that at this time there exist sufficient reasons to modify or change said order as prayed for, and said petition is denied." The defendants continued to retain custody of the child until the filing of the petition in the case now under consideration.

I. N. Cheney, of Bremen, M. J. Head, of Tallapoosa, and Edwards & Weatherly, of Buchanan, for plaintiffs in error.

J. Mallory Hunt and Geo. P. Whitman, both of Atlanta, for defendant in error.

BECK, P. J. (after stating the facts as above). Upon the hearing the court awarded the custody of the child to the father. To this order the defendants excepted, and by writ of error brought it here for review.

There is no merit in the contention that the prior orders in the case adjudicated finally the right of the defendants to the continued custody of the minor, William Hicks. There is nothing in the judgment passed on the two former hearings to indicate that the court finally passed upon the contention of the defendants that parental control had been expressly surrendered by the applicant. It is apparent, from a reading of the judgments passed at the two former hearings, that the court intended that the question of the custody of the child, when it should arrive at an age making it proper that he should be sent to school, be left open. It is inferable from the terms of the order that the court did not think that a preponderance of the evidence showed that parental control had been surrendered permanently. At any rate the court was not concluded upon this question as against the applicant, and there was evidence submitted at the last hearing which would authorize the court to find that parental control had not been surrendered and lost by the father, and there was evidence adduced to show that the father was the proper custodian of the child at the age attained by the boy when the last application was filed; his age then rendering it the duty of his custodian to send him to school. So, without reference to the question as to whether that part of the court's order containing the inhibition against the removal of the child from the jurisdiction of the court was violated or not, the court was fully authorized to find in favor of the applicant upon the controlling issues in the case, and, the court having so found, his judgment will not be disturbed.

Judgment affirmed.

All the Justices concur.

(149 Ga. 335)

PHILLIPS v. JOHNSON. (No. 1207.)

(Supreme Court of Georgia. Sept. 3, 1919.)

(Syllabus by the Court.)

APPEAL AND ERROR Ⓒ302(3)—EXECUTORS AND ADMINISTRATORS Ⓒ357 — TRIAL Ⓒ295(4)—WITNESSES Ⓒ372(2)—SALE OF PERSONALTY — INJUNCTION — EVIDENCE — ISSUES—CHARGE.

The evidence authorized the verdict, and the assignments of error; which are sufficient in form to raise any question for decision by the Supreme Court, do not show cause for reversal.

Error from Superior Court, Emanuel County; R. N. Hardeman, Judge.

Suit in equity by Della Johnson against Sherman Phillips, administrator of Isaac Johnson, deceased. Verdict for plaintiff, motion for new trial denied, and from the judgment, defendant brings error. Affirmed.

Isaac and Della Johnson, persons of color, lived together during the latter part of the Civil War. They continued to live together, and were living together as husband and wife, on March 9, 1866. In 1866 they moved to the upper part of Emanuel county and settled on a piece of land purchased by Isaac. The land was cleared and improved, and the two lived thereon as husband and wife for some years, when Isaac purchased another piece of land near by, and cleared and improved the same. For more than 50 years Isaac held Della Johnson out as his wife, and they were generally known as husband and wife. Isaac died in 1914 or 1915. In 1910 Isaac owned some 300 acres of land. In that year he gave off to certain of his kin approximately 100 acres of his land, and on November 25, 1910, he made to Della Johnson a deed to his remaining lands; the two tracts indicated above containing approximately 200 acres. At the same time he made a parol gift to Della of all his personal property, and she entered into immediate possession thereof, and held and enjoyed the same until the death of Isaac. After his death Della paid all debts due and owing by him, and continued in possession of the realty and personalty, claiming the realty as grantee in the deed and the personalty as donee under the parol gift, and both the realty and personalty as the sole heir at law of Isaac Johnson. In 1915 Sherman Phillips, a distant relative of Isaac Johnson (there being no children or representatives of children of Isaac), made application for letters of administration on his estate. Appraisers were appointed, and the administrator, together with the appraisers, went to the dwelling house of Della Johnson, in her absence, and made an appraisal of the personal property in her possession. Subsequently the administrator obtained an order to sell the personalty, and had advertised the same for sale, when Della Johnson brought her petition in equity, making in substance the foregoing allegations, and praying that the administrator be enjoined from further proceeding in the premises. To the petition the administrator made answer, and consented that the court of equity adjudicate all questions at issue. He denied that Della Johnson was the wife of Isaac Johnson, or that Isaac and Della were living together as husband and wife on March 9, 1866, and alleged that at the time the deed was executed, if the same was in fact executed, Isaac was very old and infirm, and did not have capac-

ⒸFor other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ity to execute a deed; that the deed was the result of a fraudulent scheme between Delia Johnson, one Elmore Jones, and one May Pierce to deprive the lawful heirs at law of Isaac Johnson of any part of his estate. The jury returned a verdict for the plaintiff. The defendant's motion for a new trial was overruled, and he excepted.

F. H. Saffold and T. N. Brown, both of Swainsboro, for plaintiff in error.

Williams & Bradley, of Swainsboro, for defendant in error.

FISH, C. J. (after stating the facts as above). Elmore Jones was sworn as a witness for the plaintiff. On cross-examination it was elicited by the defendant's counsel that Delia Johnson, after the death of Isaac, had made her will, and that the witness and his sisters were named as devisees therein. Counsel then asked the witness to state the condition of Delia Johnson on the day of the execution of the will. Whereupon the court ruled that counsel might show the interest of the witness, and might, therefore, show that the witness was named as a devisee or legatee in the will of Delia Johnson, but that the condition of Delia Johnson on the day of the execution of the will was irrelevant. This ruling is assigned as error in the motion for new trial. The assignment is without merit. It was relevant to show that the plaintiff, Delia Johnson, had named Elmore Jones, the witness, as a devisee or legatee in her will; but whether the plaintiff was of sound and disposing mind and memory at the time of the execution of the will is immaterial.

During the progress of the trial, and when practically all the evidence in the case had been introduced, the court made the following ruling:

"I hold that the heirs at law of the deceased, Isaac Johnson, who testified to transactions or communications with the deceased, Isaac Johnson, are incompetent witnesses to testify to such transactions or communications had with him, on the ground that, should it be found there was no marriage between the deceased and Delia Johnson, and that this deed should be set aside, they would then become directly interested in the result of this trial, and they are incompetent witnesses to testify to transactions or communications had with the deceased; and I rule out the testimony of the sisters of the deceased who have testified to transactions and communications had with Isaac Johnson. That ruling would also apply to Lula Oglesby, the niece, her mother being dead, or to any witness who is an heir at law. \* \* \* I leave in the statement of Delia Johnson, to which the witnesses have testified, of course."

This ruling is assigned as error:

"Because marriage or the want of marriage may be proven by reputation in the family, and these witnesses, being related to Isaac Johnson, were competent to testify on that point; because the rule as to the admission of tes-

timony concerning statements of the deceased person prevents the party opposed to the administrator from testifying to such communication, but allows witnesses for the administrator to testify to such communications; and the testimony excluded by this ruling, being in favor of the legal representative of the deceased, was admissible."

Several relatives of Isaac Johnson testified for the defendant. The alleged transactions or communications with the deceased are not set out in the motion for new trial; and since the court excluded certain transactions or communications from the evidence, presumably these communications are not to be found in the brief of evidence. It affirmatively appears, however, from an examination of the approved brief of evidence, that the relatives of Isaac Johnson, sworn as witnesses for the defendant, were allowed to testify to the reputation in the family, and did testify that Isaac and Delia were never married and were not man and wife. Inasmuch as the excluded testimony is not set forth in the motion for new trial, either literally or in substance, or attached thereto as an exhibit, the assignment of error cannot be considered.

After the conclusion of the testimony, the court retired the jury and ruled as follows:

"I will eliminate the land, and I submit to the jury the question as to the personal property."

This ruling is assigned as error. There was no evidence to authorize a finding that the deed was procured by fraud, or that the grantor did not have sufficient mental capacity to execute it. The court, therefore, properly withdrew from the consideration of the jury the issue as to the validity of the deed.

The court charged the jury as follows:

"If you should find that Delia Johnson and Isaac Johnson were living together prior to March 9 or on the 9th day of March, 1866, as husband and wife, that it would be immaterial whether they were married by any form of law or not. The law would not require, after March 9, 1866, that they should enter into a marriage ceremony or contract whatever, in order to constitute them husband and wife."

In one ground of the motion for new trial this charge is assigned as error:

Because "it is contrary to law," and because "March 9, 1866, and no other day or date, is the time fixed by law for the establishment or marriage between persons of color. If persons of color who lived together as husband and wife prior to March 9, 1866, saw fit before that day to abandon such relationship, the law would not adjudge them husband and wife; and if they did abandon such relationship, or either of them did so, before March 9, 1866, the law would not allow them to renew such relationship after that date without a new contract."

By reference to the entire charge of the court it appears that the court instructed the jury that—

"Persons of color, colored people, living together on the 9th day of March, 1866, who were living then as husband and wife, whether there has been a ceremony or not, sustain that legal relation to each other."

In immediate connection therewith follows the excerpt from the charge to which exception is taken. It is manifest, therefore, that the portion of the charge assigned as error was neither misleading nor harmful. It is apparent that the court construed the law as the plaintiff in error now construes it, and the jury must have so understood the charge.

The evidence authorized the verdict, and the court did not err in refusing a new trial. Judgment affirmed.

All the Justices concur.

(149 Ga. 323)

**BRACKIN v. JEFFERSON FIRE INS. CO.**  
(No. 1139.)

(Supreme Court of Georgia. Sept. 2, 1919.)

*(Syllabus by the Court.)*

**1. JUDGMENT  $\S$ 261—WHEN MOTION IN ARREST PROPERLY GRANTED.**

Where a judgment overruling a general demurrer to the plaintiff's petition was reversed by this court, and that judgment was made the judgment of the court below, and where thereupon the case was taken from the docket, but subsequently restored, and neither the non-resident defendant nor its counsel, who were also nonresidents, had notice of the restoration of the case to the docket, nor of an amendment which had been filed, and the case was placed upon the trial calendar of the court and called for trial, and a verdict and judgment were rendered for the plaintiff, it was not error for the court to sustain a motion in arrest of such judgment.

*(Additional Syllabus by Editorial Staff.)*

**2. APPEAL AND ERROR  $\S$ 1207(4)—ORDER MAKING JUDGMENT OF SUPREME COURT JUDGMENT OF SUPERIOR COURT NOT VOID.**

Where a judgment overruling a general demurrer to a petition was reversed by the Supreme Court, a judgment in the superior court, making the judgment of the Supreme Court the judgment of the superior court, was not void, even if it was voidable.

Error from Superior Court, Decatur County; H. B. Spooner, Judge.

Suit by G. B. Brackin against the Jefferson Fire Insurance Company. Verdict and judgment for plaintiff, motion in arrest of judgment sustained, and plaintiff brings error. Affirmed.

T. S. Hawes and John R. Wilson, both of Bainbridge, for plaintiff in error.

Smith, Hammond & Smith, of Atlanta, Pope & Bennet, of Albany, and Hartsfield & Conger, of Bainbridge, for defendant in error.

BECK, P. J. Brackin brought suit on a policy of fire insurance against Jefferson Fire Insurance Company of Philadelphia, returnable to the May term, 1910, of the superior court of Decatur county. On the 5th day of July, 1912, upon a trial of the case, a verdict and judgment were obtained by Brackin against the company. Subsequently, on a judgment consented to by counsel who represented Brackin and counsel for the company, an order was taken at Chambers, and in another county from that where the case was pending, setting aside this verdict and judgment. On January 5, 1915, the case came on again for trial, and a verdict and judgment were rendered in favor of Brackin against the company. This was brought to the Supreme Court for review, and among other questions raised in the record was one involving the judgment of the court below, overruling a general demurrer to the plaintiff's petition. This judgment was reversed. 147 Ga. 47, 92 S. E. 930. On June 25, 1917, during vacation, the remittitur from the Supreme Court was filed in the office of the clerk of the superior court of Decatur county, and at the next term of the superior court, convened on November 12, 1917, Hon. W. M. Harrell, judge of the superior court, passed an order in open court making the judgment of the Supreme Court the judgment of the superior court, and the remittitur, with the judgment and order of the superior court, making the judgment of the Supreme Court the judgment of the superior court, were duly entered on the minutes of the superior court, and the case was taken from the docket of the said superior court. Subsequently the case was restored to the docket, but neither the insurance company nor its counsel had notice of this. The case was also taken up and set for trial without notice to the insurance company or its counsel. A verdict was rendered in favor of the plaintiff, Brackin, and a judgment entered thereon. A motion in arrest of judgment, upon the grounds indicated above, was made by the insurance company. The court sustained this motion, and the plaintiff excepted.

[1, 2] The court properly sustained the motion in arrest of judgment. The grounds of the motion, which are not controverted, required the judgment sustaining the motion. The judgment rendered by Judge Harrell, making the judgment of the Supreme Court the judgment of the superior court, was not

void, even if it was voidable. His alleged disqualification was because of his relationship to counsel for the plaintiff and his former interest adverse to the insurance company. Whether or not, after the judgment of the Supreme Court was made the judgment of the court below, inasmuch as the judgment of the reviewing court reversed a judgment overruling a general demurrer to plaintiff's petition, the plaintiff could amend, is not decided. There are cases decided by this court apparently holding that an amendment such as was offered by the plaintiff could not be made. But that question is not now passed upon. The case was taken from the docket by an officer of the court, and treated as one finally disposed of. The nonresident defendant and nonresident counsel, there being no local counsel at the time, should have had notice of this restoration of the case to the docket, and a verdict and judgment taken without notice to them should not be allowed to stand.

We do not now pass upon the question made by the record as to whether or not the first verdict and judgment were effectually set aside by the order passed at chambers upon a consent entered by counsel of record for the insurance company and the plaintiff. If that first verdict and judgment are still of force, that affords no reason why the last verdict and judgment should not be set aside. The judgment of the court sustaining the motion in arrest of judgment is sustained.

Judgment affirmed.

All the Justices concur.

(149 Ga. 371)

HARDY et al. v. HARDY. (No. 1168.)

(Supreme Court of Georgia. Sept. 5, 1919.)

*(Syllabus by the Court.,*

**1. TRUSTS  $\Leftrightarrow$  84 — RESULTING TRUST — PURCHASE OF LAND BY GUARDIAN — USE OF TRUST FUND.**

Where one was guardian for his children and had funds belonging to them, if he used such funds to purchase lands, though he took a deed conveying the land to himself, equity would impress the property with a trust character in favor of the children, in a suit brought by them for the purpose of having a trust declared.

(a) But if the guardian bought the land with funds which he had procured by effecting a loan from a third person, or in any other way independently of the trust funds, and with the money thus borrowed purchased the land, though he might subsequently have used the funds which he held as guardian for his children to repay the loan, this would not fasten a trust upon the property, unless the borrowing of the money was done with the intent to subsequently repay it with the trust funds in his hands, so as to give

effect to a scheme whereby the title to the property might be vested in the guardian individually, free from the trust character which would have been impressed upon it, had he directly in the first instance purchased the land and paid for it with trust funds.

**2. TRUSTS  $\Leftrightarrow$  102(2) — IMPLIED TRUST — USE OF FUNDS FOR IMPROVEMENT.**

The fact that the intestate had used the funds belonging to his children to make improvements upon the land would not have the effect of creating an implied trust upon the property thus improved.

**3. APPEAL AND ERROR  $\Leftrightarrow$  272(1), 273(4) — EXCEPTION TO ADMISSION OF EVIDENCE — GROUND OF OBJECTION.**

To avail the plaintiff in error in this court, exceptions to the admission of evidence should show the ground of the objection, and that this ground was urged when the evidence was offered.

**4. EVIDENCE  $\Leftrightarrow$  219(1) — ADMISSIONS — MISAPPLICATION OF WARD'S FUNDS.**

The court erred in excluding from evidence the application to the court of ordinary, made by B. I. Hardy as guardian of his children, to be allowed to invest the funds which he had in his hands as guardian in lands, together with the order passed by the ordinary upon this application allowing the same.

Beck, P. J., dissenting in part.

Error from Superior Court, Wilkes County; B. F. Walker, Judge.

Suit by D. E. Hardy and others against Carrie Hardy, administratrix of Ben. I. Hardy, deceased. Judgment for defendant, motion for new trial denied, and plaintiffs bring error. Reversed.

Mrs. Carrie Hardy, as administratrix of the estate of her deceased husband, Ben. I. Hardy, who died intestate, advertised for sale certain lands alleged to belong to the estate of the intestate. This land consisted of a single tract of 100 acres. The plaintiffs in error, D. E. Hardy and four other children of the intestate, filed a claim to 50 acres of the tract, specifically described in the claim affidavit. At the trial term of the court at which the case was heard the claimants filed what they termed "a full statement of their claim," and in this additional statement they alleged the death of their mother; that she at the time of her death left an estate of which the claimants were heirs, the amount of the same being \$1,000; that B. I. Hardy was appointed guardian of this property, and received the sum of money stated for the benefit of claimants; that in February, 1909, B. I. Hardy bought from his brother, Alex. Hardy, 50 acres of land adjoining 50 acres of his own; that B. I. and Alex. had inherited the said 100 acres from their father, W. D. Hardy; there were other heirs of W. D. Hardy besides B. I. and Alex.;

that the land belonging to the estate of W. D. Hardy was so divided as to give each heir 50 acres; and B. I. Hardy having bought the share of Alexander Hardy, the other heirs joined in a quitclaim deed to B. I. Hardy for 100 acres, this being the tract of land advertised by the administratrix for sale.

"Claimants allege that B. I. Hardy took from the fund held by him as guardian of claimants \$250 to pay for the 50 acres of land bought from Alex. Hardy. He not only paid their money for this to the full extent of its value, but informed them that it was their property and that he held it for them. \* \* \* That said B. I. Hardy took the balance of their estate and expended all of it in improving the other 50 acres, and told them at the time that the whole 100 acres was theirs, and that he was holding it for their benefit. Claimants allege that they are entitled to the whole 100 acres, or that in any event they are entitled to the 50 acres described in claimants' petition."

On the trial of the issue made, the jury found in favor of the administratrix, that the lands belonged to the estate of B. I. Hardy. The claimants made a motion for a new trial, which having been overruled, they excepted.

Colley & Colley, of Washington, Ga., for plaintiffs in error.

R. C. Norman, of Washington, Ga., for defendant in error.

BECK, P. J. [1] 1. There are several portions of the charge excepted to in various grounds of the motion for a new trial, but they are without merit. In substance, the portions of the charge complained of instructed the jury that, if the money belonging to the claimants in the case was invested in the land which they claimed, they should find for the claimants; but, unless it did appear from the evidence that the money which B. I. Hardy held as guardian for his children was invested in this land, their finding should be in favor of the estate of B. I. Hardy. While some of the language employed in the instructions is inapt and involved, the jury could not have been misled as to the real issue. There was no question that B. I. Hardy took a deed to 100 acres of land which formerly belonged to the estate of his father, and that this comprised the share in the estate of Alex. Hardy; but which 50 acres does not expressly appear. There is evidence to show that B. I. Hardy borrowed from one Barnett the money with which to pay Alex. Hardy for his interest; and there is other evidence tending to show that the payments to Alex. Hardy were made from funds derived from sources not shown, and that he used the funds which came into his hands as guardian to repay the loan which he had effected in order to raise the money to pay for the land. There was evidence introduced by the claimants tending to show that B. I. Hardy paid for the land with the funds of his children which he held in his hands as

guardian. Such evidence as this raised the single distinct issue; for, if B. I. Hardy borrowed money from Barnett, or procured money in other ways, not from the funds which he held as guardian, and bought and paid for the land belonging to his brother Alex., and took the deed to himself, he would not hold the land thus acquired as trustee for his children, though he subsequently used the money which he held as guardian to repay the loan which he had effected in order to buy the property, unless the borrowing of the money was done with the intent to subsequently repay it with the trust funds in his hands, so as to give effect to a scheme whereby title to the property might be vested in the guardian individually, free from the trust character which would have been impressed upon it, had he directly in the first instance purchased the land and paid for it with trust funds. But it is not contended in this case that there was such a fraudulent scheme in the mind of B. I. Hardy, guardian, at the time of borrowing the money from Barnett, and with which there is evidence to show the land was paid for, or that the portions of the charge under criticism had the effect of preventing the jury from passing upon the question as to whether or not the buying of the land with the borrowed money was a part of a fraudulent scheme as that indicated.

The fact that the guardian may have said at various times that the land was the property of his children, or that he had bought the land for them, would not of itself impress the land with the character of a trust, unless it was such independently of this saying. If he had not purchased the land under such circumstances as rendered it trust property held for his children, his repeated declarations, made while in possession, that the land belonged to his children, or that he intended it for them, or that he held it in trust for them, would not be sufficient to transfer the title from himself and vest it in the children. Titles to land must be evidenced by writing, and such declarations could not create for his children an express trust in the land. All express trusts must be created or declared in writing. Civil Code, § 3733; *Smith v. Williams*, 89 Ga. 9, 15 S. E. 130, 32 Am. St. Rep. 67.

[2] 2. Headnote 2 requires no elaboration.

[3] 3. In one ground of the motion for a new trial exception is taken to the court's ruling which allowed, over the objection of claimants' counsel, the introduction in evidence of two deeds executed by the intestate; but it does not appear what, if any, objection was urged to the introduction of these deeds. It is merely stated in the ground of the motion that the documents were admitted over objection of claimants' counsel; and it is also alleged in the ground of the motion that such a ruling was error, and claimants would not be bound by these instruments;

but it is not stated that this objection was made to the court at the time of the introduction of the evidence. This being true, the exception to the introduction of this evidence cannot avail the movants here, as exceptions to the admission or rejection of evidence must show the ground of the objection, and that it was urged at the time of the admission or rejection of the evidence.

[4] 4. Another ground of the motion for a new trial complains of the refusal of the court to allow the introduction in evidence of an application to the court of ordinary, made by B. I. Hardy as guardian of his children, to be allowed to invest the funds which he had in his hands as guardian in lands and to employ later thereon, and also the order passed by the ordinary upon this application allowing the investment to be made as prayed. It is not contended by the movant that the ordinary had the authority to pass this order, but it is contended that the evidence was "admissible as an admission by B. I. Hardy." The majority of the court are of the opinion that the claimants should have been allowed to introduce this evidence as an admission tending to show that the land was actually bought and paid for with the money of the wards which was in the hands of Hardy as guardian. The writer of this opinion does not concur in this ruling, being of the opinion that this was not such an admission as to render it competent evidence against the administratrix and in favor of the claimants.

There is no merit in the other exceptions contained in the motion not specifically referred to above.

Judgment reversed.

All the Justices concur, except BECK, P. J., who dissents from the ruling made in the fourth division of the opinion and the corresponding headnote.

(149 Ga. 370)

**MARSHALL v. MATTHEWS.** (No. 1530.)

(Supreme Court of Georgia. Sept. 4, 1919.)

*(Syllabus by the Court.)*

1. INJUNCTION ⇨49—LANDLORD AND TENANT ⇨11—MASTER AND SERVANT ⇨1—TRESPASS ⇨13—RELATION—"EMPLOYER AND EMPLOYÉ."

If an owner of a farm employs another person to superintend the farm, and, in order to facilitate the services to be rendered, provides a house on the farm in which the superintendent shall reside, and in addition to a monthly salary agrees that the superintendent shall use vegetables and other food products grown and produced on the farm, the relation of employer and employé arises, but the relation of landlord and tenant does not arise between them relatively to the house or the farm. If

the employer discharges the employé, with or without cause, before the term expires, it is the duty of the latter to leave the premises and remove his personal goods therefrom. If he refuses to do so, and persists in continuing to stay on the premises and live in the house over the objection of the employer, he is a trespasser, and his continuing trespass may be enjoined. *Mackenzie v. Minis*, 132 Ga. 323, 63 S. E. 900, 23 L. R. A. (N. S.) 1003, 16 Ann. Cas. 723.

(a) Under the pleadings and the evidence it was erroneous for the judge, after enjoining the employé from interfering with the farm, to refuse to enjoin him from occupying the house with his goods and using the vegetables and other products grown on the place.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employer; Second Series, Landlord and Tenant.]

Error from Superior Court, Monroe County; W. E. H. Searcy, Jr., Judge.

Action for injunction by W. J. Marshall against W. F. Matthews. Judgment for plaintiff in part, and he brings error. Reversed.

Feagin & Hancock, of Macon, for plaintiff in error.

Willingham & Willingham, of Forsyth, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(149 Ga. 361)

**KING et al. v. HORTON et al.** (No. 1083.)

(Supreme Court of Georgia. Sept. 4, 1919.)

*(Syllabus by the Court.)*

CHARITIES ⇨22(4)—DEVISE TO CHARITABLE USES—CERTAINTY.

Mrs. F. C. Tucker, a citizen of Georgia, died testate. The second item of her will is as follows: "I give, devise, and bequeath to O. E. and M. C. Horton, in trust, all of my estate that I may have at the time of my death, after the payment of my funeral expenses, to be invested in safe securities, and the income arising therefrom to be used for the purpose of educating poor, worthy girls of good families and legitimate. This fund to be so used shall be known as the Frances Clementine Tucker fund." The will appointed the Hortons as executors. It was probated, and they qualified. Lena King and 13 others, alleging themselves to be next of kin and heirs at law of the testatrix, in behalf of themselves and all others next of kin and heirs at law of the testatrix who should desire to join in the petition, brought an action to enjoin the executors from executing the provisions contained in the second item of the will as above quoted. The petition alleged that the second item is void, because too vague, indefinite, and uncertain to be executed, in that the designation of the girls sought to be benefited is so indefinite and uncertain as to render their identity impossible,



and the kind, amount, and quality of the education to be bestowed unascertainable. Petitioners did not claim to be lineal descendants of the testatrix. *Held*, that the court did not err in refusing the grant of an interlocutory injunction, as, according to the well-settled rules for the exercise of the power of a court of chancery over charities, the provisions of the will under consideration are sufficiently definite and specific in its objects to be capable of execution. "A devise or bequest to a charitable use will be sustained and carried out in this state." Civ. Code 1910, § 3914. Among the subjects of charity designated in section 4605, falling within the jurisdiction of equity for enforcement, are the "relief of poor people," "every educational purpose," and "other similar subjects, having for their object the relief of human suffering, or the promotion of human civilization." "A devise or bequest to a charitable use will be sustained and carried out in this state; and in all cases where there is a general intention manifested by the testator to effect a certain purpose, and the particular mode in which he directs it to be done fails from any cause, a court of chancery may, by approximation, effectuate the purpose in a manner most similar to that indicated by the testator." Civil Code, § 3014. "If the specific mode of execution be for any cause impossible, and the charitable intent be still manifest and definite, the court may, by approximation, give effect in a manner next most consonant with the specific mode prescribed." Civil Code, § 4604. In *Beall v. Fox*, 4 Ga. 404, charitable bequests to the treasurer of the American Bible Society, and to the treasurer of the Domestic Missionary Society, for the sole use, benefit, and behoof of the said societies, were held to be definite and specific objects of the trusts specifically designated. In *Newson v. Starke*, 46 Ga. 88, it was held: "A bequest to the inferior court of a county of a sum of money to be placed in the hands of four men, who are to give bond and security, whose duty it shall be to loan out said amount and pay over the interest annually to the inferior court, to pay for the education of poor children belonging to the county, and providing that no part of the principal shall be used for that purpose, is, according to the well-settled rules for the exercise of the inherent power of a court of chancery over charities, sufficiently definite and specific in its objects, and sufficiently capable of execution, to authorize and require our courts of chancery to give it effect. It is the duty of the inferior court, on its acceptance of the trust, in such case, to appropriate the money, as directed, and if any difficulties arise, or any uncertainties exist, as to the precise objects, or as to the mode of applying the fund, to apply to the chancellor, who will direct, by decree, the leading details of the scheme to be adopted." *McCay, J.*, delivered for the court an able opinion, in which he cited many authorities to sustain the judgment rendered. That case was cited with approval in *Beckwith v. Rector, etc.*, of *St. Philips Parish*, 69 Ga. 564, 569, where it was held: "The rules governing the establishment and administration of charitable trusts are different from those applicable to private trusts, in giving effect to the intention of the donor and in establishing the charity. In private trusts, if the cestui que trust are so uncertain, or so in-

capable of taking, that they cannot be identified, or cannot by legal or equitable proceedings claim the benefit conferred on them, the gift will fail and revert to the donor or his heirs. But if a gift is made for a public charitable purpose, it is immaterial that the trustee is uncertain or incapable of taking, or that the objects of the charity are uncertain and indefinite. It will, nevertheless, be sustained. Courts look with special favor upon such trusts." In *Egleston v. Trust Co.*, 147 Ga. 154, 93 S. E. 84, a stated sum was bequeathed to a named trustee to be expended by him, with the advice and consent of three designated persons, "for the purchase of a lot and the erection thereon of a hospital for children, the same to be known as the 'Henrietta Egleston Hospital for Children.'" This court denominated this bequest as "clear, certain, and definite." Many cases in support of the holdings here made are cited in 11 C. J. 346; 6 Cyc. 906 et seq.; 5 Am. & Eng. Enc. L. (2d Ed.) 905 et seq.; 5 R. C. L. 309 et seq.; *Perry on Trusts*, §§ 670, 687, 699; 3 *Story's Eq. Jur.* § 1550 et seq.; 1 *Pomeroy's Eq. Jur.* § 154; 3 *Pomeroy's Eq. Jur.* §§ 1019, 1020, 1025, 1027; *Clark's Equity*, § 270.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action for injunction by *Lena King* and others against *O. E. Horton* and others. Interlocutory injunction denied, and plaintiffs bring error. Affirmed.

*W. Carroll Latimer*, of Atlanta, for plaintiffs in error.

*Rosser, Slaton, Phillips & Hopkins*, of Atlanta, for defendants in error.

*FISH, C. J.* Judgment affirmed. All the Justices concur.

(149 Ga. 330)

WESTERN UNION TELEGRAPH CO. v.  
CITY OF FITZGERALD et al.  
(No. 1049.)

(Supreme Court of Georgia. Sept. 3, 1919.)

(Syllabus by the Court.)

1. LICENSES ~~§~~29—WHEN LICENSE TAX ON TELEGRAPH COMPANY EXCESSIVE.

Upon review of all the facts disclosed by the undisputed evidence in this case, the license tax of \$100 per year imposed by the city of Fitzgerald on each telegraph company doing an intrastate business therein is excessive, unreasonable, and confiscatory. The court therefore erred in denying the interlocutory injunction.

(Additional Syllabus by Editorial Staff.)

2. LICENSES ~~§~~29—RULE FOR DETERMINING NET INCOME OF TELEGRAPH COMPANY.

In calculating the net income of a telegraph company from its intrastate business at a city office, to determine whether a license tax was unreasonable in amount, a proportionate part of the general expenses of the company in its

intrastate business, as well as the expenses peculiarly local, should be considered.

**3. MUNICIPAL CORPORATIONS — 974 — REASONABLE REVENUE TAX NOT INTERFERED WITH BY COURT.**

Courts should not interfere with the discretion of municipal taxing authorities, unless it appears that the tax imposed for revenue is unreasonable in amount or discriminatory.

Error from Superior Court, Ben Hill County; D. A. R. Crum, Judge.

Suit for injunction by the Western Union Telegraph Company against the City of Fitzgerald and others. Interlocutory injunction denied, and plaintiff brings error. Reversed.

Brewster, Howell & Heyman and Mark Bolding, all of Atlanta, for plaintiff in error.

Wall & Grantham and J. B. Wall, all of Fitzgerald, for defendants in error.

**FISH, C. J.** The Western Union Telegraph Company brought suit in the superior court of Ben Hill county against the city of Fitzgerald and certain of its officers and agents, to enjoin the enforcement of an ordinance of the city of Fitzgerald imposing an occupation tax of \$100 for the year 1917 upon the telegraph company. It was alleged that the tax imposed was unreasonable, excessive, discriminatory, and confiscatory. An interlocutory injunction was denied, and the plaintiff excepted.

[1] The facts are not disputed. The plaintiff in error is the only electric telegraph company doing business in the city of Fitzgerald. It appears that the intrastate receipts of the telegraph company from the entire state of Georgia for the year 1917 amounted to \$352,278.39. The entire intrastate business of the company was 25.1 per cent. of the total business, both intrastate and interstate. The total expenses incurred by the telegraph company in carrying on its entire business in the state of Georgia for the year 1917 amounted to \$1,306,286.92, exclusive of taxes and interest on its invested capital. The expense of the company properly apportionable to the entire intrastate business for the year 1917 is 25.1 per cent. of the total expenses of the company on its business carried on in the state for said year. The total expenses, therefore, for the state for the year in question, properly apportionable to the intrastate business for said year, amounted to \$327,878.02. The total income from gross intrastate business received at the Fitzgerald office for the said year amounted to \$2,672.49. The company's gross receipts from intrastate business at its Fitzgerald office for the said year was  $\frac{16}{1000}$  per cent. of the amount received from intrastate business in the entire state for the year 1917. On

this basis of calculation, the expenses apportionable to the Fitzgerald office would be  $\frac{16}{1000}$  per cent. of the entire expenses apportionable to the intrastate business done by the company in the state of Georgia for the year 1917, or  $\frac{16}{1000}$  per cent. of \$327,878.02, which is \$2,491.87. Deducting this amount from the \$2,672.49, the gross income from intrastate business received at the Fitzgerald office for the year 1917, the company received from intrastate business at Fitzgerald for said year \$180.62. The company was required to pay \$8.31 as a tax upon the aggregate value of its property and franchise exercised in the city. The net income received by the company at its Fitzgerald office for the year 1917 was therefore less than \$180.62.

[2] It further appears that the total local expenses of the Fitzgerald office on both intrastate and interstate business for the year 1917 was \$2,902. The city contends that only 25.1 per cent. of this total amount is properly chargeable to the Fitzgerald office on account of the intrastate business done at that office during the year 1917. In other words, it is the contention of the city, the defendant in error, that only the amount actually paid out at the Fitzgerald office for the local expenses should be taken into consideration and that the proportionate expenses of maintaining the lines of telegraph wires reaching from that office to other offices in the state of Georgia, and the proportionate part of the expenses of the management of the system in Georgia, should not be taken into consideration. The telegraph company is not engaged in the transmission of messages from one point to another point within the corporate limits of the city of Fitzgerald. Its entire intrastate business done in the city of Fitzgerald consists in the transmission of telegraph messages from the city of Fitzgerald to other cities in the state of Georgia. It is therefore clear that the telegraph company could not conduct any business in the city of Fitzgerald without the necessary expense of its general management and maintenance of its poles and wires outside the city of Fitzgerald. The cost of maintaining such lines and the cost of its general management must therefore be considered as a part of its general expenses in conducting its intrastate business in the city of Fitzgerald. These general expenses—that is, the cost incurred in maintaining its lines outside the city of Fitzgerald and within the state, and the cost of its general management—must therefore be apportioned to the intrastate business of the company at its Fitzgerald office; that is to say, the general expenses of the company, as well as the items of expense which are peculiarly local in their nature, must be considered. This

course was adopted by this court in the case of Atlantic Postal Telegraph Cable Co. v. Savannah, 133 Ga. 66, 65 S. E. 184, and was followed in the case of Postal Telegraph-Cable Co. v. Cordele, 141 Ga. 658, 82 S. E. 26. Indeed, any other method of arriving at the net income of the telegraph company at its local office on either its intrastate or interstate business would be unreasonable and unfair.

[3] It must be taken as established that a revenue tax must be reasonable in amount, and must not be discriminatory or confiscatory. The courts will not interfere with the discretion of the taxing authorities of a municipality, unless it appears that the tax imposed for revenue purposes is unreasonable in amount or is discriminatory. Under the facts in this case, recited above, the occupation tax of \$100 per year imposed by the city of Fitzgerald on each telegraph company doing an intrastate business therein is excessive, unreasonable, and therefore invalid. A consideration of the decided cases in this state compels this conclusion. See, besides the two cases just cited, Morton v. Macon, 111 Ga. 162, 36 S. E. 627 (1), 50 L. R. A. 485; Mayor, etc., of Savannah v. Cooper, 131 Ga. 670, 63 S. E. 138; Southern Express Co. v. Ty Ty, 141 Ga. 421, 81 S. E. 114. It was therefore error to deny the interlocutory injunction.

Judgment reversed.

All the Justices concur.

(149 Ga. 340)

WADE et al. v. SAUSSY.

SAUSSY v. WADE et al.  
(Nos. 1050, 1064.)

(Supreme Court of Georgia. Sept. 4, 1919.)

(Syllabus by the Court.)

1. WILLS  $\S$  700, 702—PETITION FOR CONSTRUCTION AND ADJUDICATION OF RIGHTS OF PARTIES SUFFICIENT.

The court properly overruled the general and special demurrers to the petition and intervention. The petition and intervention stated a cause of action, and the parties named as plaintiffs in the one and as interveners in the other were proper parties.

2. WILLS  $\S$  714—PROVISION IN WILL A LEGACY AND NOT RECOGNITION OF DEBT.

The third item of the will under consideration was as follows: "I owe one thousand pounds sterling, to the estate of my sister Agnes—Mrs. Scott, now represented by her son Hugh Scott. These amounts were borrowed by me on condition that I return them when I no longer needed them. Interest was not mentioned either by them or by me. One thousand pounds to each will be satisfactory. This money business to be conducted with my nephew

Hugh Scott, and with no one else." The court properly construed this portion of the will as creating a legacy, and not as a provision for the recognition and payment of a debt.

3. WILLS  $\S$  705—DECREE AND NOT VERDICT ESTABLISHES PRIORITY OF PAYMENTS.

Under the issues made and the facts, it was the office of the judgment and decree, and not of the verdict of the jury (which was special in its character and in answer to question submitted), to fix the dignity and priority in payment of the amount due and payable under the third item of the will, which has been construed as creating a legacy. Hence the ground of the motion for a new trial in the first of the cases stated above, complaining of the failure of the verdict to establish the priority in payment of the amount due and payable under the stated item of the will, is without merit.

4. WILLS  $\S$  705—LEGACY PROPERLY PAYABLE TO ADMINISTRATOR OF LEGATEE.

There was no merit in the exceptions of the plaintiffs and the interveners to that portion of the decree directing that the amount payable as a legacy, under the provisions of the third item of the will, should be paid to the administrator of the legatee.

5. ADMISSION OF EVIDENCE—HARMLESS ERROR.

Even if the evidence admitted over objection, as stated in the motion for a new trial made by the plaintiffs in error in the first of the above-stated cases, was incompetent, it is not of such materiality as to require the grant of a new trial.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Suit by W. H. Wade, as administrator of Agnes Scott, deceased, and Hugh Scott, individually, against Gordon Saussy, administrator c. t. a. of the will of Hugh F. Train, deceased, with intervention by John Train Scott and others. Decree adjudging that the will created a legacy, to be paid to plaintiff administrator, and plaintiffs, interveners, and defendant bring error. Affirmed.

W. H. Wade, as administrator of the estate of Agnes Scott, and Hugh Scott, individually, filed a petition in the superior court of Chatham county against Gordon Saussy, as administrator cum testamento annexo of the will of Hugh F. Train, deceased, for construction of the will of the latter and for recovery of the sum of \$4,866.50 from the defendant, and for a decree requiring the defendant to perform the terms of the will and pay over said sum of money, which was claimed under the provisions of the will. At the appearance term of the court (June, 1915) the defendant filed a demurrer to the petition. The demurrer was upon the grounds, among others, that the petition set forth no cause of action, and that there was a misjoinder of parties. Thereafter, at the December term, John Train Scott and others,

alleging themselves to be heirs at law of Agnes Train Scott, who had died in the year 1900, filed their intervention, alleging that under the provisions of the will of defendant's testator there was due and payable to Agnes Scott the sum of \$4,866.50, whether the language of the will should be construed to be an acknowledgment and recognition of indebtedness due by the testator to Agnes Scott, with direction to pay the same, or whether the will should be construed as creating a legacy or gift of that amount of money; that Agnes Scott being dead, and each of the interveners being entitled to a one-ninth interest in her estate and in said sum of money, a one-ninth interest thereof should be paid to each of them. Interveners prayed a judgment in their favor for that amount. This intervention was demurred to on the grounds that it showed no cause of action, and that the interveners were not proper parties. Subsequently the intervention was amended, and there was a prayer for a marshalling of the assets and a decree distributing the estate, and that the rights of the interveners as legatees or beneficiaries or as creditors be determined. The demurrers were overruled. The defendant filed a plea and answer, and a subsequent plea of plene administravit præter.

Before the trial the parties to the case entered into and filed a written stipulation and agreement, admitting that the only claim of the estate of Mrs. E. F. Train, the wife of the testator, and her children, as creditors against the estate of H. F. Train, was the sum of \$2,688.98, which had been paid, and the payment thereof was sanctioned. On the trial of the case the jury, under the charge and direction of the court, in answer to questions submitted, found that the claim under item 3 of the will was a legacy, that the interveners were the heirs at law of Agnes Scott, as alleged, and each of them was entitled to a one-ninth interest in her estate. Upon this verdict a decree was entered, adjudging, among other things, that under the third item of the will a legacy in the sum of £1,000 sterling was bequeathed to the estate of Mrs. Agnes Scott, which should be paid to the plaintiff Wade, as administrator. The decree also fixed the dignity of the bequest contained in that item of the will. It further fixed the interests of the interveners, and authorized the administrator of the estate of Hugh F. Train to sell the realty not specially devised, belonging to that estate, and apply the proceeds in payment of the bequests named in the third paragraph of the will, in their due proportions. The plaintiffs and interveners excepted to the decree, and also made a motion for a new trial, which motion, upon hearing, was overruled. The defendant administrator also excepted to the decree and made a motion for a new trial. This mo-

tion was likewise overruled. The movants in each case excepted to the overruling of their motions for new trial.

Osborne, Lawrence & Abrahams and W. L. Clay, all of Savannah, for plaintiff in error. Adams & Adams, of Savannah, for defendants in error.

BECK, P. J. The two cases brought to this court for review, as set forth in the statement of facts, were argued together, and are here decided together.

[1] 1. We are of the opinion that the court properly overruled the demurrers, both general and special. We think that a petition of the nature of the one under consideration could properly be maintained for the purpose of adjudicating and decreeing the rights, and interests of the parties to the action. Nor was there a misjoinder of parties. The parties to the action were all parties at interest, and their interests could be best settled by having them all before the court, so that their exact interest, as it might appear from the evidence, should be fixed.

[2] 2. The main and controlling question touching the merits of the case is whether, under the provisions of item 3 of the will of Hugh F. Train, a legacy or a debt was created. The court below was of the opinion that the provisions contained in this item of the will created a legacy; and while as to this holding of the court much might be said pro and con, after careful consideration of the question we are of the opinion that the court properly construed the provisions in question. Item 3 reads as follows:

"I owe one thousand pounds sterling to the estate of my sister Agnes—Mrs. Scott, now represented by her son Hugh Scott. These amounts were borrowed by me on condition that I return them when I no longer needed them. Interest was not mentioned either by them or by me. One thousand pounds to each will be satisfactory. This money business to be conducted with my nephew Hugh Scott, and with no one else."

Construing this portion of the will as creating a legacy, it may be conceded that it is unique; and as one revolves it in his mind, attempting to reach a proper construction, various objections to the construction which we have given it may arise. But then, after further considering and studying it, it becomes clearer that the intention in the mind of the testator, especially when the terms of the provisions are considered in the light of all the circumstances, was to create a legacy, and not to make provision for the payment of a debt. The statement of the amount which he had borrowed from his sister is used, it is true; but it is used rather as a measure of bounty than to fix the amount of a recognized indebtedness. While the testator in the language employed states as an

amount borrowed the sum of £1,000 sterling, he follows this language by stating that interest was not mentioned by either the borrower or the lender, and that "one thousand pounds to each will be satisfactory." If he created this as a debt which he was attempting to pay, when it is considered that the accumulated interest would have multiplied the original debt several times, he could not have asserted with such perfect confidence that £1,000 sterling would be satisfactory. But knowing his two sisters, from each of whom he had borrowed £1,000 (the other sister is mentioned in item 2 of the will), and the spirit in which they had let him have the £1,000, and the indefinite time as to when it should be repaid, and realizing their love for him and his for them, he felt that the giving of £1,000 as a legacy would be satisfactory.

We do not think the case of *Thompson v. Stephens*, 138 Ga. 205, 75 S. E. 136, is so nearly identical upon its facts with the present case as to make it controlling upon the question as to whether the third item of the will created a legacy.

[3] 3. No elaboration of the ruling made in headnote 3 is necessary.

[4] 4. As against the interveners there was no error, in view of all the pleadings and evidence in the case, in decreeing that the legacy should be paid to Wade, the administrator of Mrs. Agnes Scott. If Hugh Scott, named in the third item of the will, and "with whom this money business is to be conducted," had filed a petition and prayed that the legacy be paid over to him, the court would have been required to decide whether the money should be paid to him as trustee, or if Hugh Scott had excepted directly to the portion of the decree directing the payment of the legacy to Wade, the administrator, it might have been proper to decide the question. But we do not find in the record any exceptions made by Hugh Scott to this portion of the decree, nor does he make this distinct contention in the petition; but he joined with Wade, administrator, in a petition praying that in the event the court should construe the will and that portion thereof contained in item 3 as creating a legacy, instead of being an acknowledgment of a debt, the administrator with the will annexed, the defendant, "be required to perform the terms of the said will and to pay over to petitioners the amount named in said will." This prayer is not a distinct prayer upon the part of Hugh Scott that the money be paid over to him as trustee, and, if it were, still there is no exception on his part to the direction in the decree that the legacy be paid to Wade, the administrator.

[5] 5. Even if the evidence admitted over objection, as stated in the motion for a new trial made by the plaintiffs in error in the

first of the above-stated cases, was incompetent, it is not of such materiality as to require the grant of a new trial.

The assignments of error not specially dealt with above show no cause for reversal. Judgment affirmed in both cases.

All the Justices concur.

(149 Ga. 363)

## BURWELL v. HILL (No. 1146.)

(Supreme Court of Georgia. Sept. 4, 1919.)

(Syllabus by the Court.)

### 1. SPECIFIC PERFORMANCE §114(1)—WHEN PETITION SUFFICIENT AS AGAINST GENERAL DEMURRER.

The petition as a whole set forth a cause of action, and the court did not err in refusing to sustain the general demurrer thereto.

### 2. PLEADING §193(1)—PARAGRAPHS OF PETITION NOT DEALING WITH TRANSACTION SHOULD BE STRICKEN.

The first six paragraphs of the petition deal entirely with a transaction separate and distinct from that upon which the plaintiff's rights in the present case depend, and they should have been stricken upon demurrer objecting to them upon this ground.

### 3. SPECIAL DEMURRERS—AMENDMENTS.

The other special demurrers, in so far as they were meritorious, were sufficiently met by amendment.

Error from Superior Court, Hancock County; J. B. Park, Judge.

Suit by C. A. Hill against W. J. Burwell. Demurrers to petition overruled, and defendant brings error. Reversed.

C. A. Hill brought his petition against W. H. Burwell, in which he alleged as follows:

He and Burwell entered into an agreement to purchase a certain tract of land. Late in the fall of 1906 petitioner, having secured a verbal option on a tract of land under the terms of which he could purchase the same for \$4,500, suggested to Burwell that he and Burwell should purchase this place for an investment, and he did then agree with Burwell that they would together buy the land. Petitioner, having been compelled to use the money with which he expected to pay for his half of the purchase price, agreed that Burwell should borrow the money with which to make the purchase, and that the loan should be repaid by the two jointly, and that when so paid the unincumbered title to the property should be placed in complainant and Burwell as tenants in common. Burwell consented to the proposition, but, stated that it would suit

him to make an arrangement slightly different from that proposed; that "he (Burwell) would, if Hill would sign certain papers, arrange to borrow the whole of the money needed. To this Hill agreed, understanding that Burwell was to borrow the money for both, \* \* \* and that when repaid the unincumbered title to the tract of land, consisting of 594 acres, should be placed in Burwell and complainant as tenants in common." In compliance with this agreement between the complainant and defendant, the former signed a certain note, stipulating for the payment to the defendant of 14 bales of cotton, which was termed "rent," for each of the years 1907 and 1908, the papers being drawn in this way so that the defendant could use them for the purpose of raising money with which to pay for the land. As a matter of fact, however, the land was not worth 14 bales of cotton annually for rent. In order to effect the loan, it was more convenient for Burwell to have the title taken in his own name. The defendant undertook to have the paper prepared and executed as it should have been so as to protect the interests of both. The note was made for 14 bales of cotton, so as to aid Burwell in borrowing money on security of the place. Burwell acted throughout the entire transaction as the attorney at law for both parties. The money was borrowed by Burwell, and a mortgage given on the land. In 1907 11 bales of cotton were turned over by Hill to Burwell, and it appears that in 1908 and the subsequent years up to and including the year 1916 a stated number of bales of cotton were turned over to Burwell in each year, making in all 91 bales. Complainant cannot state the exact amount received for the cotton, as it was practically all sold by Burwell, and under the agreement was to be applied by him in discharge of the money which was borrowed to pay for the land. Complainant also paid Burwell a certain sum in cash, which, together with the money realized from the cotton turned over to Burwell, was more than enough to pay for the place. And since the year 1907 complainant has been on the land, improving and managing it for the joint account of himself and Burwell, and during all these years has received no compensation for his services, he having turned over to Burwell each year his, complainant's, share of the profits of the place to be applied to the extinguishment of the debt. Plaintiff prays for an accounting and a decree for specific performance.

The defendant filed demurrers, general and special, to the petition, which were overruled, and he excepted.

R. W. Moore, T. F. Fleming, and R. L. Merritt, all of Sparta, for plaintiff in error.

Green & Michael, of Athens, and Wiley & Lewis, of Sparta, for defendant in error.

BECK, P. J. (after stating the facts as above). [1] 1. We are of the opinion that the court properly overruled the general demurrer to the petition. If, as alleged in this petition, the plaintiff had an option on the place to purchase at a given price, the agreement with Burwell whereby they should purchase the same and become joint tenants was not inconsistent with any duty that they owed to the owner of the place. And if the defendant agreed to borrow money and paid the purchase price, giving a mortgage to secure the money borrowed, and agreed also that the plaintiff should have a half interest in the place, and the plaintiff remained upon the place, managing and improving the same by himself and by tenants, and turned over the annual proceeds to the defendant, as is alleged, then when the sum of the proceeds thus turned over to Burwell equaled the amount of the purchase-money and interest, the plaintiff was entitled to specific performance, and to have a conveyance of a half interest in the land, or to have a court decree the same in him. This case differs in its facts from the case of *Hall v. Edwards*, 140 Ga. 765, 79 S. E. 852. In that case it was held:

"An oral agreement between A. and B. to purchase a tract of land, whereby A. is to pay for the land from the proceeds of a loan to be secured by him upon the joint security of a tract of land owned by him and the purchased tract, and take title to the purchased tract in his own name, and convey to B. a half interest when he is reimbursed for the purchase money from the rents, issues, and profits of the purchased tract, is deficient in mutuality and a nude pact."

The defendant relies upon the case just cited, and cases substantially like it in principle, to support his contention that the contract stated was a nudum pactum and lacking in mutuality. The distinction between the two cases will be seen at a glance, upon comparing the facts. In the case cited the party borrowing the money and paying for the tract of land was to take title to the tract thus purchased in his own name, and convey to the other party a half interest when he should be reimbursed for the purchase money from the rents, issues, and profits of the purchased tract. The plaintiff in the instant case, under the allegations of the petition, took charge of, rented, managed, and improved the place. He collected the rents and turned them over to the party who furnished the purchase money. He had no other compensation for the services which he rendered than the interest which he had in the place; and, while Burwell borrowed the money, it was "distinctly agreed that the loan should be repaid by them jointly." The stipulation in the agree-

ment that there should be a joint liability for the loan furnished the element of mutuality; for, if Burwell effected the loan of the money for which the purchase price was paid under this kind of an agreement with the complainant, and has been forced out of his own fund to pay the obligation incurred by borrowing the money, he would have had his remedy against the complainant to compel him to repay his proportion of the sum borrowed.

[2] 2. The first six paragraphs of the petition relate to a transaction which had been completed, and which was entirely separate and distinct from that out of which the alleged rights of the plaintiff set up in the present suit arose, and the history of that former transaction is not essential to the petition in the present case as matter of inducement. The demurrer, therefore, to these six paragraphs, should have been sustained and those paragraphs eliminated; and the court erred in overruling the demurrer to that part of the petition. If by elimination of these six paragraphs certain references to them in other parts of the petition should be rendered obscure, the obscurity thus produced may be cured by proper amendments.

[3] 3. The other special demurrers, in so far as they were meritorious, were sufficiently met by amendment. In the brief of counsel for the plaintiff in error it is pointed out that the petitioner, in order to evade the effect of a certain rent note which he gave for the rent of the land after it was purchased by the defendant, alleges that the note was given by him for more rent than the land was actually worth, and that this was done for the purpose of falsely inflating its value to enable the defendant to borrow the purchase money with which to pay for the same; and plaintiff in error contends that the plaintiff in the court below "could not take advantage of his own fraud, that the rent note speaks for itself, and is an estoppel of the plaintiff to set up that it was given in fraud for the purpose of inflating the value of the land." There was no special demurrer to the paragraph of the petition just referred to, upon the ground taken in the brief; and the court below was not called upon to decide, and did not decide, whether it should be stricken from the petition or not upon that ground.

While we have upheld the overruling of the general demurrer, the judgment is reversed, because of the failure of the court to sustain the demurrer to the first six paragraphs of the petition, upon the grounds pointed out in the second division of this opinion.

Judgment reversed. All the Justices concur.

(149 Ga. 387)

## POTTS v. MATHIS. (No. 1231.)

(Supreme Court of Georgia. Sept. 4, 1919.)

(Syllabus by the Court.)

SPECIFIC PERFORMANCE — 16, 28(1), 114(2) — TERMS OF CONTRACT — CONSIDERATION — EVIDENCE — PETITION

W. J. Potts brought his petition against C. W. Mathis, as administrator of the estate of Mrs. Harriet W. Bass, the material allegations of which are as follows: Josiah Bass died February 3, 1914, leaving as his only heir at law his widow, Mrs. Harriet W. Bass, who has since died, leaving no child or descendant of children. Upon the death of Josiah Bass, after the payment of his debts, which were comparatively small, the bulk of his personal property, together with his real estate, passed into the possession of his widow. The plaintiff is a son of a sister of Josiah Bass. The plaintiff, his mother, and her other son worked on the farm of Josiah Bass for many years, for which they made him no charge. The real estate referred to is composed of three tracts of land, containing in all 305 acres, more or less, which are described in detail in the petition, and which, as administrator, C. W. Mathis now claims to own. Josiah Bass was a farmer and merchant. "On or about the 1st day of January, 1911, said Josiah Bass and petitioner contracted and agreed that if petitioner would work for the said Bass in the future so long as the said Bass should live, as he had in the past, and would treat him in the future as he had in the past, that he, the said Bass, would make a will and leave his entire property to petitioner; that is to say, that if he continued to help on the farm, and at the store, and continued to aid him in making his collections and looking after his tenants, that as petitioner's remuneration therefor he, the said Josiah Bass, would make a will and would make petitioner the sole beneficiary thereof, and would will and devise to petitioner his entire estate. Petitioner had been collecting accounts for the said Josiah Bass for the agreed compensation of 10 per cent. upon the amount collected, regardless of the amount of the account, or the distance traveled and time expended in enforcing the collection. On the faith of this promise and agreement, and in pursuance thereof, your petitioner did continue to work for the said Bass according to his said contract, and assisted him at the store and in his collections as aforesaid, and in looking after his tenants, and complied fully with his contract as aforesaid. No will of the said Josiah Bass has ever been found. He either died without making said will, or else said will was lost or stolen." The plaintiff alleges that the defendant, as the administrator and legal representative of Mrs. Harriet W. Bass, is contending that she owned the land in dispute, as the sole heir at law of her deceased husband, and that she had no claim to the land, except such as was derived from her husband. The plaintiff prays that the administrator be treated as a trustee, and that it be decreed that as such he be compelled to specifically perform the contract between Josiah Bass and the plaintiff, by conveying to the plaintiff the lands described in the petition.

The defendant filed his demurrer, general and special, to the petition. Upon the hearing the trial court passed the following order: "Upon considering the petition and demurrer thereto in the above-stated case, the demurrer is sustained upon all of the grounds thereof. Adequacy of price is a material matter for consideration in determining whether specific performance will be decreed, and on demurrer to the petition for this relief as to a contract alleged to have been made by one, since deceased, to will an entire estate to the petitioner, where the demurrer sets up an entire absence of specification in the petition of the value of the estate, or the value and extent of the service alleged to be the supporting consideration of the contract, and where it appears that the petition does not make any such specification, no case is presented authorizing the court to proceed further than to sustain the demurrer and dismiss the petition. It is therefore ordered that the demurrer be sustained on all the grounds thereof, and the case be dismissed." To this ruling of the court the plaintiff excepted. *Held*, "specific performance not being a remedy which either party to a contract can demand as a matter of absolute right, it will not in any given case be granted, unless strictly equitable and just." *Kirkland v. Downing*, 106 Ga. 530, 32 S. E. 632, cited and applied in *Pair v. Pair*, 147 Ga. 754, 757, 95 S. E. 295, 296. "Mere inadequacy of price \* \* \* may justify a court in refusing to decree a specific performance; so also any other fact showing the contract to be unfair, or unjust, or against good conscience." Civ. Code 1910, § 4637. In order to authorize specific performance of a contract, its terms must be clear, distinct, and definite. *Studer v. Seyer*, 69 Ga. 125. In the absence of allegations in the petition as to the value of the lands, or of the value and extent of the services alleged as the consideration of the contract, it is impossible for a court to determine whether the services performed constituted an adequate or grossly inadequate price for the estate of the person with whom the alleged contract was made; nor could it be determined, in the absence of such essentials, whether the contract was unfair, or unjust, or against good conscience. From the general nature of the contract sought to be set up in this case, it may be distinguishable, as to inadequacy of price, etc., from contracts made with one who goes into the home of a person who is a near relative, agreeing to nurse and to give to such person personal, affectionate, and considerate attention, such as could not readily be procured elsewhere, and where the value of such services could not be readily computed in money. It follows that the judgment dismissing the petition on demurrer must be affirmed.

Error from Superior Court, Houston County; H. A. Mathews, Judge.

Suit for specific performance, etc., by W. J. Potts against C. W. Mathis, administrator of Mrs. Harriet W. Bass, deceased. Demurrer to petition sustained, and plaintiff brings error. Affirmed.

See, also, 147 Ga. 495, 94 S. E. 767.

Hall & Grice and Chas. J. Bloch, all of Macon, for plaintiff in error.

R. N. Holtzclaw, of Perry, and Ryals & Anderson, of Macon, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

BECK, P. J. I concur in the judgment in this case, but do not concur in all that is said, because a part of it, at least, is in effect in conflict with the ruling made in the case of *Landrum v. Rivers*, 148 Ga. 774, 98 S. E. 477. I concur in the judgment because I am of the opinion that the facts alleged in the instant case can be differentiated from those in the case just referred to.

(178 N. C. 24)

DAVIS v. HARRIS. (No. 62.)

(Supreme Court of North Carolina. Sept. 10, 1919.)

1. FRAUDS, STATUTE OF §72(3) — CONTRACT TO CUT AND REMOVE TIMBER.

An executory contract to cut and remove timber is not enforceable unless in writing.

2. FRAUDS, STATUTE OF §139(1) — CONTRACT TO CUT AND REMOVE TIMBER.

The rule that a contract to cut and remove timber is not enforceable unless in writing is applicable only to executory contracts.

3. FRAUDS, STATUTE OF §125(2) — DAMAGES ON BREACH OF ORAL CONTRACT TO CUT TIMBER — RIGHTS OF OWNER.

The contract to cut and remove timber, not being in writing, and being denied by defendant buyer, plaintiff, owner of the land and seller of the timber, is entitled to recover the injury to the land from the trees cut down and removed, or the value of the logs cut and removed, as he may elect.

4. FRAUDS, STATUTE OF §125(2) — DAMAGES ON BREACH OF ORAL CONTRACT — TIMBER CUT.

The contract to cut and remove timber, not being in writing, and being denied by defendant buyer, and defendant having cut down trees on plaintiff's land and left them lying upon the ground, plaintiff, owner of the land, is entitled to recover the injury to the value of the land from the trees being cut down and left upon ground.

5. DAMAGES §182 — MITIGATION OF LOSS — AGREEMENT BY DEFENDANT.

Where defendant cut trees upon plaintiff's land and left logs upon ground, plaintiff is entitled to show that he did not sell the logs because of defendant's agreement to remove and pay for them, if it were incumbent upon him to sell logs to minimize his loss.



**6. FRAUDS, STATUTE OF §72(3)—LOGS—PAROL PROMISE TO PAY.**

A parol promise to pay for cut logs would not be barred by statute of frauds; the logs having become personalty by reason of the cutting.

Appeal from Superior Court, Edgecombe County; Bond, Judge.

Action by J. A. Davis against J. E. Harris. Judgment of nonsuit, and plaintiff appeals. Reversed in part.

The plaintiff by oral contract sold to the defendant the mill timber on his land, the same to be measured and paid for at the rate of \$6 per thousand feet before removal. The plaintiff admits that the defendant paid at that rate for all the timber cut and removed, but alleges that the defendant cut 163 other logs, which he left lying upon the land. The plaintiff further alleges that the defendant agreed that he would cut all the merchantable timber on the land, but that, on the contrary, he picked out the best timber, which he removed and paid for.

The defendant denies these allegations. The plaintiff brings this action upon the ground that, the defendant having picked out the best timber, he is entitled to be paid a higher price for the same than \$6 per thousand, and also to recover the value of the logs left upon the ground and not removed. The court nonsuited the plaintiff because the contract was not in writing.

G. M. T. Fountain & Son, of Tarboro, for appellant.

Allsbrook & Phillips, of Tarboro, for appellee.

CLARK, C. J. [1, 2] A contract to cut and remove timber is not enforceable unless in writing. *Mizell v. Burnett*, 49 N. C. 252, 69 Am. Dec. 744. But this applies to executory contracts only.

It appears in the record that it is admitted by both parties that there was no contract or memorandum of sale in writing; that all trees cut by defendant and removed were measured and paid for at \$6 per M, but that the defendant cut other trees which were not measured or paid for or removed from the land. It is controverted that the defendant promised to pay for them, and that the logs have rotted by reason of the plaintiff relying on defendant's agreement to pay for them.

[3] As to the first cause of action, the contract not being in writing and being denied by the defendant, the plaintiff is entitled to recover the injury to the land from the trees cut down and removed (*Archibald v. Davis*, 49 N. C. 138), or the value of the logs cut and removed as he may elect, unless he agreed to accept \$6 per M in full payment, as alleged by the defendant. The plaintiff claims that he accepted \$6 per M not in full

settlement, but only upon condition that the defendant should cut and pay for all the timber, and that, this not being done, he is entitled to recover the actual damage. This raises an issue of fact to be passed upon by the jury. If this issue is found in favor of the plaintiff, the recovery should be credited with the amount paid. The plaintiff admits that he has accepted payment for all the logs removed.

[4] As to the second cause of action, it being admitted that the defendant cut sundry other logs and left them lying upon the ground, and the contract being denied because not in writing, the plaintiff is entitled to recover the injury to the value of the land from the trees being thus cut down and left on the ground by the defendant. *Archibald v. Davis*, supra. If the defendant had removed these logs, the plaintiff would be entitled to recover the value of the same.

[5, 6] If it were incumbent on the plaintiff to sell the logs to minimize his loss, he is entitled to show that he did not do so by reason of the agreement of the defendant, subsequent to cutting the logs, that he would remove and pay for them. By the act of the defendant in cutting the logs they became personalty, and the promise of the defendant to pay for them, if shown, would not be barred by the statute of frauds. *Green v. Railroad*, 73 N. C. 526; *Lumber Co. v. Brown*, 160 N. C. 283, 75 S. E. 714.

The judgment of nonsuit must to this extent be reversed.

(178 N. C. 15)

**DANIELS & COX v. SOUTHERN DISTRIBUTING CO. (No. 24.)**

(Supreme Court of North Carolina. Sept. 10, 1919.)

**1. SALES §120, 287(3)—RETURN BY BUYER—CONFORMITY TO SAMPLE.**

Buyer had the right, without seller's consent, to ship goods back, if they did not come up to sample, but not otherwise, and in that event should have done so promptly.

**2. SALES §287(1)—RESHIPMENT BY BUYER—DESTRUCTION OF GOODS—RECOVERY OF PURCHASE PRICE.**

Sellers who consented to buyer's reshipment of goods if goods did not conform to the sample could recover purchase price upon destruction, during reshipment, where goods in fact conformed to the sample.

**3. TRIAL §260(1)—ISSUES—REFUSAL TO SUBMIT.**

Refusal to submit tendered issues was not error, where issues submitted were sufficient to present every phase of the controversy.

Appeal from Superior Court, Pasquotank County; Devin, Judge.

Action by L. S. Daniels and L. W. Cox, trading as Daniels & Cox, against the Southern Distributing Company. Judgment for plaintiffs, and defendant appeals. No error.

Early in 1918 Daniels & Cox, millers, at Elizabeth City, N. C., made a contract with Southern Distributing Company of Norfolk, Va., for the sale of 500 bags of meal, to be shipped in 100 bag lots, to be delivered f. o. b. steamer Elizabeth City. On March 9th plaintiffs shipped defendant 100 bags meal via "Peoples Line." There were other shipments, but they are not concerned in this appeal. Upon receipt of the first shipment defendant declined to receive it, on the ground that it did not come up to the contract, and L. S. Daniels, of plaintiffs' firm, instructed C. E. Herbert, president of defendant, to ship the meal back, which he did. The steamer Annie, on which the meal was returned, was completely destroyed by an explosion a few hours after reaching Elizabeth City, and the meal was lost. Plaintiffs sued for the recovery of the value of the lost meal. Verdict and judgment for plaintiffs. Appeal by defendant.

W. A. Worth, of Elizabeth City, for appellant.

Aydlett, Simpson & Sawyer, of Elizabeth City, for appellees.

CLARK, C. J. The meal was sold by sample, and when the first shipment (which alone is in controversy here) was received, the defendant wired plaintiffs that it was not according to sample. The plaintiffs contended that it was as represented, but wrote the defendant that, "if it was not up to sample, the defendant might ship it back, and the plaintiffs would pay the freight." The meal was not shipped back till April 4th.

[1] The defendant had the right without plaintiffs' consent to ship it back if it did not come up to sample, but not otherwise, and in that event should have done so promptly.

Mr. Herbert, president of the defendant and witness for the company, in his cross-examination stated:

"In my wire to Mr. Daniels I told him that the meal did not come up to the contract, and he said that if it did not, to ship it back."

There was a conflict of evidence whether the meal came up to the sample or not, but the jury find upon the issues submitted that this meal "in quality and fineness was as good as the sample," and that the plaintiffs did not by consenting to its return waive their right to recover therefor, and that the defendant did not reship to plaintiffs in a reasonable time.

[2] The legal right of the defendant to reship depended upon whether the meal came up to the sample. The defendant's testimony is that the plaintiffs consented that it

should be reshipped "if it did not." The jury having found upon the conflicting evidence that the meal did come up to the sample, the reshipment was made by the defendant in its own wrong, and the plaintiffs, not having received and accepted the same, are entitled to recover the purchase price.

The defendant's prayer, therefore, that if the jury should "believe all the evidence they should respond to the second issue that the plaintiffs by consenting to the return of the first hundred bags of meal waived their right to recover therefor" could not be given, in view of the testimony of the defendant's president that the plaintiffs had directed him to ship it back "if it did not come up to the sample." It is immaterial to consider the controversy whether the defendant lost the right to reship by its delay.

[3] The "issues submitted were sufficient to present every phase of the controversy," and it was not error to refuse to submit the issues tendered by the defendant. *Humphrey v. Church*, 109 N. C. 132, 13 S. E. 793, and cases therein cited, and citations thereto in *anno. Ed.*

No error.

KEYS v. ALLIGOOD et al. (No. 31.)

(Supreme Court of North Carolina. Sept. 10, 1919.)

1. INJUNCTION  $\S$  230(4) — CONTEMPT — SENTENCE — ALTERNATIVE ORDER.

Where defendants violated an interlocutory injunction, the court, before passing sentence of fine or imprisonment, had an undoubted right to make an alternative order, giving the defendants a chance to repent and undo their wrongful act.

2. INJUNCTION  $\S$  215 — ENFORCEMENT BY MANDATORY ORDER — VALIDITY.

If an order compelling defendants to restore a ditch bank which they had destroyed in violation of an interlocutory injunction be considered a mandatory injunction, it must be held a valid order necessary to enforce the court's authority.

3. INJUNCTION  $\S$  230(4) — MANDATORY INJUNCTION — CONTEMPT.

A mandatory order, compelling defendants to restore a ditch bank which they had destroyed in violation of an interlocutory injunction, withholding the question of imposition of a penalty for disobedience, *held* merely a method of enforcing the court's order, and not a punishment for contempt unauthorized by statute.

Appeal from Superior Court, Beaufort County; Devin, Judge.

Action by Malachi Keys against Ivery Alligood and another. From an order granting a mandatory injunction compelling defendants to restore a ditch bank which they

had destroyed in violation of an interlocutory injunction, defendants appeal. No error.

The court had issued an order restraining the defendants from in any way interfering with a certain road, and on return of the order, and after hearing the evidence and the argument of counsel, the court granted an interlocutory injunction to the final hearing, forbidding the defendants from entering upon the premises or using the road except strictly for purposes of ingress and egress, as heretofore, and no more. There was no appeal from this order, and while the interlocutory injunction was pending and still in full force, it was alleged and shown before the judge that defendants had willfully violated the same. Plaintiff thereupon asked for a mandatory injunction to compel the defendants to restore the former condition of things, and to desist from further interference with the road or its ditches, or from further disobeying the injunction. The court heard the parties, found that the injunction had been violated, and ordered the defendants to restore the ditch bank to the place from which they had removed it. This order is stated to have been made at the election of plaintiff, the court withholding the question as to the imposition of any penalty for disobedience. Defendants appealed.

Harry McMullan, of Washington, N. C., and John G. Tooty, of Belhaven, for appellants.

**WALKER, J.** (after stating the facts as above). It is somewhat difficult to understand from the record whether the court withheld the punishment for the contempt in violating the order, until the defendants had reasonable time and opportunity to restore the ditch bank, or whether the mandatory injunction was issued absolutely and without regard to any alternative judgment in the way of punishment for the contempt. We rather favor the former construction of the order, but will consider it in both phases.

[1] First. If the order was in the alternative, there can be no question as to the power of the court to make it. Before passing sentence of fine or imprisonment, the court had the undoubted right to give the defendants a chance to repent and undo the wrongful act committed by them in violation of its order.

[2] Second. But if the order is to be taken as one for a mandatory injunction, requiring the defendants to replace the ditch bank, we still think it was valid. The cases upon the power of the court to issue such an injunction before final decree are somewhat in conflict, but if proper distinctions are made we think they may be reconciled. Some of them, which hold that such a mandatory order cannot be issued until the final decree is passed, seem to refer to those instances where the al-

leged wrongful act was fully accomplished before the suit was commenced, and not to cases where the wrong ordered to be undone was itself in violation of an interlocutory injunction, as here. A learned and accurate text-writer has said that there would seem to be no good reason why, in a proper case, a mandatory injunction should not issue upon preliminary hearing. Gross violations of rights may occur in the shortest possible time; and a few hours' wrongdoing may result in the creation of an intolerable nuisance or in the production of an injury which, if prolonged, might soon become irreparable. In such cases the interposition of the strong arm of the chancellor ought to be most swift; and if the immediate relief afforded could not, in a proper case, be restorative, as well as prohibitory, no adequate redress would, in many instances, be given. Bispham's *Pr. of Equity* (9th Ed.) p. 638. And so it was held in *Murphey v. Harker*, 115 Ga. 77, 41 S. E. 585, that when one who has notice that an injunction has been granted against him, though he has not been formally served with the writ, does an act which is a violation of the injunction, and thus changes the status of the property involved in the case, the judge may at an interlocutory hearing, or upon an application for an attachment for contempt, require the offender to restore the status as it existed at the time he first received notice that the injunction had been granted. The court by Justice Hall, in *Robinson v. Woodmansee*, 76 Ga. 830, said it was not error to require that the defendant restore the status, as it existed at the time of the wrongful act, as it was but "a mild use of the judge's discretion." It is said in 1 *High on Injunctions*, at end of section 5, p. 10:

"Where, before the granting of the injunction, the defendant has thus changed the condition of things, the court may not only restrain further action by him, but may also, by preliminary mandatory injunction, compel him to restore the subject-matter of the suit to its former condition. And in so doing the court acts without any regard to the ultimate merits of the controversy."

Mr. Bispham in his treatise on *Equity* (9th Ed.) § 400, at page 637, says that the inclination of the courts of this country was, at one time, against granting a mandatory interlocutory injunction, but that the "tendency, however, is now towards greater liberality in granting such applications," and that many occasions may arise which render a mandatory injunction necessary. In another part of that section he further says:

"An injunction may therefore be said to be either mandatory or prohibitory. A mandatory injunction is one that compels the defendant to restore things to their former condition, and virtually directs him to perform an act. The jurisdiction of the court to issue such a writ has been questioned, but it is now established be-

yond doubt. 'This court,' said Lord Justice Cotton, in *Loog v. Bean*, 'when it sees that a wrong is committed, has a right at once to put an end to it, and has no hesitation in doing so by a mandatory injunction, if it is necessary for the purpose.' The form of the order, however, was not, under the old practice, direct in its terms, but the end was reached by a writ apparently prohibitory. Thus an injunction that a defendant should deliver up books and papers in his possession has been issued in the prohibitive form. \* \* \* This order, it will be observed, is in terms a restraining order; but in effect it is a command to the defendant to deliver up the books and papers. Under the modern practice the better form, perhaps, is that the decree should be not only in effect, but in terms, mandatory."

It has been conceded in many cases that such an injunction before the final hearing will be issued, where though mandatory in substance, is prohibitory in form, but several text-writers, and some of the judges, have said that this is a distinction without any difference, and should not longer exist. *Hillard on Injunctions*, 8. It was said in *Bosley v. Susq. Canal*, 3 Bland (Md.) at page 66, that while a court of equity will not, in the first instance, command a thing to be done, or to be undone by an injunction mandatory in form, yet where acts have been done in violation of an injunction it will order them to be undone or the matter restored. We can conceive of no sound reason why the court may compel a thing to be done or undone, by a restrictive injunction, and not require the same thing of the defendant by an injunction mandatory in form. Of course, the defendants should be heard before the mandatory writ is issued, and it should be confined to those cases where it is necessary in order that the status quo may be preserved; but, where a previous injunction has been violated, we do not see why obedience to it should not be forced by a restoration of things to their former condition. It would be permitting a recalcitrant defendant to profit by his wrong done in contempt of an order forbidding it. Where it is the obstruction of a right of way, as here, there is no difference in ordering him to remove it, and requiring him to desist from continuing it. The subject is fully discussed, and our view sustained, in *Vicksburg, etc., Ry. Co. v. Webster, etc., Co.*, 132 La. 1051, 62 South. 140, 47 L. R. A. (N. S.) 1155, and in the note to that case as reported in 47 L. R. A. (N. S.) 1155.

Lord Eldon, in one case, *Lane v. Newdigate*, 10 Vesey, 192, was of the opinion that he could not direct the thing specifically to be done, but that he could make an order which would indirectly have that very effect, which he accordingly did, stating how the order should be drawn, by making it restrictive in form, which Lord Brougham, commenting generally upon that kind of practice, considered as merely a "roundabout mode," the injunction not commanding anything to

be done or undone, but simply that an injurious irregularity should not be permitted any longer to exist, regarding the continuance of the act as a repetition of it. In these days, we have found what we deem to be a better method, and look rather to the substance than to the form of things, as being a more direct, simple, and effective way of dealing with the rights and remedies of litigants. We prefer the modern method, and the tendency of the courts, we are told, has strongly set in that direction.

Why not call this process by its right name, instead of granting what is really mandatory, under the guise of preventive relief? When this is done, we are trying to deceive ourselves, for no good or practical reason, when we know what we are actually doing, or what the inevitable effect will be. It is simply adherence to an old form and custom of the court of equity which did not even gain the approval of some of its ablest chancellors. In modern times, since we try to call things by their true and appropriate titles, so we may be better understood, the decided trend of the courts, especially in this country, is towards a more sensible policy, as we have already shown by authority.

We must be careful to remember in this connection that whether the defendant in an injunction suit who violates the order should be punished for the contempt shown the court concerns the court in the matter of the maintenance of its dignity and authority; but whether, by coercive or punitive measures, such defendant should be compelled to obey the writ issued by a competent court for the preservation of a civil right asserted by the plaintiff concerns the plaintiff, and the action of the trial court on that question may be subject to review on appeal; but where the court has full jurisdiction in the premises, its findings of fact, as to the disobedience of its order, are not open to review in a collateral proceeding, such as habeas corpus. 14 *Ruling Case Law*, § 170; *Vicksburg, etc., R. Co. v. Webster, etc., Co.*, 132 La. 1051 [62 South. 140, 47 L. R. A. (N. S.) 1155]. Applying the foregoing principle to this case, we find that there has been an open and defiant violation of the interlocutory injunction issued by the court. *Rapalje on Contempts*, § 41. The defendants have done what they were clearly prohibited from doing. If the status quo cannot be restored by a mandatory injunction, the orders of a court can easily be set at naught, and valuable rights destroyed without commensurate redress. The party may be punished for contempt by fine or imprisonment, but this will not reinstate the former condition, and be of no pecuniary benefit to the plaintiff. It is surely no adequate restoration of what he has lost by the defendants' wrongful act. If a party, who has defied the court, and deliberately violated its order, cannot be made to yield full obedience to it by undoing what he has so fla-

grantly done in contempt of the court, and in plain violation of the plaintiff's rights, the arm of the court has lost its boasted strength, and its power to grant protective relief. But we do not admit that this has been the unfortunate result of the decisions, which appear to be growing more and more favorable to the doctrine that such an interlocutory injunction, mandatory in form and substance, may be granted, that is, before decree, when it is done to compel restoration where the wrong was committed by disobeying the order of the court.

[3] This is not punishment for the contempt, not authorized by the statute, as contended by the defendants, but is merely a method of enforcing the court's order. As said in *Cromartie v. Commissioners*, 85 N. C. 215, when referring to the statute as to contempts:

"It will be noticed that, throughout these latter portions of the statute, the proceeding is designated not as the former, but a proceeding 'as for contempt,' and, while regulating, not intended to deprive the court of its well-established jurisdiction to enforce obedience to its lawful orders as before possessed and exercised. 'Without the ability to compel obedience to its mandates,' say the court in *Pain v. Pain*, 80 N. C. 322, 'whether the order be to surrender writings in possession of a party, to execute deeds of conveyance, to pay money, as in the present case, or to perform any other act the court is competent to require to be done, many of its most useful and important functions would be paralyzed.' The order here is coercive only upon persons capable of performing its requirement, and its force is exhausted by rendering obedience. There is therefore no excess of power apparent in the judgment."

The order there was one for the imprisonment of the defendants until they complied with the former order of the court, and was not one for their punishment, by fine or imprisonment or both, for disobedience to such order. As here, it is simply coercive process. This distinction is also mentioned in the case of *In re Patterson*, 99 N. C. 407, 6 S. E. 643. Whether the court also will punish the defendants for the offense against its dignity and authority is left to its sound discretion.

We find no error in the record.  
No error.

(178 N. C. 670)

#### STATE v. WINDLEY. (No. 1.)

(Supreme Court of North Carolina. Sept. 10, 1919.)

#### 1. CRIMINAL LAW §27—FELONY OR MISDEMEANOR—CONSTRUCTION OF STATUTE.

Sheriff who delivered collected taxes to county treasurer instead of person entitled thereto was merely guilty of a misdemeanor, under Revisal 1905, § 3576, and not of a felony, under section 3408, denouncing as a felony failure

to turn over to person entitled thereto "all such moneys, funds," etc., the latter statute having reference to money held in trust for any person or corporation, in view of preceding provision thereof relating to embezzlement of such trust funds.

#### 2. CRIMINAL LAW §886—VERDICT—SURPLUSAGE—FELONY—MISDEMEANOR.

Where defendant, found guilty of a felony under one statute, was not in fact guilty thereof, but merely of a misdemeanor under another statute, verdict will not be permitted to stand as one convicting him of the misdemeanor, on the theory that the words "willfully and feloniously" were mere surplusage.

#### 3. CRIMINAL LAW §763, 764(7) — INSTRUCTIONS—PROVINCE OF JURY.

Instruction that, if jurors believed defendant's testimony given in his own behalf, they should return verdict of guilty, held improper, as invading province of jury.

#### 4. CRIMINAL LAW §656(9)—TRIAL—PROVINCE OF JURY.

The jury should at all times be left free and untrammelled to find the facts, without the slightest intimation by court as to what the verdict should be.

#### 5. CRIMINAL LAW §731 — PROVINCE OF JUDGE AND JURY.

The judge declares the law arising upon the evidence, and the jury should be governed by his instructions.

#### 6. CRIMINAL LAW §731 — PROVINCE OF JUDGE AND JURY.

Jurors are the sole triers of the facts, subject to the right of the court to say what evidence is competent and relevant and what it tends to prove, the question of what in fact it does prove being for the jury.

#### 7. CRIMINAL LAW §308—PRESUMPTION OF INNOCENCE.

Defendant is presumed to be innocent, the state having the burden of proving guilt to the full satisfaction of the jury.

#### 8. CRIMINAL LAW §874—POLLING JURY BEFORE VERDICT.

Under Revisal 1905, § 535, court's action in asking the jurors, before rendition of verdict, if each of them believed defendant's testimony, and if so to hold up his right hand, held improper.

#### 9. CRIMINAL LAW §874—POLLING JURY.

The approved practice, in polling jurors after rendition of verdict, is to do so merely to make sure that verdict is that of entire jury, and not to inquire as to a special finding or their belief as to one particular fact.

#### 10. CRIMINAL LAW §1141(1)—APPEAL—PRESUMPTION.

On appeal from conviction, court, in passing upon exception complaining of conduct of lower court, will assume that defendant may be innocent.

Appeal from Superior Court, Beaufort County; Bond, Judge.

W. B. Windley was convicted of failing to pay over money received as sheriff to persons entitled thereto when lawfully required to do so, and he appeals. New trial.

The charge in the indictment is that the defendant had unlawfully, willfully, and feloniously, as sheriff of Beaufort county, failed to pay over and deliver to the proper persons entitled to receive the same, when lawfully required to do so, certain money and funds which he had received by virtue or color of his office, in trust, contrary to the provision of the statute. The indictment was drawn under Revisal, § 3408, and this is stated in the brief of the state, which refers to the original statute, Code of 1883, § 1016, as having been amended, in consequence of the decision in *State v. Connelly*, 104 N. C. 794, 10 S. E. 469, by Public Laws of 1891, c. 241, and brought forward in the Revisal as section 3408.

There was evidence tending to show that the defendant had collected certain taxes, especially unlisted taxes, such as license and privilege taxes, and had failed to pay over the same to the officer designated by the law to receive them. The court instructed the jury that if they believed the defendant's testimony which he gave in his own behalf, and found the facts to be as it tends to show them to be, it would be their duty to return a verdict of guilty on the first count, ignoring the count for embezzlement.

E. A. Daniel, Jr., and Small, MacLean, Bragaw & Rodman, all of Washington, N. C., for appellant.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

WALKER, J. (after stating the facts as above). [1] If we assume that the testimony of the defendant was of such a nature as to warrant the instruction to the jury, we are of the opinion that the court erred in further telling them, in answer to the question of one of the jurors, that they should convict the defendant if he simply received certain money and failed to pay it to the proper party, though he may have paid it to the county treasurer. The first part of section 3408 of the Revisal of 1905 relates to the embezzlement or willful and corrupt use or misapplication of funds held by any officer, agent, or employé of any city, county, or incorporated town, or of any penal, charitable, religious, or educational institution, and denounces it as a felony, and that any such person convicted of the same shall be fined and imprisoned in the penitentiary for a time to be fixed by the court in the exercise of its discretion. The next provision of the section applies to the embezzlement, wrongful conversion, or corrupt use or misapplication to any purpose, other than that for which it is held, of any money,

funds, securities, or other property, which such officer shall have received, by virtue or color of his office, in trust for any person or corporation, and such act is declared to be a felony. The statute, as amended in the year 1891, is composed of this provision, and the last one in the section (amendment of 1891), which is as follows:

"The provisions of this section shall apply to all persons who shall go out of office and fail or neglect to account to or deliver over to their successor in office or other persons lawfully entitled to receive the same all such moneys, funds and securities or property aforesaid. The punishment shall be imprisonment in the state's prison or county jail, or fine, in the discretion of the court."

The first part of the amendment refers to the embezzlement, conversion, etc., of money, funds, and other things held in trust for any person or corporation, and the second part to the failure or neglect of the officers to account for and deliver over to their successors in office, or to other persons who are lawfully entitled to receive the same, all such moneys, funds, etc.; which means, by the use of the word "such," all the money or funds, etc., held in trust by such officers for any person or corporation. The court held in *State v. Connelly*, 104 N. C. 794, 10 S. E. 469, that the statute, as then worded, applied only to the public officers who are designated in the same, and to private persons who held money or property in trust for the public corporations named therein, and therefore that Connelly, as clerk of the superior court, who held funds belonging to a distributee, private person, or corporation, was not indictable for failing to pay or deliver it to the person entitled thereto. At the next session of the Legislature after that case was decided the statute was amended, as indicated above, so as to cover such a case. But the Legislature has not failed to provide very fully for the case presented in this record. Revisal, § 3576, is as follows:

"If any state or county officer shall fail, neglect or refuse to make, file or publish, any report, statement or other paper, or to deliver to his successor all books and other property belonging to his office, or to pay over or deliver to the proper person all moneys which come into his hands by virtue or color of his office, or to discharge any duty devolving upon him by virtue of his office as he is by law required to do, he shall be guilty of a misdemeanor."

The language of this section is very broad, and seems to include every case where any officer named therein has failed to pay to the proper person, whoever he may be, all moneys received by virtue or color of his office. The offense is made a misdemeanor, and punishable as such under the law. But it is suggested that the jury are presumed

to have followed the judge's instruction that a verdict of guilty should be rendered by them, if they found only that defendant had received certain money, as taxes, and failed to pay it over to the proper party, and that such a verdict, upon the only count in the indictment they were directed to consider, would mean no more, and would not be one for embezzlement, and that, as the jury convicted under this instruction, the verdict should be taken as convicting only for the offense described in the charge; that this offense, though not a felony, but simply a misdemeanor, under Revisal, § 3576, is included in the general allegations of the count, and therefore the verdict should stand as one convicting defendant of the misdemeanor, and the punishment imposed accordingly, the words "willfully and feloniously" being regarded as mere surplusage.

[2] This would be dangerous practice, even if we admit the premises and the conclusion drawn from them. The defendant was convicted of the felony, and the jury so declared when they rendered the verdict, which means, when properly construed, guilty of the offense charged in the bill of indictment, which is a felony, because it is made so by the statute. The jury did not return as their verdict that he was guilty of the misdemeanor charged in the bill, even if such a verdict would be a legal and valid one, as to which we do not decide, it not being necessary that we should do so.

There is another consideration. As this verdict stands now the defendant has been convicted of a felony, and if the verdict is permitted to stand he will be deprived of his right to vote and to hold office, under article 6, §§ 2 and 8, of the Constitution, and the punishment may extend to confinement in the state prison at hard labor. This but shows the great importance of a close scrutiny of the record to see if the defendant has been properly convicted of the felony charged in the bill, or whether, if guilty at all, his offense is only a misdemeanor. It is all too serious a charge for the record to be left in any state of uncertainty. The court thought that the defendant had been convicted of a felony, as it sentenced him to be imprisoned three years in the penitentiary.

[3] But, leaving this matter here, we are of the opinion that in any view, whether it be a felony or a misdemeanor, the learned judge went too far in his charge to the jury. We are fully aware that he did not intend to do so, but intended to confine his instructions to the jury within the proper limits. The language of the court addressed to the jury was, in our opinion, subversive of that freedom of thought and of action so very essential to a calm, fair, and impartial consideration of the case. The desire to see the law vindicated, and any violation of it

receive the proper punishment, is a most commendable one; but we should not indulge it at the risk of taking from the defendant any of the constitutional or statutory safeguards.

[4] The slightest intimation of the court, by word or deed, as to what the verdict should be, may be fatal to any defendant, though he may be ever so innocent, and our statute provides against it. The jury should, at all times, be left free and untrammelled to find the facts.

[5, 6] The judge declares the law arising upon the evidence, and the jury should be governed by his instructions; but they are the sole triers of the facts, subject to the right of the judge to say what evidence is competent and relevant and what it tends to prove. What it does prove is the peculiar question for the jury to decide.

The present Chief Justice clearly stated the rule in *State v. Riley*, 113 N. C. 648, 18 S. E. 168, when he said:

"The plea of not guilty disputes the credibility of the evidence, even when uncontradicted, since there is the presumption of innocence, which can only be overcome by the verdict of the jury."

As said by Judge Henderson and Judge Hall in *Bank v. Pugh*, 8 N. C. at page 206:

"The manner in which the judge instructed the jury is, to me, also sufficient to warrant a new trial. He charged the jury that, if they believed the testimony of Stephens, they should find the paper writing not to be the deed of the defendant. Now, what Mr. Stephens' testimony proved was a thing on which he could not decide; that belonged to the jury, \* \* \* [who] are the constitutional judges, not only of the truth of testimony, but of the conclusions of fact resulting therefrom."

And by Pearson, J., in *State v. Shule*, 32 N. C. 154:

"We think there was error in the mode of conducting the trial. There must be a *venire de novo*. There was a departure from the established mode of proceeding, and the wisest policy is to check innovation at once; particularly as, in this case, it concerns the 'trial by jury,' which the 'Bill of Rights' declares 'ought to remain sacred and inviolable.' \* \* \* The innovation is that, instead of permitting the jury to give their verdict, the court allows a verdict to be entered for them, such as it is to be presumed the court thinks they ought to render; and then they are asked if any of them disagree to it, thus making a verdict for them, unless they are bold enough to stand out against a plain intimation of the opinion of the court."

The same view of what is the proper mode of trial is thus stated by Justice Connor in *State v. Adams*, 133 N. C. 667, 45 S. E. 553:

"It may well admit of question whether it be not more consonant with the genius of our law to permit the juries, under proper instruction of the court, to find the truth as they believe it

to be, certainly in criminal cases, drawing such inferences and conclusions from admissions and facts proved to their satisfaction as experience, observation, and reason suggest."

The judge, in this case, did not enter the verdict, and ask if any of the jurors disagreed to it, as was done in *State v. Shule*, supra; but the jurors were, in effect, polled, and asked if each of them believed the testimony of the defendant, and, if so, to hold up his right hand. This was done after a statement by the court of what the defendant, as a witness in his own behalf, had said, and the further remark that he had proved himself to be a man of good character. The court then instructed the jury that, having all of them said that they believed the statement of defendant, he had told them before, and would tell them now, that it is their duty, as jurors, to take the law from the court, and if they believe defendant's testimony, and found the facts which it tends to show, to convict him. There are other expressions of like kind, though somewhat more intensive in form and emphasis. It may be that this defendant is guilty, under the facts, of violating the law as defined in the statute; but, if so, the jury must be permitted to find the facts from the evidence freely and voluntarily; and this is true, no matter how plain a case against the defendant it may appear to be, as the plea of not guilty challenges the truth of the testimony, and "denies the credibility of the witnesses."

[7] The defendant was not given any benefit of the presumption of innocence, and no reference was made to it or to the doctrine of reasonable doubt. The burden of showing guilt is upon the state, as the contrary is presumed, and this requires that it should prove its case to the full satisfaction of the jury. It was said in *State v. Simmons*, 143 N. C. 613, 56 S. E. 701, and approved in *State v. Godwin*, 145 N. C. 461, 59 S. E. 132, 122 Am. St. Rep. 467:

"When the jury returned to court, after having been out for a few minutes, the judge inquired of them as to their trouble in reaching a verdict, and they replied that some of them thought the defendant guilty and others thought he was not guilty; whereupon the judge polled the jury, asking each juror if he believed the evidence, when each replied that he did believe the evidence as given on the stand. This was not according to regular procedure or the approved precedents in such cases, if it was not a direct violation of the act of 1796. \* \* \* Besides being in effect an intimation of opinion as to what the verdict should be, the inquiry of the judge and the manner of making it were calculated to deprive the jury of the freedom of thought and action which is so essential to an impartial consideration of the case and a proper discharge of their duty."

See, also, *State v. Green*, 134 N. C. 658, 46 S. E. 761, *Benton v. Toler*, 109 N. C. 238, 13 S. E. 763, and *McCanless v. Flinchum*,

98 N. C. 358, 4 S. E. 359, where the court said:

"Proof is the result or conclusion usually reached by evidence. If there was evidence upon the issues, the jury alone could determine and weigh its effect and find the fact to be deduced from it." *State v. Davis*, 15 N. C. 612 (Op. of Gaston, J.).

[8, 9] We do not think that the evidence was such as to admit of the instructions given by the court. The manner of instructing the jury violated the spirit, if not the letter, of our statute. Revisal, § 535 (Act of 1796, c. 452); *Withers v. Lane*, 144 N. C. 184, 56 S. E. 855. It is not permissible to poll the jury before the verdict is announced, and it is done then to make sure of the verdict being that of the entire jury—the conclusion of all the jurors. (*State v. Sheets*, 89 N. C. 543, at pages 549, 550; *Bish. Cr. Pro.* § 830; *State v. Young*, 77 N. C. 498); and that is the approved and usual practice (*State v. Sheets*, supra). We do not regard it as according to the established rule to poll the jurors as to a special finding, and especially as to their belief regarding one particular fact, or the impression made upon their minds. It is better to follow the beaten way in such vital matters. There are other considerations not now necessary to be mentioned.

A learned presiding judge, in the course of a trial, may, and sometimes does, unwittingly, or inadvertently, so express himself as to influence the minds of the jurors, and this, of course, is done unconsciously, and without due regard, at the time, to such injurious effect. We do not doubt that such was the case in this instance. The error, though, must be corrected, however unconsciously committed; for the harm is just the same, in kind and degree.

[10] The accused may be guilty of the crime alleged against him, but, in passing upon exceptions like those now taken, we must not forget, and should assume, that he may be innocent. We must conclude that the charge, especially when construed as a whole, was erroneous in the respect above indicated.

For the reasons stated, the defendant is entitled to a new trial. The solicitor will consider, in view of what we have said, whether it is prudent to make the indictment more conformable to the proof by adding another count, or by a fresh bill; but this is left entirely to his judgment.

We do not say that the defendant may not be convicted under the bill now before us, as it is not necessary to do so by anticipating further developments in the progress of the case. Our decision is strictly confined to what is presently before us, and does not go beyond it.

New trial.



(178 N. C. 22)

**LANCASTER v. LANCASTER. (No. 61.)**

(Supreme Court of North Carolina. Sept. 10, 1919.)

**1. CONSTITUTIONAL LAW §48—CONSTITUTIONALITY OF STATUTE—PRESUMPTION.**

Every presumption is in favor of the validity of an act of the Legislature.

**2. HUSBAND AND WIFE §57—WIFE'S SEPARATE PROPERTY—INSANITY OF HUSBAND—CONSTITUTIONALITY OF STATUTE.**

Revisal 1905, § 2116, giving wife power to convey her personal and real estate without husband's assent where husband has been declared an idiot or lunatic, held not violative of Const. art. 10, § 6, empowering wife to convey property with husband's written assent, in view of Revisal 1905, §§ 959, 2111, 2117, and notwithstanding section 1898.

**3. HUSBAND AND WIFE §134—HUSBAND'S INTEREST IN WIFE'S LAND—CURTESY.**

Husband has no interest in wife's land beyond a contingent right of curtesy, if she makes no will.

Appeal from Superior Court, Edgecombe County; Bond, Judge.

Action by Martha L. Lancaster against G. Z. Lancaster. Judgment for plaintiff, and defendant appeals. Affirmed.

Appeal by defendant from Bond, J., June term, 1919. The plaintiff was seized in her own right of the land described in the pleadings. Her husband having been declared a lunatic, and being confined in the hospital at Raleigh, she contracted to sell the land to the defendant, who refused the deed tendered by the plaintiff upon the sole ground that she could not convey title thereto by a good and sufficient deed without the written assent of her husband. The court gave judgment for the plaintiff, and the defendant appealed.

H. D. Hardison, of Tarboro, for appellant.

F. S. Sprull, of Rocky Mount, and W. O. Howard, of Tarboro, for appellee.

**CLARK, C. J.** The sole question raised is whether or not the plaintiff, whose husband had been declared a lunatic can during the continuance of such lunacy convey her land without the written assent of her husband, under section 2116 of the Revisal; in other words, whether or not this section is in violation of section 6, art. 10, of the Constitution.

This statute is clear and unambiguous. It provides, among other things, that "every woman \* \* \* whose husband shall have been declared an idiot or a lunatic, shall be deemed and held, \* \* \* from the date of such idiocy or lunacy and during its continuance, a free trader, and shall have power to convey her personal and real estate without the assent of her husband."

[1] Every presumption is in favor of the validity of an act of the Legislature.

The very next section (Rev. § 2117) provides that "every woman whose husband shall abandon her, or shall maliciously turn her out of doors, shall be deemed a free trader, \* \* \* and shall have power to convey her personal estate and her real estate without the assent of her husband." This has been held valid in *Vandiford v. Humphrey*, 139 N. C. 65, 51 S. E. 893; *Finger v. Hunter*, 130 N. C. 531, 41 S. E. 890; *Brown v. Brown*, 121 N. C. 8, 27 S. E. 998, 38 L. R. A. 242; *Hall v. Walker*, 118 N. C. 377, 24 S. E. 6—all of which have been cited and approved recently by *Allen, J.*, in *Bachelor v. Norris*, 166 N. C. 508, 82 S. E. 839.

For a stronger reason, section 2116, authorizing the wife to convey when the husband is wholly unable by reason of mental incapacity, duly adjudged, to give his assent, is a valid exercise of the legislative power.

[2] A reasonable construction must be put upon the constitutional provision. The husband's assent cannot be required when either by reason of mental incapacity he is unable to give assent, or by his conduct in abandoning his wife, or maliciously turning her out of doors, he has practically emancipated her, for in both cases she must rely upon her property or her labor for her support.

Section 2116 has been referred to in a number of cases as an exception to the constitutional provision which requires the assent of the husband, though not directly construed. In these cases it is stated that the husband's assent to the conveyance of the realty is required "except in cases under sections 2116 and 2117." *Council v. Fridgen*, 153 N. C. 443, 69 S. E. 404; *Harvey v. Johnston*, 133 N. C. 352, 45 S. E. 644; *Sanderlin v. Sanderlin*, 122 N. C. 1, 29 S. E. 55; *Moore v. Wolfe*, 122 N. C. 715, 30 S. E. 120; *Farthing v. Shields*, 106 N. C. 295, 10 S. E. 998; *Hodges v. Hill*, 105 N. C. 130, 10 S. E. 916; *Flaum v. Wallace*, 103 N. C. 304, 9 S. E. 567; *Sparks v. Sparks*, 94 N. C. 527.

It is inconceivable that in either of these cases the wife should be debarred from using her own property when the husband by his abandonment of her or turning her out of doors, or by reason of his mental incapacity, has left her to fight the battles of life alone. The Constitution could not have intended this, and we concur that the legislative construction, as expressed in sections 2116 and 2117, is reasonable and valid.

In *Hall v. Walker*, 118 N. C. 380, 24 S. E. 6, the court said:

"There is no constitutional inhibition on the power of the Legislature to declare where and how the wife may become a free trader. Const. art. 10, § 6, was not intended to disable, but to protect, her."

It is true that Rev. § 1898, provides that the wife of a lunatic owning real estate may proceed by petition before the clerk and obtain an order to sell the same. This is not in contradiction of section 2116, but is an optional alternative method, to which the wife can resort if for any reason it should be desirable that in future the record of the deed should show that at the time of the conveyance the husband had been adjudged a lunatic. This would prevent the possible necessity of the grantee proving that fact at some future date.

If the Legislature could dispense with the literal requirement of "the assent of the husband" by the wife obtaining the leave of the clerk it could dispense with it, without his leave, upon the same state of facts. The order of the clerk is only a contemporaneous certificate that the husband had been adjudged insane at the time of the conveyance, and that the sale is to her interest in his judgment. The Constitution does not require the approval of the clerk. That is purely legislative, and is dispensed with in the alternative method prescribed by Rev. § 2116.

Rev. § 2111, also provides that if the husband shall separate from his wife and live in adultery, or shall wrongfully abandon his wife, or if a divorce from bed and board shall be granted her, she may "sell and convey her real property as if she were unmarried."

Rev. § 959, provides that when the wife is a lunatic the husband may convey his own land without her joinder, "free and exempt from the dower rights and all other interests of his wife," with exception only of a conveyance of the homestead.

[3] The husband has no interest in the wife's land beyond a contingent right of curtesy if she makes no will. By Rev. § 2116, the Legislature holds his "written assent" to her conveyance of her land unnecessary when there is a legal adjudication that the husband is insane, and hence unable to give his assent. When he cannot give or refuse assent, the Legislature says he need not.

Affirmed.

(178 N. C. 82)

**GULF REFINING CO. v. MCKERNAN.**  
(No. 111.)

(Supreme Court of North Carolina. Sept. 17, 1919.)

**1. APPEAL AND ERROR — 1106(5) — SUPREME COURT CAN REMAND FOR FULLER FINDINGS OF FACT.**

The Supreme Court has power to remand a cause, so that there may be fuller finding of facts by the trial judge, in order that the appeal may be more intelligently considered.

**2. MANDAMUS — 187(10) — FINDINGS NOT COVERING MATERIAL ISSUE, CAUSE REMANDED.**

Where the court directed mandamus to issue to compel a chief of the fire department and ex officio building inspector to issue permit to erect an oil and gasoline distributing plant, failing to find as to applicability of an ordinance existing at beginning of suit and of two ordinances subsequently passed, which the defendant had pleaded, and whether the plant proposed to be erected by the plaintiff would conform to their provisions, *held*, that the cause must be remanded for such findings.

Appeal from Superior Court, Lee County; Connor, Judge.

Mandamus by the Gulf Refining Company against J. T. McKernan, as Chief of the Fire Department and ex officio Building Inspector of Sanford, to compel him to issue a permit for the erection of an oil and gasoline distributing plant. From a judgment directing mandamus to issue, defendant excepts and appeals. Error, and case remanded, with directions.

This was an application for a mandamus to compel the chief of the fire department, ex officio building inspector, of Sanford, to issue a permit for the erection of an oil or gasoline distributing plant in the said town, at the corner of the Southern Railway right of way and Washington street, a fully itemized description of which accompanied the plaintiff's written application.

In his answer, the defendant, among certain denials of the complaint and other matters alleged in defense, says:

"(1) That as the defendant is advised and believes he has no legal authority to issue a permit such as is desired by the plaintiff, and if the defendant has such authority that the issuance of such permit is within his sound discretion, in the exercise of which the court will not interfere.

"(2) That the plaintiff, through its authorized agent, A. W. Teague, made application to the board of aldermen for the town of Sanford, N. C., for permission to erect such buildings and structures desired for storing and distributing great quantities of gasoline, oil, and other highly dangerous and inflammable substances, at a regular meeting of the said board, held on the 1st day of July, 1919, and the said board of aldermen, in the exercise of its discretion, refused and declined to grant permission for the erection of the buildings and structures referred to.

"(3) That the storing of gasoline and oil and other highly dangerous and inflammable material nearer than 1,000 feet from any residence or in any residential section of the town of Sanford, N. C., is contrary to the ordinances of the said town.

"(4) That the erection or construction of buildings or other structures designed for the purpose of storing large quantities of gasoline, oil, and other highly dangerous and inflammable sub-

stances is in violation of the ordinances of the said town.

"(5) That the issuance of the said permit referred to and requested by the plaintiff is a matter exclusively within the sound discretion and judgment of the proper authorities of the town of Sanford, N. C., in the exercise of inherent governmental functions, pursuant to the Constitution and statutory authority conferred by chapter 380, Private Laws of 1915."

It appeared that after this proceeding was commenced the board of aldermen of Sanford passed two ordinances forbidding the erection of such an oil and gasoline plant as that which is described by the plaintiff, except under certain restrictions, "within 1,000 feet of any dwelling, or in any residential section within the corporate limits of the two of Sanford," and any violation of either of the two ordinances is made a misdemeanor, with penalty prescribed. There was already an ordinance forbidding the location of such a plant in the town within 100 feet of any dwelling house.

The court was of the opinion, and so adjudged, that the defendant is not vested with any discretion to refuse the permit to the plaintiff, and it declined to decide the question as to the validity of the ordinance passed before the suit was commenced, or the two ordinances which were passed in July, 1919, and above described, and directed the mandamus to issue. Defendant excepted and appealed.

Williams & Williams, of Sanford, for appellant.

Hoyle & Hoyle, of Sanford, for appellee.

WALKER, J. (after stating the facts as above). [1] We deem it impossible, or at least inadvisable, to decide upon the merits of this case, and to render such a judgment as will finally settle it, without a finding of the facts with reference to the three ordinances, and especially as to whether the proposed structures, if placed upon the lot in Sanford, which has been described, will violate the provisions of the said ordinances, or any one of them, and, if so, which one of them. We therefore remand the case, with instructions to find the facts as indicated above, to the end that the case may be fully considered.

This court has the power to remand a case, so that there may be a fuller finding of facts by the judge, and in order that the appeal may be more intelligently considered in every view of it. *Straus v. Beardsley*, 79 N. C. 59; *Gatewood v. Burns*, 99 N. C. 357, 6 S. E. 635; *Holley v. Holley*, 96 N. C. 229, 1 S. E. 553. This case is far too important in itself, and in its results, for us to decide it, except upon the fullest showing as to the facts. The defendant pleaded the

new ordinances, and their effect upon the case should be passed upon.

[2] The case is therefore remanded, with directions to find the facts relating to the two ordinances, and as to the other question, whether the plant proposed to be erected by the plaintiff will conform to their provisions, stating the location of the plant and its surroundings, and such other matters as will enable the court to determine whether the ordinances are applicable, and, if so, to what extent. Our opinion as to the law is withheld until all the facts are before us.

We do not agree with the learned judge that the ordinances were not before him for his consideration, and a determination as to whether or not they would affect the result, and, if so, in what way and to what extent; but the facts should have been found. In this respect there was error. The judge will reconsider the case, upon the new facts found by him, and enter such judgment as he may deem to be proper. The case may be further heard at this term, if so desired by the parties. Defendant will pay the costs of this appeal to this time.

Error, and remanded, with directions.

(178 N. C. 61)

TOWNSHIP ROAD COMMISSION OF NO.  
10 TP. v. BOARD OF COM'RS OF  
EDGECOMBE COUNTY. (No. 60.)

(Supreme Court of North Carolina. Sept. 17, 1919.)

1. TOWNS ~~654~~ — POWER OF TOWNSHIP  
BOARDS AS TO TAXATION CONTROLLED BY  
COUNTY COMMISSIONERS.

The power of township boards in matters of municipal taxation under Const. art. 7, §§ 3-6, which sections are subject to the provisions of section 14 thereof, to the effect that Legislature shall have full power by statute to modify, change, or abrogate their provisions, is limited by Revisal 1906, § 1318, subsec. 30, to powers authorized by act of the General Assembly, to be exercised under supervision of the board of county commissioners.

2. TOWNS ~~655~~ — TOWNSHIPS NOT AUTHOR-  
IZED TO WORK ROADS BY CURRENT TAXA-  
TION.

Pub. Laws 1913, c. 122, purporting to provide for the establishment of a township road system to be maintained under separate governance, funds to be raised by bond issue, construed together with Pub. Laws 1917, c. 279, amending it, held insufficient to authorize working the roads by current taxation.

3. STATUTES ~~621~~ — VOID WHEN NOT PASSED  
AS PROVIDED BY CONSTITUTION.

Pub. Laws 1917, c. 279, amending Pub. Laws 1913, c. 122, and purporting to change the method of maintaining a separate township road system from a bond issue restricted in amount

to current taxation from year to year, indefinite as to time must be set aside and declared void, where not read and passed by the assembly on three different days, and the yeas and nays on second and third readings entered on the journal, as required by Const. art. 2, § 14.

Appeal from Superior Court, Edgecombe County; Bond, Judge.

Controversy without action wherein the Township Road Commission of No. 10 Township applied for mandamus to compel the Board of Commissioners of Edgecombe County to lay a special tax. Judgment for defendant, and plaintiff excepted and appeals. Affirmed.

Controversy to determine the question whether defendants can be compelled to lay special township tax for road purposes, heard on case agreed before his honor, Judge Bond, at June term, 1919, of the superior court of Edgecombe county. The pertinent facts appearing in the case agreed are as follows:

"(1) That the township road commission of No. 10 township is a corporate body, duly created and existing under and by virtue of the public laws of the state of North Carolina. That the board of commissioners of Edgecombe county exercises control of the affairs of the county under and by virtue of the laws of North Carolina.

"(2) That on April 17, 1919, under the provisions of chapter 122, Public Laws 1913, and the amendment thereto by chapter 279, Public Laws 1917, W. L. Dunn and 107 other qualified voters of No. 10 township duly petitioned the board of commissioners of Edgecombe county, said 108 being more than one-fourth of the qualified voters of said township, to call an election to determine the will of the voters of said township as to whether or not to establish a township road district, to create and appoint a township road commission, and to levy a special road tax of 40 cents on the \$100 value of property and a poll tax of \$1.20.

"(3) That at the election duly ordered and held in said No. 10 township on May 21, 1919, the vote was 131 to 30 in favor of establishing said township road district, creating and appointing said township road commission, and levying said special road tax; said 131 being more than a majority of the qualified voters of said No. 10 township.

"(4) That on June 2, 1919, at the regular meeting of the said board of commissioners of Edgecombe county, the result of said election was duly certified to the said board. That the said board of commissioners duly created the said township road district of No. 10 township, and duly appointed W. L. Dunn, W. B. Walston, and A. J. Walston as the township road commission of No. 10 township, but refused to levy the said special road tax voted for in said election.

"(5) That the said chapter 122, Public Laws 1913, was duly and constitutionally enacted, and that the amendment thereto, as set out in chapter 279, Public Laws 1917, was duly certified by the presiding officers of both houses of the General Assembly and duly enrolled, but that said amendment was not read and passed

on three different days and the yeas and nays on the second and third readings entered on the journal. That the said chapter 122, Public Laws 1913, and the amendment thereto by chapter 279, Public Laws 1917, and the entire public law as amended, is hereby made a part of this record.

"(6) That to enable the plaintiff to obtain the necessary means to develop and maintain the public roads in No. 10 township they applied to the defendants, according to the result of said election, to levy the said property tax of 40 cents of the \$100 value of property and a poll tax of \$1.20 upon the property and polls of said township. That the assessed value of all taxable property situated in said township for the past ten years is of the average value of \$400,000.

"(7) That the said defendant refused to levy the said special road tax as voted for in said election and demanded by the said plaintiff, pursuant to the vote of the people in said election, among other reasons, on the ground that the amendment as set out in chapter 279, Public Laws 1917, was not passed by the General Assembly as required by the Constitution of North Carolina, article 2, section 14.

"Wherefore it is agreed that, if the court be of the opinion with the plaintiff, the court will order the necessary writ to issue compelling the defendant to levy the said special tax, but, if the court be of opinion with the defendant, the necessary order will issue dismissing the action."

There was judgment for defendant, and plaintiff excepted and appealed.

John L. Bridgers and Henry C. Bourne, both of Tarboro, for appellant.

Allsbrook & Phillips, of Tarboro, for appellee.

HOKE, J. [1] We concur in the ruling of his honor that on the facts appearing in the case agreed, the application of the plaintiff has been properly denied. Whatever may have been the power of township boards in matters of municipal taxation existent under article 7 of the Constitution, more especially in sections 3, 4, 5, and 6, they are subject to the provisions of section 14 of the same article, to the effect that the Legislature shall have full power by statute to modify, change, or abrogate any and all provisions of the article, except sections 7, 9, and 13; these last having no bearing on the questions presented in the controversy.

Acting under the powers conferred by this section, the General Assembly, in Revisal, c. 23, § 1318, subsec. 30, have provided, among other things, that:

"No township shall have or exercise any corporate powers whatsoever, unless authorized by an act of the General Assembly, to be exercised under the supervision of the board of commissioners."

[2] By the express provisions of this statute, therefore, township boards have no corporate powers, municipal or otherwise, except those expressly conferred by legislative enactment and to the extent that the statute

provides. This being the general law presently appertaining to the subject, a perusal of chapter 122, Public Laws of 1913, on which plaintiff must rely in support of the relief sought by him, will disclose that it purports to provide a scheme by which townships may establish a township road system and maintain same under its separate governance, and the method of raising funds for the purpose is to be by a bond issue, restricted in amount and on approval of the voters of the township. The vote is to be "for or against bonds"; the taxation authorized is to pay the interest on said bonds, and it is nowhere provided or contemplated by the act that the roads designated therein are to be worked or maintained by current taxation directly applicable to the purpose.

It is contended for the appellants that, while chapter 122, Laws of 1913, does not authorize current taxation directly for road purposes, this power is conferred by chapter 279, Pub. Laws of 1917, in force at the time of the petition and election had in this instance, and in which the power of direct taxation is claimed to be fully authorized. This statute is, in terms, an amendment to that of 1913, and, construing the two together, the proper method of arriving at their true intent and meaning (*Keith v. Lockhart*, 171 N. C. 451, 88 S. E. 640, Ann. Cas. 1918D, 916), there would seem to be no sufficient authority given to work the roads by current taxation; but, if the power, as expressed, be conceded, it would not avail the plaintiffs, for the last act was not passed in accord with article 2, § 14, of the Constitution, and is therefore inoperative so far as conferring the power of taxation is concerned.

[3] Although the section of the Constitution just referred to, requiring that statutes for creating debts or imposing taxes shall be enacted with certain specified formalities, refers in express terms to the state, counties, cities, and towns, it has been directly held that the same applies also to townships as constituent parts of counties, and will render ineffective any legislation of that character which fails to comply with its requirements. *Wittkowsky v. Commissioners*, 150 N. C. 90, 63 S. E. 275. True, we have held, in *Wagstaff v. Commissioners*, 177 N. C. 354, 99 S. E. 1, *Gregg v. Commissioners*, 162 N. C. 479, 78 S. E. 301, *Glenn v. Wray*, 126 N. C. 730, 36 S. E. 167, and other cases where the question was directly considered, that, when a principal statute had been enacted in accord with the constitutional provision referred to, an amendment "which does not increase the amount of the debt or the taxes to be levied, or otherwise materially change the original bill, will be upheld and constitute a portion of the law without the observance of the stated formalities"; but we are of opinion that an amendment of the kind presented here, which purports to change the method

of maintaining a separate township road system from a bond issue restricted in amount to current taxation from year to year, indefinite as to time, might, in its practical application, work such a change in the burdens imposed that it could, in no sense, be regarded as immaterial within the meaning of the principle, and must be set aside because it was not passed with the formalities required by the organic law. *Bennett v. Commissioners*, 173 N. C. 625, 92 S. E. 603.

In accord with these views, we must hold that the commissioners are without valid statutory authority to levy this tax, and that plaintiff's application for mandamus, compelling its levy, has been properly denied.

Affirmed.

(173 N. C. 87)

MITCHELL v. MELTON et al. (No. 122.)

(Supreme Court of North Carolina. Sept. 17, 1919.)

1. APPEAL AND ERROR ⇨799—WHEN MOTION TO DISMISS FOR FAILURE TO FILE TRANSCRIPT DEFECTIVE.

Motion to dismiss appeal for appellant's failure to file transcript seven days before entering on the call of the docket as required by rule 5 (18 S. E. vii), where not accompanied by certificate of clerk of court as required by rule 17 (81 S. E. ix), was defective.

2. APPEAL AND ERROR ⇨797(3) — MOTION TO DISMISS MUST BE MADE BEFORE DEFECT CURED.

When appellant fails to docket his appeal at the required time, the applicant must move to dismiss at that time, or subsequently during the term, provided he does so before the appellant cures the defect by docketing the transcript.

3. APPEAL AND ERROR ⇨800—MOTION TO DISMISS DENIED ON CORRECTION OF DEFECT.

Where appellee moved to dismiss appeal for appellant's failure to file transcript within required time, under court rule 5 (81 S. E. vii), but failed to file certificate of clerk of court until after appellant had filed transcript, it will not be dismissed, since appellant, by filing transcript, cured his laches.

Appeal from Superior Court, Bertie County; Gulon, Judge.

Action by Luzania Mitchell against Mary Melton and others. Judgment for plaintiff, and defendants appeal. On motion to dismiss appeal. Motion denied.

W. R. Johnson, of Ahoskie, and R. C. Bridger, of Winton, for appellants.

Winston & Matthews, of Windsor, for appellee.

CLARK, C. J. [1] The defendants not having filed the transcript on appeal on September 2d, seven days before entering upon

the call of the docket of the district to which it belonged, as required by rule 5 (81 S. E. vii), the plaintiff filed his motion under rule 17 (81 S. E. ix) to docket and dismiss. But this motion was defective, because it was not accompanied by the certificate of the clerk of the court as required by said rule. The defendants thereupon filed said transcript on the next day, September 3d. The clerk's certificate to complete the appellee's motion to dismiss was filed thereafter on September 5th.

[2] When the appellant fails to docket his appeal at the required time, the appellee can move to dismiss at that time, or subsequently during the term, provided he does so before the appellant cures the defect by docketing the transcript. *Benedict v. Jones*, 131 N. C. 473, 42 S. E. 909; *Vivian v. Mitchell*, 144 N. C. 472, 57 S. E. 167. And for that purpose we have held that the appellee can file his motion, even in vacation, or on a day when the court is not in session. *Craddock v. Barnes*, 140 N. C. 428, 53 S. E. 239; *Vivian v. Mitchell*, supra. But if the appellant files his record before such motion is made by the appellee, if at the term at which the appeal should be taken, it is too late then for the appellee to move to dismiss. This has been held in numerous cases. *Laney v. Mackey*, 144 N. C. 630, 57 S. E. 386; *Foy v. Gray*, 148 N. C. 436, 62 S. E. 523; *Gupton v. Sledge*, 161 N. C. 214, 76 S. E. 527.

[3] In this case the appellee moved in time, but he did not comply with rule 17, because of the absence of the certificate of the clerk below, which is the very basis upon which the motion to dismiss is based. It was therefore no motion. In the meantime, before the appellee perfected his motion by filing such certificate, the appellant cured his laches by docketing the transcript on September 4th. The case was therefore regularly on docket before the appellee filed an efficient motion; but, the case being docketed less than seven days before the call of the district, it stands continued under rule 5. The motion to dismiss came too late.

Motion denied.

(178 N. C. 7)

HARRIS v. HARRIS et al. (No. 18.)

(Supreme Court of North Carolina. Sept. 10, 1919.)

1. WITNESSES ⇨180—COMPETENCY—TRANSACTION WITH DECEASED—OBJECTION.

Incompetency of evidence under Revisal 1905, § 1631, as to testimony of transaction or communication with deceased, must appear at the time of objection to the evidence, so that court can rule intelligently upon objection.

2. WITNESSES ⇨158—COMPETENCY—TRANSACTION WITH DECEASED.

In action against heirs of deceased brother to have resulting trust established upon interest

in land purchased in name of brother, with consideration furnished in part by plaintiff, plaintiff's testimony as to harvesting of crop was not incompetent, under Revisal 1905, § 1631, where it did not appear that brother participated in, and was concerned with, harvesting of such crop.

3. WITNESSES ⇨158—COMPETENCY—TRANSACTION WITH DECEASED.

In action against heirs of deceased brother to have resulting trust established upon interest in land purchased in name of brother, with consideration furnished in part by plaintiff, plaintiff's testimony as to negotiations by plaintiff with brother's grantor held not incompetent, under Revisal 1905, § 1631.

4. WITNESSES ⇨180—COMPETENCY—TRANSACTION WITH DECEASED—TESTIMONY INCOMPETENT IN PART.

In action to have resulting trust established on interest in land purchased in name of deceased, with consideration furnished by plaintiff, refusal to exclude plaintiff's testimony as to his negotiations with grantor, as incompetent evidence of transaction with deceased, was not error, notwithstanding reference to time "we bought," where sentence containing reference was not separated from the rest of the statement and made the sole ground of exception.

5. WITNESSES ⇨139(5), 171—COMPETENCY—TRANSACTION WITH DECEASED.

In action against heirs of deceased brother to have resulting trust established on interest in land purchased in brother's name with plaintiff's money, testimony of one of the defendants as to transaction with deceased brother was not incompetent, under Revisal 1905, § 1631, where witness had no interest in result of action, or where his interest, if any, could not be favorably affected by his testimony.

6. TRUSTS ⇨90—RESULTING TRUST—JURY QUESTION.

In action against heirs of deceased brother to have resulting trust established on interest in land purchased in brother's name with consideration furnished in part by plaintiff, evidence as to the trust held sufficient for consideration of jury.

7. TRUSTS ⇨86—RESULTING TRUSTS—PRESUMPTION.

Where legal title is taken in the name of one person while consideration is furnished by another, as part of same transaction, the parties being strangers to each other, the presumption, in the absence of rebutting circumstances, is that he who supplies the money intends the purchase for his own benefit, and that the conveyance in the name of the other is a matter of convenience and arrangement for collateral purposes.

8. TRUSTS ⇨72—RESULTING TRUSTS—CREATION.

Where purchase money is furnished by one party, and as part of same transaction title is taken in the name of another, a resulting trust immediately arises, and person named in the conveyance becomes a trustee for party who furnished consideration.

9. TRUSTS ⇨89(5)—RESULTING TRUST—BURDEN OF PROOF.

One who claims a resulting trust, by reason of having paid purchase money of land the title of which is taken in name of another party, has the burden of establishing such trust by strong, clear, and unequivocal facts.

10. TRUSTS ⇨72—RESULTING TRUST—NATURE.

A resulting trust in favor of one who furnishes purchase money for land purchased in the name of another is based upon the presumed intention of the party furnishing the money, arising from the payment thereof, that he intended purchase for his own benefit.

11. TRUSTS ⇨89(2)—RESULTING TRUSTS—SUFFICIENCY OF EVIDENCE.

In action against heirs of deceased brother to have resulting trust established on interest in land purchased in name of brother, with money furnished in part by plaintiff, evidence held to show contribution by plaintiff of one-half of the purchase money, and to warrant inference that brother bought land in trust for plaintiff as to one-half interest therein.

12. TRIAL ⇨295(1)—INSTRUCTIONS—CONSTRUCTION.

The charge must be read as a whole, and not disconnectedly, with effect given to every essential part thereof.

13. TRIAL ⇨285—INSTRUCTIONS—CONSTRUCTION.

Court's charge must be given a natural and reasonable construction, and should be considered upon the supposition that jurors are men of understanding and intelligence.

Appeal from Superior Court, Hyde County; Devin, Judge.

Action by George W. Harris against W. D. Harris and others, heirs of W. S. Harris. Judgment for plaintiff, and defendants appeal. No error.

Following is the testimony covered by exceptions 1 and 2, and the testimony of Jesse Harris, referred to in opinion.

George Harris, being duly sworn, testified:

"I am 67 years old now. In 1882 I lived at the old homestead where I am now living, where we were all raised. My father bought it. He died before my mother. My oldest brother was David Harris; he is not living. Sanford Harris was my next oldest brother. In 1882 I suppose there was about 15 or 16 acres of the homestead land cleared. (I raised corn on the lands of Mr. Howard that year, I don't know exactly how much. I myself worked on the Howard land; raised about 75 barrels of corn; put it in Mr. Tooley's barn. I myself shucked, shelled, bagged, and moved that corn to Captain Howard's boat to go to New Bern.)

"To the foregoing statement in parentheses defendants objected; objection overruled; defendants excepted." Exception No. 1.

"It was about 75 barrels; just about enough to run me. I knew this man McGowan who made this deed; his first name is Sylvester. He lived on Goose Creek Island, about 30 miles

from here. He is the one who made one of these deeds. (I myself went to see this man McGowan in person about the purchase of this land. I went twice. The last time I saw him was nearly a year before this deed was made; it was before we bought the next spring; it was in 1881.)

"To the foregoing statement in parentheses defendants objected; objection overruled; defendants excepted." Exception No. 2.

Jesse Harris, being duly sworn, testified:

"I am a nephew of Sanford Harris and of George Harris; Wilson was my father. I always lived right near the home of Sanford and George Harris; I guess 200 or 300, I don't reckon it is over 300, yards, up until I was married. I am 51. I got it in fee simple; I purchased it back. I have conveyed that land back since the last trial. That land is my interest. I sold him my interest in the land and got it back, so now I own just what I owned as if I had never sold to him. I am one of the nephews of Sanford Harris. I have got a deed from George Harris for the real estate; for the personal property I have not. I sold him all the interest I have in it, and he deeded the land back to me; the deed has been recorded. I rather not testify in the case; I rather not have anything to do with it. The crops raised on the McGowan land, on the homestead land, and the other tract referred to as belonging to the wife of George Harris, were all held in the old homestead, and they usually got the bread corn out of the best and put it in the barn, and put the other in another barn. They had two barns. I don't remember of Uncle Sanford Harris ever putting so much in his or Uncle George putting so much in his; if they did it, I don't have any recollection of it. When I was small and first started in the field to work I worked with Uncle Sanford, and we lived right along side of him, and I started as a boy, and Uncle Sanford did plow for a short while. I don't know, I won't say, how far back my recollection goes. I am in my 52d. I don't know when that was when I worked with them as a kid, but I do say he did work some then, but he was feeble then, and it was not long, I'll say for 30 years. He would disc plow and work a little, but then he wasn't able to work when they were clearing the McGowan land. I would go to the house many a time. (I wouldn't say who cleared the McGowan land. I won't say who did it; there were so many that worked in there under both of them and with me, I just wouldn't attempt it. It was cleared under the direction of Uncle Sanford and Uncle George. Uncle George worked on it himself. I don't know how old I was; I was a good size boy. I was thinning corn on this McGowan land and Uncle Sanford was dirt-ing behind me. My grandmother came down there one morning soon after breakfast and said, 'Sanford you take that mule out right now and go and give George a deed for this land.' He answered, 'Ma, I can do that any time.' She didn't say the McGowan land, and didn't mention any land; she said 'this land.' I was on the McGowan land and Uncle Sanford was on it. She never said anything who bought it.)

"To the foregoing statements in parentheses defendants objected; objection overruled; defendants excepted." Exception No. 3.

"He said, 'Ma, I haven't got time now; I can do that any time.' I remember her saying that to him. That's the only time I ever heard her speak of that. I won't say positively who handled the proceeds of the sales of the crops. Uncle Sanford never told me; he didn't tell me either way. (I know that Mr. Sanford Harris once had a will written; he said so. It was seen and read by me. His sister gave it to me to take care of for her. They were both in the porch when she brought it out. He said it was his will; she had it for safekeeping, and for some reason she asked me to take care of it. They were both on the porch. He got it back in his possession. He only mentioned the McGowan land when he gave Staten the other half of it.)

"To the foregoing testimony in parentheses defendants objected; objection overruled; defendants excepted." Exception No. 4.

"It said one-half of the McGowan land to his nephew Staten. No reference was made to the other half. I helped to gather the crops, and it all went in the old homestead. First they usually gather the bread corn and put it in one barn, and it in the old barn, and then they gather the entire crop and place it in the other barn. The homestead, the McGowan land, and the Swindell land in one barn together; that's what they always did, ever since I have known they had two barns. The Swindell land is the land he got by his wife.

"Defendants moved that the Court strike from the record all the testimony of Mr. Jesse Harris; motion overruled and defendants excepted." Exception No. 5.

"Cross-examination: I say I read the will, and it was given me by Sandry Silverthorn for safekeeping, and in that will one-half of the McGowan land was mentioned as having been given to Staten Harris. That will was written July 26, 1900. I didn't testify last court that the will was written and dated in 1891 or 1890. I didn't testify that I was not positive on what date the will was written. I acknowledge that I got a little wrong in testifying. I said 1891, and he said wasn't it 1901, and he asked me didn't I mean 1901. I said, 'I mean 1900.' I meant 1900, too, because that was the date. I finally testified at the last term of court that it was 1900. I was settled then that the date was 1900. The will stated that the half of the McGowan land joining the old homestead was that given to Staten Harris. I remember that Joe Watson wrote the will, and W. S. Balle and Joe Watson witnessed it. I do not know where Mr. Balle is. I have seen him in court to-day. I haven't got that will now. I give it to Uncle Sanford. I didn't tell Mr. Ward I didn't remember whether Uncle Sanford and Uncle George handled their crops separately or not; if I did, I didn't mean it. I don't remember saying so. I told him I didn't know who handled it. I wouldn't say Uncle George didn't get what was coming to him from the sale of those crops; I wouldn't swear he did or did not. I never asked Uncle Sanford what he gave Uncle George; I don't know anything about it. Sure I know who lived at the old homestead. I don't know how old I was when I could first remember Uncle Sanford and Uncle George lived there, Uncle Benny did not. He was married when my father moved from Middletown; I think he was; if he wasn't, I don't remember

his living there. I feel sure he was married when we moved from Middletown, still I was small when we moved from Middletown, I remember that. When we came back why then Uncle Sanford and Uncle George and Aunt Annie and Aunt Sandry lived there. I don't know how long ago that was. I wouldn't swear it was or was not as many as 20 years ago. I have an idea it was longer than five years ago, but I wouldn't swear to any date. I said I am 51, in my 52d. When that conversation took place between my grandmother and Uncle Sanford I was a good big boy and was thinning corn. Uncle George has asked me about that I expect 40 times; from the time it was spoken he always spoke to me about it. I shouldn't say that I mentioned it to him first. Uncle George was in the field. I think he heard the conversation. I don't know how far away he was; as well as I remember, I think he was hoeing on the ditch bank. We had all gone in the field. I might have been as far off as from here to you from Aunt Betsy and Uncle Sanford and grandmother. Grandmother came to the end; we plowed out to the end. I said I was thinning corn, and while my Uncle Sanford came out to the end she was standing there. I must have been coming out the same way with Uncle Sanford because we both came out at the end at the time, I remember that. I can't say how old I was. I wouldn't swear to how many years ago it has been. Mr. George Harris' daughter, who testified here the last time this case was tried, is named Rosie. I heard her testify. I heard her testify how this will read with reference to Staten Harris. I wouldn't swear that I remember just how she stated it. I remember the will said, 'I give to my "bequeathed" nephew, Staten Harris.' That's exactly the way the will read. I'll swear that Squire Watson wrote that will, 'I give to my "bequeathed" nephew.' My uncle told me that; and from what I have seen of the old gentleman's writing I would say it was his, but I would not be willing to swear to the writing, but I believe I would feel safe in swearing it. He gave half the land of the old homestead to his sister during her natural life. The exact words were, 'I give to my sister, Cassandry Silverthorn, a half interest in the old homestead where I now live, during her natural life, and then to my bequeathed nephew.' I read it a hundred times. She usually went up there once a week. I kept it ten or fifteen years. I wouldn't swear that I read it a hundred times and wouldn't swear that I didn't. She asked me to do it every time she went there. She wouldn't give any reason at all for wanting me to read it every time she came. She didn't come up there every day or every few days. I might have read it a hundred times. I might have done it. I read it just as well as I know my a, b, c. I just know it by heart. I say I know it by heart. I have stated it to you; I have not got it in my hand. The will first gave it to his sister, Cassandry Silverthorn. She was the first one mentioned in the will—his half interest in the homestead. It said, 'I give to sister, Cassandry Silverthorn, half of the homestead on which I now live, during her natural life, and then to my bequeathed nephew, Staten Harris, one-half of the McGowan land joining the old homestead. I give to my brother, George Harris, all personal property owned on the old



homestead on which I now live. I give to my brother, W. L. Harris, half of the cattle which I own on the Bell Island, and my brother George Harris the other half; and he was appointed his executor, George H. Harris, to his will, and he give Uncle George all of the personal property owned on the homestead where they lived. To George H. Harris, every time the name in the will, it was George H. Harris. I told you he gave half of the McGowan land to Staten. I mought have left out that he gave him the half of the McGowan land next to the old homestead. I mought have left that out and I mought read it to you a dozen times. It was joining the old homestead. I certainly did not say I have no interest in the result of this lawsuit. I tell any man I have an interest in it. My interest is just this: I want what's coming to me, what honestly belongs to me, and no more. That's all the interest I have got in it, all the interest that is coming to me honestly and justly, and I have got that much interest in it. I think I told you once before that I deeded my interest in this W. S. Harris estate to George Harris. I am frank to tell you and the jury, too; I am perfectly frank, in his recovery what belongs to him. I am perfectly frank, for the heirs at law to hold what belongs to them. That is all the interest I have got in it—everything in the world. Mr. George Harris paid me \$125 for my interest when I made a deed to him. He paid that cash. I am sure I did not testify last court that the consideration he paid me was a mule. The heirs said he bought a mule for me. He paid me the hard cash. They said he bought me a mule; that's what my uncle told my brother. He didn't buy any mule for it any more than you did. He bought my interest and paid me for it. When I sold my interest there was a judgment against me; I don't remember how much it was for. The plaintiff who got the judgment out against me was Mr. Brinn. I don't remember the amount of the judgment. It was Mr. Charlie Brinn. I think there was a judgment against me; I don't think there was an execution issued on the judgment. I didn't hear there was an execution issued on the judgment. Mr. Spencer was after collecting it and I saw him about it several times. I don't remember seeing Mr. Long about it, I wouldn't swear whether I did or did not. I don't remember whether I did or did not see him anything concerning any judgment or paper of any kind. I think George Harris sold me the interest in the land back again. You read the record. Don't the record show it? Yes; he sold it back to me. He didn't sell me the personal property. I paid him exactly the same that he paid me, \$125. I didn't pay all of it right down. I paid him \$75 of it in cash, and borrowed the balance from my son in Norfolk. He is in Norfolk now. I have not paid it back. I gave him the benefit of the personal estate, and he still has that interest. I have not given it to him. When I bought this land back I never thought about the personal property, never gave it a thought when I had the deed made for the real estate, before it covered all the personal property, and the deed was made back, and it was too late. I think Mr. Long prepared the deed that conveyed the land back to me.

"Redirect: I know old man Gray Credle, a negro. I won't say whether it was the last

court he testified. I'll swear to this, when this case was tried, but I think there has been a court or two since. I don't know whether he is living or dead; they tell me he is dead. I don't know; my wife told me he was dead."

Plaintiff sought to have established a resulting trust as to one undivided interest in a tract of land which he alleges was purchased by him and his brother, W. S. Harris, the deed having been made to the latter for their joint benefit, and that he paid one-half of the purchase money.

The jury found for the plaintiff upon the following issues:

"(1) Was half of the purchase money, expended in buying the McGowan land described in the complaint, furnished by plaintiff, George W. Harris, and did Sanford Harris take a title to same to hold one-half interest in same in trust for the benefit of George W. Harris, as alleged? Answer: Yes.

"(2) Is plaintiff, George W. Harris, owner of one-half of the fund on deposit in the Bank of Hyde to credit of Sanford Harris at the time of his death? Answer: Yes."

Judgment was entered for the plaintiff, and defendants appealed.

Spencer & Spencer and S. S. Mann, all of Swan Quarter, and John G. Tooley, of Belhaven, for appellants.

Ward & Grimes, of Washington, N. C., for appellee.

WALKER, J. (after stating the facts as above). There was sufficient evidence of the trust, apart from the following testimony of Gray Credle:

"I worked with the two HARRISES, Mr. Sanford and George. I know the McGowan land and the homestead; know when they bought it. I cut the ditch for him. They cleaned the ditch off and hired me to cut it. Mr. Sanford set along the ditch bank, and told me this is the land I and brother George bought; one-half is his and the other is mine. He was talking about the McGowan land. I cut the ditches for them, and they cleared up the land crops. They hauled them and put them in one barn. I cut the ditch on the land that Mr. Sanford Harris said he and Mr. George bought. Mr. Sanford Harris told me, because I was doing the ditching for him. The old man handed me the money for cutting the ditch—Mr. Sanford Harris. I don't know whose money it was; one spoke at the time, and they were both together. Mr. George Harris and Mr. Sanford said they had a ditch for me to cut."

There are exceptions to evidence upon the ground that certain answers of the plaintiff, as his own witness, related to transactions and communications with his deceased brother, W. S. Harris. The testimony covered by the exceptions 1 and 2 did not show on its face such a transaction or communication. The testimony of Richard Howard, afterwards given, does not show its incompetency

under Revisal, § 1631, when properly considered.

[1] If there was a transaction or communication between plaintiff and the deceased, it should have appeared to be so when the objection was made, so that the court could rule intelligently upon it. As we view it, the testimony was admissible.

[2-4] The exception which refers to the use of the word "we," in the sentence, "It was before we bought the next spring," must be overruled, because that sentence is a part of a mass of testimony, some of which was plainly competent, and the particular sentence was not separated from the rest of the statement and made the sole ground of exception. *State v. Ledford*, 133 N. C. 714, 45 S. E. 944, and *Nance v. Telegraph Co.*, 177 N. C. 313, 98 S. E. 838, where the cases are collected. *Stocks v. Cannon*, 139 N. C. 60, 51 S. E. 802, does not apply.

[5] We do not see how Jesse Harris was interested in the result of this action (*Brown v. Adams*, 174 N. C. 496, 93 S. E. 989, L. R. A. 1918C, 911), or how his interest, or any he ever had, could be affected favorably by his testimony. The facts seem to show, on the contrary, that his testimony was, in one aspect of the case, unfavorable to himself, and therefore he was not disqualified. *Bunn v. Todd*, 107 N. C. 266, 11 S. E. 1043. Plaintiff derives his title or interest to the property in dispute under the agreement between him and his brother, W. Sanford Harris, and not under the witness. *Bunn v. Todd*, supra; *Mull v. Martin*, 85 N. C. 406. There are other answers to the objections not necessary to be considered.

[6] Upon the question of nonsuit, we are of the opinion that there was evidence as to the trust for the consideration of the jury. Among other testimony, we may refer to that of Gray Credle, which seems to be not only some evidence, but very full and sufficient evidence, of the trust.

We do not agree with the learned counsel that the judge excluded from the consideration of the jury the intention to create a trust in favor of the plaintiff as to one-half interest in the land. The form of the issue called for a finding as to this intention, and we also think that the charge includes it as an element of the equity which is sought to be established by the plaintiff. The jury say that one-half of the purchase money was furnished by the plaintiff, and that Sanford Harris acquired the legal title in trust to hold one-half interest in the land for his benefit. This is sufficiently clear as to the intention of the parties.

The court charged substantially that the jury must find from evidence, which is clear, cogent, and convincing, that George Harris, the plaintiff, not only furnished one-half of the purchase money, but that Sanford Harris acquired the title, which was to be held, as

to one-half interest in the land, in trust for the plaintiff.

*Bispham on Equity* (9th Ed.) § 80, states that resulting trusts are substantially divided into four classes. It is then said that the nature of resulting trusts of the first of these classes—that is, where one pays the purchase money, but takes the title in the name of another—was clearly explained by Lord Chief Baron Eyre in *Dyer v. Dyer*, 2 Cox, 92 (1 Lead. Cases in Eq. [4 Eng. Ed.] 165, 203); it being there held, as the clear result of all the cases, without a single exception, that the trust of a legal estate, whether freehold, copyhold, or leasehold, whether taken in the names of the purchaser and others jointly, or in the names of others without that of the purchaser, whether in one name or several, whether jointly or successively, results to the man who advances the purchase money. To illustrate the doctrine thus stated, suppose A. advances the purchase money of an estate, and a conveyance of the legal interest in it is made either to B., or to B. and C., or to A., B., and C. jointly, or to A., B., and C. successively. In all these cases, if B. and C. are strangers a trust will result in favor of A.

"The reason of this doctrine is that the man who pays the purchase money is supposed to become, or to intend to become, the owner of the property, and the beneficial title follows that supposed intention. This doctrine is an analogy to the common-law rule, that where there is a feoffment without consideration the use will result to the feoffor. It applies to both realty and personalty, and trusts of this nature are expressly excepted out of the statute of frauds. The person in whose favor a trust is claimed to result must pay the purchase money as his own; if he merely advances it as a loan, no trust will result. Where money is advanced, and there is nothing more in the transaction than is implied from the violation of a parol agreement, equity will not decree the purchaser a trustee. A resulting trust of this kind must arise, if at all, from the payment of the purchase money at the time of the conveyance. If the purchase money is paid by several, and the title taken in the name of one, a trust will result to the others in proportion to the amount paid by each. But to create a resulting trust in such a case, the payment must be of some definite part of the purchase money."

The annotator of this text cites in its support *Summers v. Moore*, 113 N. C. 394, 18 S. E. 712 (opinion by Shepherd, C. J.), which states the doctrine in substantially similar language. The rule is well-stated in the first two headnotes, as follows:

[7-9] "1. Where, upon a purchase of property, the conveyance of the legal title is taken in the name of one person, while the consideration is given or paid by another at the same time or previously and as part of the same transaction, the parties being strangers to each other, the presumption, in the absence of rebutting circumstances, is that he who supplies the money intends the purchase for his own benefit, and

not for another, and that the conveyance in the name of the other is a matter of convenience and arrangement for collateral purposes, and a resulting trust immediately arises from the transaction, and the person named in the conveyance will be a trustee for the party from whom the consideration proceeds.

"2. In such case the burden is upon him who claims the resulting trust, and, as the law gives a peculiar force and solemnity to deeds, it will not allow them to be overthrown by mere words, but only by facts strong, clear, and unequivocal."

[10] It will be perceived from this statement of the law that the trust is based upon the presumed intention of the party arising from the payment of the purchase money or his share of it and the court in this case substantially followed the rule in its charge to the jury.

[11] There was ample evidence to show a contribution to one-half of the purchase money, and also evidence from which the jury could reasonably infer that Sanford Harris had bought the land in trust to hold, as to one-half interest therein, for the plaintiff. This evidence consisted, in part, of his own declarations or admissions tending to prove such a transaction before the purchase, or such an intention of the parties at the time that he should hold the title, not for himself as the sole owner of the land, but for their joint and equal benefit, and the judge evidently referred to this evidence when he gave the instruction as to what would constitute such a trust, and as to the quantum of proof.

[12, 13] The charge must be read as a whole, giving effect to every essential part of it, and not disconnectedly; it must have a natural and reasonable construction, and should be considered upon the supposition that the jurors are men of understanding and intelligence. *State v. Exum*, 138 N. C. 599, 50 S. E. 283; *Kornegay v. Railroad Co.*, 154 N. C. 389, 70 S. E. 731; and *Bradley v. Mfg. Co.*, 177 N. C. 153, 98 S. E. 318, citing other cases.

The other exceptions are either formal or without merit.

No error.

(178 N. C. 1)

**GALLOP v. ELIZABETH CITY MILLING CO. (No. 12.)**

(Supreme Court of North Carolina. Sept. 10, 1919.)

**1. CHATTEL MORTGAGES ¶48 — CROPS — DESCRIPTION — "ETC."**

Mortgage on "my entire crop of Irish and sweet potatoes, corn, etc., grown in the year 1916 on the lands of T., being one-half of crop grown on said land," held to contain sufficient description embracing one-half of the crops of every description grown on such land during

such time; the word "etc." meaning other crops.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Etc.]

**2. APPEAL AND ERROR ¶193(9) — SUFFICIENCY OF COMPLAINT — EXCEPTION.**

Failure of complaint to state cause of action may be first raised on appeal.

**3. CHATTEL MORTGAGES ¶229(2) — PLEADING — "DULY REGISTERED."**

Allegation that mortgage was "duly registered" held to allege that it was registered in due time.

**4. CHATTEL MORTGAGES ¶229(2) — PLEADING — REGISTRATION OF MORTGAGE.**

In mortgagee's action against purchaser of mortgaged crops, failure of complaint to allege that mortgage was registered would not have been fatal.

Appeal from Superior Court, Currituck County; Devin, Judge.

Action by W. H. Gallop against G. W. Beveridge and others, partners trading as the Elizabeth City Milling Company. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

This was an action by plaintiff to recover \$295.20, the value of certain cotton sold to the defendant the Elizabeth City Milling Company by one A. Cherry, against whom the plaintiff held a mortgage. The complaint alleged that the mortgage was duly recorded in Currituck county. At the trial the defendant demurred *ore tenus*, and moved to dismiss upon the ground that the complaint did not state a cause of action. A copy of the mortgage was set out in full as a part of the complaint. The demurrer was sustained, and the plaintiff appealed.

Aydlett, Simpson & Sawyer, of Elizabeth City, for appellant.

Thompson & Wilson, of Elizabeth City, for appellee.

CLARK, C. J. [1] The mortgage describes the property as follows:

"My entire crop of Irish and sweet potatoes, corn, etc., grown in the year 1916 on the lands of Thomas Harris, being one-half of crop grown on said land."

This was a sufficient description. It was not necessary to mention in detail every article of the crop. The words "Irish and sweet potatoes, corn, etc.," were sufficient to indicate that all the crop of every description was embraced in the mortgage, and that the lien was not limited to the articles specifically named. The description of the land on which it was to be raised was "the lands of Thomas Harris," and certainly extended to the crops raised by the mortgagor during 1916 on the lands of said Harris in the coun-

ty of Currituck, in which the mortgage was registered.

The word "etc.," or "et cetera," means other crops. In *Railroad v. Metcalfe*, 4 Metc. (Ky.) 199, 81 Am. Dec. 541, it was held that a resolution of the board of directors of a railroad company authorizing a mortgage of the road and its property, "etc.," embraced its franchises, rights, and privileges. Besides, in this case the clause at the end, "being one-half of the crop grown on said lands," clearly indicated an intention that the mortgage should embrace one-half of the crops of every description.

[2-4] The point was further taken in this court, though not raised by exception on the trial, that the complaint was insufficient, in that it did not recite that the mortgage was registered before the cotton was bought by the mill company. If the complaint on this ground did not state a cause of action, the exception could be taken for the first time in this court, of course; but the allegation that the mortgage was "duly registered" would indicate that it was registered in due time. Indeed, a failure to allege that it was registered at all would not be fatal.

Reversed.

(178 N. C. 12)

LATHAM et al. v. LATHAM. (No. 19.)

(Supreme Court of North Carolina. Sept. 10, 1919.)

# 1. VENUE $\S$ 8 — STATUTORY PROVISIONS — COMMON LAW.

The venue of civil actions is a matter for legislative regulation, and is not governed by the rules of common law.

# 2. VENUE $\S$ 17—JURISDICTIONAL DEFECT.

Venue of civil actions is a matter of procedure, and in absence of statutory provision is not jurisdictional.

# 3. ABATEMENT AND REVIVAL $\S$ 77—PLACE OF TRIAL.

Revisal 1905, §§ 415, 417, relating to continuation of suit, upon death of a party, by or against the personal representative or successor in interest, contemplate the trial of the action where instituted, notwithstanding section 421.

# 4. STATUTES $\S$ 231 — CONSTRUCTION — REVISAL—SEPARATE SECTIONS.

One section of the revisal must be construed in connection with the other sections thereof, and apparent inconsistencies reconciled; the whole, and not a part, representing the legislative will.

# 5. EXECUTORS AND ADMINISTRATORS $\S$ 436 — VENUE — CONSTRUCTION OF STATUTE — "INSTITUTE."

Revisal 1905, § 421, requiring actions against executors and administrators to be "instituted" in the county where the bond was

given, refers to original actions against the personal representative, and does not entitle the representative made a party under sections 415 and 417, upon defendant's death, to remove the suit to the county where the estate is administered; the word "institute," when applied to legal proceedings, signifying the commencement of the proceedings—citing Words and Phrases, First and Second Series, Institute.

# 6. STATUTES $\S$ 225 — CONSTRUCTION — CHANGE IN PHRASEOLOGY.

A change in phraseology, when dealing with a subject, raises a presumption of a change of meaning.

Appeal from Superior Court, Beaufort County; Devin, Judge.

Action by A. C. Latham and others against Samuel W. Latham, to which Carrie W. Hancock, as executrix of the estate of Samuel W. Latham, and individually, was made a party. From an order denying a motion to remove the suit to another county, Carrie W. Hancock appeals. Affirmed.

This was a civil action instituted in the superior court of Beaufort county, in October, 1916, to recover for alleged conversion by Samuel W. Latham of the proceeds of the sale of certain lands. The action was commenced in the right county. Complaint was filed December 27, 1917. No answer was filed.

Shortly thereafter, on the ——— day of ———, 1918, Samuel W. Latham died, leaving a last will and testament, naming Carrie W. Hancock executrix without bond. The will was probated in Craven county, and Carrie W. Hancock qualified as executrix.

At October term, 1918, an order was made directing that said Carrie W. Hancock, as executrix and individually, be made a party defendant to the suit. Pursuant thereto, summons was issued, returnable to November term, 1918. At November term, 1918, Carrie W. Hancock, executrix, appeared and filed her motion to remove the suit to Craven county, as a matter of law, under the provisions of Revisal, § 421. The motion was denied, and the executrix appealed.

E. A. Daniel, Jr., and Small, MacLean, Bragaw & Rodman, all of Washington, N. C., for appellant.

Guion & Guion and Moore & Dunn, all of Newbern, for appellees.

ALLEN, J. [1,2] The venue of civil actions is a matter for legislative regulation, and is not governed by the rules of the common law. *Cooperage Co. v. L. Co.*, 151 N. C. 456, 66 S. E. 434. It deals with procedure and is not jurisdictional, in the absence of statutory provision to that effect. *McCullen v. Railroad*, 146 N. C. 568, 60 S. E. 506.

When we turn to the statutes, we find in

Revisal, § 415, that in case of death of a defendant the court "may allow the action to be continued by or against his representative or successor in interest," and section 417 requires the summons to the personal representative to be returnable before the clerk, and not in term, "commanding him to appear before him on a day to be named in said summons, which shall be at least twenty days after the service thereof, and answer the complaint, and the issue joined by the filing of the said answer shall stand for trial at the term of the superior court next following."

[3] These sections clearly recognize the continuity of the action and the right to have it tried where instituted, and to avoid delay the personal representative must appear before the clerk and answer so that the issues may be tried at the next term, thus showing that no right of removal was contemplated, because of the requirement to answer and be ready for trial before the term, at which he would have to make his motion to remove. The executrix says, however, that the question is controlled by Revisal, § 421, which is as follows:

"All actions upon official bonds or against executors and administrators in their official capacity shall be instituted in the county where the bonds shall have been given, if the principal or any of the sureties on the bond is in the county; if not, then in the plaintiff's county."

[4, 5] This section must be construed in connection with the other sections of the Revisal, the whole, and not a part, representing the legislative will (36 Cyc. 1167), and apparent inconsistencies must be reconciled, and when so considered it must be held that the latter section refers to original actions instituted against the personal representative, as its language, standing by itself, indicates. It says that actions against executors and administrators "shall be instituted in the county," etc., not tried, and "institute, when applied to legal proceedings, signifies the commencement of the proceedings; when we talk of instituting an action, we understand bringing an action." 4 Words and Phrases, 3661.

A similar question was considered in *Trust Co. v. Kauffman*, 108 Cal. 222, 41 Pac. 469, in which a local action was brought in the proper county, but before trial the subject-matter was transferred by legislative act to another county, and a motion to remove to the latter county was made. The motion was denied, and the court, in its opinion, uses language very pertinent in the construction of the statute now before us. It says:

"The Constitution (article 6, § 5) declares that 'all actions for the enforcement of liens shall be commenced in the county in which the

real estate, or some portion thereof, is situated; and at the time this action was 'commenced' the property was situate within the boundaries of San Diego. The Constitution does not, however, require that the action shall be 'tried' in the county in which the property is situated."

The same principle was applied in *Blake v. Freeman*, 13 Me. 134, in *University v. Railroad*, 49 Wis. 161, 5 N. W. 329, and in *Hannon v. Power Co.*, 173 N. C. 522, 92 S. E. 354; the court saying in the latter case:

"The question of venue is governed by the locus 'at the commencement of the actions.'"

[6] It is also a rule of construction that a change in phraseology when dealing with a subject raises a presumption of a change of meaning, and it appears that the General Assembly, when providing for the commencement and trial of actions says, in section 419, "Actions for the following causes must be tried in the county," etc.; in section 420, "Actions for the following causes must be tried in the county," etc.; while in section 421, on which the executrix relies, nothing is said about the place of trial, and the language changes from "shall be tried" to "shall be instituted."

We are of opinion the motion to remove was properly denied.

Affirmed.

(178 N. C. 57)

WALKER et al. v. WOODHOUSE et al.  
(No. 27.)

(Supreme Court of North Carolina. Sept. 17, 1919.)

# 1. TRUSTS ¶277—CREDIT TO TRUSTEE ON ADVANCES TO BENEFICIARY PROPER.

In an action to recover a sum, and interest, alleged to have been bequeathed to defendant in trust for plaintiff, in which defendant proved he had received the money, not under the will, but in testator's lifetime, under parol agreement, wherein the limitation as to expenditure of more than \$100 on behalf of plaintiff referred only to plaintiff's education, the defendant trustee was entitled to a credit for the sum of \$370.80, advanced at plaintiff's request for plaintiff's necessities.

# 2. TRUSTS ¶219(1) — INTEREST ON FUNDS NOT INVESTED NOT RECOVERABLE FROM TRUSTEE.

In an action by beneficiary against a trustee, where it was determined that the trust was not received by the trustee under a will, but under a prior parol agreement, whereby he was to keep money in a safe, separate and apart from other funds, and was not to pay interest thereon, plaintiff could not recover interest.

# 3. TRUSTS ¶371(8)—IN ACTION BY BENEFICIARY ANSWER OF TRUSTEE SUFFICIENT.

In a beneficiary's action to recover a trust alleged to be received by trustee under a will, trustee's answer containing a section setting

up a parol trust, which was established by the trial, but which section did not allege plaintiff's execution of a deed to another as a condition of receiving the money, *held* sufficient, under the rule of liberal construction, to permit evidence thereon, where other parts of the answer set out such condition, and defendant offered to make payment of the balance upon the condition being performed.

Appeal from Superior Court, Currituck County; Devlin, Judge.

Action by Pearl Scott Walker and husband against D. W. Woodhouse and another. Judgment for plaintiffs for the sum of \$1,000, subject to a credit of \$370.80, and both named parties appeal. Plaintiff's appeal affirmed; defendant's appeal reversed.

This action was instituted by the plaintiff to recover the sum of \$1,000 and interest alleged by her to have been bequeathed to D. W. Woodhouse to hold in trust for the plaintiff by and under the terms of the will of Hiram Gregory, deceased. The defendant answered, admitting that he had received \$1,000, but denying that he had received such amount, or any part thereof, under the terms of said will, and averring that he had received same during the lifetime of Hiram Gregory under a parol agreement, whereby he was to hold same in trust for the plaintiff. The allegations of the defendant with respect to the trust, under the terms of which the jury found he held said money, are set out in sections 10, 15, and 16 of the answer as follows:

(10) "For further defense the defendants aver that shortly before the death of Hiram Gregory, grandfather of the feme plaintiff, the said Gregory left with the defendant Woodhouse the sum of \$3,000, which, by agreement, was to be placed in the safe of the said Woodhouse, and to remain there until his grandchildren May, Elsie, and Pearl Scott, should become 21 years of age, at which time the said defendant was to pay over to said three grandchildren \$1,000 each out of the money so left, without interest, with the right to expend as much as \$100 on each child for education; and with this understanding and agreement the said D. W. Woodhouse accepted the \$3,000, and has kept the same separate and apart for the said grandchildren in his safe, and has not used it or mingled it with his own funds, but has at all times kept it in his safe in accordance with the request and agreement made with Hiram Gregory and referred to in his will."

(15) "The defendant Woodhouse admits and has always admitted that he has in hand, of the \$1,000 left with him for the feme plaintiff upon her execution of her interest in the deed after she became 21 years of age, the sum of \$429.12, which he herewith tenders to the plaintiff, and has always been ready to pay the same over to her; that the money is now in his safe, and has been in his safe and ready to be paid over to her whenever she executed the deed as set out in the will. He also owes her \$81.40, with interest thereon from April 15, 1910, being the amount which he received from S. M. Beasley,

executor of Hiram Gregory, the grandfather of feme plaintiff; that he has always been ready to settle this with her when she became of age, and does hereby tender it to her, with interest."

(16) "The defendant consents that upon execution of the deed by plaintiffs as stipulated in the will the plaintiffs may have judgment against him for the above amounts so tendered and the cost up to the filing of this answer and the final judgment, and that a decree may be so entered."

The defendant trustee further contended that of the \$1,000 so received he had advanced the plaintiff during her minority, at her request, the sum of \$570.80 for necessities, which she promised to pay out of said sum, of which \$200 had been advanced for the purpose of meeting her expenses incidental upon her marriage. Plaintiff was married at the age of 16. The plaintiff admitted that the defendant had expended \$570.80 for her benefit and at her request, but contested her liability to be charged therewith unless the defendant consented to pay interest, which he refused to do because by the terms of the trust he was to pay no interest and was to keep the money in his safe for the plaintiff, which he did. Upon the third issue, to wit, "What amount has defendant paid out for necessities for plaintiff prior to her coming of age?" Plaintiff in apt time requested the court to charge the jury as follows:

"The court instructs you that, upon all the evidence in this case, if you find the facts to be as testified, your answer to the third answer should be \$100; that in no view of the case you answer said issue in a larger amount."

Refused, and plaintiff excepted.

The defendant offered evidence tending to prove that it was one of the conditions of the trust that the plaintiff should execute a deed to Hiram, the grandson of Hiram Gregory, conveying to him her interest in what is known as the Hobbs tract of land before receiving any part of the money, and tendered an issue to be submitted to the jury involving this question. His honor excluded the evidence and refused to submit the issue, upon the ground that the answer did not allege that this was a part of the trust, and the defendant excepted to each of these rulings.

The jury returned the following verdict:

"(1) Did the defendant receive the sum of \$1,000 under the will of Hiram Gregory, to hold in trust for the plaintiff, Pearl Scott Walker, as alleged in the complaint?

"A. No.

"(2) Did the defendant Woodhouse receive the sum of \$1,000 from Hiram Gregory during his lifetime to hold in trust for the plaintiff, Pearl Scott Walker, as alleged in the answer?

"A. Yes.

"(3) What amount has defendant paid out for necessities for plaintiff prior to her coming of age?

"A. \$370.80."

Judgment was entered thereon in favor of the plaintiff for the sum of \$1,000, subject to a credit of \$370.80, and the plaintiff appealed, upon the ground that the defendant could not be credited with more than \$100. The defendant also appealed, alleging as error the refusal to admit evidence and to submit the issue as to the execution of the deed by the plaintiff conveying her interest in the Hobbs tract.

Meekins & McMullan and Thompson & Wilson, all of Elizabeth City, for plaintiff. Aydlott, Simpson & Sawyer and Ehringhaus & Small, all of Elizabeth City, for defendant.

ALLEN, J. [1] There is no error on the plaintiff's appeal, as the limitation on the amount to be expended by the trustee in behalf of the plaintiff refers only to the education of the plaintiff, and as the jury has found, and she practically admits, that the sum of \$370.80 was advanced by the defendant at her request and for necessities, it was proper to charge her with this amount.

[2] The defendant is not chargeable with interest, because the jury has found that he received the sum of \$1,000 to hold in trust as alleged in the answer, and the answer alleges that the trust was accepted with the understanding that he was not to be charged with interest, and was to keep the money in a safe, separate and apart from other funds, which he did.

[3] The question presented by the defendant's appeal depends upon a construction of the answer, as it is clear that he was entitled to offer evidence as to all of the terms of the trust and to have an issue submitted thereon if the pleadings raised the issue. His honor was of opinion that the terms of the trust were alleged in section 10 of the answer, and as the plaintiff failed therein to allege that the plaintiff was required to execute the deed before receiving any part of the money left with him, the evidence was not competent, because there was no allegation, and that no such issue was raised by the pleadings, but under the Code system, which prevails in this state, the answer must be considered as a whole; it must be "liberally construed," and if it can be seen from its general scope that a defense is alleged, the fact that it has not been stated with technical accuracy or precision will not deprive him of the defense. If in any portion of the pleading it presents facts sufficient to constitute a defense, or if facts sufficient for that purpose can be gathered from it, the pleading will stand, as every reasonable intentment and presumption must be made in favor of the pleader (*Brewer v. Wynne*, 154 N. C. 472, 70 S. E. 947); and, applying this principle, we are of opinion that the

defendant sufficiently alleges that the plaintiff was required to execute the deed as a condition to receiving the money.

In section 15 of the answer the defendant admits that he has the money in hand, "left with him for the feme plaintiff upon her execution of her interest in the deed after she became 21 years of age," and he tenders the balance due, which he says he is ready to pay "whenever she executed the deed"; and in section 16 the defendant consents for judgment to be entered against him for the balance due "upon the execution of the deed to the plaintiff." It would have been better and more orderly for the defendant to have set out all of the terms of the trust in section 10 of the answer; but upon an inspection of the whole pleading it is a reasonable and fair construction that section 10 was directed particularly to those parts of the trust by which the amount to be recovered would be ascertained, and sections 15 and 16 to the condition upon which she would be entitled to the money.

It is therefore ordered that the judgment upon the plaintiff's appeal be affirmed, and that upon the defendant's appeal it be reversed, with directions to submit an additional issue as tendered by the defendant. The issues as found by the jury will not be disturbed.

Plaintiff's appeal affirmed.

Defendant's appeal reversed.

(178 N. C. 26)

**MARTIN COUNTY et al. v. WACHOVIA  
BANK & TRUST CO. (No. 65.)**

(Supreme Court of North Carolina. Sept. 10, 1919.)

**1. COUNTIES —1—NATURE OF.**

Counties are merely instrumentalities and agencies of the state government.

**2. CRIMINAL LAW —111—VENUE—BOUNDARY WATER COURSE.**

Under Revisal 1905, § 3234, when a crime has been committed on a boundary water course which lies wholly in one of the counties, either county has jurisdiction of the offense.

**3. CONSTITUTIONAL LAW —68(4)—POLITICAL QUESTIONS — COUNTIES — BOUNDARIES —TAXATION.**

The establishment of boundary between two counties being a political question, the Legislature, even after taxes are assessed, can decide where the boundary is, even though erroneously in fact, and direct to which county the tax from the disputed territory shall be paid.

**4. BRIDGES —10(2) — CONSTRUCTION — BOND ISSUE — PERMISSIVE PROVISION OF STATUTE.**

Pub. Loc. Laws 1919, c. 53, authorizing construction of bridge between Martin and Bertie counties and bond issues therefor, and specify-

ing amount which bond issue of each county shall not exceed, is merely permissive as to the amount of bonds each county can issue, and not mandatory.

#### 5. BRIDGES ⇐7 — CONSTRUCTION — COST.

The Legislature has the power to have bridge between two counties constructed entirely at the cost of the whole state, though no part of the bridge and its approaches will be upon the soil of the other counties contributing to its erection, the construction and maintenance of bridge being a matter of public concern of benefit to people of the entire state.

#### 6. BRIDGES ⇐10(2) — CONSTRUCTION — BRIDGE BETWEEN COUNTIES — APPORTIONMENT OF COST — CONSTITUTIONALITY OF STATUTE.

Pub. Loc. Laws 1919, c. 53, authorizing construction of bridge between Martin and Bertie counties, and apportioning Martin county's contribution to cost of construction at not more than \$150,000, and Bertie county's contribution at not more than \$50,000, held constitutional, though the river is in Bertie county and the improvement embraces construction of approach to bridge in Bertie county, the greatest proportion of benefit accruing to Martin county.

#### 7. COUNTIES ⇐178 — BRIDGES — CONSTRUCTION—BOND ISSUE—VOTE OF PEOPLE.

Under Pub. Loc. Laws 1919, c. 53, authorizing construction of bridge between Martin and Bertie counties, and bond issues to defray cost thereof, the counties can issue the bonds without a vote of the people, the construction of bridge being a necessary expense.

#### 8. BRIDGES ⇐10(2) — CONSTRUCTION — BRIDGE BETWEEN COUNTIES—APPORTIONMENT OF COST.

In view of Revisal 1905, § 1318, subsec. 29, and section 2696 as amended by Laws 1917, c. 103, as amended by Laws 1919, c. 185, Legislature could have authorized construction of bridge between Martin and Bertie counties at Martin county's expense, though the river is in Bertie county, and the improvement embraced construction of approach in Bertie county, the principal benefit of the bridge accruing to Martin county.

#### 9. CONSTITUTIONAL LAW ⇐70(1) — JUDICIAL ENCROACHMENT ON LEGISLATURE — SPECIAL IMPROVEMENTS — PROPERTY BENEFITED.

It is for the Legislature, and not the courts, to determine what property will be benefited by road and bridge improvements, and court will not interfere with legislative determination, unless its action is palpably arbitrary and a plain abuse.

#### 10. HIGHWAYS ⇐121 — CONSTRUCTION — COST.

The construction and maintenance of roads and bridges is a matter of general public concern, of benefit to people of the entire state, and Legislature may cast expense thereof upon state at large, or on territory specially and immediately benefited, even though the work may not be a part of the total area attached.

#### 11. STATUTES ⇐97(2) — SPECIAL LAWS — HIGHWAYS AND BRIDGES.

Const. Amend. art. 2, § 29 (see Pub. Laws 1915, c. 99), prohibiting enactment of local, private, or special act authorizing the laying out or construction of streets, highways, bridges, or alleys, does not prohibit legislation authorizing the raising of proper funds by a sale of bonds, or by taxation, required for the public good, though such bonds should be for improvements in some fixed place, or in restricted territory determined upon by local authorities, in pursuance of general laws on the subject.

#### 12. STATUTES ⇐97(1) — SPECIAL LAWS — CONSTRUCTION OF BRIDGES.

Pub. Loc. Laws 1919, c. 53, authorizing bond issue for construction of bridge between Martin and Bertie counties, is not in violation of Const. Amend. art. 2, § 29 (see Pub. Laws 1915, c. 99), prohibiting local, private, or special legislation relating to construction of bridges.

#### 13. COUNTIES ⇐190(2) — TAXES — EXCEEDING CONSTITUTIONAL LIMITATION.

Revisal 1905, § 2696, as amended by Laws 1917, c. 103, as amended by Laws 1919, c. 185, and Laws 1919, c. 312, held to authorize the levy of a tax beyond the constitutional limitation for bridge construction purposes within Const. art. 5, § 6, requiring the special approval of the Legislature to exceed the limitation of taxation for even necessary purposes.

#### 14. BRIDGES ⇐7 — CONSTRUCTION — STATUTES—BOND ISSUE.

Pub. Loc. Laws 1919, c. 53, authorizing construction of bridge and bond issue to defray expense thereof, does not, by reason of provision limiting amount of bond issue to "actual cost" of the bridge, prohibit issuance of bonds before completion of work.

Appeal from Superior Court, Martin County; Connor, Judge.

Controversy submitted without action by Martin county and others against Wachovia Bank & Trust Company. From the judgment rendered, defendant appeals. Affirmed.

This is a controversy submitted without action upon facts agreed, and involves the validity of \$150,000 bonds proposed to be issued by the county of Martin under authority of Pub. Loc. Laws 1919, c. 53, entitled "An act to authorize the boards of commissioners of Martin and Bertie counties to build a bridge over the Roanoke river at Williamston, N. C., and for other purposes."

The defendant put in the highest bid for this issue, \$160,869.50 and accrued interest to date of delivery, which bid was accepted by the county of Martin, but the defendant now declines to accept and pay for said bonds upon the ground that the bonds are not legal and binding obligations of said county. The court upheld the validity of the bonds, and adjudged that the county of Martin should execute and deliver the same to the defend-



ant, and that the defendant should pay said bid and costs of action. Appeal by defendant.

Manly, Hendren & Womble, of Winston-Salem, for appellant.

Dunning & Moore, and H. W. Stubbs, all of Williamston, John W. Hinsdale, Jr., of Raleigh, and Reed, McCook & Hoyt and W. Henry Hoyt, all of New York City, for appellees.

CLARK, C. J. This is a controversy submitted upon an agreed case without action, relating to a proposed issue of \$150,000 of bonds of Martin county for the purpose of paying the county's share of the cost of building a bridge at Williamston over the Roanoke river, which divides Martin and Bertie counties, including the causeway or continuation of the bridge through the swamp on the Bertie side to the highlands.

It is provided that the entire work is to be constructed by the two counties jointly, at their joint expenses, with federal and state aid. The proposed road or approach on the Bertie side will run through swamps and other lowlands, and is necessary to the use of the bridge and practically a part of it. The bonds were awarded by Martin county to the appellant as the highest bidder on 30th June, 1919. The appellant is willing to comply with its bid, provided the county can lawfully issue these bonds and levy sufficient taxes to pay them. This proceeding was instituted in order to determine this question.

The defendant bank refuses to take and pay for said bonds upon the ground that they are not legal because—

"The act authorizing such bond issue violates the constitutional amendment, art. 2, § 29 (see Pub. Acts 1915, c. 99), which declares that the Legislature shall not pass any local, private, or special act relating to ferries or bridges; and for the further reason that the Legislature had no power under the Constitution to authorize Martin county to issue bonds to pay a part of the costs of building the road in Bertie county under the exclusive control of Bertie."

The court below adjudged that the bonds are valid obligations of the county; that the county is authorized to levy a sufficient tax to pay the principal and interest of the bonds without regard to the tax limit prescribed by the state Constitution; and that the proceeds of the sale of the bonds may be used by Martin county—

"In constructing the road approaching the bridge in the county of Bertie, whether said road be wholly in the county of Bertie, or partly in the county of Bertie and partly in the county of Martin."

The plaintiff relies upon three different statutes for authority to issue the bonds and to levy sufficient taxes to pay principal and interest thereof, i. e.:

(1) Chapter 53, Public Local Laws 1919, entitled "An act to authorize the board of commissioners of Martin and Bertie counties to build a bridge over the Roanoke river at Williamston and for other purposes."

(2) Chapter 103, Laws 1917, amending Rev. § 2696, as amended by chapter 185, Laws 1919, which is now sections 137-143, c. 69, Cons. Stat.

(3) Chapter 312, Laws 1919, entitled "An act to enable all counties to provide funds to pay the cost of constructing or improving roads with federal aid, and to pay the cost of maintaining such roads."

Under each of these three acts Martin county is authorized to issue bonds for road and bridge purposes and to levy sufficient taxes to pay such bonds.

The first act is applicable only to Martin and Bertie counties, and specifically authorizes them, "by joint action and agreement, to build and construct a bridge over the Roanoke river at Williamston, as the same has already been surveyed and laid out, and to build and construct the road leading from the bridge on the Bertie side to the highlands of Bertie county"; authorizes each county to issue bonds for this purpose, the total amount not to exceed "the actual cost of said bridge and road," the Martin county bonds not to exceed \$150,000, and the Bertie county bonds not to exceed \$50,000, and further authorizes each county to levy a "sufficient tax to pay the bonds issued by it."

The second act provides, in substance, that "any county in the state" may build a public road or a bridge in the county, and any two counties may jointly build a highway bridge over a stream which divides them, and may apportion the cost between themselves in such proportion as they may agree upon; but the cost must not exceed 2 per cent. of the assessed valuation of the taxable property in the two counties. County bonds may be issued for such roads or bridges in an amount not exceeding "the actual cost" thereof, and a "sufficient" county tax may be levied to pay the bonds.

The third act provides that any county may issue its bonds to pay its share of the cost of constructing or improving public roads in the county with federal or state aid, or both, and may levy a "sufficient" tax to pay such bonds; and that the term "road," as used in the act, includes bridges and culverts in all cases where they constitute a part of the road which is to be so constructed or improved. The act provides, however, that certain portions of it shall not be enforced in 31 counties named therein (which do not include Martin), unless it is adopted by the voters at an election.

Pursuant to the first act, which for convenience may be called the "special act," Martin and Bertie counties having previously taken appropriate action for building at their

Joint expense the bridge and road prescribed in that act, Martin county now proposed to issue the \$150,000 of bonds in question to pay its share of the cost. It appears upon the face of the special act that the road or approach referred to therein is to be almost wholly in Bertie.

It may be noted here that the bridge proper across the river is in Bertie, for the boundary of Martin county is the low-water mark on the south side of the river. This appears from chapter 4, Laws 1729; 25 St. Records, 212; 2 Rev. Stat. 164; which boundary is recognized by the subsequent acts creating Edgecombe county out of Tyrrell (Laws 1741, c. 7; 23 St. Records, 164; 2 Rev. Stat. 124); the act creating Halifax county out of the territory of Edgecombe (Laws 1758, c. 13; 23 St. Records, 496; 2 Rev. Stat. 133); and, finally, the act creating Martin county out of Halifax and Tyrrell (Laws 1774, c. 32; 25 St. Records, 976; 2 Rev. Stat. 145). Indeed, it has been the usual procedure in establishing new counties that, where a river or other stream is the dividing line, said river has remained within the limits of the county from which the new county has been taken.

[1] But counties are merely instrumentalities and agencies of the state government.

[2, 3] It has been enacted that, when a crime has been committed on a boundary water course which lies wholly in another county, either county has jurisdiction of the offense (Rev. § 3234); and that a grand jury may be authorized to indict for offenses committed in another county (State v. Lewis, 142 N. C. 626, 55 S. E. 600, 9 Ann. Cas. 361); and that, as to civil matters, not only the Legislature can change the boundaries at will with or without provision that the annexing county shall pay a part of the debt of the county from which the territory was taken (Mills v. Williams, 33 N. C. 556; Com'rs v. Com'rs, 95 N. C. 189; Com'rs v. Com'rs, 79 N. C. 565; Watson v. Com'rs, 82 N. C. 17), but the establishment of the boundary being a political question, the Legislature, even after taxes are assessed, can decide where the boundary is (even though erroneously in fact), and direct to which county the tax from the disputed territory shall be paid. R. R. v. Washington, 154 N. C. 333, 70 S. E. 634.

The act of the Legislature here has authorized Martin county to issue \$150,000 bonds as its just contribution to the entire cost of the bridge and its approaches from its beginning in Martin to the highlands in Bertie. The Legislature was doubtless moved to so enact by the representatives of that county in the General Assembly. As the bridge itself and the long approach through the swamp are in Bertie county, almost the entire expense, but for the apportionment authorized in the act by agreement of the commissioners, would have fallen upon Bertie,

though doubtless the greatest proportion of the benefit would have accrued to the county of Martin. The bridge, therefore, would not have been constructed but for the apportionment in the act which has been approved by the county commissioners of the two counties, and which was doubtless made in consequence of their agreement before the act was passed.

[4] The act, however, is merely permissive as to the amount of bonds each county can issue, and not mandatory.

[5] It was entirely within the power of the Legislature to have built the bridge entirely at the cost of the whole state, as in the numerous cases of state bonds issued to build railroads, though no part of the bridge and its approaches would have been upon the soil of the other 98 counties contributing to its erection.

[6] The act of the Legislature authorizing the two counties in the vicinity, and apportioning the contribution of Martin county at not more than \$150,000, and of Bertie at not more than \$50,000, was not forbidden by any provision of the state Constitution.

[7] Being a necessary expense, these counties, under the authority of the Legislature, can issue the bonds without a vote of the people. Herring v. Dixon, 122 N. C. 424, 29 S. E. 368, and cases cited thereto in the Anno. Ed.

Rev. § 1318, subsec. 29, provides:

"When a bridge is necessary over a stream which divides one county from another, the board of commissioners of each county shall join in constructing or repairing such bridge; and the charge thereof shall be defrayed by the counties concerned, in proportion to the number of taxable polls in each."

In *Bridge Co. v. Com'rs*, 151 N. C. 216, 65 S. E. 895, it was held that this provision would apply irrespective of whether the division line between counties ran up the middle of the stream, or whether the stream lay, as is not unusual (and as in this instance), entirely in one of the counties. In *McPeeters v. Blankenship*, 123 N. C. 651, 81 S. E. 876, where the boundary ran up the middle of the stream between Yancey and Mitchell counties, it was held that the commissioners of Yancey could not build the bridge without the joinder of the commissioners of the other county, but "should have applied to the Legislature for an act authorizing the county of Yancey to construct the bridge at its sole expense."

[8] It therefore appears that the Legislature might have authorized the county of Martin to build this bridge entirely at its own expense. Certainly, if the Legislature could direct, as it does under Rev. § 1318, subsec. 29, that the expense should be divided between the counties concerned "in proportion to the number of taxable polls of each," it has the power to provide for any

other method of apportioning the expense. In this case, chapter 103, Laws 1917, amended by chapter 185, Laws 1919, has provided that "any two counties may jointly build a highway bridge over a stream which divides them, and may apportion the cost between them in such proportion as they may agree upon." Chapter 53, Public Local Laws 1919, apportioning \$150,000 to Martin, was evidently proposed in consequence of such agreement.

It has never been questioned that the construction of a bridge over a stream dividing two counties is a necessary and public purpose for which each county may constitutionally raise money. *Bridge Co. v. Com'rs*, 151 N. C. 215, 65 S. E. 895; *Mills v. Com'rs*, 175 N. C. 215, 95 S. E. 481. There is ample authority also in other jurisdictions that "it is not necessary that any part of a highway or bridge be within the territorial limits of the political subdivision on which the burden of its construction is imposed by the Legislature provided such political subdivision is benefited thereby." *State v. Williams*, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465, affirmed *Williams v. Eggleston*, 170 U. S. 304, 18 Sup. Ct. 617, 42 L. Ed. 1047; 13 Ruling Case Law, title "Highways," § 13; 4 Ruling Case Law, title "Bridges," § 10.

[9] And it is for the Legislature, and not for the courts, to determine what property is benefited under such circumstances, unless the legislative action is palpably arbitrary and a plain abuse. *Houck v. Drainage District*, 239 U. S. 254, 36 Sup. Ct. 58, 60 L. Ed. 266; *Byram v. Marion County*, 145 Ind. 240, 44 N. E. 357, 33 L. R. A. 476. To the same purport *Taylor v. Com'rs*, 55 N. C. 141, 64 Am. Dec. 566; *Holton v. Mecklenburg*, 93 N. C. 430; *Wood v. Oxford*, 97 N. C. 227, 2 S. E. 653; *Elizabeth City v. Com'rs*, 146 N. C. 539, 60 S. E. 416; *State v. Williams*, supra; *Mobile v. Kimball*, 102 U. S. 691, 26 L. Ed. 238; *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. Ed. 658; *Thomas v. Gay*, 169 U. S. 265, 18 Sup. Ct. 340, 42 L. Ed. 740; *Transit Co. v. Kentucky*, 199 U. S. 202-204, 26 Sup. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493; *State v. Marion County*, 170 Ind. 595, 85 N. E. 513; *Duval County v. Jacksonville*, 36 Fla. 196, 18 South. 339, 29 L. R. A. 416; *State v. Atkin*, 64 Kan. 174, 67 Pac. 519, 97 Am. St. Rep. 343, affirmed *Atkin v. Kansas*, 191 U. S. 207, 24 Sup. Ct. 124, 48 L. Ed. 148; *State v. Edmondson*, 89 Ohio St. 93, 105 N. E. 269, 52 L. R. A. (N. S.) 305, Ann. Cas. 1915D, 934; *Thurston v. Caldwell*, 40 Okl. 206, 137 Pac. 683.

[10] The rule to be deduced from these authorities may be thus summed up: The construction and maintenance of roads and bridges is a matter of general public concern. The whole body of the people of this state is benefited by them. The Legislature may cast the expense of such public works upon the state at large, or upon territory

specially and immediately benefited, even though the work may not be within a part of the total area attached.

The decisions in *Com'rs v. State Treasurer*, 174 N. C. 141, 93 S. E. 482, 2 A. L. R. 726, and *Com'rs v. Boring*, 175 N. C. 105, 95 S. E. 43, may be distinguished from this case in that Martin county is not issuing bonds in behalf of any other political subdivision, and the road and bridge in question is an essential part or adjunct of the bridge which begins in Martin county. The proportionate part of the costs, i. e., three-fourths, is a fair estimate doubtless of the proportional part of the benefit which will accrue to that county from the construction of the bridge, including the causeway through the swamp on the Bertie side (which is an indispensable part of the bridge), having been enacted at the instance of the representatives of Martin county in the General Assembly, and approved by the commissioners of that county. The road on the Bertie side is an "approach" to the bridge, and, indeed, is essentially a part of the bridge, for at places there are large arches as an outlet for the overflows of the river, which are not infrequent. These approaches are in law, as well as in fact, a part of the bridge. *Brown County v. Keya Paha County*, 88 Neb. 117, 129 N. W. 250, Ann. Cas. 1912B, 790; 4 Ruling Case Law, tit. "Bridges," § 2.

Besides, the apportionment in the act is merely premissive as to the amount of bonds each county may issue, and, being within the powers of the General Assembly, is not reviewable by us.

We have discussed this proposition first, for it seems to be the real defense set up in this case. As to the other exception, that the special act (Public Local Laws 1919, c. 53) is within the constitutional prohibition of local, private, or special legislation, and forbidden by Const. Amend. § 29, art. 2 (see Pub. Laws 1915, c. 99), that matter has been fully discussed and conclusively settled by *Brown v. Road Commissioners*, 173 N. C. 598, 92 S. E. 502, and *Mills v. Commissioners*, 175 N. C. 215, 95 S. E. 481. That amendment provides:

"The General Assembly shall not pass any local, private or special act or resolution: \* \* \* Authorizing the laying out, opening, altering, maintaining or discontinuing highways, streets or alleys; relating to ferries or bridges. \* \* \* Any local, private or special act or resolution passed in violation of the provisions of this section shall be void."

Chapter 53, Public Local Laws 1919, provides that the board of commissioners of Martin and Bertie are authorized by joint action to build and construct a bridge over the Roanoke river at Williamston, as the same has already been surveyed and laid out, and to build and construct a road leading from the bridge on the Bertie side to the

highlands of Bertie county, and that to raise funds for that purpose the commissioners of Martin are authorized to issue bonds not to exceed \$150,000, and the commissioners of Bertie not to exceed \$50,000, with provisions as to issuing the bonds and levying taxes to pay the interest, and to provide a sinking fund for the payment of bonds at maturity. The only necessary part of this act is the legislation authorizing a special tax. Even if the primary purpose of the act was not to authorize the bonds and tax, and if the provision authorizing the building of the bridge was unconstitutional, the latter is mere surplusage, and the bond and tax provisions would be valid, and the work could be done under the implied power and under the general statutes above set out.

In *Brown v. Road Commissioners*, supra, chapter 456, Public Local Laws 1917, "authorized and directed" the board of commissioners of a county named in the act to issue bonds "for road purposes" in a certain township named therein, and provided for a sufficient annual tax in the township to pay the principal and interest of the bonds. The court held that this act was primarily a statute to provide for raising revenue for road purposes, and therefore was not within the constitutional prohibition. *Brown, J.*, said:

"An analysis of the act shows that its primary purpose is to authorize the sale of bonds for road purposes in North Cove township, and to require the levying of a tax to pay the interest and principal of the bonds. \* \* \* It only provides the means for constructing and repairing them. \* \* \* Speaking of such legislation as affected by a constitutional provision, \* \* \* the Pennsylvania court in *Re Sugar Notch Borough*, 192 Pa. St. 349, 43 Atl. 985, says: 'The restrictions of the Constitution upon legislation apply to direct legislation, not to the incidental operation of statutes, constitutional in themselves, upon other subjects than with those with which they directly deal.' So in this case, the bond issue being the direct legislation, the fact that it provides that the proceeds of the bonds are to be used for road purposes will not bring it within the prohibition of the constitutional amendment."

In support of this proposition the court referred (173 N. C. 600, 92 S. E. 502) to the absolute necessity of special legislation authorizing county and township bond issues and taxes for roads. The object of the amendment was not to inhibit the Legislature from granting such permission in cases where, under our Constitution, legislative permission is necessary, but it was intended to prevent taking up the time of the General Assembly, and filling up the volumes of statutes in authorizing the laying out of highways and other local matters, which the county commissioners were fully authorized and empowered to act upon without legislative permission.

In *Mills v. Commissioners*, supra, chapter

575, Public Local Laws 1917, was held not to be in conflict with above-cited amendment to the Constitution (section 29, art. 2). The act there considered authorized the people of the county named in the act to issue bonds "for the purpose of building bridges across the Catawba river" jointly with another county named, and to levy a special tax to pay the bonds. Hoke, J., placed the decision upon the ground above stated in *Brown v. Com'rs*. He said:

"It is well understood that our General Assembly, at session after session, was called on by direct legislation to authorize a particular highway or street, or to establish a bridge or ferry at some specified place. \* \* \* The Legislature in these cases was in fact called on to usurp, or rather to exercise, functions which were more usually and properly performed by the local authorities, and it was in reference to local and special and private measures of this character that these amendments were adopted; and as stated in *Brown's Case*, supra, it was never intended to prohibit legislation authorizing the raising of proper funds by the sale of bonds or by taxation for measures required for the public good, though such funds should be for improvements in some fixed place or in restricted territory determined upon by local authorities in pursuance of general laws on the subject."

[11] This is a clear conception and statement of the purpose and the applicability of section 29, art. 2, of the Constitution. We could not add to it or make any change therein without making it less clear. It cannot be improved upon. The *Brown and Mills Cases* were, we think, rightly decided, and are reaffirmed. They have been cited with approval in *Parvin v. Com'rs*, 177 N. C. 510, 99 S. E. 432.

The same view is taken in *Morrill v. Supervisors*, 112 N. Y. 585, 20 N. E. 549, and *Bridge Co. v. Attica*, 119 N. Y. 204, 23 N. E. 542. In *Robertson v. Board of Supervisors*, 112 Miss. 54, 72 South. 852, the court held that an act providing for the issuance of bonds to pay for the improvement of public roads did not violate a section of the Constitution of that state almost identical with section 29, art. 2, of our Constitution, for the reason that it did "not provide for the 'laying out, opening, altering, and working roads and highways,' but for the raising of revenue with which to pay for the working of roads and highways, the method by which they have been or are to be laid out, opened, altered, and worked being governed by the general laws relating thereto." The same principle was enunciated in *Re Sugar Notch Borough*, 192 Pa. 349, 43 Atl. 985, already quoted in the citation from the opinion in *Brown v. Commissioners*, supra.

More than 150 statutes, more or less of similar purport, relating to the roads or bridges in certain counties, townships, or road districts therein named, were passed

at the last session in reliance upon the Brown and Mills Cases. Under the authority of these statutes many hundreds of thousands of bonds have been issued, or are about to be issued, and contracts have been let, or are about to be let, for the construction of roads and bridges in all parts of the state. It is of the highest importance, therefore, that the authority of those cases shall be sustained.

The primary purpose of the special Martin county act above was to authorize the bonds, and the levy of a tax to pay the principal and interest thereof. Under their power to undertake public improvements involving a necessary expense, Martin and Bertie could have built the bridge and approaches and road thereto without any act of the Legislature, and could have issued bonds for that purpose, and by agreement apportioned the total cost between them. The only really necessary legislation was to authorize a special tax to pay the bonds. *Com'rs v. MacDonald*, 148 N. C. 125, 61 S. E. 643.

Lastly, it is contended in the defendant's brief that in *R. R. v. Cherokee*, 177 N. C. 65, 97 S. E. 758, the court held that a general act giving every county, or certain named counties, optional authority to levy special taxes, was unconstitutional, and a "special act" was necessary, and that a contrary decision was made in *Parvin v. Com'rs*, 177 N. C. 508, 99 S. E. 432. The court in the Cherokee Case divided, the dissenting opinion expressing the view that the legislative authority to levy a special tax under Constitution, art. 5, § 6, did not require a "special act" for that purpose, but only the "special approval," which could be given as well by a general act empowering any or all counties to do so. *Parvin v. Com'rs* did not, as the defendant contends in his brief, overrule the Cherokee Case, but distinguished it by pointing out that it was based on a statute enacted in 1913, prior to the constitutional amendment. In the Parvin Case the court held that a general statute passed since the amendment, i. e., chapter 284, Laws 1917, providing that the "county commissioners of any county, for the purpose of laying out and opening \* \* \* the public roads and bridges of said county," may order an election to take the sense of the qualified voters of the county upon the question of issuing bonds for that purpose, was sufficient. This is the latest utterance of the court.

The Constitution, art. 5, § 6, requires the "special approval" of the Legislature to ex-

ceed the limitation of taxation for even necessary purposes. If the Cherokee Case were construed to prohibit this approval being given by a general act, and Const. art. 2, § 29, prohibits a special act, this will prevent such approval being given in any case.

[12, 13] We think, therefore, that the special act (chapter 53, Public Local Laws 1919, relied upon as authority for the bonds does not conflict with the constitutional amendment (article 2, § 29), which prohibits local, private, or special legislation in certain cases. We are also of opinion that the two general acts (chapter 103, Laws 1917, as amended by chapter 185, Laws 1919, and chapter 312, Laws 1919), referred to in the beginning of this opinion, also satisfy the constitutional requirement of "special approval of the General Assembly" authorizing the levy of a tax beyond the constitutional limitation.

[14] The provision limiting the amount of the bond issue to the "actual cost" of the bridge or road is not a prohibition against issuing bonds before the work is done. The amount of bond issue may be based upon the estimate of the cost made either before or after the work is done. Any other construction of the statutes might make it impossible for the county to proceed with the work, for contractors usually insist that the financial arrangements be made before the work is begun. Should it happen that the work can be let at a less total cost than the amount received from the bond issue, the surplus can be invested in the sinking fund required to pay off the bonds at maturity.

The Roanoke river, as is well known, is the only one in the entire Union of its length between the falls and its mouth, and of no greater width, that is not spanned by any bridge at all. In this state there are numerous public bridges across the French Broad, the Catawba, the Yadkin, the Cape Fear, the Neuse, and the Tar rivers where they are wider than the Roanoke. Particularly is this so as to the bridges across the Neuse at New Bern and the Pamlico at Washington, and the railroad bridge across Albemarle Sound is 5½ miles long. It is patent that the construction of this bridge, and indeed of bridges at divers other points, over the Roanoke, is a public necessity, not only for the people of the fertile country on each side of that stream, but will be to the great benefit of the entire state.

After the fullest consideration of all the arguments adduced, the judgment below is affirmed.

(178 N. C. 39)

## GUIRE v. BOARD OF COM'RS FOR CALDWELL COUNTY. (No. 473.)

(Supreme Court of North Carolina. Sept. 10, 1919.)

1. STATUTES  $\Leftrightarrow$  143, 168—AMENDING STATUTE—EFFECT OF INVALIDITY.

Act of March 10, 1919, amending Pub. Loc. Laws 1917, c. 67, being wholly void, could not have the effect of repealing or amending the latter act, which remained in full force.

2. COUNTIES  $\Leftrightarrow$  178—BONDS—ELECTION—VALIDITY—INTEREST RATE.

Although Pub. Loc. Laws 1917, c. 67, under which a bond election was held, limits interest to 5 per cent., the people having voted an issue thereunder at a rate not exceeding 6 per cent. was equivalent to a vote for bonds at any less rate, and an approval of an issue of 5 per cent. bonds and the submission of the question at a rate not exceeding 6 per cent., while irregular, did not invalidate the election.

3. COUNTIES  $\Leftrightarrow$  183(2)—SERIES OF BONDS—STATUTE.

The provision of Pub. Loc. Laws 1917, c. 67, § 1, for three series of bonds payable at different dates is merely permissive or discretionary with the board of county commissioners, and an issue is not invalid because they failed to provide for three series.

4. COUNTIES  $\Leftrightarrow$  52—ISSUE OF BONDS—MEETING OF BOARD OF COMMISSIONERS—ADJOURNED SESSION.

Where a meeting of the board of county commissioners at which bids were to be received and accepted for an issue of bonds was properly advertised according to Pub. Laws 1917, cc. 147, 174, it was competent for the board to adjourn over to another day in the near future to complete such business, and those interested must take notice of the same.

Appeal from Superior Court, Caldwell County; Harding, Judge.

Action by V. D. Guire against the Board of Commissioners for Caldwell County. From a judgment holding the county bonds proposed to be sold valid, and enjoining the issue of bonds bearing more than 5 per cent. interest, plaintiff appeals. Affirmed.

This case was before this court at the last term, and our decision therein is reported in 177 N. C. at page 516, 99 S. E. 430, where the facts are stated, so far as pertinent to that appeal. We there held that the act of 1919, increasing the rate of interest, as fixed by the Public Local Laws of 1917, c. 67, from 5 per cent. to a rate not exceeding 6 per cent., was invalid, not having been passed in accordance with Const. art. 2, § 14. Since that case was decided, the board of commissioners of the county has properly advertised the meeting for the sale of the bonds, and the meeting was held

accordingly, at which the commissioners received and accepted a bid for the bonds at a 5 per cent. interest rate. The plaintiff sought and obtained a restraining order, and at the hearing of the application for an injunction the court, by consent of the parties found the facts, and concluded therefrom that the bonds proposed to be sold to the successful bidder will be valid obligations of the county. The court held the bonds to be valid, and so adjudged, but enjoined any issue of bonds bearing more than 5 per cent. interest.

J. T. Pritchett, of Lenoir, for appellant.  
Mark Squires, of Lenoir, for appellee.

WALKER, J. (after stating the facts as above). We will now consider the case with reference to the objections of the plaintiff and their validity, as they are presented in the record, and in the findings and judgment of the court:

[1] First. The Public Local Laws of 1917, c. 67, provided for a second election, if at the first one there was an adverse vote by the people. There is no dispute as to the regularity of the election, except in one respect which will presently be noticed. There were two elections held. At the first of these, held in 1917, the result was against a bond issue, and at the second the vote was in favor of issuing the bonds at a rate of interest not exceeding 6 per cent. Both elections were held under chapter 67 of the Public Local Laws of 1917, as appears by the record, the second, though, was held after the passage of the amendatory act of 1919. That act amended the act of 1917 only in one respect, viz., by striking out "five per cent." and inserting in lieu thereof the words "not exceeding six per cent.," and for that reason the call for the election specified the rate, which was not to exceed 6 per cent., but the election was held and conducted under the act of 1917, the other act making no provision for an election, but simply changing the rate of interest. The latter act being wholly void, it could not have the effect of repealing or amending the act of 1917, which remained in full force, notwithstanding the same. There was no intention, expressed or implied, to repeal the old law, but the only purpose was to amend it, and this purpose failed altogether by reason of the invalidity of the later act. This principle is well settled by the authorities. 36 Cyc. 1098, and the numerous cases in the notes which sustain the text. *Waters-Pierce Oil Co. v. State of Texas*, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657; *City of Lexington v. Bank*, 165 Mo. 671, 65 S. W. 943; *Wilkison v. Board, etc.*, of Marion Co., 158 Ind. 1, 62 N. E. 481; *Barker v. Potter*, 55 Neb. 25, 75 N. W. 57; *Russell v. Ayer*, 120

N. C. 180, 27 S. E. 133, 37 L. R. A. 246. Many other cases are cited in the defendant's brief to the same effect.

[2] The people having voted for the issue of bonds at a rate not exceeding 6 per cent., it was equivalent to a vote for bonds at any less rate, as the greater includes the less, and therefore they have approved an issue of bonds at 5 per cent. The submission of the question was irregular, it is true, but not sufficiently so to invalidate the result, when the court has perpetually enjoined any issue above the proper rate, as was done in this case. This is amply protective of the interests of the taxpayers. It was held in *City of Quincy v. Warfield*, 25 Ill. 317, 321, 79 Am. Dec. 330, that, where bonds were issued bearing interest at 12 per cent., whereas no more than 8 per cent. interest was allowed in the statute by which they were authorized, the bonds were good at the rate of 8 per cent., or pro tanto, and that all in excess of that rate must be rejected. The court said:

"It is said the bond is void, because it stipulates for a greater rate of interest than 8 per cent. per annum. In the case of *Johnson v. Stark County*, 24 Ill. 75, we recognized the doctrine that in exercising a power, all acts performed in excess of or beyond the power delegated must be rejected as unwarranted; but if, after the rejection of such acts, there has been enough done to show a proper execution of the power, the act will be sustained, irrespective of the acts performed beyond the power delegated. In other words, so much of the act done as is within the power granted shall be upheld, whilst all beyond the power shall be rejected as an excess of power. Upon this ruling in this case, we must decide, and do decide, that the bond is valid and binding on the city, with interest to be calculated at 8 per cent. per annum. It is not vitiated by the excess, but only pro tanto, and the court trying the case should have made the deduction, and given judgment for the bond, with interest at 8 per cent. per annum, the city having no power to stipulate for interest beyond that rate."

And likewise it was held in *Parkinson v. City of Parker*, 85 Pa. 313, that—

"The right of a borough to borrow money within the prescribed limits, and issue certificates therefor, bearing interest, is conferred by the borough law of the state, and the fact that the bond in this case called for 8 per cent. interest did not invalidate it, and it was only void for the excess over the legal rate of interest."

[3] Second. The proposed issue of bonds is not invalid upon the ground, alleged by the plaintiff, that the commissioners of the county have not provided for three series of bonds payable at three different dates. That arrangement, as authorized by the act of 1917, was merely permissive or discretionary with the board, and was manifestly intended to be so, as otherwise the pro-

visions of the act would be conflicting. It empowers the commissioners, in the exercise of their discretion, to fix the maturity of the bonds, so that they will be payable at such time, or times, not exceeding 40 years from the date thereof, and at such place, or places, as the board may determine, and also conferred upon them the power to prescribe the form and tenor of the bonds. This general authority was broadly given, upon the theory that a restricted one might militate against an advantageous sale of the bonds. Public Local Laws of 1917, c. 67, § 1.

[4] Third. The meeting at which bids were to be received and accepted was properly advertised according to Public Laws of 1917, cc. 147, 174. The notice as to the first meeting was a strict compliance with those statutes, and as the board could not finish the transaction and consummate the sale at that meeting, it was competent for them to adjourn over to another day in the near future, as they did, and complete the business. This very question was decided in *McChesney v. City of Chicago*, 201 Ill. 344, 66 N. E. 217, where it was held that such an adjournment was clearly legal, as the interested parties must take notice of the same, when the first meeting has been properly advertised. But in our case the board did give special notice of the second meeting. The object of this provision of the law was to prevent secret or clandestine sales of municipal and other bonds of public corporations, and this purpose was fully accomplished in the present instance.

Fourth. This contention is substantially the same as the first one. The particular form of the objection here is that the call for the election and the notice of the same was confined to the issuing of bonds at a rate not exceeding 6 per cent., but the form of the objection is immaterial, as we are concerned more with its substance. It involves the same principle we applied to the first contention and upon which we decided it. If the people voted for bonds at a rate not exceeding 6 per cent., they were intelligent enough to know that it meant a 6 per cent. rate or any rate below it, which of course included a 5 per cent. rate. Suppose the act of 1919 had not been passed, then they could have voted only for a rate not exceeding 5 per cent. under the act of 1917, as it provides for such a rate, that is, a maximum rate of 5 per cent. If the result had been favorable to the issuing of the bonds, can it be doubted that the commissioners could have validly issued them at any rate below 5 per cent.? The object of fixing a maximum rate of interest was to enable the commissioners to get a lower rate than 5 per cent., if they could do so, and there was no other reason for it. One of the familiar maxims of the law is, "Utile per inutile non vitiatur," which means that surplusage

does not vitiate that which, in other respects, is good and valid; and there is another, "Surplusagium non nocet," or that surplusage is innocuous and must be disregarded. Broom's Legal Maxims (6th Am. Ed.) p. 462, marg. p. 603. Where an award recited that the three arbitrators had concurred in it, whereas one had not, but had dissented, it was held (*White v. Sharp*, 12 M. & W. 712), applying the maxim, that the award was good, as the recital, so far as it stated the higher number of concurring arbitrators, was immaterial and useless, as the two were sufficient. So here the 5 per cent. was valid, and sufficient to sustain the election, and the recital of the 6 per cent. or 1 per cent. more, being surplusage and useless, does not vitiate that which is legal. The election was held under the act of 1917, by clear and specific reference to it in the call for it. There was no machinery provided in the act of 1919 for holding an election, and in this respect the former act was left intact. All of the objections of the plaintiff were properly overruled.

Affirmed.

(112 S. C. 421)

#### STATE v. HALL. (No. 10254.)

(Supreme Court of South Carolina. Aug. 25, 1919.)

#### CRIMINAL LAW §1042—APPEAL—RESERVATION OF GROUNDS OF REVIEW—INCONSISTENCY OF VERDICT WITH EVIDENCE.

Where defendant did not raise in the circuit court the question of error in sentencing on a verdict inconsistent with the evidence, in that defendant had been found guilty on a count charging him with procuring a name to be forged on a note, and on a count charging him with himself writing the name, such question is not properly before the Supreme Court for consideration on defendant's appeal.

Appeal from General Sessions Circuit Court of Kershaw County; W. H. Townsend, Judge.

Oliver Hall was convicted of forgery, and he appeals. Appeal dismissed.

W. B. De Loach, of Camden, for appellant.

W. H. Cobb and A. F. Spigner, Sols., both of Columbia, for the State.

GARY, C. J. The defendant was convicted under an indictment charging him in one count, with making, causing, and procuring to be falsely made, forged, and counterfeited a certain note of the said Oliver Hall, in the sum of \$450, payable to the Bank of Camden, S. C., by then and there writing and indorsing thereon the name of W. T. Hall, and in the second count, with uttering and

passing said note, which he then and there knew to be a forgery.

The only exception upon which he appealed is as follows:

"For error in his honor, the presiding judge, in passing the sentence upon the defendant that he did; the verdict of the jury being inconsistent with the evidence, as the said jury found the defendant guilty on both counts in the indictment, one count charging the defendant with procuring the name of W. T. Hall to be written upon the said note, and the other count charging the said defendant with writing the name of W. T. Hall upon the said note."

The question presented by the exception was not raised in the circuit court, and therefore is not properly before this court for consideration.

Appeal dismissed.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

(112 S. C. 466)

#### STATE v. ROGERS. (No. 10265.)

(Supreme Court of South Carolina. Aug. 25, 1919.)

#### 1. BIGAMY §4—OBJECTIONS TO INDICTMENT NOT WELL TAKEN.

Indictment charging bigamy held sufficient as against objections that it did not show jurisdiction of court, that state was not named as a party, and that it did not run in name of state.

#### 2. BIGAMY §9—ORIGINAL MARRIAGE LICENSES ADMISSIBLE IN EVIDENCE.

In prosecution for bigamy, the original marriage licenses issued to defendant by clerk of court, who was authorized by Civ. Code 1912, § 3745, to issue them, in form prescribed by section 3746, held admissible in evidence under section 3750, where proved by clerk of court, who had them in his possession under section 3747.

Appeal from General Sessions Circuit Court of Oconee County; S. W. G. Shipp, Judge.

Alex Rogers was convicted of bigamy, and he appeals. Affirmed.

Following is the indictment referred to in opinion:

"The State of South Carolina, County of Oconee.

"At a court of general sessions, begun and holden in and for the county of Oconee, in the state of South Carolina, at Walhalla Court-house, in the county and state aforesaid, on the first Monday of March in the year of our Lord, one thousand nine hundred and nineteen, the jurors of and for the county aforesaid, in the state aforesaid, upon their oath present:

"That Alex M. Rogers, late of the county



and state aforesaid, on the 11th day of September, in the year of our Lord one thousand nine hundred and thirteen, at Walhalla courthouse, in the county of Oconee, and state of South Carolina, did marry one Myrtle Lusk, and her, the said Myrtle Lusk then and there had for wife, and that the said Alex M. Rogers, afterwards, and while he was so married to the said Myrtle Lusk as aforesaid, to wit, on the 11th day of September, in the year of our Lord one thousand nine hundred and eighteen, with force and arms, at Walhalla Courthouse, in the county of Oconee, and state of South Carolina, feloniously and unlawfully did marry and take to wife one Celia May Bolick, and to her the said Alex M. Rogers was then and there married, and her the said Alex M. Rogers then and there had for wife, the said Myrtle Lusk Rogers, his former wife, being then alive, against the form of the statute in such case made and provided, and against the peace and dignity of the state.

"John K. Hood, Acting Solicitor."

J. R. Earle, of Walhalla, for appellant.

John K. Hood, Acting Sol., of Anderson, for the State.

HYDRICK, J. [1] Defendant appealed from sentence on conviction of bigamy. He complains of error in overruling his demurrer to the indictment on the ground: (1) That it did not show jurisdiction of the court; (2) that the state was not named therein as a party to the action; and (3) that it does not run in the name of the state. It appears from inspection of the indictment, which will be reported, that none of these objections are well taken. It is in the usual form, which has been approved by immemorial practice and the authorities. 1 Bish. Cr. Proc. §§ 409, 411.

[2] There was no error in admitting in evidence the original marriage licenses issued to defendant by the clerk of court. They were proved by the testimony of that officer, who was authorized by the statute (1 Civ. Code 1912, § 3745) to issue them, and who issued them in the form prescribed by the statute (Id. § 3746), upon the application of defendant, and who had possession of them by virtue of the provision of the statute (Id. § 3747). The statute (Id. § 3750) makes the original license, or a copy thereof, together with the certificate of marriage, indorsed thereon and properly filled out, and signed by the person who performed the marriage ceremony, and by both the contracting parties, sufficient evidence of the contract of marriage between the parties therein named, in any of the courts of this state.

Both licenses and the certificates indorsed thereon were in exact accord with the provisions of the statute, and were competent evidence. Besides, the fact that both marriages took place in Oconee county was

proved by the testimony of the person who performed both ceremonies. Therefore the contention that there was no evidence of the several marriages is clearly untenable, as is also the contention that defendant was not confronted with the witnesses against him. Judgment affirmed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(112 S. C. 468)

LODGE NO. 13, JOINT-STOCK CO. OF  
SOUTH CAROLINA. v. BROWN.  
(No. 10286.)

(Supreme Court of South Carolina. Aug. 25, 1919.)

1. MORTGAGES  $\Leftrightarrow$ 34 — PAROL AGREEMENT  
WITH DEBTOR TO RECONVEY ON PAYMENT  
VALID.

Where grantor, holding legal title to land as security for payment of a debt, conveys land for amount of debt, grantee's agreement with grantor's debtor to convey property to debtor on debtor's payment of debt need not be in writing.

2. MORTGAGES  $\Leftrightarrow$ 38(1) — WHEN EVIDENCE  
SUFFICIENT TO SHOW ABSOLUTE DEED A  
MORTGAGE.

Evidence held to show that grantee, to whom grantor had conveyed property, the legal title of which he was holding as security for payment of debt, agreed to convey property to grantor's debtor upon payment of debt to grantee.

Appeal from Common Pleas Circuit Court of Florence County; H. F. Rice, Judge.

Action by Lodge No. 13, Joint-Stock Company of South Carolina, against C. R. Brown. Decree for plaintiff, and defendant appeals. Affirmed and remanded.

McNeill & Oliver, of Florence, for appellant.

C. J. Gasque, of Florence, for respondent.

GAGE, J. The subject-matter in dispute is a storehouse and lot in the city of Florence. The parties litigant are negroes—the plaintiffs a fraternal lodge, and the defendant a preacher of the gospel. So much gives some necessary uncertainty to the transaction under inquiry.

The plaintiff claims equitable title to the house and lot, the legal title of which is in the defendant. The plaintiff alleges in the complaint that one Cohen, a white man, had the legal title before the defendant, Brown, took it from Cohen, and that while Cohen had the legal title there was a contract (in writing) betwixt the plaintiff and Cohen, whereby Cohen agreed with the plaintiff to convey to it the house and lot when the plaintiff

should pay him \$500. About the above-stated facts there is no doubt at all; the plaintiff and Cohen both so testified, and there is no testimony to the contrary. Cohen got tired waiting on the plaintiff to perform its contract, and conveyed the title to Brown, and the legal effect of that transaction is the matter under review.

The plaintiff testified that it made a parol agreement with Brown before he took title from Cohen, and practically the same contract as that which it had with Cohen. The defendant seems to deny so much, and contends that he discovered through counsel that Cohen had, not a mortgage on the property as he had been informed, but a deed to the property, and that he bought the legal title from Cohen; that he is now owner of the property, and owes no duty to the plaintiff. That was the issue tried by the circuit court, and the decree was in favor of the plaintiff. The five exceptions do but renew the same issue here.

[1] 1. The appellant is mistaken (exceptions 1, 3, and 4) to contend that such a contract, as has been stated, between the plaintiff and Brown, needs to be in writing. A court of equity would soon have its hands tied by that doctrine. 3 Pomeroy, Eq. § 1196.

2. The other exceptions go to the fact, found by the circuit court, that there was such an agreement between the plaintiff and the defendant. The plaintiff testified plainly and directly to the point that, before and when Brown purchased from Cohen, he knew of Cohen's contract with the plaintiff, and he took the title under a like agreement with the plaintiff. Brown's testimony thereabout is at least of doubtful meaning. He thus answered his counsel on the direct examination:

"In the year 1911, December, Robert Lanes came to me and told me that Mr. Cohen had a mortgage on their hall property which he was about to foreclose, and that the mortgage called for \$500, and he asked me would I take that mortgage up and give them a chance to redeem it. I told him, 'Yes, I would,' on condition, if the authorities of the lodge would come to me and bring me \$40 interest, and make me out papers, and promise to keep up the taxes and insurance and repairs on that property, I would take up the mortgage and give them a chance to redeem it. He went away and brought these two gentlemen here, Mr. Sweet and Mr. McCants, and I repeated the same to them, and they said they would present the matter to the lodge. They came to me in January, 1912. They said, 'If the lodge agrees, we will bring you the papers.' These men never did return. At that time I was presiding elder, and stayed the most of my time in the mountains."

Brown further testified that he was called into Cohen's store by Cohen, and Cohen told him then that the plaintiff had advised Cohen that Brown was to buy the property and was to give the plaintiff the same chance that

Cohen had given it. It was then, upon an inspection of the deed Cohen had, that Brown first discovered that Cohen had not a mortgage, as he had been led to believe, but a deed; and upon that discovery he altered his attitude to the plaintiff. He took a deed to the property and held the plaintiff at arm's length as tenants.

[2] The circuit court was right, therefore, to conclude that Brown had made a parol contract with the plaintiff, whereby Brown held the legal title, on the trust that the plaintiff should have it when the plaintiff should pay him \$500.

The decree of the court is affirmed, and the cause remanded, to have that decree performed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(112 S. C. 553)

POLLARD v. SAVANNAH RIVER LUMBER CO. (No. 10279.)

(Supreme Court of South Carolina. Aug. 26, 1919.)

1. MASTER AND SERVANT ⇐280(15)—WHEN CONTRIBUTORY NEGLIGENCE A JURY QUESTION.

In action for injuries to planing mill employé from negligently placed and exposed trim-saw, question of employé's contributory negligence held for jury.

2. MASTER AND SERVANT ⇐288(2)—WHEN ASSUMPTION OF RISK A JURY QUESTION.

In an action for injuries to planing mill employé for injuries from negligently placed and exposed trim-saw, question of assumption of risk held for jury.

3. TRIAL ⇐142—WHEN CASE FOR JURY.

Where testimony was susceptible of more than one inference, court properly submitted case to jury.

Appeal from Common Pleas Circuit Court of Colleton County; H. F. Rice, Judge.

Action by George Pollard against the Savannah River Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Nathans & Sinkler, of Charleston, for appellant.

M. P. Howell, of Walterboro, for respondent.

HYDRICK, J. Plaintiff recovered judgment for injury to his hand, caused by contact with a negligently placed and exposed trim-saw in defendant's planing mill. The only errors assigned are in the refusal of defendant's motion to direct the verdict, on the

grounds of assumption of risk and contributory negligence.

Plaintiff was put to grading and trimming the lumber to specified lengths, as it came from the planer. His position was about 10 feet from the planer and 4 feet from the trimsaw. When a piece of the right length came through, he handed it to another laborer, who put it on a chain, by which it was carried on to be loaded into a car. But if a piece came through that was too long, it was his duty to take it off and trim it to the right length. When he had trimmed a board, and was turning toward the other laborer, his hand came in contact with the saw and was injured.

[1-3] There was testimony that the saw was improperly placed so near to where the grader had to stand as to make it unnecessarily dangerous to him in doing his work, and that it could have been made safe by boxing or covering it, which was usually done in other mills also, that plaintiff had complained of the danger, and defendant's foreman had promised to remedy the unsafe arrangement, and that plaintiff continued in the service in reliance upon that promise. On both issues, the testimony was susceptible of more than one inference, and therefore the case was properly submitted to the jury. *Bodie v. Railway*, 61 S. C. 468, 39 S. E. 715; *Lorick v. Railway*, 102 S. C. 276, 86 S. E. 675, Ann. Cas. 1917D, 920; *Id.*, 108 S. C. 100, 93 S. E. 332.

Judgment affirmed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(112 S. C. 448)

FARR v. PACOLET MFG. CO. (No. 10260.)

(Supreme Court of South Carolina. Aug. 25, 1919.)

MASTER AND SERVANT — 296(4) — EMPLOYE  
FAILING TO PERFORM DUTY CAUSING IN-  
JURY CANNOT RECOVER.

Where there was an issue, under the evidence as to whether it was employe's specific duty to keep a floor free from oil, employer was entitled to an instruction that employe, if charged with such duty, could not recover for injuries resulting from his failure to perform it.

Appeal from Common Pleas Circuit Court of Spartanburg County; T. J. Mauldin, Judge.

Action by F. M. Farr, as administrator, against the Pacolet Manufacturing Company. Judgment for plaintiff, and defendant appeals. New trial granted.

Bomar & Osborne, of Spartanburg, for appellant.

Wallace & Barron, of Union, and John Gary Evans, of Spartanburg, for respondent.

WATTS, J. This is an action for damages, actual and punitive. The cause was tried before Judge Mauldin and a jury, and resulted in a verdict in favor of the plaintiff for \$3,000 actual damages. After entry of judgment, defendant appeals, and by 30 exceptions alleges error and seeks reversal. These exceptions allege error in not directing a verdict in favor of the defendant, allege error on the part of his honor in his charge to the jury, and allege error in the admission of certain testimony.

His honor was right in submitting the cause to the jury. There was an abundance of evidence for that purpose. The jury only awarded actual damages. Counsel for appellant admit that a directed verdict should not have been granted as to actual damages. The evidence was conflicting as to what the duties of plaintiff's intestate were, whether or not he was to sweep up the oil or not, or whether or not his duty was simply to remove the waste and clear it out, and not to clean up the oil on the floor and under the machines, and whether he was employed in the dual capacity to sweep up and remove the waste simply, and stop the machines, 15 in number, and not to sweep up oil and make the place safe for himself and others. During the trial of the case, and throughout the case, the defendant's contention was that under the law it had the right to delegate to the plaintiff's intestate the duty to sweep and clean the floor, and to keep and maintain the same free from oil, and that the plaintiff's intestate could not hold the defendant responsible for his own failure to do this, or for the injuries resulting therefrom. The presiding judge did not admit the correctness of this position, and failed to charge the jury, as requested, along this line, that the master had the right to employ a servant for the specific duty of making the place safe, and the consequences of the failure of the servant employed for this specific duty, where it results in injury to himself.

There was a square issue of fact under the evidence as to whether or not the plaintiff's intestate was employed by the defendant for the specific duty of sweeping and cleaning the floor, and of cleaning the waste oil and everything off of the floor, so as to make it safe for himself and all others who were employed there. If he was employed, and it was his plain and known duty, to sweep the floor, clean it up, and remove all obstructions therefrom, or anything that would impede or obstruct any one employed to work, and had to use the floor, or render it unfit or un-

safe, then the defendant was entitled to have its request charged involving this point.

At no time did his honor instruct the jury on this particular point, as asked for, and he was in error in not doing so, and the exceptions raising this question are sustained, and a new trial must be granted.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

(112 S. C. 477)

**CLEVELAND v. CANNADY et al.**  
(No. 10289.)

(Supreme Court of South Carolina. Aug. 25, 1919.)

**ATTACHMENT ~~63~~—CHECK GIVEN TO SECURE CARRIER NOT ATTACHABLE AS PROPERTY OF SELLER.**

A purchaser of potatoes from a resident of Georgia, who gave the agent for the carrier at destination in South Carolina a certified check for amount of draft attached to the bill of lading by the seller and forwarded to a bank, but delayed, could not, in his action against the seller for damages, attach the check in the hands of the carrier's agent as the property of the seller, as it was deposited to protect the carrier.

Appeal from Common Pleas Circuit Court of Greenville County; I. W. Bowman, Judge.

Action by Grover Cleveland against J. C. Cannady and H. C. Harvley, agent for the Charleston & Western Carolina Railway Company. From an order denying a motion to vacate the attachment, defendant Harvley appeals. Reversed.

Cothran, Dean & Cothran, of Greenville, for appellant.

H. P. Burbage, of Greenville, for respondent.

HYDRICK, J. On March 23, 1919, the defendant Cannady, a resident of Douglas, in the state of Georgia, on an order from plaintiff, shipped a carload of potatoes to Greenville, S. C., and consigned them to himself, with directions to notify himself. He made draft on plaintiff, for whom they were intended, for the price thereof, \$978.53, attached it to the bill of lading, which he indorsed, and delivered both to a bank for collection of the draft and delivery of the bill of lading on payment thereof. The shipment arrived on March 26th, but the bill of lading and draft were delayed, and did not reach there until March 31st. On arrival of the potatoes, plaintiff applied to Harvley,

the agent of the railway company, for them; but Harvley told him that he could not deliver them without production of the bill of lading, indorsed by Cannady. As the potatoes were perishable, and plaintiff was anxious to get them at once, he deposited with Harvley a certified check for the amount of the draft to indemnify Harvley against loss by reason of his delivering the potatoes to him without the order of Cannady, contained in the indorsed bill of lading, and the potatoes were delivered to him. This was done without the knowledge or consent of Cannady.

On the same day (March 26th) plaintiff brought this action against Cannady, making Harvley, as agent of the railway company, a party defendant, and alleging that, when he took the potatoes out of the car, he discovered that they were not the kind or quality ordered, and were badly damaged by decay, and claimed damages to the amount of \$400. He procured a warrant of attachment against the property of Cannady, which was issued on the ground that he was not a resident of this state, and had the same levied on the check in Harvley's hands, as Cannady's property.

The court erred in refusing Harvley's motion to vacate the attachment, made on the ground that Cannady had no property in the check. Cannady had nothing to do with the arrangement between plaintiff and Harvley. The carrier delivered his property to plaintiff without his authority, and was therefore liable to him for the resulting damage. The check was deposited to protect the carrier, and not for Cannady or for his benefit. If Cannady had consented to that arrangement, a different question would have been presented; but he repudiated it and notified the carrier that he would hold it liable for the value of his potatoes, and the fact that the carrier took indemnity from plaintiff would be no defense to Cannady's suit against it. Suppose the carrier had taken only a promise to indemnify or a bond? Its liability to Cannady is the same, whether it had taken any indemnity or not. Having deposited the check to protect the carrier, plaintiff cannot be allowed to destroy or diminish the security which he agreed that it should afford the carrier by seizing it under his attachment. The jurisdiction of the court depended upon Cannady's property in the check. As he has none, the attachment should have been set aside. *Grocery Co. v. Elevator Co.*, 72 S. C. 450, 52 S. E. 191, 2 L. R. A. (N. S.) 79, 110 Am. St. Rep. 627, 5 Ann. Cas. 261; *Baker v. Doe*, 88 S. C. 69, 70 S. E. 431, 34 L. R. A. 510. Order reversed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ. concur.

(112 S. C. 462)

**SMITH v. ATLANTIC COAST LINE R. CO.**  
(No. 10264.)

(Supreme Court of South Carolina. Aug. 25, 1919.)

**1. APPEAL AND ERROR ¶1010(1)—FINDINGS REVIEWED TO DETERMINE IF ANY EVIDENCE TO SUSTAIN THEM.**

The Supreme Court will not review findings of circuit court, except for purpose of determining whether there is any evidence whatever to sustain them.

**2. RAILROADS ¶5½, New, vol. 6A Key-No. Series—WHEN ACTION LIES AGAINST CARRIER AND NOT DIRECTOR GENERAL IN FEDERAL CONTROL.**

The consignee can recover penalty against railroad in action against railroad, instead of against Director General of Railroads, where action was commenced and cause of action arose before issuance of General Order No. 50. Fraser, J., dissenting.

Appeal from Common Pleas Circuit Court of Sumter County; Ernest Moore, Judge.

Action by W. P. Smith against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Mark Reynolds and L. W. McLemore, both of Sumter, for appellant.

R. D. Epps, of Sumter, for respondent.

**GARY, C. J.** The record contains this statement:

"This action was commenced in the magistrate's court August 30, 1918, to recover one hundred dollars, (\$100.00) and costs, to wit, fifty-six dollars, the alleged value of the carload of wood and forty-four dollars penalty, six dollars of the penalty being expressly waived. The car was alleged to have been shipped on or about the 26th January, 1918, from Swimming Pens siding, to the plaintiff, at Sumter, S. C., within a reasonable time after the said shipwood was lost through the negligence of the defendant, and a claim of fifty-six dollars was filed with the agent at Sumter, S. C., within a reasonable time after the said shipment should have arrived.

"The case was tried before the magistrate without a jury on September 27, 1918. The magistrate reserved his decision until November 9, 1918, when he rendered a verdict for one hundred dollars for the plaintiff, as sued for. A motion for a new trial was made before the magistrate on the following grounds:

"I. Evidence showed that R. E. Brown, the shipper, was the owner of the shipment and the real party in interest.

"II. That Smith, the plaintiff, had no interest whatever in the cause of action; Brown having testified that the loss would be his, that Smith had made no obligation to pay, nor was there any charge on his books against Smith for shipment.

"III. That there was no evidence whatever

that Smith was the consignee aggrieved, or any evidence that Smith had authorized the suit, and the verdict is without any evidence to support it.

"This motion was overruled and appeal was taken to the Circuit Court, on the same exceptions to the Supreme Court herein.

**"Synopsis of Answer.**

"For a first defense: That the A. C. L. R. R. Company did not enter with plaintiff into the transaction alleged in the complaint, because at the time this alleged defendant was not carrying on business of common carrier and was not operating business of railroad carrier, between the points named in the complaint, but prior to that time the U. S. government had taken entire charge of the railroad property and facilities of this defendant, and was operating same, to the complete exclusion of this defendant.

"For a second defense: General denial.

"For a third defense: That the defendant railroad company is now being operated by the U. S. government as a war measure, and that it has been so operated for some time prior to the movement of the shipment referred to in the complaint, and that no penalty can be awarded in this case against the defendant, as it would be in effect an award of a penalty against the United States, and that the application of a penalty by state statutes is necessarily suspended while the United States is operating the defendant road.

"The circuit judge affirmed the judgment of the magistrate, and the defendant appealed to the Supreme Court from the said judgment."

The defendant appealed upon the following exceptions:

"I. Because there was no evidence that W. P. Smith, the plaintiff, was the owner of the shipment and the real party in interest, and the magistrate erred in holding that he was the real party in interest.

"II. Because there was no evidence that W. P. Smith, the plaintiff, had any interest whatever in the cause of action; Brown having testified that if he lost the case the loss would be his, and in further testifying that Smith had made no obligation to pay for the said shipment, nor was there any charge on his books for the shipment.

"III. Because the magistrate erred in rendering a judgment for the penalty, when there was no evidence whatever that Smith was the consignee aggrieved, and because there was no evidence whatever that the plaintiff authorized any suit in this case, nor that any penalty be collected against the defendant.

"IV. Because the magistrate erred in rendering a judgment for the penalty, as the operation of the railroad by the United States government would necessarily preclude the awarding of a penalty against the government.

"V. Because the verdict was without any evidence to support it."

[1] In so far as the exceptions assign error in the findings of fact by the circuit court, they are not reviewable by this court, except for the purpose of determining wheth-

er there was any testimony whatever tending to sustain such findings. Without undertaking to discuss the testimony in detail, we are satisfied that there was evidence to that effect. The exceptions in that respect are therefore overruled.

[2] The only other question raised by the exceptions is whether there was error in allowing the penalty, amounting to \$44. In deciding this question, it will not be necessary to consider whether the action should have been brought against the defendant, or against the Director General of Railroads. The record shows that the case was tried before the magistrate on the 27th of September, 1918. Therefore it was commenced, and the cause of action arose, before the issuance of General Order No. 50, on the 28th of October, 1918, which contains the proviso that—

"This order shall not apply to actions, suits, or proceedings, for the recovery of fines, penalties, and forfeitures."

**Affirmed.**

HYDRICK, WATTS, and GAGE, JJ., concur.

FRASER, J. I dissent. The consignee does not testify. The shipper, who does testify, admits that the loss, if any, is the loss of the shipper, and not of the consignee. I do not see how the consignee can recover, when he never had title to the wood, and is not to lose in case this suit shall fail.

(112 S. C. 451)

**STATE v. SIMMONS. (No. 10261.)**

(Supreme Court of South Carolina. Aug. 25, 1919.)

**1. HOMICIDE ⚡223—STATEMENT OF ACCUSED AT CORONER'S INQUEST ADMISSIBLE.**

In homicide prosecution, defendant's statement at coroner's inquest was admissible, though inquest was held during afternoon, and defendant had been given no breakfast or dinner, where he had prior thereto voluntarily told policeman his connection with the case, and where there was no evidence that he had complained of not having had food, or that lack thereof had influence on him in making statement.

**2. CRIMINAL LAW ⚡518(2)—WHEN CONFESSIONS ADMISSIBLE.**

In homicide prosecution, confession of 19 year old negro defendant to policemen held admissible, as against objection that he was ignorant of his right not to answer questions and had not been advised thereof.

**3. HOMICIDE ⚡250—WHEN EVIDENCE SUFFICIENT TO SUSTAIN CONVICTION OF MANSLAUGHTER.**

In homicide prosecution, evidence held to sustain conviction of manslaughter.

**4. HOMICIDE ⚡43—ONE STRIKING BLOW IN SUDDEN HEAT GUILTY OF MANSLAUGHTER.**

One who struck fatal blow with deadly weapon, not in self-defense, but in sudden heat and passion, aroused by sufficient provocation, was guilty of manslaughter.

**5. HOMICIDE ⚡340(4)—ERROR IN INSTRUCTION ON MURDER HARMLESS ON CONVICTION OF MANSLAUGHTER.**

In homicide prosecutions, instructions relating to murder charge were harmless, where conviction was for manslaughter.

**6. CRIMINAL LAW ⚡834(2)—REFUSAL OF INSTRUCTIONS COVERED BY THOSE GIVEN, NOT ERROR.**

A party has no right to complain of refusal to give requested instructions, if the law of the case is correctly charged, though not in the precise language preferred by him, especially if his request is so framed that it might be misleading.

Appeal from General Sessions Circuit Court of Charleston County; S. W. G. Shipp, Judge.

Le Roy Simmons was convicted of manslaughter, and he appeals. **Affirmed.**

Logan & Grace, of Charleston, for appellant.

Thomas P. Stoney, Sol. of Charleston, for the State.

HYDRICK, J. Defendant was indicted for the murder of Ethel Scriven, and convicted of manslaughter. The crime was committed in the city of Charleston, about 11 o'clock at night, on July 21, 1918. Defendant was the only witness to the fatal encounter. He testified that he had been going with deceased for about a year, but they had had a falling out that day, and about 9 o'clock that evening she saw him in company with another woman, and called him, but he refused to go to her, saying that he had told her he did not care to have anything more to do with her, whereupon she threatened to cut his throat, but went on off. On his way home in company with Julius Scurven, he went out of his way to avoid meeting her; but she saw them on Line street, near Coming, and came toward him with a brick in her hand, with which she attempted to strike him, but was prevented by his getting behind Scurven. She then went back, and around the block, and met them on Sheppard street, and came up with something in her hand. He did not know what it was, but afterwards found out that it was a rock, and as she came up she said, "Now, I am going to kill you." He then drew his knife to protect himself, and Scurven walked on and left them. She then took his hat off his head and said she was going to cut it up. He said, "Give me my hat," and reached for it, when she raised the thing in her hand to strike him, and he

stabbed her. She told him he had cut her, and asked him to take her to a doctor, which he tried to do; but she fell, and he called Scurven, who was a block away, to come and help him take her to a doctor. He came, and they got her up; but she fell again. He then left her there, and went to his brother's house, and Scurven went to tell her people. Deceased was found by others and taken to a hospital, where she died from loss of blood. There was testimony that the fatal wound was a stab "in the cheek of the thigh," and that it was inflicted from the rear.

Defendant was arrested about 5 o'clock the next morning at his brother's house, and taken to the police station, where he was asked if he had killed deceased, and admitted that he had. He told the officers that he had thrown the knife with which he had stabbed her into a certain lot, where it was found with blood on it, and afterwards identified by him as his knife. Two policemen testified that these admissions were freely and voluntarily made, and were not influenced by threats, hope of benefit, or other inducement held out to him. About 1 or 2 o'clock the same day he was carried to the coroner's inquest, where he made a statement, which was reduced to writing, read over to him, and signed by him, after being told by the coroner "that the state would not compel him to make a statement, it was up to him whether he would or not, and whatever he said would be held for or against him." In that statement he said:

"She grabbed my hat off my head, and said she was going to cut up my hat. I ran behind her to try and get my hat, and she picked up a rock, and to keep her from hitting me I stabbed her."

In other respects the statement is not materially different from his testimony at the trial. The testimony of the policemen and the statement made to the coroner were objected to as incompetent, under the circumstances. The grounds relied upon in argument are that defendant was a negro youth of 19 years, ignorant of his rights and without friend or counsel, and was not warned or advised by the policemen who had him in their custody, that he had the right to refuse to answer their questions; and as to the statement made to the coroner the further objection is urged that defendant was carried to the inquest about 1 or 2 o'clock in the afternoon, without having been given breakfast or dinner. He so testified.

[1] With regard to the objection last mentioned, while there is no evidence to contradict defendant's statement, the record falls to show that he made any such complaint at the time of or before making his statement to the coroner. He did not even say at the trial that the fact had any influence upon him in making the statement. No reason appears why he should have been starved into

making a statement, since it appears that he had already freely and voluntarily told the policemen about his connection with the homicide. So, even if true, it cannot avail appellant, not even as a makeweight, because the circumstances do not warrant the inference that it was done to influence him to make a statement, or that it actually had any such effect.

[2] The following cases show that the other objections urged are untenable: *State v. Baker*, 58 S. C. 111, 36 S. E. 501; *State v. Middleton*, 69 S. C. 72, 48 S. E. 35; *State v. Henderson*, 74 S. C. 477, 55 S. E. 117. These cases show, too, that in deciding whether confessions made to an officer having the party in custody are free and voluntary, or are influenced by threats or other inducements the conduct of the officer will be rigidly scrutinized; nevertheless, that it rests in the judgment and discretion of the trial judge to decide, in the light of all the circumstances, whether the proper foundation has been laid for the admission of such testimony, and that his ruling will not be disturbed, unless it is clearly wrong and prejudicial. We see no error in the rulings complained of.

[3] There was ample testimony to sustain the verdict, as will appear by reference to the statement above of the evidence and its tendencies. The jury evidently found that it was not necessary for defendant to strike in self-defense, and that he did so in sudden heat and passion, aroused by deceased's snatching off his hat and threatening to cut it up. The court was asked to charge:

"The mere fact that a person intended to kill another when he struck at him is not sufficient to prove that his intention was malicious and murderous, since he may have been acting in self-defense. Nor does the fact that the slayer intended, not to kill, but only to disable, make the killing manslaughter. And, though a person killing another bore express malice against him, he is not guilty of murder, when he acted in self-defense."

[4, 5] The request was refused on the ground that it involved a charge on the facts. Technical consideration of the request shows that it was hardly objectionable on that ground while it contains only propositions of law, it will be noted that the statement found in the second sentence is not expressly qualified by the same condition which qualified those contained in the first and third, to wit, that the slayer was acting in self-defense. It is so qualified only by implication from the manner of its connection with the first sentence. As appellant had testified that he did not intend to kill deceased, the second sentence, without the qualification indicated being clearly expressed, might have been misunderstood by the jury, and construed as an expression of the judge's opinion that, if appellant did not intend to kill, but only to disable, they could not convict him of man-

slaughter. That would have been an erroneous conception of the request and of the law; because, even though appellant did not intend to kill, but only to wound or disable deceased, yet, having used a deadly weapon, if he struck the fatal blow, not in self-defense, but in sudden heat and passion, aroused by sufficient provocation, he was properly found guilty of manslaughter. As the proposition contained in the first and third sentences bore only on the charge of murder, which was eliminated by the verdict, the refusal to give them was clearly harmless.

[8] Besides, the jury was very fully, clearly, and correctly instructed as to the law of the case in the general charge, and other requests which were given, wherein the request refused was substantially charged, though not in the same language. But a party has no right to complain, if the law of the case is correctly charged, though not in the precise language preferred by him, especially if his request is so framed that it might be misleading. Considering the charge as a whole, we are satisfied that appellant was not prejudiced by the refusal of the request.

Judgment affirmed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(112 S. C. 541)

BARNHILL v. CHEROKEE FALLS MFG. CO. (No. 10275.)

(Supreme Court of South Carolina. Aug. 26, 1919.)

1. MASTER AND SERVANT §288(11)—WHEN QUESTION OF ASSUMPTION OF RISK IS FOR JURY.

Whether an 18 year old employé of average intelligence, but of limited experience, appreciated the danger of sliding a loaded wheelbarrow down an unguarded gangway from which he was thrown into a river, when one of the legs of the wheelbarrow slipped off, *held* for the jury, though the conditions were obvious.

2. MASTER AND SERVANT §217(2)—APPRECIATION OF DANGER NECESSARY TO ASSUMPTION OF RISK.

A master, to relieve himself from liability on ground that servant assumed risk, must show, not only that the servant knew the danger, or that it was so obvious that he should have known it, but also that he comprehended or appreciated it.

Appeal from Common Pleas Circuit Court of Cherokee County; S. W. G. Shipp, Judge.

Action by John W. Barnhill, administrator, against the Cherokee Falls Manufacturing Company. Judgment of nonsuit, and plaintiff appeals. Reversed.

G. W. Speer, of Gaffney, and John Gary Evans, of Spartanburg, for appellant.

Butler & Hall, of Gaffney, for respondent.

HYDRICK, J. This is an action for damages for the wrongful death of plaintiff's intestate, Casper Barnhill, while employed by defendant. One end of defendant's dam on Broad river had been washed away, and Barnhill and other laborers were carrying stones in wheelbarrows from the opposite side of the river across the dam, the top of which was 12 feet wide, to repair the breach. The dam was about 4 feet lower than the river bank, and a gangway was constructed of two pieces of timber, 10 inches wide and 16 feet long, laid side by side, with one end on the bank and the other on the dam. For convenience, it was placed near the edge of the dam. It had no guard rails, and its slope was so great that the men were unable to roll their wheelbarrows down it, when loaded, but had to slide them down by bearing down on the handles, so that the legs would serve as brakes. The floodgates in the dam were under the gangway, and were raised, and the river was rushing through them in a torrent. While Barnhill was sliding his wheelbarrow, down the gangway, one of the legs slipped off, and he was thrown into the river and drowned. He had been working for defendant about 10 days, and had been rolling stone about 3 days. He was 18 years old, and of average intelligence, but of limited experience, never having worked away from home before, except for a few days. Defendant's officers and agents were on the ground daily, and observed the conditions and method of doing the work. There was testimony that the gangway could have been placed at the center of the dam, and, if it had been so placed, Barnhill would have fallen on the dam, and not into the river, and, if there had been guard rails on it, he could not have fallen off.

Plaintiff alleged negligence and recklessness in failing to provide a safe place to work, in that the gangway was too narrow and unprotected by guard rails. At the close of his testimony, which tended to prove the facts above stated, defendant moved for a nonsuit, on three grounds: (1) That there was no evidence of recklessness; and (2) none of negligence; and (3) that Barnhill assumed the risk. The court refused the motion on the second ground, but granted it on the first and third. The ruling as to the first and second grounds is not questioned, but appellant assigns error in granting the nonsuit on the third ground.

[1] The trial judge based his ruling on the fact that the risk was obvious, from which he concluded, as matter of law, that it was assumed. No doubt, in the majority of cases, assumption of the risk follows, as matter of law, from the fact that danger is obvious.



But it is not always so, since one may know the facts and be ignorant of the danger growing out of them. Nonappreciation of the danger is inconsistent with the supposition that, in entering upon or remaining in the service, the servant exercised that deliberate choice which is an essential element of contract, upon the implication of which the doctrine rests. When we say that a man appreciates a danger, we mean that he forms a judgment as to the future, and that his judgment was right. *McKee v. Tourtellotte*, 167 Mass. 69, 44 N. E. 1071, 48 L. R. A. 542.

While it appears that Barnhill was a youth of ordinary intelligence, and therefore it should be presumed that he comprehended what a person of ordinary prudence and of his intelligence and experience would have understood from the situation, it also appears that he was only 18 years of age and of limited experience and that he was set to work with older and more experienced men, and was working under the immediate supervision of defendant's officers. Did he form a correct judgment of the danger of the situation? Or did he simply proceed in reliance upon the supposed superior knowledge and experience of his fellow workmen and of defendant's officers and agents in providing the place and method of work, without forming or exercising his own judgment? While the circumstances warrant the inference drawn by the court, we do not think that was the only inference of which they were susceptible. The conditions were obvious, but the circumstances were such that the jury should have been allowed to say whether Barnhill appreciated the danger incident to them.

[2] Where the master's fault is the cause of injury to his servant, he is *prima facie* liable, and if he would relieve himself of the consequences, on the ground that the servant assumed the risk, he must show, not only that the servant knew the danger, or that it was so obvious that he should have known it, but also that he comprehended or appreciated it.

Judgment reversed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(112 S. C. 422)

MULL et al. v. TOUCHBERRY. (No. 10255.)

(Supreme Court of South Carolina. Aug. 25, 1919.)

1. CONTRACTS ¶168—ON EXPRESS UNDERTAKING MATTERS NECESSARY TO CONTRACT ARE IMPLIED.

From an expressed undertaking, the law will also imply whatever the parties reasonably may be supposed to have meant, and whatever

is essential to render the transaction fair and honest.

2. SALES ¶267 — EXPRESS WARRANTY OF QUALITY EXCLUDES IMPLIED WARRANTY.

Where, by the contract of sale of an automobile, the seller expressly warranted the car to be first-class in all respects, and fully worth the value paid, such express warranty or undertaking excluded any implied warranty of quality.

Appeal from Richland County Court; M. S. Whaley, Judge.

Action by A. P. Mull and others against E. C. Touchberry. From a judgment for plaintiffs, defendant appeals. Affirmed.

The second and third paragraphs of the second defense of the answer, directed to be reported, read as follows:

(2) That on the 19th day of December, 1917, for a full consideration, the plaintiff sold and delivered to this defendant the automobile therein referred to, and received from him one used automobile and defendant's check for eight hundred and fifty (\$850.00) dollars, having received from plaintiff the day before the sum of forty-five (\$45.00) dollars, on account of said transaction; that the said transaction was based on the guaranty and warranty of plaintiffs that the automobile so sold to defendant was first-class in all respects, and fully worth the value paid for the same, on which guaranty this defendant relied, as was well known to plaintiff; that as soon as defendant had an opportunity to test the said automobile he discovered that it was far below the guaranty in value, and not worth the price paid; and that he promptly reported said fact to plaintiffs and tendered the car to them, demanding a rescission of the contract embracing a return of his check and of his used car.

(3) That plaintiffs' warranty referred to was that the said car was very powerful, would climb any hills in the vicinity in high gear, would travel 16 to 20 miles on a gallon of gasoline, and was as good a car as a Buick Six; that said warranties have failed, and the said car is not worth the consideration paid therefor.

Weston & Aycock, of Columbia, for appellant.

Robert Moorman, of Columbia, for respondents.

GAGE, J. The appeal is by the defendant from the charge of the court. The action is on an unpaid check given by the defendant to the plaintiff in part payment of an automobile. The answer alleges that the vendor sold the vendee the machine upon a special warranty, expressed in the second and third paragraphs of the second defense. Let so much of the answer be reported.

The court submitted those warranties to the jury upon proper instructions, and the verdict was for the plaintiff. The defendant desired the court to instruct the jury that the defendant might stand, besides on the ex-

press warranties, on that warranty implied by law, to wit, that a sound price calls for a sound article. The court ruled that, inasmuch as the defendant had pleaded an express contract of warranty, there was no room for implication.

The challenge of that statement of the law is the major issue in the case. The argument of the appellant is:

"The rule excluding the defense of implied warranty, where an express warranty exists, had its origin in the rule of evidence excluding everything except that which was embraced in the express warranty, which was usually in writing. *Stucky v. Clyburn*, Cheves, 186, 34 Am. Dec. 590; *McLaughlin v. Horton*, 1 Hill, 383."

It is true that in the cases cited, and in most of our reported cases, the warranty was expressed in writing; and the courts have in some of the cases denied the operation of an implied warranty, upon the ground that the allowance of it would impeach the written word. It is not apparent how the invocation of a contract implied by law can be called the proof of another contract than that which the parties have reduced to writing. Aside from that question, however, it was clearly and succinctly stated as early as 1833 that—

"The soundness of the [article] is the subject of express warranty; it shows that that was the subject of the contract, and the plaintiff's liability cannot be extended beyond it, either by parol or legal implication." (The italics are supplied.) *Johnson, J., in McLaughlin v. Horton*, 1 Hill, 383.

[1] The reason, or it may be the policy, of the rule is that, when two persons have expressed their whole contract by writing or by word of mouth, there is no warrant to think they have left any other contract to be implied. 6 R. C. L. p. 589; 2 *Parsons on Contracts*, p. 515. It is true that—

"From an expressed undertaking, the law will also imply whatever the parties may be reasonably supposed to have meant, and what is essential to render the transaction fair and honest." *Bishop on Contracts*, § 105.

[2] But that is not saying that, where the expressed undertaking has limited the liability of a vendor, the same may be enlarged by that different contract implied from the simple act of sale. The right of the plaintiff to hold the defendant to the contract which the defendant says was expressed arises, not so much out of a rule of evidence, nor out of the pleading; it arises out of the sense of the transaction. If, therefore, the defendant had particularly alleged, as it is contended he did, two defenses, the one a contract implied by law, and the other a contract expressed by the parties, yet we should hold that the expressed contract fixes the plaintiff's liability.

The appellant argues that the rule we have

stated shuts the defendant up to confine his defense to an express warranty; but the defendant shut himself up when he alleged the parties made a particular agreement.

All the other exceptions are to language quoted by the court from the books at, we infer, the suggestion of the plaintiff's counsel. In each instance the court properly modified the quotations, so as to rob them of any appearance of a charge upon the facts.

The judgment is affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(112 S. C. 419)

EVANS et al. v. WATKINS et al.  
(No. 10253.)

(Supreme Court of South Carolina. Aug. 25, 1919.)

1. PARTIES ⇐59(2) — SUBSTITUTION OF ASSIGNEE ON ASSIGNMENT AFTER SUIT ALLOWED.

The cause of action being assignable, nonsuit should not be granted because of assignment after commencement of action, but, under provision of Code Civ. Proc. 1912, § 170, substitution of assignee should be allowed.

2. ASSIGNMENTS ⇐24(1)—RIGHT OF ACTION FOR INJURY TO PROPERTY ASSIGNABLE.

Right of action for injury to property is assignable.

Appeal from Common Pleas Circuit Court of Chesterfield County; R. W. Memminger, Judge.

Action by G. F. Evans against Robert Watkins and another. From a judgment granting a nonsuit, and refusing substitution of Frank Lewellyn as plaintiff, plaintiff and Lewellyn appeal. Reversed.

Hanna & Hunley, of Chesterfield, for appellants.

J. A. Knight, of Chesterfield, and Pollock & Pegues, of Cheraw, for respondents.

HYDRICK, J. The plaintiff, Evans, brought this action against the defendants to recover damages for injuries done to his mule, which was struck by an automobile, owned by the defendant Mary Watkins and driven by the defendant Robert Watkins, and plaintiff attached the automobile, under the provisions of the act of 1912 (27 St. at Large, 737). Defendants admitted the injury, but alleged that it was caused by the negligence of Frank Lewellyn, who had charge of the mule at the time.

[1] At the trial Lewellyn was examined as a witness for plaintiff, and, on cross-examination by defendants, he was allowed to testify, over objection of plaintiff, that he had

paid plaintiff for the mule, and that the cause of action for damages had been assigned to him, after the commencement of the action and before the trial. Evans had not informed his attorneys of the assignment to Lewellyn. Upon the fact being brought out at the trial, defendants moved for a nonsuit, and Evans and Lewellyn moved for an order substituting Lewellyn in place of Evans as plaintiff. The court granted the nonsuit and dismissed the complaint.

This was error. The motion to substitute should have been granted. Section 170 of the Code of Civil Procedure provides:

"No action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue."

Then follows provisions relating to the case of death, etc., and the section continues:

"In case of any other transfer of interest, the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action."

[2] The right of action being an injury to property, was assignable (*Montgomery v. Kerr*, 1 Hill, 291; *Miller v. Newell*, 20 S. C. 123, 139, and cases cited at top of page 140, 47 Am. Rep. 833; 4 Cyc. 24), and the substitution prayed for should have been granted.

Judgment reversed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(112 S. C. 472)

#### MEDLIN v. HODGES. (No. 10268.)

(Supreme Court of South Carolina. Aug. 25, 1919.)

#### 1. GAMING §50(1)—WHEN EVIDENCE SHOWS INTENT TO DELIVER IN FUTURE SEED SOLD.

All the testimony in action for breach of contract to sell and deliver cotton seed in the future held to tend to prove that the seller was, at the time of contract, the owner of the seed, and that it was then the bona fide intention of both parties that it should be actually delivered and received, so that there was no error in not leaving the questions to the jury.

#### 2. GAMING §49(3)—INTENT TO RECEIVE SEED SOLD FOR FUTURE DELIVERY EVIDENCED BY CIRCUMSTANCES.

To show that it was the buyer's intention, at time of contract to sell and deliver cotton seed in the future, to actually receive it, his testimony in terms to that effect, which would not be conclusive, is not necessary; but such intention is to be determined from the whole event.

Appeal from Common Pleas Circuit Court of Marlboro County; R. W. Memminger, Judge.

Action by J. T. Medlin against H. M. Hodges for breach of contract for sale and future delivery of cotton seed. From a judgment on a verdict directed for plaintiff, defendant appeals. Affirmed.

Defendant's exception is as follows:

"His honor erred in directing the jury to find for the plaintiff, when the contract was for future delivery, and it was for the jury to decide whether under the evidence adduced it was established that the defendant was the owner or assignee of the cotton seed when the contract was made, or that it was the bona fide intention of both parties at the time of making the contract that the cotton seed should be actually received and delivered in kind by the parties to the agreement at the future period mentioned."

Stevenson, Stevenson & Prince, of Bennettsville, for appellant.

Townsend & Rogers, of Bennettsville, for respondent.

GAGE, J. [1, 2] The one exception is that it was for the jury, and not for the court, to find (1) whether the defendant, Hodges, contemporaneously with the execution of the contract, was the owner of the cotton seed which was the subject of the contract; and (2) whether at the same event the bona fide intention of both the seller and the buyer was that the cotton seed should be actually delivered by the one side and received by the other side. Let the exception be reported.

The written contract was concluded September 1, 1915. It is true that there was a parol agreement before that day, and in the spring of the year; but on August 16th Hodges wrote a letter to Medlin, setting out what he esteemed the parol agreement to be, and asked Medlin to "acknowledge the trade," and September 1st Medlin wrote to acknowledge the contract so stated. And on October 14th Hodges wrote to Medlin:

"You remember, when seed began to advance in August, I wrote to you and reviewed our verbal trade, and asked for your individual contract."

So that the parleying had before September was reduced to a written contract, evidenced by the letters above mentioned. On September 1st Hodges, by the letter of October 14th, admitted that he had planned to buy seed from other parties and so perform his contract with Medlin, "and sell my own seed at an advanced price." Hodges, who was a farmer, worth by his own declaration in a letter to Medlin from \$50,000 to \$75,000, was therefore the owner on September 1st of the seed he had agreed to sell. The same fact is manifest from the letter of December 20th, hereinafter quoted in another connection. There is, therefore, no reasonable conclusion to be drawn, other than that Hodges

was owner of the 3,000 bushels of cotton seed when the contract was made; all the testimony tends to prove so much, and there is none contrary.

The brief of the appellant does not question but that Hodges' bona fide intention at the making of the contract was to actually deliver the seed; for he did soon after that event so deliver 718 bushels. The argument only is that there is no testimony to show that Medlin's bona fide intention, at the making of the contract, was to actually receive the seed. The argument is that Medlin never expressly testified to what his then intention was. What a party's intention at a given time depends, not so much upon what the party may subsequently testify it to have then been, as upon what all the circumstances attending the transaction shows it to have been. It would be vain for a person to swear that his intention at a given time and about a given act was one thing, when all the circumstances tended to show it was another thing. We have held that a declaration, even in the written contract, of the intention of the parties, is not conclusive of the fact. *Maybank v. Rodgers*, 98 S. C. 285, 82 S. E. 422.

So in the instant case that which Medlin intended when the contract was made, whether he intended to actually receive the seed, must be determined by the whole event. The whole event, resting largely on correspondence, is this: At the time stated Medlin was engaged in the business of buying cotton seed at Bennettsville; that is a common business in the state; the contract was evidenced in informal fashion; Medlin bought for himself and for the Buckeye Cotton Oil Company; the transaction involved only \$1,200; the proposition to sell came from Hodges; the sale was made by Hodges for a particular purpose, and with the expressed intention on his part to put himself in funds with which to pay for fertilizers, so that he intended to deliver the actual seed and receive the actual money; 718 bushels of seed were received from Hodges by Medlin on September 18th; Medlin frequently and persistently demanded a delivery of the balance of the seed; every feature of the transaction suggests that the parties contemplated an actual sale and an actual delivery of cotton seed then in the hands of the vendor; and there is no feature of it to suggest even that the parties intended to deal in futures, in violation of the statute law.

Although the answer set up the mala fides of both parties to violate the statute, the defendant offered no testimony which tended to prove the allegation; he did not testify; in his letter to Medlin of December 20th he expressly declared that he sold the seed to Medlin because he thought Medlin had property in his name and was otherwise reliable; and in the same letter he declared:

"I would have shipped you every seed of 3,000 bushels by the middle of September, but I was warned not to let a car of seed, only at my risk, leave Brownsville before being paid for, unless the general market was forty cents per bushel."

And Hodges made practically the same statement in a letter of November 27th to Medlin. The entire testimony is susceptible of only one reasonable inference, and that is that Hodges intended to deliver the seed and that Medlin intended to receive them; there is none to the contrary.

The judgment is affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(112 S. C. 551)

WINSLOW WRIGHT & CO. v. McKNIGHT.  
(No. 10278.)

(Supreme Court of South Carolina. Aug. 26, 1919.)

ABATEMENT AND REVIVAL  $\S$ 15—WHEN MOTION TO DISMISS FOR OTHER ACTION PENDING PROPERLY OVERRULED.

Motion to dismiss action by W. against M., to recover possession or value of property mortgaged by M. to W. for price of fertilizer sold by W. to M., because of pendency, when it was brought, of action of M. against W. for damages for breach of warranty of fertilizer, and to cancel mortgage, which motion was made before, and renewed after, M.'s action was discontinued, *held* properly overruled.

Appeal from Common Pleas Circuit Court of Florence County; John S. Wilson, Judge.

Action by Winslow Wright & Co., a partnership, against Thos. Edward McKnight. From an order overruling a motion to dismiss, defendant appeals. Appeal dismissed.

Arrowsmith, Muldrow, Bridges & Hicks, of Florence, for appellant.

McNeill & Oliver and Willcox & Willcox, all of Florence, for respondents.

HYDRICK, J. In February, 1913, plaintiffs sold defendant some fertilizer and took his note for the price thereof, due October 15, 1913, and secured by mortgage of defendant's crops and some chattels. In October, 1913, defendant brought an action against plaintiffs for damages for breach of warranty of the fertilizer, and for cancellation of his note and mortgage. Plaintiffs answered, denying the warranty and the allegations upon which cancellation was sought. Thereafter plaintiffs brought this action in claim and delivery to recover possession of the mortgaged property, or the value thereof. Defendant answered, pleading, *inter alia*, an-

other action pending, to wit, that which he had brought against plaintiffs.

Both cases were referred to a referee, and when they were called for trial before the referee a contention arose as to which case should be first tried. The referee ruled that the action first brought—that of the defendant herein against the plaintiffs herein—should be first tried; but, on the insistence of defendant herein that his plea in abatement should be first decided, the referee considered and overruled it. Defendant then moved for a continuance of the cases, until the court should decide upon the validity of his plea, and that motion was overruled. A motion for continuance on the ground of surprise was then made and overruled. Thereupon, on motion of defendant, and by consent of plaintiffs, an order was taken discontinuing defendant's case against plaintiffs.

Thereafter this case came on to be heard on the report of the referee, whereupon defendant renewed his motion to dismiss it, on the ground of another action pending at the time it was commenced. The motion was properly overruled, as clearly appears from the authorities cited by respondent.

Appeal dismissed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(112 S. C. 400)

Appeal of BROOKLAND BANK.

MARTIN et al. v. MARTIN et al.

(No. 10277.)

(Supreme Court of South Carolina. Aug. 26, 1919.)

**1. HOMESTEAD §18—SEPARATION OF HUSBAND AND WIFE DOES NOT AFFECT HIS HOMESTEAD RIGHT.**

Husband, who has been separated from wife for 14 years, and who during such time has not supported wife, is nevertheless "head of a family," and entitled to a homestead; the separation not having absolved him from supporting wife.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Head of a Family.]

**2. HUSBAND AND WIFE §4 — SEPARATION DOES NOT AFFECT HUSBAND'S DUTY TO SUPPORT WIFE.**

Husband's separation from and failure to support wife does not absolve him from duty of supporting her.

**3. HUSBAND AND WIFE §3(1/2)—HUSBAND FAILING TO SUPPORT WIFE REMAINS HEAD OF FAMILY.**

The fact that a husband does not support his wife does not deprive him of his legal rights as the head of the family.

Appeal from Common Pleas Circuit Court of Lexington County; W. H. Townsend, Judge.

The Brookland Bank levied execution on a judgment against A. W. Martin, and brought action to enjoin sale of A. W. Martin's interest in land sold in partition proceedings by W. A. Martin and others against A. W. Martin and others, and A. W. Martin files a petition asking that a homestead be set apart to him out of the proceeds of sale. Petition granted, and the Brookland Bank appeals. Affirmed.

C. M. Efrid, of Lexington, for appellant.

Weston & Aycock, of Columbia, for respondent.

**HYDRICK, J.** The sole question is whether A. W. Martin is head of a family and entitled to claim a homestead in lands, as against his judgment creditor, the Brookland Bank, under the following agreed statement of facts:

"He was married a number of years ago, and lived in and around the town of Swansea, in the said county and state, and to him and his wife were born quite a number of children, all of whom are now of age and self-supporting. None of them reside with him. He and his wife separated 14 years ago and have not lived together since that time. There is no animosity or ill feeling existing between them, but about that time they simply agreed for reasons mutually satisfactory to separate and live apart, but no immoral conduct on the part of either was the cause of the separation. He now lives in the city of Columbia, and conducts a mercantile business for another person, in which he has no interest as owner. His wife lives in the town of Swansea, in the county of Lexington, and owns in her own right a valuable farm, consisting of 295 acres, near the town of Swansea, and an improved lot in the town. She supports herself entirely from the profits of the plantation and property, and is not in any way dependent upon her husband for support. He has not contributed anything whatever to her support for a number of years, and is not now doing so. He occasionally visits her, and she visits him, also; but they do not live together as one family."

[1-3] The circuit court correctly held that Martin is the head of a family, and entitled to the homestead. The separation did not absolve him from the duty of supporting his wife, which is imposed upon him by the law. *Gilliam v. Railway*, 108 S. C. 195, 199, 93 S. E. 865. Nor did it change the marital relation. She is still his wife, and has the right to require him to perform his duty; and they may yet be reconciled and live together. The fact that a husband does not support his wife does not deprive him of his legal rights as the head of the family. He may be an invalid, and she may, in fact, support him; nevertheless he is in law the head of the

family. The circumstances stated cannot change the law.

Judgment affirmed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(112 S. C. 436)

WILLIAMS v. PHILADELPHIA LIFE INS. CO. et al. (No. 10258.)

(Supreme Court of South Carolina. Aug. 25, 1919.)

1. INSURANCE §136(5)—INSURER NOT LIABLE ON POLICY OF WHICH INSURED HAD NO KNOWLEDGE.

If insurer sent general agent a policy essentially different from that for which insured had applied, and if insured at no time had knowledge thereof or assented thereto, insurer is not liable thereon, though policy had not been canceled at time of insured's death.

2. INSURANCE §136(2)—WHAT CONSTITUTES DELIVERY OF POLICY TO INSURED.

Generally, when an insurance company sends a policy the contents of which is known to, and assented to, by the insured, to the company's general agent for delivery to the insured, then delivery is effected, and the contract of insurance is of force.

3. EVIDENCE §442(1)—COLLATERAL AGREEMENT WITH AGENT AS TO PREMIUM OF POLICY INADMISSIBLE.

Where application provided that all "agreements made by or with the company or the agent taking this application are reduced to writing and made a part of the application," evidence of agreement between general agent and insured's husband, a special agent, that initial premium should be paid by a bonus to be earned by husband as agent, held incompetent in action on the policy, where such agreement was not made part of application.

4. INSURANCE §141(2) — PREPAYMENT OF FIRST PREMIUM MAY BE WAIVED.

Parties to insurance contract may waive that part of contract requiring prepayment of initial premium before insurance shall take effect.

5. INSURANCE §646(4)—RECITAL OF PAYMENT OF FIRST PREMIUM PRESUMED TRUE.

Where policy reciting payment of first premium was sent to general agent for delivery, first premium will be presumed to have been paid.

6. INSURANCE §141(1)—WAIVER MAY ARISE BY IMPLICATION.

Waiver often rests in a subtle operation of mind and speech; it may arise by expression, but more often by implication.

7. INSURANCE §141(2)—WHEN WAIVER OF PAYMENT OF FIRST PREMIUM MAY BE INFERRED.

If insurer, with a right to payment of first premium before taking effect of insurance, shall make any speech or perform any act from which

a reasonable inference may be drawn that the insurer does not stand upon its rights, then waiver may be inferred.

8. INSURANCE §668(3) — WHERE DEFENSE WAS NO CONTRACT, MEANING OF LETTER OF INSURER FOR JURY.

In action on life policy, where defense was that no contract of insurance was ever entered into between the parties, the meaning of a letter from insurer to insured held for jury.

Fraser, J., dissenting.

Appeal from Common Pleas Circuit Court of Lancaster County; George E. Prince, Judge.

Action by H. F. Williams, as administrator of the estate of Margaret E. Williams, deceased, against the Philadelphia Life Insurance Company and others. Judgment of nonsuit, and plaintiff appeals. Order of nonsuit set aside, and new trial ordered.

Following is the statement of facts referred to in opinion:

The defendant is a Pennsylvania corporation, in the business of insuring lives; the Gordon Investment Company is a corporation under the laws of North Carolina, in the business of selling life insurance; the plaintiff was husband to Margaret, and was, at the time in issue, an agent of the defendant company, duly constituted by writing to canvass for applications for life insurance in York county, and also, by his testimony, agent for the Gordon Company; and one Gordon was president of the Gordon Company.

On 22d December, 1910, Margaret made application to the defendant, through H. T. Williams, printed as "Agent" on the application blank, and the Gordon Company, printed as "General Agent" on the application blank, "for \$5,000 insurance on the 20-year term plan, annual premium \$40.25, payable semiannually"; that application was written into a detached printed form, six by eight inches in size, which, for identification, may be called part 1, though not so marked.

This part 1 is in these words:

"I, Margaret E. Williams, hereby make application to the Philadelphia Life Insurance Company for \$5,000 insurance on the 20 yr. term plan; annual premium \$40.25, payable semiannually. I was born on the 12th day of April, 1876. Age nearest birthday 34 years.

"Residence, Yorkville, S. C.

"Place of business, Yorkville, S. C.

"(No.) (Street) (City) (State)

"Premium notices to be sent to Yorkville, S. C.

"My occupation is housewife.

(State kind of business.)

"Beneficiary, estate.

"Dividends to be paid to assured at the end of each year.

"I have this — day of — given to —, Agent, the sum of \$ —, to be used in payment of the first — annual premium on policy when issued by the company in accordance with this application, and I hereby agree to be examined forthwith by an authorized med-

ical examiner of the company, and to accept the policy when issued.

"I hereby agree that all representations and agreements made by or with the company or the agent taking this application are reduced to writing herein and made a part of this application and the policy issued hereunder.

"Dated at Yorkville, S. C., this 22d day of December, 1910.

"Witness: H. T. Williams, Agent.

"Margaret E. Williams.

"General Agent, Gordon Insurance & Inv. Co."

Upon the face of the original of part 1 is rubber stamped the numerals "18090," and upon the back of it is rubber stamped "James H. Perry, General Agent, 27 Dec. 1910." Detached from this application paper, but a part with it, is a large sheet of paper printed on the back "Application Part 2," which embodies (1) the declaration of the applicant made to the company's medical examiner, and (2) the declarations of the medical examiner. The concluding sentence of part 1 are those words already set out in it; and at the end of the applicant's declaration in part 2 are these words:

"I hereby agree, for myself and all parties who may have an interest herein, that all the foregoing statements and answers and those made to the medical examiner are true and complete, and are offered to the company as a consideration for the contract which I hereby agree to accept; that no other information or answer than is herein contained, whether known to, made by, or given to any person, shall be considered as a part of the contract; that should this policy become a claim during its first year, nothing herein shall prevent the company from introducing any information as evidence of fraud; that the policy granted herefor shall not take effect until issued, delivered, and the premium paid thereon to the company or to an agent holding the premium receipt from the company during my lifetime and while in good health."

One of the applicant's answers is that the premiums were to be paid by the husband, H. T. Williams.

This application, part 2, has rubber stamped on the face of it "Dec. 27, R. E. G.," and on the folded back of it is the same number, "18090," and on the folded face there was indorsed, as "at the office of the company," the following:

"Name, Margaret E. Williams.

"No., 18090.

"Age, 35.

"Amount, \$2,000.

" $\frac{1}{2}$  annual premium, \$52.56.

"Policy date, Dec. 28, 1910.

"From 321-6-08. Kind, 20 E. A. S. 20.

"Beneficiary, estate.

"G. A., J. H. Perry.

"Agent, Gordon Ins. & Inv. Co.

"H. T. Williams."

And on the folded back there is indorsed the following:

"Approved, December 30, 1910.

"For \$5,000.00 only.

"Fairly good family history.

"T. Hewson Bradford, Medical Director."

\*Approved:

"20 E. A. S. 20

"12/30/10.

\$2,000.00.

E. B."

So much for the applications and the writings in and upon the same.

There was put in evidence a 20-year endowment accumulated surplus policy of insurance, signed by the defendant, No. 18090, dated 28th December, 1910, for \$2,000, to Margaret E. Williams, the annual premium for which is \$101.06, payable semiannually in equal parts.

Pasted within this policy's sheets is a photographic copy of the declarations of Margaret, made to the medical examiner, and the examiner's declarations, before referred to in an application, part 2, for a \$5,000 policy.

And on the back of this policy there purports to be a "Copy of Application." No original was proven, but the same is a modified copy of the application for \$5,000 insurance, before referred to; for it is a literal copy thereof, save in these particulars, to wit: The original is for \$5,000; the copy is for \$2,000. The original states nearest birthday to be 34 years; the copy states nearest birthday to be 35 years. The original is for 20-year term plan, premium \$40.25; the copy is for 20 end A. S. plan, premium \$101.06. The original calls for payment of dividends at the end of each year; the copy calls for payment of dividends at the end of 20 years.

On the top margin of the third page of the policy in pen script is this significant admission, to wit:

"At the request of the insured the premiums hereon are changed to semiannual installments of fifty-two 56/100 dollars each, payable on the 28th day of December and June of each year hereafter during the premium paying period of this policy.

"Philadelphia, Dec. 31, 1910.

"William H. Hubbard, Secretary."

This policy for \$2,000 was never put into the hands of Margaret or her husband. Thereabout the defendants' actuary wrote a letter, dated 13th April, 1911, to H. T. Williams, after Mrs. Williams' death, as follows:

"Philadelphia Life Insurance Company, Home Office, North American Building, Philadelphia.

"April 13, 1911.

"Ernest M. Blehl, Actuary,

"Mr. H. T. Williams, Yorkville, S. C.:

"Dear Sir: In re Policy No. 18090—M. E. Williams.

"In reply to your telegram of to-day, I beg to state that your application for a policy on this life was on twenty-year term plan, and same for several reasons would not be approved. We did, however, issue a contract in January, on twenty-year endowment, accumulated surplus plan, and forwarded it to the Gordon Insurance & Investment Company for delivery, but same was returned to this office for cancellation, as not taken.

"If you desire the policy revived on twenty-year endowment, accumulated surplus plan, please advise."

There is no mark of cancellation on the policy. Margaret died in March, 1911, of an operation.

No premium was actually paid to the defendant, though the plaintiff would have made payment had he the opportunity to do so; for pay-

ment, the husband relied on that answer in the application which made him the payer of the premiums; and upon his parol contract with the Gordon Company (printed in the application blank as general agent of the defendant), which contract, when performed, constituted the defendant his debtor by way of a bonus to the amount of \$125, for writing an aggregate of \$50,000 insurance.

Williams & Williams & Stewart and Jones & Jones, all of Lancaster, for appellant.

Wilson & Wilson, of Rock Hill, Stack & Parker, of Monroe, N. C., and C. N. Sapp, of Columbia, for respondents.

GAGE, J. Let the statement of facts appended hereto be reported with the opinion.

The major and decisive issue in the case is one of law, and it is this: Did the testimony tend to prove a contract of life insurance betwixt the parties?

We are of the opinion that the written testimony tended to prove such a contract, and that, therefore, the order of nonsuit ought not to have been ordered, the second nonsuit now granted in this cause. 105 S. C. 305, 89 S. E. 675.

Beyond question a policy for \$2,000 was written on the life of Mrs. Williams by the defendant, and was sent from Philadelphia to Monroe, N. C., to the Gordon Insurance & Investment Company (hereinafter called the Gordon Company), described on the application blank as the "general agent" of the defendant, for delivery to Mrs. Williams. So far, therefore, as the defendant company's part in the contract is concerned, it was fully intended to be performed and was performed.

The original policy was before the trial court and before us, and it is uncanceled.

The prime argument of the defendants' counsel at the trial was thus expressed by him:

"Mr. Parker: Your honor, we produce this policy as the policy which was sent to the Gordon Insurance Company. We propose to deny that it is a binding contract."

The major argument at that time and now is that the company is not bound by the policy, because Mrs. Williams was not bound, and that she was not bound because she had never applied for a policy of that character, but for a policy for \$5,000 of an essentially different character, and that she never knew of and never assented to the \$2,000 policy which the company wrote.

[1] That postulate of law is based on the case of *Insurance Co. v. Young*, 23 Wall. 105, 23 L. Ed. 152, decided in 1874 and it is, of course, sound if the facts are right.

But in the instant case there is written in pen script, on a margin of the \$2,000 policy, by one of its chief officers, the man who signed the policy, that which tends to prove an admission by the company that Mrs. Williams knew of, and assented to, the \$2,000

policy. The writing is set out in the statement of facts, but is here repeated. It reads.

"At the request of the insured the premiums hereon are changed to semiannual installments of fifty-two and 50/100 dollars each, payable on the twenty-eighth day of December and June in each year hereafter during the premium paying period of this policy.

"Philadelphia, December 31, 1910.

"Wm. H. Hubbard, Secretary."

Thereby the secretary of the company declared that the insured requested the premiums "hereon"—that is to say, on the instant policy—should be paid semiannually, and the there stated premiums were those chargeable on policies of the character on the instant \$2,000 policy, and not those chargeable on the \$5,000 policy.

It is irrelevant to inquire how Mrs. Williams got that knowledge, for the defendant declares in writing that she had it. The case does not show that this significant declaration of the company was even called to the trial court's attention. And the letter of the company's actuary to H. T. Williams (set out in the statement of facts) tends to show that the \$2,000 policy was forwarded by the company to its general agent at Monroe, N. C., the Gordon Company, for delivery to the insured. The defendant did all it could to make and to deliver a contract of insurance.

[2] There will be no question about the truth of the following postulate, that generally, when an insurance company sends a policy the contents of which is known to and assented to by the insured, to the company's general agent for delivery to the insured, then delivery is effected, and the contract of insurance is of force. The defendant admits so much in the argument. See opinion in the former appeal, cited *supra*.

The other exceptions become irrelevant, save that which refers to payment of the initial premium. The court did not rule upon that issue, though it was made; but an exception goes to the exclusion of testimony offered by the plaintiff to prove payment, and a sustaining ground goes to an absence of proof of payment to sustain the nonsuit. We shall therefore consider the question of payment to guide the court on the new trial, for the issue must arise there, and the cause has already been tried on the circuit many times.

There is no pretense by the plaintiff that the initial premium was paid in money or its equivalent by the applicant, or by anybody for her in the company's hands, or into the hands of anybody acting for it.

The only contention of the plaintiff is that the defendant company, by and through its general agent, the Gordon Company, agreed by parol with H. T. Williams, the agent of the company, to sell insurance, and the husband of the applicant and by the words of



the application constituted the payer of the premiums, that the initial premium should be paid by a bonus to be earned by H. T. Williams as selling agent for the company.

The defendant denies that any such contract was made, and it contends that, if made, the proof of it is cut off by two clauses in the applications, part 1 and part 2, set out in the statement of facts.

Reverting to these clauses, that in part 2 of the application has no relevancy to the present issue; it expressly refers to statements and answers touching the applicant's health and habits.

That clause found in part 1 of the application needs, therefore, only to be considered; it is short, and we repeat it here. It is:

"I hereby agree (1) that all representations and agreements (2) made by or with the company (3) or the agent taking this application (4) are reduced to writing and (5) made a part of this application (6) and the policy issued hereunder."

The numerals are supplied.

[3] Plainly, the agreement of H. T. Williams with the Gordon Company, to which H. T. Williams offered to testify, was not so reduced to writing and made a part of the application. For that reason it is incompetent, and the court was right to exclude it.

Nevertheless, the court ought not to have ordered a nonsuit (1) upon the ground that there is no testimony tending to show that the initial premium had been paid; or (2) upon the ground that there was no testimony tending to prove that the company had waived so much of the contract of insurance as prescribed a prepayment of the initial premium.

The written agreement of the parties, it is true, was that the policy should not take effect until the premium thereon was paid.

[4] But payment may be effected by many mediums; and the parties may forego that part of the contract which prescribes prepayment by a waiver of it.

[5] The policy recites payment of the premium, and it was sent to the general agent

for delivery. So much raises the presumption that the premium was paid.

[6] It is true that waiver is defined to be the voluntary relinquishment of a known right; but it often rests in a subtle operation of mind and speech. It may arise by expression, but more often by implication.

[7] If the company, who had a right under the contract, especially a right like the instant one, shall make any speech or perform any act from which a reasonable inference may be drawn that the company does not stand upon its right, then waiver may be inferred.

[8] In the case at bar the letter of the 13th April, 1911, before set out in the statement of facts, was a declaration by the company which has at least a doubtful meaning. It should have been left to a jury to find if the company thereby meant that the delivery therein referred to should depend upon a prepayment of the premium, and if the policy was returned for nonpayment, or because it was declined by the applicant, or for any other reason, and whether the "revival" therein referred to meant the revival of a policy always dead, or one which was once alive, but which afterwards became dormant.

The order of nonsuit is set aside and a new trial is ordered.

GARY, O. J., and HYDRICK and WATTS, JJ., concur.

FRASER, J. I dissent. If it be true that the insured was willing to take a different kind of policy from that originally applied for, had expressed her willingness to do so, and that the general agent had the authority to waive the payment of the initial premium in cash, and to substitute therefor a parol agreement to look to future unearned profits for the payment of the initial premium, still the record shows that the agent of the deceased, who was authorized to make the payment, did not do so, but took for his own use the profits when earned, and thereby failed to carry out the agreement on behalf of the insured.

(112 S. C. 519)

## SPARKS v. McCRAW. (No. 10272.)

(Supreme Court of South Carolina. Aug. 26, 1919.)

## 1. APPEAL AND ERROR ⇨1009(1)—FACTS REVIEWABLE IN SUIT BY BANKRUPTCY TRUSTEE TO ESTABLISH TRUST.

In an action by trustee in bankruptcy against bankrupt's former president and general manager to have property purchased with bankrupt's funds impressed with a trust in favor of the creditors of the bankrupt, court, on appeal, will review the facts, the action being in equity, and not an action at law.

## 2. APPEAL AND ERROR ⇨901—BURDEN OF PROOF ON APPELLANT TO SHOW INSUFFICIENCY OF EVIDENCE.

In equity cases the burden is upon appellant to show that the preponderance of the evidence is against the findings or any particular finding complained of.

## 3. APPEAL AND ERROR ⇨1071(3)—INSUFFICIENCY OF EVIDENCE TO ESTABLISH IMMATERIAL FINDING, NOT REVERSIBLE ERROR.

In action by trustee in bankruptcy for bankrupt corporation against former president and general manager of corporation to impress a trust upon certain property purchased with corporation's funds, in favor of the creditors of a corporation, insufficiency of evidence to sustain finding that former president declared in a statement that, if he ever went into bankruptcy, his creditors would get nothing, is immaterial, such finding not affecting the result.

## 4. TRUSTS ⇨84—WHEN PROPERTY PURCHASED BY PRESIDENT IN TRUST FOR CREDITORS.

Where president and general manager of corporation purchased property in own name with corporation's funds, property will be impressed with a trust in favor of creditors of the corporation.

## 5. TRUSTS ⇨873—SUFFICIENCY OF EVIDENCE TO IMPRESS TRUST ON PROPERTY BOUGHT WITH CORPORATION'S FUNDS.

In action to impress trust upon property purchased by former president and general manager of bankrupt corporation with corporation's funds, in favor of creditors of corporation, it was unnecessary, in finding that the former president had purchased property with funds of corporation, to specify amount for which he was to account, since, having appropriated corporation's funds it was his duty to specify.

Appeal from Common Pleas Circuit Court of Cherokee County; T. J. Mauldin, Judge.

Action by J. R. Sparks, as trustee for Bonner McCraw Company, bankrupt, against A. B. McCraw. Judgment for plaintiff, and defendant appeals. Affirmed.

Following are the findings of fact and conclusions of court referred to in opinion:

"This is an action by J. R. Sparks, as trustee of the Bonner McCraw Company, bankrupts, against the defendant, A. Bonner McCraw, to

recover from him certain real estate described in the complaint, and to require him to turn over the same, or the proceeds thereof, and all moneys, notes, mortgages, and other evidence of the amount of money or property of the bankrupt in the possession of, or under the control of, the defendant.

"The contention of the plaintiff, briefly stated, is that the defendant, as the president and general manager of the Bonner McCraw Company, bankrupt, a corporation, used and converted the money and property of the corporation for the purpose of acquiring property in his own name, and, at the expense of the corporation and its creditors, to promote his individual interests.

"The defendant by his answer denies generally all allegations of the complaint material to plaintiff's cause of action, and further avers that the corporation was indebted to him in the sum of \$1,300 or more, and that, if the court should find anything to be due him to the corporation, the sum above stated should be set off against the same.

"All issues were referred by this court to G. W. Speer, Esq., as special referee to take the testimony and report his findings of fact and conclusions of law to this court, with leave to report any special matter. Several references were held, at which a great volume of testimony, oral and documentary, was submitted, including evidence taken before the referee in bankruptcy, so far as the same should be relevant to the issues made in this case.

"On October 12, 1917, the referee filed his report, in which he found from the evidence that the allegations of the plaintiff's complaint are sustained, and recommended that the title to the property sought to be recovered be adjudged to be in the trustee, the plaintiff, with such other recommendations as are designed to carry into effect the decree of the court.

"To this report the defendant filed exceptions, and the cause came on to be heard by me as presiding judge of the court of common pleas for Cherokee county, during the spring term of the court. The cause was submitted to me then, and arguments made by counsel for the plaintiff and defendant. The cause was marked 'Heard' by me, and taken under advisement until such time as I might give the matter careful consideration.

"The evidence in the cause is abundant to support the findings and conclusions of the referee.

"The defendant was the president and manager of the bankrupt corporation; he and his wife were the sole stockholders. They had no other property when the business was organized, and all the property acquired by the defendant individually has been acquired through the use of the corporate property. As early as 1912, the first year of the business, the defendant used \$1,000 of the corporate funds, with which he purchased the house and lot now occupied by his family, and paid the remaining \$1,000 of the purchase money by giving a mortgage on the premises to a local building and loan association. This debt to the B. & L. was repaid by checks of the corporation down to whatever amount may remain due. No meeting of the stockholders was ever held, and no attempt was made to declare a dividend out of the profits

of the business, if there were any, but the money was used as if it were the private property of the defendant, and no means were adopted to separate the funds from the corporate ownership.

"Later on the defendant, by use of the corporate funds, commenced to acquire in his own name other real estate, described in the complaint, and made improvements thereon out of the funds of the corporation in the nature of dwellings thereon, while part of the funds so used were withdrawn directly from the corporation by checks in many instances, in others the indebtedness of the defendant individually to the contractors and materialmen were discharged by crediting their accounts on the books of the corporation with the amounts due them by the defendant personally. The defendant claims that he has paid back into the corporation more money than he withdrew, but this claim is not found to be true by the referee; but from the very nature of the defendant's course of dealing with the corporate funds and property the funds redeposited by him belonged to the corporation, and could not be regarded as the discharge of any personal obligations of the defendant. He could not pay his own debt to the corporation with money belonging to the corporation. However, the results do not lend support to the contention of defendant.

In 1915 and 1916, while he was acquiring this property, the creditors began to suffer, as shown by the list of claims filed against the bankrupt corporation. When the petition in bankruptcy was filed on May 25, 1917, the corporation admittedly owed some \$10,000 or \$12,000, with assets as scheduled amounting to \$7,400, which included notes and open accounts to the amount of \$2,900, leaving \$4,500 as stock in trade and merchandise. The amount of claims actually filed with the referee in bankruptcy exceeded the amount scheduled by a considerable sum, and the actual value of the assets much less.

"The defendant, as manager of the corporation, was not able to account for the loss to creditors, nor was he able to give a satisfactory account of the conduct of the business or of its assets. In a statement made by the defendant to one of the creditors on February 23, 1917, he represented that the corporation was solvent, with net assets amounting to \$6,950, which, as shown by the evidence, was absolutely untrue, as the business was then insolvent. His conduct in converting property of the Gaffney Live Stock Company, a creditor, shows the utter disregard had by the defendant for the rights of creditors of the corporation. Testimony was introduced to show that the defendant admitted to creditors that he was using the corporation's money to build houses on lots purchased by him in his own name, and that when he sold these lots he would pay the creditors their accounts. There is testimony also to show that the defendant, in a statement made to or in the presence of one Allison, declared that if he ever went into bankruptcy his creditors would get nothing.

"In a statement made by the defendant, as manager and president of the bankrupt corporation, to the federal income tax officials for 1916, he represented that the business had on hand, January 1, 1916, stock of the value of \$6,784, to which he added purchases during

the year to the amount of \$17,510; that he sold during the year goods to the amount of \$18,190, and had left a stock of goods of the value of \$6,304; and that his total indebtedness was the sum of \$2,065. This, as proven by subsequent investigation before the referee, was untrue.

"No rational account is given of the proceeds of the \$18,190 realized from the sale of goods. The net results of the business is an unexplained loss to creditors of some \$10,000, while the defendant has acquired property in his own name to the extent of several thousand dollars, which plaintiff seeks to recover.

"It was the duty of the defendant, as manager and president of the bankrupt corporation, to show that he exercised the utmost good faith in his transactions and dealings with corporate funds and property, and especially is this rule applicable when it is shown that the manager has acquired property to his own advantage, while the corporation and its creditors have suffered loss. This the defendant has failed to do.

"The facts and circumstances related above, along with other evidence in the case, leads to the same conclusion as arrived at by the referee.

"It was contended in argument that the loss shown in assets and the volume of debts ascertained was largely due to the liberality of the defendant in extending credit to his friends. The schedule as filed by the defendant for the bankrupt does not sustain this contention. The open accounts, as scheduled by the defendant, amount to only \$2,800, which is a relatively small credit business from sales of \$18,190 during the year, and falls far short of explaining the deficiency of some \$10,000 over and above the total amount of assets. It is also shown by the testimony that the defendant has used the rents from portions of the property described in the complaint for the personal use of himself and family; that he has traded one or more of these lots to other parties, who have no deeds, but who have made payments from time to time thereon; and the defendant admitted that he had no account of such statements, and that if the purchasers could not produce receipts showing payments made by them they would have to pay again.

"It is clear from the evidence as a whole that the defendant has used the corporation, its funds and property, as a means to gain an advantage to himself personally.

"It is therefore adjudged and decreed that the report of the referee herein be, and the same is hereby, affirmed and made a part of the judgment and decree of the court, and the exceptions thereto be overruled.

"Further decreed that the defendant turn over and deliver to the plaintiff herein, as trustee, all deeds and conveyances to the property described herein in his possession or under his control, and all mortgages held by him for the purchase money or any part thereof, and all other evidences of indebtedness held or controlled by him or affecting the property involved, the title to which is hereby adjudged to be in the plaintiff as trustee; that the trustee take charge of the said property and sell the same where not affected by the rights of purchasers or any equity of the defendant therein; that the defendant be, and he is hereby, enjoined perpetually from collecting any money or moneys as rent

or purchase money from any of the property herein or purchasers thereof; that he do account to the plaintiff for all such sums of money heretofore received by him as rent or purchase money.

"Further decreed that the plaintiff, as trustee herein, shall take such steps to secure the property herein or its proceeds as he may be advised, protecting fully the rights of all persons who may have acquired any of the property as innocent purchasers, or who, as creditors without notice, may hold valid liens thereon.

"Further decreed that any sale or sales made hereunder by the trustee shall be for cash, after three weeks' notice published in one or more of the newspapers published in Gaffney, and that he make to the purchasers thereof deeds of conveyance thereto.

"Further decreed that the plaintiff may apply at the foot of this decree for such other or further relief as he may be advised to carry into effect the terms of this decree and its purposes."

Cornelius Otts, of Spartanburg, for appellant.

Dobson & Vassy and Butler & Hall, all of Gaffney, for respondent.

**HYDRICK, J.** This action was brought by the trustee in bankruptcy of Bonner McCraw Company against A. Bonner McCraw, the former president and treasurer of the corporation and general manager of its business, to have certain property, which he purchased with funds of the corporation and took titles thereto in his own name, impressed with a trust in favor of the creditors of the insolvent corporation.

[1] It is not an action at law to recover the property so purchased, but an action in equity to subject it to a trust, and therefore we do not agree with respondent's contention that the facts are not reviewable.

[2] In equity cases the burden is upon appellant to show that the preponderance of the evidence is against the findings, or any particular finding, complained of. In this case appellant has not convinced us of error of any finding complained of except one. In stating the evidence and its tendencies, the court said:

"There is testimony also to show that the defendant, in a statement made to or in the presence of one Allison, declared that, if he ever went into bankruptcy, his creditors would get nothing."

[3] There is no testimony in the record before us to sustain that finding, but it is wholly immaterial; for, even if defendant made no such statement, it would not affect the result. But it appears that there was a great deal of testimony before the circuit court, which it was deemed unnecessary to set out in the record for appeal and it is possible that there was, in the record before that court, testimony to support that finding.

[4] The evidence abundantly sustains all

the material findings of the court, and the conclusions therefrom are correct. *Palmetto Lumber Co. v. Risley*, 25 S. C. 309.

[5] Appellant complains that, having found that he had used the funds of the corporation to buy property, the titles to which he took in his own name, the amount for which he was to account should have been specified. This shows a misconception of the action. Defendant was a trustee, and as such he was called upon to account for the assets of the corporation, which he had appropriated to his individual use. It was therefore his duty to specify. If he kept the books and transacted the business of the corporation in such a way that it was impossible for him to show exactly how much of the funds of the corporation went into the property sought to be impressed with a trust, it is his own fault. But the evidence shows that when he went into business he had comparatively nothing, and that his private estate increased commensurately with the debts of the corporation. We find no error of substance in the decree.

Judgment affirmed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(112 S. C. 495)

STURGIS v. CITY OF ROCK HILL (four cases). (No. 10271.)

(Supreme Court of South Carolina. Aug. 25 1919.)

1. MUNICIPAL CORPORATIONS — 845(4) — EVIDENCE INSUFFICIENT TO SHOW POLLUTION OF WATER COURSE.

Evidence in action for damages held to sustain finding that there was no additional pollution by defendant city's sewerage purification plant of the stream flowing through plaintiff's lands.

2. MUNICIPAL CORPORATIONS — 845(4) — WHEN PURIFICATION PLANT DECREASED NOXIOUS ODORS FROM STREAM.

Evidence in action for damages held to show that defendant city's sewerage purification plant, by purification of a stream nearer plaintiff's land than the plant, decreased, rather than increased, foul smells and noxious odors.

Appeal from Common Pleas Circuit Court of York County; R. W. Memminger, Judge.

Separate actions by E. W. Sturgis, by W. T. Sturgis, by B. M. Sturgis, and by W. V. Sturgis against the City of Rock Hill. Judgments for defendant, and plaintiffs appeal. Affirmed.

The report of Special Referee John R. Hart is as follows:

"All of the above actions are similar in their natures. The respective plaintiffs ask damages

against the city of Rock Hill, alleging that by reason of the city emptying its sewage at a point just above the lands of plaintiffs, and into a stream which flows through the lands of plaintiffs, the said stream has been polluted and made unfit for use; and that by reason of the construction and maintenance by the city of Rock Hill of a disposal plant near the lands of the plaintiffs, which disposal plant gives off such foul and noxious odors, that it has rendered the homes of the plaintiffs undesirable and unfit to live in, with consequent damages to the respective plaintiffs and in the sums as respectively set out in the complaints.

"The defendant, the city of Rock Hill, answers with a general denial, and pleads, further, that whatever compensation plaintiffs may be entitled to may only be awarded to plaintiffs by a board of arbitrators, pursuant to the terms of the statute, and therefore denies the jurisdiction of this court.

"By consent the issues of law and fact were referred to me as a special referee.

"As I understand the law as laid down in *Parish v. Town of Yorkville*, 106 S. C. 23, 90 S. E. 185, the only question that is before me, and the only question for me to decide, is, Have the plaintiffs shown damage to themselves at the hands of the defendant? I have nothing to do with the quantum of the damages, and it is with this view of the law that I frame my report.

"As previously stated, the plaintiffs contend that they are damaged from two sources—namely, pollution of the stream, and the creation of foul and noxious odors rendering their homes uninhabitable.

"To reach a decision on these two questions of fact has caused me much trouble and considerable time. The class of testimony offered has been unusually high. Both plaintiffs and defendant have presented witnesses whose integrity and veracity could not be impeached, yet whose testimony is in apparent conflict, the one with the other.

"Taking up first the question of the pollution of the stream: The plaintiff B. M. Sturgis, in response to the question as to how this stream was affected by the erection of this septic tank, answered that in one way it was affected by the odors arising therefrom. He also states that he had never used this land for a pasture. He also stated that the Carhartts were putting dyestuff into the branch prior to the erection of the septic tank. This last fact seems to have been established beyond question by other testimony to which I will allude later. The witness did state that the sediment found in the stream was not so thick prior to the installation of the septic tank.

"Mr. W. V. Sturgis, another plaintiff, stated that he did not use the water from the stream, but that a colored man on the place used it.

"Another plaintiff, Mr. F. W. Sturgis, states that he had the branch wired off, as he did not care to let the cattle drink from it, and that the odor from the branch was very offensive. He also stated that the presence of the tank so affected the water that his cattle would not drink it; and, further, in his testimony he states that this branch has been a foul one for about 25 years, and ever since Winthrop College sewage and the dyestuff was emptied into it, but that he could see no sewage matter in the stream.

"I have thus stated the testimony of the

plaintiffs fully for the reason that this covers practically all of the testimony for the plaintiffs touching upon the foulness or pollution of the stream.

"As against this testimony the defendant offered many witnesses. The testimony of the witnesses Barnwell, Dr. Fennell, and Ludlow—these three witnesses qualified as experts, and the substance of their testimony was to the effect that the installation of the septic tank bettered the condition of the stream below it. Without reviewing the testimony of the witnesses by name, it was shown that an area comprising from one-fourth to one-third of the city of Rock Hill was drained into this branch. Three cotton mills are within its drainage area, and many of these mills still maintain open closets, and one emptied its dye water into the stream prior to the installation of the sewerage system. The testimony is too lengthy to review it in detail, but from all the testimony I am convinced that the stream has not been polluted by the erection of the septic tank, but, on the contrary, if there has been any change in its condition it has been for the better.

"I, therefore, find as a matter of fact that the stream has not been polluted by reason of the city erecting and using this septic tank.

"The next question, that of odors, is more difficult. Many witnesses, who were absolutely reliable, testified that there are pronounced odors arising from the septic tank and branch. Others equally as reliable testified to the contrary. The city went into the defenses fully and presented very strong testimony. The testimony of Messrs. Barnwell and Ludlow both convince me that the city has spared no expense, and has used all modern and scientific methods to purify its sewage, and that the septic tank in controversy is of the most modern design, and is properly constructed and operated. From the testimony of Mr. Barnwell it will be seen that for a time the tank was not properly operated, and during this time, particularly, the odors were extremely offensive; but, owing to a correction of the volume of sewage handled through this tank, this defect was overcome. Witnesses visited the tank for the special purpose of ascertaining if there were odors, and practically all of these witnesses testified that there was no odor other than that arising from the use of dyestuff and dye water, which was emptied into the septic tank. The testimony of Mr. Ludlow indicates the chemical action taking place in the tank is designed to purify the sewage, and would have no effect upon the odor in dye water, nor would it rob it of its color.

"On the other hand, witnesses of equal integrity, including the plaintiffs, testified that the odors arising from the tank were offensive in the extreme. The testimony of the witnesses of plaintiffs and defendant can only be reconciled by the assumption that at times there are odors and offensive odors, while at other times there are no odors. This might or might not be due to the condition of the tank, the manner of its operation, or the state of the temperature. In fact, some of the witnesses testified that the odors were more offensive during the morning and night. It will be idle to attempt to review the testimony witness by witness, in more than 100 pages of testimony taken in the reference. I am convinced from the testimony, and so find, that there are foul and noxious odors arising from the septic tank owned and main-

tained by the defendant, and these odors are of such an extreme nature as to pollute and contaminate the air in and around the premises of the plaintiffs, and interfere with their proper enjoyment and use of their homes and lands, and that the lands of the plaintiffs are thereby reduced in value to plaintiffs' damage, and I so find and recommend.

"As to the law of the case, I think it has been settled by the suit of Parish v. Town of Yorkville, reported in 96 S. C. at page 24, 79 S. E. 635, L. R. A. 1915A, 282. This case held that, when the right to institute condemnation proceedings is contested, 'the proper remedy is to bring an action in the court of common pleas in order that the court may, in the exercise of its chancery powers, determine such right.' See, also, Railway v. Riddlehuber, 38 S. C. 308, 17 S. E. 24, and other cases cited in the Parish Case.

"This being the law, the referee is limited in his findings merely as to the question of whether or not the plaintiffs are entitled to any damages, but is without authority to find or even suggest the quantum. I have previously stated that I do not think the plaintiffs are entitled to any damages for the pollution of the stream, but am of the opinion that they are entitled to damages by reason of the odors created by the defendant's septic tank.

"The referee also takes this occasion to commend counsel for both plaintiffs and defendant for the thorough manner in which they developed the testimony in the case, and for the assistance given to the referee."

Dunlap & Dunlap and J. Harry Foster, all of Rock Hill, and Thomas F. McDow, of York, for appellants.

Spencer, Spencer & White, of Rock Hill, for respondent.

GARY, C. J. The following statement appears in the record:

"These four suits involve the same issues, and were heard together. These suits were commenced May 21, 1917. The plaintiffs bring suit to recover compensation against city of Rock Hill, S. C., for alleged polluting of Watson's branch, a small stream heading in the city, and running through the lands of the plaintiffs; and compensation is also demanded by reason of alleged foul odors being emitted from a septic tank, or the sewerage system installed by the city just near Watson's branch. It is alleged that these foul odors make undesirable the homes of the plaintiffs, and also damage the value of their lands.

"By consent the issue as to whether the plaintiffs were entitled to compensation was referred to Hon. John R. Hart, as a special referee. A reference was begun in January, 1918, and by divers continuances concluded some time in May, 1918. The referee found that the stream was not polluted from the operation of the sewerage system, but found that the plaintiffs were entitled to compensation by reason of the foul odors emitted from this septic tank, or the sewerage system.

"Exceptions were taken by each side to the report of the referee, and the matter came on for trial before his honor, Judge R. W. Memminger, at the December, 1918, term of court for York county, and the court affirmed the

finding of the referee that there was no additional pollution of the stream, and reversed the referee in his finding that the plaintiffs were entitled to compensation on account of odors, and dismissed the complaints. In due time a notice of intention to appeal was served in each of the four cases."

The referee's report will be incorporated. B. M. Sturgis testified as follows:

"I am one of the plaintiffs. I own 84 acres of land near this septic tank, through which a creek passes running from it. One way the stream is affected by this tank is by the odor. My house is 210 yards from this branch, and about 1,500 yards from the septic tank. \* \* \* This stream also receives the dyestuff. I know that the dyestuff comes down along with the effluent from the tank. I do not know whether the odor comes from the tank or from the dye. I could not tell whether it is sewage or not. The stream rises back of Neely's stable, in Rock Hill. The septic tank has been there about six or seven years. I did not make the complaint until this year.

"Q. Do you claim that the condition of the tank affects the farming of your land? A. So far as the crops are concerned the septic tank does not affect them, but it is very unpleasant to live there. The stream is used by Winthrop College. It has been used since 1894 for putting dyestuff from the mills and other matter. I can't tell exactly how many years. The Winthrop College tank was about the same place where the city tank is now located. My property is not the nearest to the septic tank. This stream is not the only one that runs through my plantation. \* \* \* There is another stream that runs into Watson's branch right at the tank."

W. S. Sturgis, another plaintiff, testified:

"I own about 135 acres. The stream runs through my place about 500 or 600 yards. My home is about 600 or 800 yards from this branch, and between 1,200 and 1,500 yards from the septic tank.

"Q. Is there anything in the conditions around your place to affect your crops? A. I cannot say that it affects my crops.

"Q. Do you think it would affect the value of your land any? A. I cannot say as to its affecting its value."

E. W. Sturgis, another plaintiff, testified:

"The effluent from the old Winthrop College sewage settled on my sand beds. The dye water came down the branch also, but there was not as much there.

"Q. Has this branch always been a fouled one? A. For about 25 years. Since Winthrop College sewage has been put in there. The matter that comes out of the tank is liquid, and you cannot see any sewage in it. So far as farming is concerned, the tank has not affected my place, but it is undesirable because of the bad odor."

N. C. Walker testified:

"I live in Rock Hill, and am an architect and engineer, and was living here when the sewerage plant was installed. I worked with Mr. Cothran on his preliminary plans of the system. Mr. Cothran was the engineer employed by the

public service commission, and Herring and Gregory at that time were supposed to be about the best consulting sanitary engineers in the country, and they were employed by the commission, at Mr. Cothran's request, to act as consulting engineers. Mr. Cothran and I first made a survey, in which we went over the territory, and after making the topographical maps we decided on the approximate location of the disposal plant, and later on ran the actual survey following the natural drainage of the disposal plant site. I understand Exhibit B, the maps made by Mr. Miller, showing several branches that form Watson's branch, and the location of the business houses along Main street, the stables and other houses along the branches, and the mills and industrial enterprises. I also understand that portion of Rock Hill, as indicated on the map, which drains itself into the branch. \* \* \* It is my opinion that one-third of the inhabitants of Rock Hill live within the area which drains into Watson's branch. This section includes a whole group of tenant negro houses, several mill villages, besides one of the best residential sections. One wing of the branch runs back to Neely's livery stable, on Black street, and another runs from Winthrop College and the Wymojo Mill. There are four branches which join and go right into the septic tank. I was familiar with all the branches before the installation of the plant, as I surveyed along all of them. We followed one wing from Black street through the Arcade Mill to the conflux. At that time it was one of the worst branches I ever saw. It passed through the negro settlement. The washerwomen all emptied their washing water into the branch, and all the back yards and surface closet washings went right into this branch. The arm of the branch from the Carhartt Mill, after passing through the mill village, goes through the old fertilizer yard, then right under the old laundry, then under Main street and through a negro settlement, as filthy a section as I ever saw. We had to be careful to keep our tape line from touching the water, as it was filthy. The Carhatt and Victoria Mills were putting their dye water and the Arcade its sizing water into the branches."

**J. G. Barnwell testified:**

"I am employed as city manager of Rock Hill, S. C. I came to Rock Hill in 1912. The Imhoff System was installed and completed three months after I came to Rock Hill. I have had charge ever since it was installed and turned over to me. I have been in charge as engineer of sewerage and water plants for the last 12 or 15 years here, in York, and in Columbia. The Imhoff tanks were installed at Rock Hill with Mr. Cothran as engineer for the commission, and with Herring & Gregory, sanitary experts and engineers of repute. I heard Mr. Miller testify this morning, and, while I have never attempted to take a census of the area around by Watson's branch, the housing facilities of that locality are near together, and the population dense, and I would say that area includes probably one-third of the population of Rock Hill. I have personally followed both prongs of Watson's branch, which join about the Arcade plant, the entire way to their sources. One prong of Watson's branch begins about the Carhartt Mills, passing between the laundry and

Pepsi-Cola building, and goes across Black street, and on through the Victoria Mill village, and on to the Arcade Cotton Mill, where it joins the other prong that heads up at Winthrop. Another prong made in the very heart of Rock Hill. All the street washings from the pavements, horse droppings, and any surface draining that does not go into the sanitary system, goes into the branch from that wing. The Hamilton, Carhartt, Victoria, Arcade, and Wymojo Cotton Mills, the Rock Hill Buggy Company, a dense negro settlement included, I should say 50 per cent. of all of them are situated within the area which drains itself into Watson's branch.

"Q. Will you just explain to the court where about this Imhoff tank is and the character of the treatment of the sewage in this system? A. Dr. Carl Imhoff, of Germany, was the inventor of this tank, and Herring & Gregory obtained the patent rights in this country. Describing the tank as we have it here, it consists of a unit composed of two basins, each basin being divided into two compartments. These compartments are one above the other, and are known as a two-story tank. The upper compartment is known as the settling chamber; the lower compartment as the sludge-digesting chamber. The Imhoff tank is only a part of the purification works at the Arcade disposal plant, and this tank is further supplemented by sludge-drying beds, an automatic flush tank, and a sprinkler filter. Raw sewage enters first the settling compartments of the Imhoff tank. These tanks perform their function, and the liquids pass from the tank to the flush tank; from the flush tank they are conveyed by means of cast-iron lines to the spray nozzles, located on the sprinkler filter. The sewage is sprayed into the air from these nozzles and falls on the crushed stone filter. Through this filter the liquids percolate and are collected on the bottom in troughs and laterals, which collect the liquids, and convey them to the Watson branch, where they are finally disposed of into the stream. The treatment of the raw sewage at these works is as follows: Raw sewage enters the settlement compartments, which, as described, are located above the sludge-digesting chamber. The solids are settled out in this chamber, and fall through a longitudinal opening at the bottom of this chamber into the sludge-digesting chamber. The liquid passes out of this settling chamber and is collected into a 3,000-gallon automatic flush tank. When this tank is full it empties its contents through a spray nozzle system into the sprinkler filter. The process of purification at this point is the creation of the liquid which replenishes its lost oxygen. This replacement of oxygen is accomplished in two ways: First, the spraying of the liquid into the air; and, second, the air collected as it percolates through the well-ventilated crushed stone filters. The organic matter in the sewage is further attacked in the sprinkler by means of the aerobic bacteria, which live and are fed by the organic matter in the sewage. Two agencies are constantly at work at this point purifying the sewage—aerobic bacteria and oxygen. As previously described, the solids are settled out into the sludge-digesting chamber. The action taking place in this chamber on the organic solids settled therein is continuous. This destructive action is brought about by the presence

of millions of purifying or anaerobic bacteria. These bacteria attack the solids settled therein and reduce it to a stage of complete decomposition. When the proper amount of decomposition has set in, or the sludge is 'ripe,' valves are opened, and the ripe sludge is allowed to pour out on the two sludge-drying beds. The sludge is allowed to stand on this bed until it is dry, and is then loaded with a shovel and spade, and carried with a wheelbarrow and deposited on the soil. The biological action on this organic matter has been so complete in the sludge-digesting chamber as to destroy even the fertilizer value of the organic matter, and it seems turned back to dust. The underlying principle of the treatment of raw sewage and organic matter present might be explained in the phrase, 'Dust we are, and to dust returneth.' The basic principle of the treatment is to accomplish this purpose."

J. L. Ludlow testified:

"I live at Winston-Salem, N. C., and am a civil and sanitary engineer. I am the engineer member of the board of health of North Carolina, and I am at present supervising engineer of construction for the government at Camp Greene, Charlotte. I have had quite a lot of experience in sewerage and sanitary work in South Carolina. I designed and built the sewerage system for Columbia, Union, Laurens, and Spartanburg, and designed the sewerage system for Charleston. I am familiar with the several maps testified about by Mr. Miller and placed in evidence, and I am familiar with, and have inspected, the Imhoff tank, concerning which these suits have been brought. I have seen the branch into which the effluent flows. That branch would be foul by nature on account of its origin and sources in the confines of the town. Q. Mr. Ludlow, you made a careful inspection and physical examination of the plant and saw it operating. Will you state what sort of plant it is, and whether it is functioning properly? A. I found the plant to be in very good condition, functioning very well, indeed, and performing as well as could be expected by most any plant. I have inspected a large number of other plants at other places. I think there would be no question but that the sewage collected and treated as it is at one point and discharged into the stream puts the stream below in better condition than it would be in the absence of the system and sewage treatment. I express this opinion with the assistance of the maps with reference to the natural drainage, and also from my observation of the surroundings and visit to the plant, and my knowledge of the improved condition that always follows the collection of sewage filth in any community, and the proper treatment at one point. The smells at this plant are very slight. Could hardly detect them at all. Had to go right down close to the tank and close to the place where the sprinklers operate,

and near where the effluent enters the branch, to get any odor. Odors such as were there today would not go under any condition for a distance of 50 or 100 feet. I should not think they could possibly go over 200 yards. Untreated sewage proceeds a long way. The odors from a polluted, foul branch would travel farther, for the reason that decomposition taking place in a branch filling the air, while decomposition in Imhoff tank is buried under a mass of liquid, and is sealed away from the air. Where allowed to accumulate, as is usually the case, any ordinary rain would wash a considerable amount of organic matter down into the branch. I think the offensive odors from the dyestuff would be reduced to a slight extent by putting it through the tank. The odors from dyestuffs do not make any one sick, and are not deleterious to health, and do not cause disease. The records show that people working on big sewers of Paris are about the healthiest group of citizens of the city."

[1] It is only necessary to refer to the foregoing testimony to show that the exceptions assigning error on the part of his honor, the circuit judge, in his findings of fact that the plaintiff was not entitled to damages for the alleged pollution of the stream, cannot be sustained.

[2] We proceed to the consideration of the second question, to wit, Was there error on the part of his honor, the circuit judge, in his findings of fact that the plaintiff is not entitled to damages on account of the foul smells and noxious odors arising from the installation of the defendant's sewerage system?

The lands of the plaintiff do not adjoin the lands upon which the septic tank is located. His residence is about 1,500 yards from the septic tank, but is much nearer Watson's branch, which runs through his lands. The testimony shows that said stream was very foul for many years prior to the installation of the septic tank. The foulness of the stream had the natural effect of generating odors and poisoning the atmosphere. The only reasonable inference from the testimony is that the purification of the stream necessarily had the effect of making the atmosphere more wholesome and the odors less noxious.

The exceptions raising this question are also overruled.

Affirmed.

HYDRICK, WATTS, and GAGE, JJ., concur.

FRASER, J., did not sit.



(112 S. C. 431)

**McFADDIN v. LUMPKIN et al.**  
(No. 10257.)

(Supreme Court of South Carolina. Aug. 25, 1919.)

**1. INFANTS ⇨102—INFANT'S EXCEPTIONS TO MASTER'S REPORT MAY BE FILED AT HEARING.**

In a proceeding to marshal assets and adjust equities among parties claiming portions of the land of an estate, where an infant defendant's guardian ad litem did not except to the master's report, it being duty of court to guard rights of infants, court could allow infant's exceptions to be filed at any time, before or at hearing.

**2. DEEDS ⇨125 — POWERS ⇨34(1) — WILL EXECUTED BEFORE TRUST DEED NOT EXERCISE OF POWER THEREIN.**

Under a deed in trust for grantee to sell and convey to such person as she may be directed by grantor, upon death of M. grantee to reconvey to grantor, and upon the death of grantor before reconveyance to him, or upon his death before death of M., to convey to such person as directed by grantor's will, and, in default of such appointment, grantee to become the owner in fee, the grantee had a vested remainder in such lands as should be left after such conveyances as were directed by grantor during his lifetime, defeasible only by execution of a new will by grantor, directing conveyance to some one else, and a will of the grantor, executed prior to the deed, was not an exercise of the power reserved, so as to defeat grantee's remainder.

**3. WILLS ⇨194—WILL REVOKED PRO TANTO BY SUBSEQUENT DEED.**

A deed is a revocation of a will previously made pro tanto, unless provision is made to the contrary in the deed.

**4. APPEAL AND ERROR ⇨1008(1)—FINDINGS OF FACT NOT REVIEWABLE.**

A finding of court, with the facts before him, will not be disturbed.

Appeal from Common Pleas Circuit Court of Richland County; R. W. Memminger, Judge.

Action by Susan McFaddin against Charlie Lumpkin and others. Judgment for plaintiff, and certain defendants appeal. Reversed.

The will of Emanuel Holman was dated May 1, 1905, he died December 4, 1908, and the will was admitted to probate December 19, 1908. His deed to Mary Holman was executed and delivered January 7, 1907; and by it lands were conveyed to the use of Mary Holman, in trust nevertheless—

"to sell and convey to such person or persons, in whole or in such parcels, at such time or times, as she may be directed to do by the said grantor, free of all trusts, and upon the death of the said Melissa, before the death of the said Emanuel, the said Mary is to convey the same or the remainder thereof not previously conveyed, in fee simple, to the said Manuel, and

upon the death of the said Manuel before such conveyance or before the death of his wife, Melissa, to convey the same to such person or persons as she may be directed to do by the will of the said Manuel Holman, and in default of such appointment, then the said Mary Holman shall become the owner in fee."

D. C. Ray and A. W. Ray, both of Columbia, for appellants.

Green & Green, H. F. Jennings, De Pass & De Pass, Alfred Wallace, Jr., and James H. Hammond, all of Columbia, for respondents.

WATTS, J. This action was heard by his honor, Judge Memminger, at the spring term of court, 1916, for Richland county, who filed his decree, from which appeal is taken. The action purports to be brought to marshal assets, adjust equities among the parties claiming portions of the land of Emanuel Holman, and to apply to the debts and expenses of this suit and of the estate the lands undisposed of, except in the residuary clause of the will, to the exoneration, as far as possible, of the specific devise under the will, and to set apart the remaining portions of the land devised to the respective devisees.

[1] The points made by the appeal are, first, what standing the infant defendants have in the court; the guardian ad litem not having excepted to the master's report. This is a matter of discretion with the court. It is the duty of the court to guard the rights of infants, whether exceptions have been filed to the master's report or not within the time fixed. The court can allow exceptions filed at any time, before or at hearing, by an infant. Mr. Justice Hydrick, in *Barfield v. Barnes*, 108 S. C. 12, 93 S. E. 428, says:

"However, the duty and responsibility of safeguarding the rights of infants rests primarily upon the judges of the circuit court."

It is their duty to safeguard an infant's rights in any case that comes before them, and to see to it that the interest of the infant is fully looked after, protected, and safeguarded.

[2] The next point made by the exceptions is second, that the deed to Mary Holman conveyed to her in her own right a vested remainder in such lands as should be left after such conveyances as were made by direction of Emanuel, defeasible only by execution of a new will by Emanuel Holman, directing her to convey the property to some one else, and that, not having done so, Mary becomes the owner in fee simple upon the death of Emanuel. An inspection of the deed shows that it does not refer at all to any existing will. The deed from Emanuel to Mary shows, first, Mary to sell and convey to such person as she may be directed to do by Emanuel; second, upon the death of Melissa

before Emanuel, Mary to convey to Emanuel; third, upon the death of Emanuel before conveyance to him, or upon the death of Emanuel before Melissa; fourth, Mary to convey the land to such person as she may be directed to do by the will of Emanuel; fifth, in default of such appointment, then Mary to have the fee.

[3] A deed is a revocation of a will previously made pro tanto, unless provision is made to the contrary in the deed. There is nothing in the deed to show that the will previously made is to remain in force. No reference is made to it in the deed. Provision in the deed necessarily refers, not to an antecedent will, but to a will to be made in the future. The deed contemplated a future direction. The existing will was in the past, and direction, if any, was in the past. The deed contemplated and provided for a future direction, and there was no direction by the grantor after the execution of the deed by him, and these exceptions must be sustained.

This ruling carries with it the next exception, as to whether or not the plaintiffs' attorneys are entitled to a fee to be paid out of the lands involved here. They are not, and these exceptions are sustained.

[4] The next question is the contention that Susan McFaddin was not entitled to be paid \$50, or any sum whatever, for the funeral expenses of Emanuel Holman. His honor, with the facts before him, found that she was, and we are not disposed to interfere with his finding, and this exception is overruled.

Judgment reversed.

HYDRICK, FRASER, and GAGE, JJ., concur.

GARY, C. J., did not sit.

(112 S. C. 426)

BARNES et al. v. LEEVY et al. (No. 10256.)

(Supreme Court of South Carolina. Aug. 25, 1919.)

**1. WASTE §12—CONTINGENT REMAINDERMEN MAY ENJOIN WASTE.**

Contingent remaindermen may bring action to enjoin waste.

**2. PLEADING §214(1) — DEMURRER ADMITS FACTS ALLEGED.**

Demurrer to complaint admits facts alleged therein.

**3. APPEAL AND ERROR §917(3)—PRESUMPTION THAT JUDGMENT ROLL OF FORMER ACTION SHOWS SERVICE.**

On appeal from order sustaining demurrer to complaint on ground that the proceeding was a collateral attack on a judgment, court will assume, unless the contrary appears in the rec-

ord, that the facts set forth in the judgment roll of former action do not show affirmatively that the plaintiffs were not served in such action.

**4. JUDGMENT §518—WHEN ACTION IS COLLATERAL ATTACK ON FORMER JUDGMENT.**

Action by alleged remaindermen against defendants, claiming under purchasers at foreclosure sale under mortgage from life tenant, to enjoin waste, where complaint alleged invalidity of foreclosure sale judgment because remaindermen were not served, was a collateral attack on such judgment, where judgment roll did not affirmatively show remaindermen were not served.

**5. JUDGMENT §497(1) — WHEN JURISDICTIONAL DEFECT APPEARS ON RECORD JUDGMENT IS VOID.**

When the jurisdictional defect does not appear on the face of the proceedings, the judgment is voidable only, and the remedy is by a motion in the cause; but, where defect appears on the face of the proceedings, the judgment is void and may be disregarded.

**6. COURTS §90(5)—WHEN DECISION OF SUPREME COURT CONCLUSIVE AS STARE DECISIS.**

Decision of Supreme Court upholding validity of service on remaindermen in mortgage foreclosure action, and upholding title of foreclosure sale purchasers, if not res adjudicata in remaindermen's subsequent action to enjoin waste, is conclusive on them under doctrine of stare decisis.

Appeal from Common Pleas Circuit Court of Kershaw County; R. W. Memminger, Judge.

Action by Henry C. Barnes and others against Mary Leevy and others. From an order sustaining demurrers to complaint, plaintiffs appeal. Affirmed.

David E. Anthony, of Washington, D. C., and J. Fraser Lyon, of Columbia, for appellants.

Kirkland & Kirkland, of Camden, Nelson & Gettys, of Columbia, and L. A. Wittkowsky, of Camden, for respondents.

FRASER, J. George Stafford dies leaving his will, wherein he devised a tract of land to his daughter, Sarah Cook, for life, with remainder to his granddaughter, Sarah Cook, for life, with remainder over "to the children of my said granddaughter who may be living at the time of her decease, to them and their heirs forever." The granddaughter, Sarah Cook, married George W. Barnes. Mr. and Mrs. Barnes, seeking to increase their income from this land, applied to the court for permission to mortgage this land in the sum of \$3,000. To this proceeding the children then in being were made parties. Permission was given, the mortgage was made, and, as might have been expected, was

not paid. An action was brought to foreclose the mortgage, to which only Mr. and Mrs. Barnes were made parties. It seems that the court refused to decree foreclosure unless the children then living who were minors were made parties defendant. The complaint alleges that they were not served with the summons and were not made parties. The land was sold, and is now claimed by the defendants. Mrs. Sarah Barnes is still alive.

This action is brought by the plaintiffs as contingent remaindermen for damages for waste and to enjoin future waste.

The defendants demurred to the complaint, and the demurrer was sustained upon three grounds: They will be considered in their order.

I. "Contingent remaindermen are not entitled to any action for waste, damages, nor injunction. See *Pearson v. Yongue*, 25 S. C. 162."

*Pearson v. Yongue* does not sustain the finding, for at page 167 of 25 S. C. we find:

"It may be said that unless these plaintiffs are entitled to an action, that here is a case, especially as to the commission of waste by the defendant, of a wrong without a remedy. We think not. It is not for this court to suggest proper proceedings in any case, but we may venture to say that there is a remedy within reach, wherein all questions raised here could be brought within the jurisdiction of the court, and its full judgment invoked and obtained."

*Pearson v. Yongue* was an action to establish the rights of contingent remaindermen and for damages for waste. This action includes an injunction to stay waste, and is not within the case of *Pearson v. Yongue*.

[1] The case of *Carson v. Kennerly*, 8 Rich. Eq. 259, shows that this holding cannot be sustained.

II. "This proceeding is a collateral attack upon a judgment of this court, which is not permissible. *Kaylor v. Hiller*, 77 S. C. 393, [58 S. E. 2]; *Rice v. Bamberg*, 59 S. C. 498 [38 S. E. 209]."

[2] This is a demurrer, and admits the facts set forth in the complaint. Even if the complaint, as set forth in the record, be held to allege that the judgment roll shows affirmatively that the plaintiffs were not served, yet that statement is a conclusion of fact. The judgment roll was made a part of the complaint, and the judgment is not in the record.

[3] We must therefore assume, unless the contrary appears in the record, that the facts set forth in the judgment roll do not show affirmatively that the plaintiffs were not served.

[4] If the judgment roll does not show affirmatively that the plaintiffs were not served, then this action is a collateral attack.

In *Love v. Domain*, 91 S. C., 389, 74 S. E. 830, we find:

"The recent case of *New York Life Insurance Company v. Mobley*, 90 S. C. 532 [73 S. E. 1032], is full authority for the position that judgment of the circuit court can only be attacked in a direct proceeding issued for that purpose when the jurisdictional defect does not appear upon the face thereof."

[5] When the jurisdictional defect does not appear on the face of the proceedings, the judgment is voidable only, and the remedy is by a motion in the cause.

When the jurisdictional defect appears on the face of the proceedings, the judgment is void, and may be disregarded.

This holding is sustained.

III. "In the case of *Barfield v. Barnes*, 108 S. C. page 1 [93 S. E. 425], the decision of the Supreme Court is entirely pertinent and conclusive against plaintiffs herein, wherein the title to the land rests upon precisely the same grounds. The demurrer sustained, and complaint dismissed."

[6] The case of *Barfield v. Barnes* may not be res adjudicata, but the holding of the circuit judge must be sustained under the doctrine of stare decisis.

The judgment is affirmed.

GARY, C. J., and HYDRICK, GAGE, and WATTS, JJ., concur.

(112 S. C. 544)

LEWIS et al. v. DUNLAP et al. (No. 10276.)

(Supreme Court of South Carolina. Aug. 26, 1919.)

1. CONTRACTS  $\S$  101(1)—HAVE REFERENCE TO LAW IN FORCE AT THEIR DATE.

Every contract is made with reference to the law of force at its date.

2. USURY  $\S$  9—NOTE BEARING 10 PER CENT. INTEREST VALID IF NOT UNLAWFUL WHEN MADE.

Parties to note calling for 10 per cent. interest could calculate interest according to such rate, notwithstanding Civ. Code 1912,  $\S$  2518, making such rate of interest unlawful, where note was executed prior to enactment of such statute.

3. USURY  $\S$  9—RENEWAL, INCLUDING COMPOUNDED INTEREST AT 10 PER CENT., USURIOUS UNDER EXISTING STATUTE.

Although under Act Dec. 21, 1832 (18 St. at Large, p. 35), the taking of interest upon interest at 10 per cent. per annum would have been lawful under a written contract therefor, yet where a note made while that act was in effect provided for 10 per cent. interest, but not for the payment of interest upon interest at such rate, a new note, given after the taking effect of the 1898 act (Civ. Code 1912,  $\S$  2518), which, in including the amount

of the first note, compounded interest thereon at 10 per cent., was usurious, for, although the Act Feb. 10, 1898 (22 St. at Large, p. 749), provides that it shall not apply to contracts made prior to March 2, 1898, compounding of interest on the old note was not provided for by any written contract made prior to such date, and the provision of the 1898 act was not intended to sanction the making of a new contract under the 1882 act after it had been superseded by the 1898 act.

**4. USURY ⇐117—PAYEE OF RENEWAL NOTE SHOWN TO KNOW INTEREST COMPOUNDED AT USURIOUS RATE.**

Evidence held to show that payee knew that interest added to new note had been compounded at illegal rate of interest by bank cashier, to whom he had handed old notes for computation of interest.

**5. USURY ⇐98—ON RENEWAL NOTE USURIOUS FOR COMPOUND INTEREST PAYEE COULD RECOVER SIMPLE INTEREST.**

Where new note was usurious because interest on prior 10 per cent. note included in the new note was compounded at 10 per cent. without prior written agreement to pay compound interest, payee could recover simple interest on amount of old note at 10 per cent. to date of new note, for in Civ. Code 1912, § 2519, providing, in case of usury, such portion of the original debt as shall be due shall be recovered "without interest" or costs, the quoted words apply to interest on the second or tainted note, and not to lawful interest on the prior or untainted note.

[Ed. Note.—For other definitions, see Words and Phrases, Without Interest.]

Appeal from Common Pleas Circuit Court of Abbeville County; S. W. G. Shipp, Judge.

Action by Jessie J. Lewis, as executrix, and others against William C. Dunlap and others. From judgment rendered plaintiffs appeal. Modified.

Bonham, Watkins & Allen, of Anderson, for appellants.

Wm. N. Graydon, of Columbia, for respondents.

**HYDRICK, J.** This is an action against the administrators and heirs of W. A. Bigby to foreclose a mortgage given by him to R. A. Lewis. The defense is usury.

On November 22, 1886, Bigby gave Lewis and Morehead two notes, one for \$2,871.50, due one day after date, with interest from date at 7 per cent. per annum, and the other for \$600, due one day after date, with interest from date at 10 per cent. per annum. Both were lawful when given, and remained so until the subsequent transaction of 1907.

On January 11, 1907, the parties had a settlement, and Bigby gave Lewis a new note for \$15,758.58, due one day after date, with interest from date at 8 per cent. per annum, payable annually, and, if not so paid, to be-

come a part of the principal and bear interest at the same rate until paid. It also provided for the payment of attorney's fees for collection. This note was secured by the mortgage herein foreclosed.

The amount of this new note was made up of several items. One of the items has no special bearing on the issues to be decided, and the statement of the details concerning it is omitted, because it would only serve to confuse. The other items were a store account for \$1,772.68, and old note for \$500, and the two notes of 1886, on which interest was compounded at the respective rates therein mentioned.

The first question is whether compounding the interest on the \$600 note and adding it to the new note tainted the latter with usury. Plaintiffs specially urge two reasons why it should not have that effect. First, because the act of 1882, which was of force when the note was given, permitted the taking of 10 per cent. upon written contracts therefor. The answer is that the new contract was made after the act of 1882 (18 St. at Large, p. 35) had been superseded by that of 1898 (vol. 1, Civ. Code 1912, § 2518), which provides that—

"No greater interest than seven (7) per cent. per annum shall be charged, taken, agreed upon or allowed upon any contract arising in this state for the hiring, lending or use of money, \* \* \* except upon written contracts, wherein, by express agreement, a rate of interest not exceeding eight per cent. may be charged."

The act of 1898 (22 St. at Large, p. 749) is practically the same as that of 1882, so far as the rate allowed is concerned, except that the former allowed 10 per cent. and the latter only 8 per cent., when expressly agreed to in writing.

[1, 2] Every contract is made with reference to the law of force at its date. Here, then, we have the taking of interest on interest at 10 per cent. per annum without any written contract therefor, made during the time when such a contract could have been lawfully made. But it is agreed that the act of 1898 expressly provides that it shall not apply to contracts made prior to March 2, 1898. That provision was inserted out of abundance of caution to sanction the validity of contracts made under the previous law, which were lawful when made. Hence, under that provision, it would have been lawful for the parties to have calculated the interest on the note according to its terms, for it was a lawful contract when made. But the provision was not intended to sanction the making of a new contract, under the act of 1882, after it had been superseded by the act of 1898.

[3] As the note did not provide for the payment of interest on interest at 10 per cent.,

and as there was no written agreement to that effect, while the act of 1882 was of force, the compounding of the interest at that rate, in 1907 was a violation of the law in force at that time, and made the note taken therefore usurious.

[4] The second ground upon which it is contended that compounding interest did not taint the transaction with usury is that it was unintentionally done. The testimony is that Lewis handed the two notes to Greer, the cashier of the Bank of Belton, and asked him to calculate the interest on them, saying one of them bore 7 and the other 10 per cent., and that Greer, of his own motion, compounded the interest, because it was customary with him to do so. He says, however: "Mr. Lewis and Mr. Bigby accepted my calculations as correct." From this and the evidence that the calculations, which showed on their face that the interest had been compounded, were attached to the notes, the court did not err in finding that Lewis knew that the interest had been compounded. Greer was Lewis' agent, and his intention must be presumed to have been Lewis' intention, in the absence of evidence to show that what Greer did was against the intention of Lewis.

The act of 1898 (vol. 1, Civ. Code 1912, § 2520) makes the defense available to the defendants, notwithstanding the provision that it shall not apply to contracts made prior to March 2, 1898, because the contract of 1907 is the one to which the defense is made, and not to those of 1886.

[5] The court held that, under the statute (vol. 1, Civ. Code 1912, § 2519), which provides, in cases of usury, that "such portion of the original debt as shall be due shall be recovered, without interest or costs," plaintiffs were not entitled to recover interest on the notes of 1886, according to the terms thereof up to the date of the new contract in 1907, and based that conclusion on the case of *Harp v. Chandler*, 1 Strob. 461.

The opinion in that case does not support the conclusion stated. In that case, Harp held a note which Chandler had given to Croker. It was untainted. Chandler gave Harp a new note, which the testimony tended to show included interest on the old note, calculated at an usurious rate. Judge Wardlaw, speaking for the court, said:

"It is hard to resist the inference \* \* \* that the note now sued on was given for the balance of a previous note, which was originally untainted by usury, but was by subsequent agreement calculated at some usurious rate of interest. If this were so, the verdict should have been (without interest and without costs) for the balance of the amount, which, when the second note was given, was really due on the first note calculated at the lawful rate of interest," etc.

The words italicized show that the words "without interest" in the parenthesis above meant without interest as provided for in

the new note, and that the amount which was really due on the first note at the date of the usurious contract included the interest thereon, calculated at the lawful rate, and that that sum was recoverable, but without costs. In other words, that that sum (the principal of the old note and lawful interest thereon) was the original debt, which could be recovered, but without costs. That idea is expressed again further on in the opinion, at page 467, where he said:

"But the forbearance of a pre-existing debt is a new loan, and upon this principle only can excessive interest upon such forbearance be regarded as usury. The Legislature prohibits usury, and directs that in all cases whatsoever only the principal sum or amount lent shall be recovered without interest or costs. The original security remains untainted, but it has been as to the original parties, superseded by a new corrupt agreement, and therefore the amount lent on that new agreement, that is, the first principal and the lawful interest which was due when the new agreement took effect, shall be recovered, but without interest or costs."

Again, it clearly appears, from the words italicized, that the words, "without interest," in the last clause of the sentence, refer to interest on the tainted note, and not to the lawful interest on the untainted note, which, by the words italicized, is expressly included in "the amount lent on the new agreement." Again, on page 468, he says:

"Whenever, by acceptance of usurious interest, or an agreement for it once actually operating, a corrupt contract has been established concerning the debt contained in a security originally untainted, the amount really due on the day when that contract [evidently meaning the corrupt contract] commences to operate must be taken to be the principal sum from which all subsequent payments must be deducted to ascertain the balance which shall be recovered without interest and without costs."

The same principle is expressed thus in 39 Cyc. 1907:

"When usury inheres only in a renewal note given for principal and interest of a previous valid note, it is manifest from the principles hereinbefore stated that the subsequent usury cannot defeat the lender's right to recover principal and interest due on the valid note at the time of the usurious renewal."

And the case of *Harp v. Chandler* is one of those cited to sustain the text, showing that the author interpreted that opinion correctly.

It follows that the plaintiffs are entitled to recover (in addition to the store account and the \$500 note, which have not been questioned) the principal and interest on the notes of 1886, calculated at the rates therein stipulated, after deducting payments made thereon, up to the date of the new note; but, as the new note was tainted with usury, by the incorporation therein of the

amount due on the \$600 note, calculated at an usurious rate, no further interest and no costs or attorney's fees can be collected.

The judgment of the circuit court is modified accordingly.

Judgment modified.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(178 N. C. 46)

RICHARDSON et al. v. WOODRUFF & SONS. (No. 22.)

(Supreme Court of North Carolina. Sept. 17, 1919.)

**1. SALES ⇨199, 201(1)—WHEN TITLE PASSES WITHOUT DELIVERY.**

Present physical delivery of the goods is not always required to an executed contract of sale, as title will pass without such delivery, if that is the intention as expressed in the agreement.

**2. SALES ⇨197—ON EXECUTORY SALE DAMAGE WHILE IN STORAGE IS BORNE BY SELLER.**

Where defendants offered to sell a certain kind of potatoes at \$12.50 a barrel for future shipment, August 1st, "any shrinkage to be stood by you after they go into cold storage," which plaintiffs accepted, the contract continued executory until the goods were shipped, August 2d, so that damage by reason of their storage by defendants was not to be borne by plaintiff.

**3. EVIDENCE ⇨457—SALES ⇨88, 445(4)—WHEN MEANING OF TERMS OF CONTRACT FOR THE JURY.**

In an action by the purchasers of potatoes by contract providing they should stand any shrinkage while in storage for future delivery, the goods being warranted sound and No. 1 at time of making the contract, question whether the potatoes were up to specifications, also the meaning of the terms "shrinkage to be stood by the purchaser," held for the jury, the terms being sufficiently ambiguous to permit explanation by parol.

**4. ATTACHMENT ⇨225, 239—WHEN ATTACHABLE INTEREST IS NOT JURISDICTIONAL POINT.**

Where defendant sellers in the purchasers' action for damages appeared, answered, and defended generally, the point that no attachment lay because defendants had no attachable interest in the potatoes involved, title to which had passed to plaintiffs, was no longer jurisdictional, and in such cases objections of law or fact to the sufficiency of the affidavit or the validity of the attachment should be raised and presented by motion or by special objection to the form or amount of judgment.

**5. SALES ⇨201(7)—WHEN TITLE TO SHIPMENT TO SELLERS' ORDER REMAINED IN SELLER.**

Where purchased goods were shipped to the sellers' own order, and rejected by the purchas-

ers because not in compliance with specifications, title was in the sellers at the time of the purchasers' attachment levied on the goods.

**6. SALES ⇨200(3)—WHEN CONSIGNEE HAS RIGHT TO INSPECT SHIPMENT.**

Even when goods are shipped under open bill of lading on a contract of sale, and the shipment is made by common carrier for delivery at a distant point, the consignee buyer has the right of reasonable inspection to discover if the shipment meets the contract.

**7. EVIDENCE ⇨544—EXPERT TESTIMONY AS TO CONDITION OF POTATOES AFTER COLD STORAGE ADMISSIBLE.**

In an action for failure to furnish the quality of seed potatoes ordered, a witness for plaintiff purchasers, who examined the potatoes on their arrival at destination, having had 16 years' experience handling potatoes, held qualified to give his opinion as to the condition of the potatoes when taken out of cold storage by defendant sellers, who had held them for future delivery.

**On Plaintiff's Appeal.**

**8. SALES ⇨442(4)—ON FAILURE TO MEET SPECIFICATIONS BUYER CAN RECOVER DEPOSIT AND DAMAGES.**

Where seed potatoes were ordered for future delivery, but failed to meet specifications, the buyers could recover from the sellers in default not only the \$500 advanced as a deposit when the contract was made, but the difference between the contract and market prices at the time and place of delivery, as provided in the executory contract.

Appeal from Superior Court, Pasquotank County; Devin, Judge.

Action by J. W. Richardson and the Produce Exchange Company against Frank C. Woodruff and another, trading as Woodruff & Sons. From judgment for plaintiffs both parties appeal. Affirmed on defendants' appeal; on plaintiffs' appeal new trial on the issue of damages ordered.

The action is to recover damages for failure to deliver 100 barrels of seed potatoes, pursuant to a contract of defendant with plaintiff J. W. Richardson, and in which company plaintiff had acquired an interest pending negotiations. The amount of \$5 per barrel had been paid by plaintiff, at making order, on "deposit," to be applied towards the purchase money, pursuant to the terms of the agreement.

There was denial of liability by defendants, and a counterclaim for balance of the purchase money alleged to be due defendants, claiming that the potatoes were in all respects up to contract specifications.

On the issue as to damages the court restricted plaintiff to recovery, at most, of the \$500 made on deposit, as stated.

As ancillary process in the cause, plaintiffs had sued out an attachment, and caused same to be levied on the potatoes that were

shipped and after plaintiffs had declined to receive same.

The jury rendered the following verdict:

"(1) Did the defendants contract to sell to the plaintiffs 100 barrels of Irish potatoes at the price of \$12.50 f. o. b. New York for shipment August the 1st, upon the terms set out in the correspondence offered in evidence?" Answer: "Yes."

"(2) Did the defendants fail to comply with the terms of said contract?" Answer: "Yes."

"(3) What damage, if any, are the plaintiffs entitled to recover therefor?" Answer: "\$500 and interest."

"(4) What amount, if any, are the defendants entitled to recover of plaintiffs by reason of their counterclaim set up in the answer?" Answer: " \* \* \* ."

There was judgment on the verdict for plaintiffs, and both sides appealed, assigning errors.

Meekins & McMullan, of Elizabeth City, for plaintiffs.

Robt. J. Woodruff and Geo. J. Spence, of Elizabeth City, for defendants.

#### Defendants' Appeal.

HOKE, J. The facts in evidence tended to show that, in answer to a letter of plaintiff, doing business in Elizabeth City, N. C., of date June 7, 1917, seeking to purchase a lot of "Peach Blow cold-storage" seed potatoes, and making inquiry as to price of 100 bags and per carload, defendants, doing business in New York City, wrote in reply from that place, on June 8th, as follows:

"We are in receipt of your letter of the 7th, asking us to give you prices on some Peach Blow cold-storage potatoes, but we have no Peach Blow, and we promptly wired you that we had 40 bags of Cobblers and 100 bags of Spaulding Rose No. 4. Spaulding Rose No. 4 is very similar to the Peach Blow. We quote you these at \$12.50 per barrel f. o. b. New York, for shipment August 1. If you order, we shall expect deposit of \$5 a barrel at once, the balance draft attached to bill of lading. Any shrink to be stood by you after they go into cold storage. Goods are sound and a No. 1 now in every matter. We await response to this matter.

"Yours very truly, S. D. Woodruff & Sons."

On June 11th plaintiff wrote from Elizabeth City, N. C., accepting offer of 100 barrels Spaulding Rose at price of letter, and on June 12th sent a telegram to plaintiff accepting offer, and on June 20th sent the \$500 as required, etc. It was admitted that, on August 2d, Woodruff & Sons shipped from New York to their own order, 86 barrels of Irish potatoes, bill of lading attached, order notify New Bern Produce Company, and same arrived at Elizabeth City on August 8th.

There was testimony on part of plaintiff to the effect that the potatoes so shipped, on arrival at Elizabeth City, were utterly unfit for the purpose for which they were ordered, and were at the time they were put in cold

storage, and at the time same were shipped out of cold storage on August 2d; "that the barrels were about one-half to two-thirds full; that they were sprouting, with sprouts one-half to three inches long; they were soft, shriveled up, and a great many of them rotten;" that plaintiff declined to accept the potatoes, and thereupon instituted the action for damages, and had issued and levied an attachment on same, as property of defendants.

Plaintiffs' testimony further tended to show that the term, "Any shrink to be stood by the purchaser after they go into cold storage" as contained in letter of defendant proposing sale, signified only "that when the barrels are filled they will stretch and cause the potatoes to shrink," and had no reference to the condition of the potatoes, except perhaps as to weight, but in other respects potatoes, if up to specifications, should have continued sound to time of arrival in Elizabeth City, and that the market value of seed potatoes at said time of arrival was from \$18 to \$25 per barrel.

The testimony of defendants tended to show that the potatoes were sound and fully up to specifications when put in cold storage, June 20, 1917; were properly cared for there, and were sound and all right when shipped; that the natural effect of taking potatoes out of cold storage, exposing same to the temperature then existent, from 2d August to 8th, would cause them to shrink and make them soft, etc.; that the term "shrinkage to be stood by you" covers both sprouting, rotting, and softening, and "was put in there to protect the defendants," etc.

[1-3] Upon this, the evidence chiefly relevant to the inquiry, it is insisted for the defendant that the facts showed an executed contract of sale at the time the potatoes were put in cold storage, on June 20th, and any damage by reason of such storage or which thereafter followed must be properly borne by the purchaser; but we do not so interpret the agreement. It is undoubtedly true, as defendant contends, that present physical delivery of the goods is not always required to an executed contract of sale, but that title will pass without it, if that be the intent of the parties as expressed in the agreement. In the last case on the subject (*Teague v. Grocery Co.*, 175 N. C. 195-198, 95 S. E. 173, 175) a proper application of the principle is given, as follows:

"On the present record there are facts in evidence tending to show that this transaction was an executed contract of sale, having reference to designated and specific pieces of property, and, if these facts should be accepted by the jury, it is well understood that present physical delivery of the property is not necessary to the transfer of the title, but that the same passes according to the intent of the parties as expressed in the contract between them; and, further, that, in the absence of specific agreement on the question, the presumption is that

the title passed at the time of the purchase and without such delivery." Citing *Richardson v. Insurance Co.*, 136 N. C. 314, 48 S. E. 733; *Jenkins v. Jarrett*, 70 N. C. 255; *Tiffany on Sales*, pp. 82-83; *Benjamin on Sales* (7th Ed.) p. 728.

But while such a position is fully recognized in sale of specified articles, we concur in the view of his honor that, by the terms of the agreement, this contract continued executory till the goods were shipped on August the 2d, and beyond that, the same having been shipped to defendant's order, and the question of whether the goods were up to specifications was properly submitted to the jury in that aspect, leaving it to them to say what was the significance of the terms, "shrinkage to be stood by the purchaser," these terms being sufficiently ambiguous to permit of explanation by parol testimony. *McMahan v. R. R.*, 170 N. C. 456, 87 S. E. 237, and authorities cited.

[4-6] Nor, on the record as now constituted, can the objection be sustained or properly considered that no attachment lies in this case for that defendant had no attachable interest in the potatoes. Defendant having appeared and answered and defended generally, this question is no longer jurisdictional in its nature, it is not raised in the pleadings, nor is it an issuable question as a matter of right. In such case, objections of law or fact to the sufficiency of the affidavit, or in general to the validity of the attachment, as ancillary to the principal demand, should be raised and presented by motion in the cause, or, in some instances, by special objection to the form or amount of the judgment. *Manufacturing Co. v. Steinmetz*, 133 N. C. 192, 45 S. E. 552. And if it were otherwise, the goods, as stated, having been shipped to defendants' own order, and rejected by plaintiffs because not in compliance with the contract specifications, title to the goods was in the defendants at the time of attachment levied. *Bank v. So. Ry.*, 153 N. C. 346, 69 S. E. 261; *Asheboro, etc. v. R. R.*, 149 N. C. 261, 62 S. E. 1091; *Development Co. v. Ry.*, 147 N. C. 503, 61 S. E. 381. Even when goods are shipped under an open bill of lading, on a contract of this character, and when the shipment is to be made by common carrier, for delivery at a distant point, the consignee has the right of reasonable inspection in order to ascertain if the shipment is in accord with the contract. Speaking to the subject in 23 R. C. L. p. 1433, title "Sales," § 256, the author pertinently says:

"It is the general rule that where goods are ordered of a specific quality, which the seller undertakes to deliver to a carrier to be forwarded to the buyer at a distant place, the right of inspection, in the absence of any specific provision in the contract, continues until the goods are received and accepted at their ultimate destination; in such a case the carrier is not the agent of the buyer to accept the goods as corresponding with the contract, although he may

be his agent to receive and transport them." Citing *Pope v. Allis*, 115 U. S. 363, 6 Sup. Ct. 69, 29 L. Ed. 393, *Eaton v. Blackburn*, 52 Or. 300, 96 Pac. 870, 97 Pac. 539, 20 L. R. A. (N. S.) 53, 132 Am. St. Rep. 705, 16 Ann. Cas. 1198, and other cases in support of the text.

In the Oregon case a very satisfactory statement of the position very generally prevailing is given, and appears in the first three headnotes of the case as reported in 16 Ann. Cas. 1198, as follows:

"Under an executory contract for the sale and delivery of goods of a specified quality, the quality is a part of the description, and the seller is bound to furnish goods actually complying with such description. If he tenders articles of inferior quality, the vendee is not bound to accept them, and unless he does so he is not liable therefor. This necessarily gives to the vendee the right of inspection, and he must be given an opportunity to make such inspection before becoming liable for the purchase price, unless the contract otherwise provides."

"A vendee of merchandise shipped from a distant point, under a contract specifying the quality of the merchandise and providing for its delivery f. o. b. at the point of shipment, but which contains no provisions as to the time or place of payment, inspection, or acceptance, is entitled to a reasonable time after the merchandise arrives at its destination in which to inspect it at that point, and to reject it if it does not comply with the contract."

"Assuming, without deciding, that where merchandise is sold under a contract providing for its delivery to a carrier f. o. b. at the point of shipment, title vests in the vendee, for some purposes, at the time when the merchandise is delivered to the carrier, such title is, nevertheless, conditional as between the vendor and vendee, the condition being that the merchandise shall be found to be of the quality called for by the contract; and such conditional vesting of title in the vendee does not prevent the latter from exercising his right of inspection when the merchandise arrives at its destination."

And C. Justice Bean, delivering the opinion, refers also with approval to *Pierson v. Crooks*, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831, and *Alden v. Hart*, 161 Mass. 576, 37 N. E. 742, in further illustration of the correct principle. In any aspect of the matter, therefore, on the facts as established by the jury, the title to the potatoes was in the defendants at the time of attachment levied.

[7] Defendant objects, further, that W. W. Newbern, a witness for plaintiffs, who examined the potatoes on arrival at Elizabeth City, and testified as to their condition, was allowed to give his opinion, based upon such examination as to their condition on 2d day of August when taken out of cold storage. This witness had previously stated, after giving description of potatoes on arrival that he had had 16 years' experience handling potatoes, handling from 5,000 to 10,000 barrels of seed potatoes each year, some from cold storage and some not, and knew from experience the effect of cold storage upon



them. On such statement, and, under numerous decisions of the court, the opinion of this witness was clearly competent. *Hux v. Reflector Co.*, 173 N. C. 97, 91 S. E. 591; *Morrisett v. Cotton Mills*, 151 N. C. 31, 65 S. E. 514; *Wilkinson v. Dunbar*, 149 N. C. 20, 62 S. E. 748. Speaking to its reception in *Wilkinson v. Dunbar*, *supra*, the court said:

"Testimony of this kind, from such a source, is coming to be more and more allowed in investigations of this character, and the courts are disposed to admit 'opinion evidence' when the witnesses have had personal observation of the facts and conditions, and from their practical training and experience are in a condition to aid the jury to a correct conclusion. While not expert testimony in the strict sense of the word, it is coming to have a recognized place in the law of evidence."

After careful consideration, we find no error as to exceptions appearing in defendant's appeal, and on such questions we are of opinion that the judgment should be affirmed. No error.

#### Plaintiff's Appeal.

[8] Plaintiff excepted, and appealed from a ruling of the court restricting the amount of damages to the \$500 advanced as a deposit. The plaintiff having, as established by the verdict, rightfully exercised his privilege of rejecting the potatoes because not in compliance with the specifications, the title to the goods remained in the defendants, plaintiffs are assuredly entitled to recover the \$500 paid on deposit, and, as now advised, we see no reason why, in addition to this amount, they should not be allowed to recover the difference between the contract and market price at the time and place of delivery, as provided in the executory contract, f. o. b. New York, August 1, 1917, this being the rule ordinarily applicable in such cases, and illustrated and applied in numerous decisions of this court on the subject. *Flour Mills v. Distributing Co.*, 171 N. C. 708, 88 S. E. 771; *Tillinghast v. Cotton Mills*, 143 N. C. 268, 55 S. E. 621; *Hosliery Co. v. Cotton Mills*, 140 N. C. 454, 53 S. E. 140; *Coal Co. v. Ice Co.*, 134 N. C. 574, 47 S. E. 116.

For the error indicated, and on plaintiff's appeal, there will be a new trial on the issue as to damages, and it is so ordered.

Partial new trial.

(178 N. C. 73)

#### WALTON v. WALTON. (No. 99.)

(Supreme Court of North Carolina. Sept. 17, 1919.)

#### 1. HUSBAND AND WIFE §292—ABANDONED WIFE CAN ATTACH LAND OF NONRESIDENT HUSBAND.

A wife, abandoned with her child by her husband and suing for allotment and payment

of a reasonable subsistence out of his estate, pursuant to Laws 1919, c. 24, was entitled to have warrant of attachment issue against his land, under Revisal 1905, § 758; he being a nonresident of the state and a fugitive from justice.

#### 2. ATTACHMENT §8—LIES FOR UNLIQUIDATED DAMAGES ON BREACH OF CONTRACT.

An attachment lies for unliquidated damages arising out of breach of contract.

#### 3. MARRIAGE §62—WIFE CAN ATTACH HUSBAND'S LAND ON JUDGMENT FOR ALIMONY AND COUNSEL FEES.

A wife's judgment against her husband for alimony and counsel fees, allowed in the husband's action to annul the marriage, which the wife successfully defended, is an implied contract, entitling the wife to attach the husband's realty as for unliquidated damages arising out of the breach of such contract.

#### 4. ATTORNEY AND CLIENT §69—ON SPECIAL APPEARANCE FOR FUGITIVE AND NONRESIDENT ATTORNEY MUST SHOW WRITTEN AUTHORITY.

In suit by a wife, pursuant to Laws 1919, c. 24, to have allotted and paid a reasonable subsistence from the estate of her husband, who is a nonresident and a fugitive from justice, the trial court should have required counsel for the husband to file written authority, as required by Revisal 1905, § 213, to appear specially for such husband to move to dismiss the wife's attachment of his land.

Appeal from Superior Court, Bertie County; Connor, Judge.

Action by Pauline Walton against Isham Walton, Jr. From an order dissolving an attachment, plaintiff appeals. Order reversed, and attachment reinstated.

E. R. Tyler, of Roxobel, and John W. Davenport, of Windsor, for appellant.

Winston & Matthews, of Windsor, for appellee.

CLARK, C. J. This action was begun under chapter 24, Laws 1919, which was enacted as a substitute for Revisal, § 1567, by the plaintiff against her husband, "to have a reasonable subsistence allotted and paid or secured to her from the estate or earnings of her husband." The summons was issued April 29, 1919, returnable May 12, 1919. The verified complaint, used as an affidavit upon which the warrant of attachment issued, avers that the defendant in July, 1917, abandoned the plaintiff and the child of the marriage in New York, and, returning to Bertie county, brought a suit for the annulment of said marriage. The plaintiff herein defended the action and obtained judgment that the marriage was in all respects legal and binding. During the pendency of said action she obtained an order from the court that the defendant should pay her

\$10 monthly from December 1, 1917, to July 1, 1918, and the further sum of \$50 as counsel fees, which he failed to do. A motion to attach him for contempt for failure to obey the order was continued, to be heard later. It is further averred in the complaint, used as an affidavit, that the defendant was indicted under Revisal, §§ 3355 and 3357, for abandonment, and gave bond, but left the state with the expressed purpose and intent of placing himself beyond the jurisdiction of the court, and since that time has been a fugitive from justice and a nonresident. The plaintiff further avers that the defendant is a strong and able-bodied man, earning \$75 per month, and since his abandonment has inherited an interest in land in Bertie county described in the petition, and asks that she be allowed \$50 per month for the support of herself and child, and an allowance for counsel fees, and that the interest of the defendant be condemned to the payment of said amounts, and for an attachment in this cause against said property. The warrant was duly issued and served upon the real estate of the defendant in said county, and the court ordered the summons to be served by publication. The defendant, appearing through counsel, specially moved to dismiss the warrant of attachment. This was allowed, and the plaintiff appealed.

[1] The question presented is the right of the plaintiff to a warrant of attachment as an ancillary remedy to her cause of action. Chapter 24, Laws 1919, prescribes that the wife, abandoned by her husband, is entitled "to have a reasonable subsistence allotted and paid or secured to her from the estate or earnings of her husband." This gives the wife, who has been abandoned, a remedy both in personam and in rem. The attachment is to secure the property, so that it may be held to satisfy the judgment when rendered, and also as a basis for publication of the summons. The wife has always had the remedy of garnisheeing the salary or wages of her husband in such cases, and she is entitled to an attachment of the property for the same reason. Otherwise the defendant, pending litigation, can sell or convey his property, or creditors may attach it for debt, or obtain prior liens by judgment.

The defendant contends that an attachment does not lie under Revisal, § 758, unless there is a breach of contract express or implied. We are of opinion that the husband is under an implied contract, for he is primarily liable for the support and maintenance of his wife. *Levi v. Marsha*, 122 N. C. 567, 29 S. E. 832. In *Archbell v. Archbell*, 158 N. C. 417, 74 S. E. 380, Ann. Cas. 1913D, 261, it was held that the "right of a married woman to support and maintenance is primarily a property right," and the Legislature has given the wife the right

to sue for such support. *Cram v. Cram*, 116 N. C. 298, 21 S. E. 197. This obligation is declared and enforced by statute, and this action, therefore, by the wife, is on the implied contract. The defendant being a nonresident of this state and a fugitive from justice, the warrant of attachment properly issued, under Revisal, § 758, for such cause.

[2] An attachment lies for unliquidated damages arising out of breach of contract. *Foushee v. Owen*, 122 N. C. 360, 29 S. E. 770; *Judd v. Mining Co.*, 120 N. C. 397, 27 S. E. 81. The only way the court could obtain jurisdiction of the defendant and his property in this case is by attachment. *Everitt v. Austin*, 169 N. C. 622, 86 S. E. 523. The property is within the jurisdiction of the court; the defendant is not. The court could not enforce the statutory provision (chapter 24, Laws 1919) "to secure her the reasonable subsistence allotted on the estate of her husband" otherwise, and the statute would be nugatory, for the defendant is beyond the jurisdiction of the court. The plaintiff is entitled to an attachment of the property and publication of notice to the nonresident defendant. *Bernhardt v. Brown*, 118 N. C. 701, 24 S. E. 627, 715, 36 L. R. A. 402; *Armstrong v. Kinsell*, 164 N. C. 127, 80 S. E. 235.

[3] Besides, the plaintiff is also seeking to enforce the judgment of \$120 for alimony and counsel fees allowed in the former action, which judgment is an implied contract. In *Pennington v. Bank*, 243 U. S. 269, 37 Sup. Ct. 282, 61 L. Ed. 713, L. R. A. 1917F, 1159, a proceeding like this, the court sustained the right of the wife to attach the deposit in bank of the nonresident husband for payment of alimony. In that case the court says:

"In ordinary garnishment proceedings the obligation enforced is a debt existing at the commencement of the action; whereas the obligation to pay alimony arises only as a result of the suit. The distinction is, in this connection, without legal significance. The power of the state to proceed against the property of an absent defendant is the same, whether the obligation sought to be enforced is an admitted indebtedness or a contested claim. It is the same, whether the claim is liquidated or is unliquidated, like the claim for damages in contract or in tort. It is likewise immaterial that the claim is, at the commencement of the suit, inchoate, to be perfected only by time or the action of the court. The only essentials to the exercise of the state's power are presence of the res within its borders, its seizure at the commencement of the proceedings, and the opportunity of the owner to be heard. Where these essentials exist, a decree for alimony against an absent defendant will be valid, under the same circumstances and to the same extent as if the judgment were on a debt; that is, it will be valid, not in personam, but as a charge to be satisfied out of the property seized."

The following cases from other states also sustain the rule that alimony may be enforced by seizing the property of the absent defendant by attachment or similar process at the commencement of the suit: *Hanscom v. Hanscom*, 6 Colo. App. 97, 39 Pac. 885; *Thurston v. Thurston*, 58 Minn. 279, 59 N. W. 1017; *Wood v. Price*, 79 N. J. Eq. 1, 81 Atl. 1093. The following sustain the proposition that "the wife's inchoate right to alimony makes her a creditor of the husband": *Livermore v. Boutelle*, 11 Gray (Mass.) 217, 71 Am. Dec. 708; *Thurston v. Thurston*, supra; *Murray v. Murray*, 115 Cal. 266, 47 Pac. 37, 37 L. R. A. 626, 56 Am. St. Rep. 97; *Hinds v. Hinds*, 80 Ala. 225.

Another case on all fours with the present is *Pendleton v. Pendleton* (Ky.) 112 S. W. 674, which holds that where a husband, having an interest in real estate, left the state and remained away for about a year, and during that time failed to contribute to the support of his wife and children, the court properly sustained an attachment against his property to enforce such support.

The wife's remedy by attachment puts every one on notice of her claim, and she does not lose any priority as against the other creditors of the husband. If the attachment was denied her, the husband could sell the property, or permit it to be exhausted by other judgments, thus making the decree for alimony nugatory when obtained. The wife and children in the meantime would be left destitute. The order dissolving the attachment must be reversed, and the attachment reinstated.

[4] The plaintiff further contends that the court committed error in refusing to grant her motion to strike out the special appearance of counsel, upon the ground that the defendant, being a fugitive from justice and absent from the state, "stands in the attitude of defiance to its power," as was said in *Cromer v. Self*, 149 N. O. 164, 62 S. E. 885, 128 Am. St. Rep. 658. We need not pass upon this question, as the plaintiff is entitled to reinstatement of her attachment; but we think the court should at least have required counsel for defendant to file written authority from the defendant, as required by Revisal, § 213.

Reversed.

(178 N. C. 77)

**BRYANT v. BRYANT.** (No. 104.)

(Supreme Court of North Carolina. Sept. 17, 1919.)

**1. EVIDENCE** ⚡130, 318(2)—**HEARSAY—RES INTER ALIOS ACTA.**

Letter between persons who were not parties to the cause, or interested therein, and who were not witnesses, was inadmissible, being hearsay and res inter alios acta.

**2. TRIAL** ⚡86—**RECEPTION OF EVIDENCE—OBJECTIONS—INCOMPETENCY OF EVIDENCE.**

The rule that the party objecting to evidence because of its incompetency for one purpose should request that court restrict the evidence to the purpose for which it is competent applies, where objection is to effect of the evidence, or when it may tend to prove two or more things, and is competent only as to one of them, but not where the evidence is wholly incompetent, as where it is hearsay.

**3. APPEAL AND ERROR** ⚡1050(1)—**REVIEW—PREJUDICIAL ERROR.**

In action to establish parol trust, where controversy was a close one, the erroneous admission in evidence of a letter tending to corroborate plaintiff's version of the transaction was prejudicial to defendant.

**4. EQUITY** ⚡88 — **LIMITATION OF ACTIONS** ⚡182(2)—**NECESSITY OF PLEADING.**

Defendant, to avail himself of laches, or statute of limitations, or any other matter in defense, should plead such defense, and tender the proper issues.

Appeal from Superior Court, Bertie County; Gulon, Judge.

Suit by C. F. Bryant against A. C. Bryant. Judgment for plaintiff, and defendant appeals. New trial.

Plaintiff, C. F. Bryant, brought suit against his brother, A. C. Bryant, to establish a parol trust. He alleged that the administrator of the estate of his father filed a petition to sell the land in controversy to make assets; that a sale was ordered, and the land was advertised for sale during the year 1887; that the plaintiff, C. F. Bryant, and the defendant, A. C. Bryant, desiring to own said land together, agreed that A. C. Bryant should attend the public sale at the courthouse door in Windsor, N. C., and bid off and purchase said land for both C. F. Bryant and himself, pay for the same, and take title in his own name, and hold the same in trust for both C. F. Bryant and himself, and that, after payment by plaintiff to A. C. Bryant of his half of the purchase price, the latter would convey in fee simple to C. F. Bryant his share of the land; that A. C. Bryant attended the sale and purchased the land, in furtherance of this agreement, and took title therefor in trust for himself and C. F. Bryant by the deed to him, which is recorded, and now holds said title in trust as above set out.

Defendant denied that he purchased the land for the benefit of himself and his brother, or that his brother had any interest in the land, and pleaded further that, if the allegations of the complaint are true, the plaintiff had failed to diligently press his claim, and that it was barred by laches and lapse of time. Defendant also contended that plaintiff had abandoned such equity as he

may have had by consenting to a sale of the land by the defendant to Dr. Jenkins, who occupied it for five years and then reconveyed it to the defendant. Defendant's motion for judgment of nonsuit was overruled at the close of plaintiff's evidence, and again at the conclusion of all the evidence.

Defendant contended that the evidence is not sufficient to establish a parol trust, and further that the uncontradicted evidence shows that the equity was abandoned, if any ever existed. Plaintiff testified that, after he moved on the land in 1896, he consented to a sale of the part which he now claims, and that the defendant thereupon sold it to Dr. Jenkins. He further testified that Dr. Jenkins went into possession of the land and remained there five years. The defendant testified that Dr. Jenkins bought the land claimed by plaintiff for \$300, and that after remaining in possession five years Dr. Jenkins gave it up. Dr. Jenkins corroborated this testimony. Defendant further contended that upon plaintiff's own evidence this action is barred by lapse of time. The sale was made in 1897; suit was brought 30 years later, in 1917.

Plaintiff offered in evidence an unrecorded deed from Millie Futrell to plaintiff, dated April 2, 1888, purporting to convey to plaintiff her dower interest in the land in controversy. Millie Futrell was the widow of Samuel Bryant, original owner of the land. The case on appeal contains the statement that this deed was not recorded. Plaintiff testified on cross-examination, after the deed had been admitted in evidence: "I took this deed in 1888, and have never had it recorded." Defendant, in due time, objected to the introduction of this deed, and assigned the admission of it as error. Plaintiff testified that, after the purchase of the land at the courthouse door, defendant furnished the money to buy the dower interest of Millie Futrell, widow of Samuel Bryant. Defendant denied this. Plaintiff was permitted to introduce a letter from Mrs. Futrell (which was written since suit was brought), in which she states that A. C. Bryant paid her for the land. Mrs. Futrell was not present at the trial. The letter was directed to the son of plaintiff, and defendant contends that it is simply an unsworn statement by a third party, who was not then present, and that it was harmful. The facts about the letter are as follows: It purported to be a letter from Mrs. Millie Futrell, widow of Samuel Bryant, deceased, to M. L. Bryant, son of C. F. Bryant. This letter was a reply to a letter written to her by Bryant, in which he inquires the reason why she conveyed her dower interest in these lands to A. C. Bryant. She replied, in answer to this question, that some 25 years ago she thought she had conveyed her dower right to A. C. Bryant, the defendant, and that about 2

years ago A. C. Bryant saw her, and said that he had no deed for it, and wanted a deed, and that in consideration of A. C. Bryant paying her the sum of \$10 she then made A. C. Bryant a deed for the dower right; further that somebody back in 1888 had paid her \$150, and that she thought it was A. C. Bryant, and for this reason she made him a deed for the consideration of \$10.

Another exception is to the admission of the final account of the administrator of Samuel Bryant. The defendant had testified that, according to his recollection, the heirs of Samuel Bryant received in all about \$20. To contradict him plaintiff introduced the final account, showing that each heir received about \$20.

The jury returned the following verdict:

"(1) Did the defendant, A. C. Bryant, by agreement with C. F. Bryant, made before the sale, purchase the Samuel Bryant land at the administrator's sale for himself and C. F. Bryant, as alleged in the complaint?

"Answer: Yes.

"(2) Did the defendant, under such agreement and purchase, agree with plaintiff that the land described in the complaint should be allotted to the plaintiff, and a deed made therefor, when the balance of the debt on the whole tract was paid by the plaintiff?

"Answer: No, according to first issue; plaintiff getting equal share with defendant.

"(3) How much of said debt now remains unpaid?

"Answer: \$225, and interest now due."

Judgment for the plaintiff, and defendant appealed.

E. R. Tyler, of Roxobel, Gillam & Davenport, of Windsor, Murray Allen, of Raleigh, and G. E. Midyette, of Jackson, for appellant.

Winston & Matthews, of Windsor, for appellee.

WALKER, J. (after stating the facts as above). [1] We need consider only one question, and that is the competency of the letter addressed by Mrs. Futrell to the plaintiff's son. This, in our opinion, was hearsay, and therefore should not have been admitted. It was also prejudicial. The letter was not competent, because Mrs. Futrell was not sworn as a witness, and was not even present at the trial. It was written to the plaintiff's son, a third party, and was therefore a transaction between persons who were not parties to the cause or interested therein, and who were not witnesses. Plaintiff says it was corroborative of him, as he had stated that he had received letters from her, or that this letter had been so received. But this fact that a letter, or letters, had been received from her proved nothing, and therefore needed no corroboration.

[2] It is further contended that, because it was at least corroborative, the defendant should have placed his objection on that

ground alone. But that rule applies when the objection is to the effect of the evidence, or when it may tend to prove two or more things, and is competent only as to one of them, but not where the evidence is wholly incompetent, as here; it being hearsay. The objection is that in that form it is competent for no purpose. It is saturated with hearsay, and was res inter alios acta. It should have been excluded.

[3] But plaintiff contends that it was not prejudicial, as it proved nothing that could affect the defendant injuriously in the trial of the case. We can well see how, in one phase of the testimony, it may have been used with fatal effect against the defendant. The controversy was a close one, and it required little to turn the scales in favor of either side. This letter may have been the deciding factor. The plaintiff contended that it was competent, when it was introduced, because it tended to corroborate his version of the facts. If this be so, it was surely hurtful to the defendant. But we do not think that we could better demonstrate its harmfulness than by quoting from the plaintiff's own brief what it so forcefully said about the matter, which we now do:

"The deed [referred to in the letter] is not offered as a link in a chain of title. It is offered to prove the contention of the plaintiff, and in corroboration of it. The defendant denied the parol agreement, and denied that there was such a deed in furtherance of it. The introduction of the paper writing, not as title, but in corroboration, follows as a matter of course. It is a very strong circumstance in support of plaintiff. Defendant had denied the parol agreement in toto. He also denied that there was such a deed. The presentation of the deed put that matter at rest. The plaintiff does not claim that he owns the land under that deed; he might safely do so, but that was not his agreement. The deed is a strong circumstance tending to show that his contention is the true contention."

If this deed was a strong piece of evidence for the plaintiff, he tried to strengthen it by showing that, while the deed recites that he paid the purchase money, it was really paid by the defendant, and, as plaintiff had an equitable interest in the land, and the parties were dealing with each other on that basis, the deed was made to him, and that there was no other reason why it should have been so made, if defendant owned the entire interest, and had paid the purchase money. It is evident from the record that the letter explaining the transaction in re-

gard to the deed had great weight in deciding the issue against the defendant. Besides, the plaintiff's contention was, and he so testified, that the dower of Mrs. Futrell was to be bought at the price of \$150, and a deed therefor taken to him; that defendant had negotiated the trade and advanced the purchase money, which was to be a part of the price to be paid by them jointly for the land. In this view of the plaintiff's claim, and testimony, it was incompetent to show any facts, by hearsay, which tended to support the plaintiff's theory. The court admitted the testimony for this purpose, and we must assume, under the circumstances, that it was permitted to be used in that way. It was, at least, given such a trend in the court below as to be calculated to affect the result unfavorably to the defendant, and therefore may have seriously prejudiced him. *Patton v. Porter*, 48 N. C. 539.

The deed, without the letter to help give it point and relevancy, would have been of little or no value. The two were so allied to each other that the object of introducing the deed, and its bearing upon the case, would not appear until the letter was considered. They could not well be severed or disassociated as pieces of evidence, because the one explained the other. We do not see how such evidence could have been otherwise than prejudicial. It may be that it was slight, and that the jury should attach little importance to it; but we cannot safely say, as contended by the plaintiff, that it was harmless. As said by Pearson, C. J., in *McLenan v. Chisholm*, 64 N. C. 323, at page 324:

"There is no telling how far the defendant's case was affected by this error. Where there is error, its immateriality must clearly appear on the face of the record, in order to warrant this court in treating it as surplusage."

See *Johnson v. Railroad Co.*, 140 N. C. 581, at page 587, 53 S. E. 362.

[4] The other exceptions need not be considered. If defendant wished to set up laches, or the statute of limitations, or any other matter in defense, he should so plead, and tender the proper issues. We do not mean to say that laches or the statute will avail him, for that will depend upon the evidence.

We feel constrained by the ruling of the court in respect to the incompetent evidence to grant another trial to the defendant.

New trial.

(178 N. C. 70)

ROGERS et ux. v. PILAND. (No. 98.)

(Supreme Court of North Carolina. Sept. 17, 1919.)

**1. MORTGAGES ⇨338—MORTGAGOR CAN SUE TO RESTRAIN FORECLOSURE AFTER SALE TO THIRD PERSON.**

Mortgagors who have conveyed the mortgaged premises to a third person by deed containing full covenants of all usual kinds, seisin, right to convey, general warranty, and against incumbrances, can maintain suit, joining their grantee, against the mortgagee to restrain foreclosure.

**2. MORTGAGES ⇨301 — FORMAL TENDER OF INTEREST DUE WAIVED.**

Where a mortgagee refused in advance the mortgagors' offer to pay interest due, and demanded payment of the whole indebtedness, which was not then due, he waived any formal tender of the amount of interest due, particularly where he had misrepresented the amount of interest at what the mortgagors later offered to pay.

**3. TENDER ⇨24—AFTER TENDER REFUSED DEBTOR MUST DEPOSIT IN COURT.**

A debtor must be able, ready, and willing to pay when the money is due, and, having tendered payment, must deposit the money in court to keep his tender good.

**4. MORTGAGES ⇨301—MORTGAGOR ON REFUSAL OF TENDER LIMITED TO OBJECTIONS THEN MADE.**

Where a mortgagee, when the mortgagors offered to pay more than was actually due as accrued interest, declined to receive it, not on the ground the amount was not sufficient, he himself having represented it was, nor on the ground check was tendered, but because he had changed his mind, and then demanded payment of the full debt not yet due, he cannot subsequently contend that the tender of interest at the time was insufficient.

Appeal from Superior Court, Hertford County; Connor, Judge.

Action for injunction by W. W. Rogers and wife against J. J. Piland. From an order granting injunction, defendant appeals. Affirmed.

The action was brought by the plaintiffs to enjoin the sale of land, under a power contained in a mortgage to secure the sum of \$2,000, with interest, which was payable in installments of \$500 on January 1, 1919, and of each succeeding year thereafter until January 1, 1922, with interest due annually; and it was provided that in default of the payment of principal or interest when due, or any part thereof, the defendant (mortgagee) should have the power to sell for foreclosure.

Defendant, before the maturity thereof, assigned the first note to one Shaw, and this was paid by the plaintiffs, who notified the defendant thereof, and offered to pay the in-

terest accrued on the other notes. Defendant notified plaintiffs that the amount of interest due was \$111, and agreed to wait a few days for its payment. Plaintiffs offered to pay the accrued interest, or \$111, but a dispute arose as to the correct amount of the interest due on the notes not yet due. On the day of this transaction (January 13, 1919) there was due on the notes secured by the mortgage only \$90 and interest thereon from October 19, 1918. At the time plaintiffs were ready, able, and willing to pay the \$111, but the defendant refused to receive it, although he had represented this to be the correct amount and had agreed to accept payment of it. Plaintiffs tendered a check for \$120, but this was declined. He demanded instead that plaintiffs pay the full amount of the principal and interest on all the notes. This was refused, and he thereupon advertised the land for sale, and the restraining order was issued. Plaintiffs tendered the full amount due as interest, and have brought \$135 into court, where it is now deposited to await the result of this action.

Judge Connor found the facts substantially as above set forth, and granted an injunction to the hearing. Defendant appealed.

Roswell C. Bridger, of Winton, for appellant.

W. R. Johnson, of Ashoskie, for appellees.

WALKER, J. (after stating the facts as above). There are only two questions raised and necessary to be considered:

[1] First. Defendant contends that plaintiffs have sold and conveyed their equity of redemption to O. L. Joyner, and therefore cannot maintain this action. This position cannot be sustained. The deed to Joyner contains full covenants of all the usual kinds—seisin, right to convey, warranty, and against incumbrances. Joyner is a party to this suit. It is stated in the record that "Joyner has not paid the full purchase price in cash, the terms for the payment of the balance on same having been made by plaintiffs upon the basis of their notes to defendant."

The plaintiffs have a vital interest in this case, although they may have conveyed their equity of redemption to Joyner. They are still mortgagors, and liable on the mortgage debt, and have the right to see that the land brings a fair and full price, and, if it is sold under the mortgage, Joyner will lose his land, and the plaintiffs will become liable on the covenant against incumbrances in his deed. It seems hardly to need authority for the position that plaintiffs, under those facts, can maintain this action. This question was presented in *Dedrick v. Den Bleyker*, 85 Mich. 475, 482, 48 N. W. 633, where the contention was that the mortgagor who had sold and conveyed his equity, with full covenants, to a

third party (Dedrick), was not an interested party, and could not maintain an action to restrain a foreclosure by the mortgagee; but it was held that not only could this be done, but that the mortgagor and his grantee had a common interest to get rid of the mortgage, and could join as plaintiffs in the suit, if desired, as the grantee of the mortgagor would have a remedy upon the covenants in his deed, if he was compelled to pay the mortgage debt, or if he lost the land by the foreclosure, "they being all full covenant deeds of warranty," as in this case. It is said in 27 Cyc. 1532, that "a suit to restrain the foreclosure of a mortgage may be maintained not only by the mortgagor, but also by any owner of the equity of redemption deriving title from or under him." *Hubbard v. Jasinski*, 46 Ill. 160, also is directly in point.

[2, 3] Second. As to the tender of the interest due at the time it was made. The defendant is in no position, under the facts found, to question its sufficiency. He had deceived the plaintiffs as to its amount, and when the latter offered to pay what was due, even the \$111, he declined to accept the money, and peremptorily demanded the full payment of principal and interest of the mortgage debt. He was in the wrong throughout the transaction, and it would be grossly inequitable if he were permitted to take advantage of it. The mortgage was given strictly as a security for the debt due to him, and not as means of enabling him to acquire title to the land by a foreclosure, which will be unnecessary and in violation of the plaintiffs' right, under the mortgage. The time for the maturity of the whole debt had not arrived by the terms of the mortgage, and the entire debt will not mature until 1922, if the mortgagor keeps his contract by paying the interest promptly, and the installments of the principal as they are due. The defendant's refusal, in advance, to accept the plaintiffs' offer to pay, and his demand of the whole indebtedness, which was not then due, was a waiver of any formal tender of the amount, and his conduct in the matter was clearly one. *Mobley v. Fossett*, 20 N. C. 93; *Abrams v. Suttles*, 44 N. C. 99; *Blacklock v. Clark*, 133 N. C. 306, 45 S. E. 642; *Bateman v. Hopkins*, 157 N. C. 470, 73 S. E. 133, Ann. Cas. 1913C, 642; *Gallimore v. Grubb*, 156 N. C. 575, 72 S. E. 628; *Gaylord v. McCoy*, 161 N. C. 685, 77 S. E. 959. The debtor must be able, ready, and willing to pay at the time the money is due, and this was the case here, and he has deposited the money in court to keep his tender good. *Tuthill v. Morris*, 81 N. Y. 94.

[4] It also appears that the defendant, when the offer to pay the accrued interest was made, declined to receive it, not upon the ground that the amount was not sufficient, for he had represented that it was, or that

a check was tendered, but for the reason that he had changed his mind, and then demanded payment of the whole debt. This being so, he cannot now base his contention upon the ground that the tender was insufficient. He is confined to the reason he gave at the time of the tender. It is said in 38 Cyc. 141:

"An objection to the amount of a tender must be made at the time the tender is made, otherwise it is waived; and where the sum tendered is less than the sum due, and the tender is refused by the creditor on some ground other than that the amount is too small, as where it is claimed that the contract is forfeited, the tenderer waives the objection to the insufficiency of the amount."

See, also, *Ford v. Stroud*, 150 N. C. 362, 64 S. E. 1, where more was demanded of the debtor than the creditor had a right to exact, and it was held to be a waiver of the validity of the tender. But here the plaintiffs tendered more than was due.

We adopt the judge's findings of fact, and upon them there is no basis for defendant's contentions.

Affirmed.

(177 N. C. 461)

WALDO et al. v. WILSON. (No. 587.)

(Supreme Court of North Carolina. May 27, 1919.)

1. COSTS  $\S$  256(1)—APPELLANTS CAN RECOVER AS COSTS ONLY PRICE OF NECESSARY PRINTING.

The Supreme Court having adjudged that unnecessary matter in the transcript was sent up at the instance of plaintiff appellants, who were not allowed to recover the cost of printing such matter, an order taxing defendant with the entire cost of copying the transcript was improper under rule 22 of the Supreme Court (174 N. C. 833, 81 S. E. x); plaintiffs being entitled to recover for cost of copying only so much of the transcript as they were permitted to recover for the printing of.

2. APPEAL AND ERROR  $\S$  119—ORDER TAXING COSTS OF COPYING OF TRANSCRIPT APPEALABLE.

An order taxing defendant with the entire cost of copying the transcript on plaintiffs' appeal, it having been adjudged that unnecessary matter was sent up at the instance of plaintiffs, who were not allowed to recover the cost of printing it, was appealable.

3. COSTS  $\S$  264—PREPARATION AND TRANSMISSION OF RECORD ARE COSTS OF TRIAL COURT.

The cost of preparing and transmitting the record on appeal to the Supreme Court are not costs of such court, but of the court below, and orders and judgments for payment should be made in the lower court.

**4. COSTS ⇐3—NO COSTS RECOVERABLE AT COMMON LAW.**

At common law neither party recovered costs; right to such recovery depending on statute.

**5. COSTS ⇐267—PAYABLE AS ACTION PROCEEDS SUBJECT TO RECOVERY AT FINAL JUDGMENT.**

It is in the contemplation of law that each party should pay its own costs as the action proceeds, subject to the right of recovery of costs in the final judgment.

**6. COSTS ⇐146—COURTS WILL PREVENT IMPOSITION OF UNNECESSARY COSTS.**

It is the duty of the court to prevent the imposition by either party of unnecessary costs on the other.

Appeal from Superior Court, Graham County; Ferguson, Judge.

Action by Frank Waldo and others against W. L. Wilson. From judgment for defendant, plaintiffs appealed. On rehearing new trial was ordered, and from an order taxing defendant with the entire cost of copying the transcript on plaintiffs' appeal to Supreme Court (173 N. C. 690, 92 S. E. 692; 174 N. C. 767, 94 S. E. 442, 715), defendant appeals. Order reversed.

Martin, Rollins & Wright, of Asheville, for appellant.

James H. Merrimon, of Asheville, for appellees.

CLARK, C. J. There was a motion in this cause (Waldo v. Wilson, 174 N. C. 767, 94 S. E. 715) to retax the costs by allowing the plaintiffs to recover the entire costs of printing the record (238 pages), notwithstanding the general rule confined the allowance of costs for printing to 60 pages of printed matter. Rule 31 (174 N. C. 836, 95 S. E. vii). This was denied upon the ground, as therein stated, that—

"A large part of the record as printed related to a matter upon which the appellant failed to establish his contentions, although he secured a new trial."

In the superior court, when the case went back, the plaintiffs filed a motion and obtained an order to tax against the defendant the entire cost of copying the transcript on appeal to the Supreme Court which consisted of 238 printed pages, although this court had adjudged that much of this matter was immaterial, and adjudged that the defendant was not liable for the cost of printing the transcript in excess of 60 pages. Rule 22 of this court (174 N. C. 833, 81 S. E. x) prescribes:

"The cost of copying and printing unnecessary and irrelevant testimony, or other matter not needed to explain the exceptions or errors assigned, and not constituting a part of the record

proper shall in all cases be charged to the appellant, unless it appears that they were sent up at the instance of the appellee in which case the costs shall be taxed against him."

This rule applies to "copying" as well as "printing" the unnecessary matter, and that "in all cases it shall be charged to the appellant unless it appears that the unnecessary matter was sent up at the instance of the appellee."

[1] This court having adjudged in this case that the unnecessary matter was sent up at the instance of the appellant, in the former appeal the plaintiffs, they were not allowed to recover the costs of printing the unnecessary matter. If it was unnecessary to print, it was unnecessary to have it copied in the record. The plaintiffs are entitled to recover the costs for copying so much of the transcript of the record as they were permitted to recover for the printing thereof and no more.

[2] The order was appealable. It is said in *Van Dyke v. Ins. Co.*, 174 N. C. 81, 93 S. E. 446, quoting from *State v. Horne*, 119 N. C. 853, 26 S. E. 36:

"While this court will not entertain an appeal to determine who shall pay the costs of an action in which the subject-matter has been disposed of, yet where the question is whether a particular item is properly chargeable as costs, or, taking the case below as rightly decided, whether the costs are properly adjudged, the case is reviewable on appeal."

[3] It is true that the costs of preparing and transmitting the record on appeal to the Supreme Court are not costs of this court, but of the court below, and that orders and judgments for the payment thereof should be made in the lower court. *Roberts v. Lewald*, 108 N. C. 405, 12 S. E. 1028; *Dobson v. Railroad*, 133 N. C. 624, 45 S. E. 958. Still the order in the superior court is appealable. *Van Dyke v. Ins. Co.*, *supra*.

[4] At common law neither party to a civil action recovered costs, and each side paid its own witnesses (*Costin v. Baxter*, 29 N. C. 111), and in criminal actions the sovereign neither paid nor recovered costs. Costs are entirely creatures of legislation, and an appeal lies from a judgment involving merely the taxation of a bill of costs. *Blount v. Simmons*, 120 N. C. 23, 26 S. E. 649; *Guliford v. Board of Commissioners*, 120 N. C. 23, 27 S. E. 94; *Luther v. Railroad*, 154 N. C. 104, 69 S. E. 762.

[5] It is in contemplation of law that each party should pay its own costs, as the action proceeds subject to the right of recovery of costs in the final judgment. *Smith v. Railroad*, 148 N. C. 335, 62 S. E. 416.

[6] The object of the prosecution bond is



not to secure the officers against the plaintiff for their costs, but to secure the defendant in the recovery of costs wrongfully paid out by him. It is the duty of the courts to prevent the imposition by either party of unnecessary costs upon the other. It is for this reason that rule 22 prohibits the costs of copying and printing unnecessary and irrelevant testimony to be taxed against the appellee in any case, unless the appellee was responsible for inserting the unnecessary matter in the record. It is for this reason also that rule 19 (81 S. E. ix) designates what matter is unnecessary to be sent up, and that rule 21 (81 S. E. x) prescribes that the evidence on appeal shall be set out in narrative form.

The order below is reversed.

(178 N. C. 84)

**JERNIGAN v. JERNIGAN. (No. 118.)**

(Supreme Court of North Carolina. Sept. 17, 1919.)

**1. JUDGMENT  $\S$ 153(1)—IRREGULAR DEFAULT JUDGMENT MAY BE SET ASIDE AT ANY TIME.**

Where judgment by default final is irregular, court may set it aside at any time.

**2. JUDGMENT  $\S$ 153(2)—STATUTE AS TO DOCKETING NOT APPLICABLE TO MOTIONS TO SET ASIDE FOR NEGLIGENCE.**

Revisal 1905, § 573, providing that judgments docketed during term at which they were rendered, and within 10 days of rendition, shall be deemed to have been rendered and docketed on the first day of the term, does not apply to motions to set aside judgments for excusable neglect.

**3. JUDGMENT  $\S$ 441—INDEPENDENT ACTION NECESSARY TO SET ASIDE FOR FRAUD.**

Where judgment was procured by fraud, the remedy is by independent action.

**4. JUDGMENT  $\S$ 153(3)—NOTICE OF RENDITION DOES NOT RELATE BACK TO FIRST DAY OF TERM.**

Parties to an action are fixed with notice of all judgments and orders taken in a cause during the term of the court, but they cannot have notice until judgment is rendered, and, when rendered, notice does not relate back to first day of term.

**5. JUDGMENT  $\S$ 153(3) — MOTION TO SET ASIDE NECESSARY WITHIN ONE YEAR FROM RENDITION.**

Under Revisal 1905, § 513, requiring that motion to set aside judgment be made within one year "after notice thereof," defendant, who has been served with summons, must make motion within year after rendition of judgment, he being charged with notice from such date, and not from first day of term, notwithstanding section 573, providing that judgment shall be deemed rendered on first day of term.

**6. JUDGMENT  $\S$ 153(3)—PARTY TO PENDING ACTION WITHOUT NOTICE CAN MOVE TO VACATE IN ONE YEAR FROM NOTICE.**

Under Revisal 1905, § 513, requiring that motion to set aside judgment be made within one year "after notice thereof," defendant who has been made a party to a pending action without notice can make motion within one year from actual notice.

Appeal from Superior Court, Harnett County; Kerr, Judge.

Action by Rebecca Jernigan against Blackman Jernigan. From order refusing to set aside judgment by default final, defendant appeals. Reversed.

E. F. Young, of Dunn, and R. W. Winston, of Raleigh, for appellee.

C. L. Guy and Clifford & Townsend, all of Dunn, for appellant.

CLARK, C. J. [1] This was a proceeding to set aside a judgment by default final on the ground of irregularity and excusable neglect. The action was to declare certain deeds void, and the plaintiff the owner of the lands in fee simple. The complaint was duly verified and filed July 3, 1916, and judgment by default final entered at September term; no answer having been filed. The summons was issued returnable to the May term, and was served on May 11, 1916. The judgment by default final was regular. Revisal, § 556 (4); *Junge v. MacKnight*, 137 N. C. 285, 49 S. E. 474; *Steiges v. Simmons*, 170 N. C. 44, 86 S. E. 801; *Lee v. McCracken*, 170 N. C. 576, 87 S. E. 497. Had it been irregular, the court could have set it aside at any time. *Becton v. Dunn*, 137 N. C. 559, 50 S. E. 289. The court declined also to set it aside on the ground of excusable neglect, because it held that the motion was not made within one year, as provided by Revisal, § 513.

Section 513 provides:

"The judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect, and may supply an omission in any proceeding."

The judgment here sought to be set aside was rendered on September 17, 1916, at the term of Harnett court, which began on September 3d. The motion to set aside for excusable neglect was entered on September 4, 1917, at the term which began September 2d. The court was of opinion that as judgments related back to the first day of the term that the motion entered September 4, 1917, at September term, which began September 2d, was not within the one year after the entry of a judgment rendered at Sep-

tember term, 1916, which term began September 3d.

The defendant's counsel with some pertinency suggests that if the judgment entered September 16, 1916, related back to September 3d, the first day of that term, then the motion which was entered on September 4, 1917, should relate back also to September 2d, the first day of that term, and that the fiction that all proceedings should date back to the first day of the term should apply to the motion to set aside the judgment equally as to the judgment itself.

[2] But we do not think that Revisal, § 573, which provides that "all judgments rendered in any county by the superior court thereof, during a term of the court, and docketed during the same term, or within ten days thereafter, shall be held and deemed to have been rendered and docketed on the first day of said term" applies to motions to set aside judgments for excusable neglect.

Revisal, § 573, originated in rule 18 of the Supreme Court (63 N. C. 667) in 1869, to prevent an unseemly contest as to priority of judgments and of docketing where the judgments were all obtained at the same term. *McKinney v. Street*, 165 N. C. 515, 81 S. E. 757; *Fowle v. McLean*, 168 N. C. 540, 84 S. E. 852; *Hardware Co. v. Holt*, 173 N. C. 311, 92 S. E. 8. To prevent such scramble where the defendants might be in falling circumstances and the priority of judgment by one day, or even by hours or minutes, though taken at the same term, might give priority of lien, this rule was adopted and was afterwards made statutory. That section is entitled: "Judgment" "Docketed and Indexed—All of Same Term as of First Day."

[3] Originally, when a judgment was taken it could not be set aside on motion after the adjournment of the term for excusable neglect or mistake when the judgment was taken in regular course. *Moore v. Hinnant*, 90 N. C. 164; 23 Cyc. 902. The remedy on allegation of fraud in taking the judgment is still by independent action. *Carter v. Rountree*, 109 N. C. 29, 13 S. E. 716, and citations thereto in *Anno. Ed.* To prevent such defect of justice Rev. § 513, was enacted. This provides that such motion to "relieve a party from judgment, order, verdict, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect" may be made "at any time within one year after notice thereof." This statute does not deal with the priority of lien, as contemplated by Revisal, § 573, acquired by the docketing of a judgment.

[4] Parties to an action are fixed with notice of all judgments and orders taken in a cause during the term of the court (*University v. Lassiter*, 83 N. C. 38, often cited), but they cannot have notice of the judgment until it is rendered, and there is no provision of the

law, nor any legal fiction, which provides that notice of the judgment taken shall relate back to the first day of the term.

[5, 6] Revisal, § 513, provides that the motion to set aside this judgment can be made at any time within one year "after notice thereof." The defendant was fixed with notice of this judgment, having been served with summons, from the day it was taken, i. e., on September 16th. In all other cases (as for instance when he has been made a party to a pending action without notice) he has one year from actual notice. *McLean v. McLean*, 84 N. C. 370. The motion to set aside was entered on September 4, 1917, and being within one year of the entry of judgment was within the time allowed by the statute.

The merits of the motion have not been passed upon, and are not before us. The order refusing the motion must be set aside that the merits of the motion may be passed upon.

Reversed.

(178 N. C. 102)

HEARNE v. PERRY et al. (No. 117.)

(Supreme Court of North Carolina. Sept. 24, 1919.)

LOGS AND LOGGING §3(11) — PLAINTIFF CANNOT RECOVER ON CONTRACT ON FAILURE TO PERFORM HIMSELF.

Where a contract giving plaintiff the right to log defendant's land provided that plaintiff should begin operations within a reasonable time, and move his mill to the land as soon as he finished his existing location, but plaintiff failed to do so, moving his mill to another's land, and did not offer to cut defendant's timber for 13 months, he cannot maintain action against defendant to recover damages for refusal to allow cutting.

Appeal from Superior Court, Chatham County; Kerr, Judge.

Action by W. H. Hearne against M. E. Perry and another. From a judgment of nonsuit, plaintiff appeals. Affirmed.

This is an action to recover damages for breach of contract in refusing to allow the plaintiff to cut and remove certain timber. The contract was executed on the 18th of April, 1914. It conveyed certain timber for \$850, of which \$50 was to be paid in cash, which was done, and the balance at a certain sum per 1,000 feet as manufactured—

"with full right and privilege for and during the period of 2 years and 6 months from the date of commencing sawing the timber on the above-described land, provided the party of the second part begins the same within a reasonable time and moves his mill to said land as soon as he finishes his present location, and it is further agreed by the parties of the first part that

the party of the second part will have a right to place his mill on said lands for the manufacture of said timber at one suitable place."

It was further provided in the contract:

"It is the intention of this deed to convey the timber as above described on the condition that the party of the second part will comply with all the agreements and make the payments as above set forth, and in the event of said faithful performance this conveyance is to be in full force; otherwise, to be null and void."

The plaintiff admitted that at the time the contract was made his mill was on his own land cutting timber, and that he finished the work on this land within 3 or 4 weeks after the contract was made; that he then moved the mill to what is known as the Womble land, which according to his evidence was three-fourths of a mile from the land of the defendant, and according to the evidence of the defendant a mile and a half distant; that he has never moved or attempted to move his mill to the land of the defendant, and that he did not go to the land of the defendant, or offer to cut the timber under the contract, until October, 1915, 18 months after the execution of the contract.

At the conclusion of the evidence his honor entered judgment of nonsuit, holding that the plaintiff was not entitled to recover, because of his failure to perform the conditions of the contract, and the plaintiff excepted and appealed.

A. C. Ray, of Pittsboro, and Siler & Barber, of Siler City, for appellant.

Long & Bell, of Pittsboro, for appellees.

ALLEN, J. The contract gives to the plaintiff 2 years and 6 months within which to cut and remove the timber, the time to commence "from the date of commencing sawing the timber," and it therefore became very material to have some stipulation which would prevent the plaintiff from postponing indefinitely the time when he would remove his mill to the land of the defendant and begin his work, and it was for this reason that it was made a provision of the contract that the plaintiff should begin "the same within a reasonable time and move his mill to said land as soon as he finished his present location."

This is the contract of the parties, and the court cannot do otherwise than enforce it, and, the plaintiff having admitted that he has not performed his part of the contract, that he has never attempted to move his mill to the land of the defendant, that he did not attempt to go from the place where he was then working to begin work under the contract, and that he made no move to cut the timber of the defendant until 18 months after the contract was executed, he cannot maintain his action. The controlling princi-

ple is stated in *Supply Co. v. Roofing Co.*, 160 N. C. 445, 76 S. E. 499, as follows:

"In *Ducker v. Cochran*, 92 N. C. 597-600, Chief Justice Smith, delivering the opinion, said: 'The proposition is too plain to need any reference to authority in its support that a party to a contract cannot maintain an action against another for its breach, without averring and proving performance of his own antecedent obligations, or some legal excuse for nonperformance, or, if the stipulations are concurrent, his readiness and ability to perform.' This statement has been quoted with approval in *Corinthian Lodge v. Smith*, 147 N. C. 246 [61 S. E. 49], and *Tussey v. Owen*, 139 N. C. 457-461 [52 S. E. 128], and the principle is one very generally recognized in our decisions. *Wildes v. Nelson*, 154 N. C. 580 [70 S. E. 940]; *Hughes v. Knott*, 140 N. C. 550 [53 S. E. 361]."

There is no error in the judgment of nonsuit.

Affirmed.

(178 N. C. 104)

BARHAM et al. v. HOLLAND et al.  
(No. 119.)

(Supreme Court of North Carolina. Sept. 24, 1919.)

1. DESCENT AND DISTRIBUTION ¶19 — ON PARTITION OF ESTATE HEIRS NEED NOT PROVE INTESTACY.

In proceedings by heirs for partition of ancestor's land, heirs are not required to prove that ancestor died intestate; the presumption being that ancestor did not leave a will.

2. WILLS ¶449 — IT IS PRESUMED TESTATOR INTENDED DISPOSITION OF ENTIRE ESTATE.

It is presumed in the first instance that testator intended to make disposition of all of his property.

Appeal from Superior Court, Harnett County; Kerr, Judge.

Proceeding by Hettie Barham and others against Matt Holland and others. Judgment for defendants and plaintiffs except and appeal. New trial.

J. R. Baggett, of Lillington, and Clifford & Townsend, of Dunn, for appellants.

E. F. Young, of Dunn, and F. T. Dupree, of Angier, for appellees.

HOKE, J. There were facts in evidence tending to show that the property in controversy belonged to one Lem Holland; that in 1882 he left the state, going to South Carolina, and that no message had been received from him by any of his family or others "since about a year or two after he left the state, and the reputation in the family was that he was dead," and plaintiffs and defendants are his heirs at law, brothers and sisters of the deceased or their children; that just before leaving Lem Holland, the

owner, placed the property in possession of his brother, Jim Holland, to hold the same for the owner, and not long after Jim died, leaving his widow, Lucy, and several of their children in possession, and they or some of them had continued to live on the place till institution of the suit.

There was testimony for defendant tending to show that Lem Holland placed his brother, Jim, and his wife on the place as owners, and that, since Jim's death, his widow, Lucy, who sets up the plea of sole seisin, had continued to occupy and possess the property, and that such possession was adverse and in the assertion of ownership; that she was the sole owner, as alleged in her plea. On the issues thus raised, his honor, among other things, charged the jury:

"The burden, then, is upon the plaintiffs to satisfy you by the evidence, and by its greater weight, that Lem Holland is dead, and that he died seized and possessed of this piece of land; second, that he died intestate, that is to say, that he did not leave a will and give this land to anybody else; third, that the parties to this action are his heirs at law; that is, that they are the ones who are entitled to his property in the event that he did die owning this property, and that he did die without any will conveying it to somebody else."

And further:

"In order that you should answer the issue 'Yes,' it is essential, as I said, that you should find all of these facts to exist from the evidence, by its greater weight, as I have defined greater weight to you; and, if you fail so to find, you will answer the issue, 'No.'"

[1] There is no presumption which requires that before an heir at law can recover as for lands descended he should show that his ancestor died intestate. On the contrary, the presumption is the other way. Speaking to the subject in 9 R. C. L., p. 9, sec. 3, the author states the prevailing position as follows:

"The heir is favored in law. He never takes by the act or intention of the testator. His right is paramount to and independent of the will, and no intention of the testator is necessary to its enjoyment. He needs no argument or construction showing intention in his favor to support his claim. They belong to the party claiming under the will and in opposition to him. To cut off either the heir or next of kin therefore, the estate must be devised or bequeathed, expressly or by necessary implication, to some other person, and whoever claims against the laws of descent must show a sufficient written title, for an estate in fee is presumed to descend, on the death of the ancestor, in pursuance of the laws of inheritance, unless the descent is shown to have been interrupted by a devise."

The cases referred to are in support of the text: among others, Lipman's Appeal, 30 Pa. 180, 72 Am. Dec. 692, Graham v. Gra-

ham, 23 W. Va. 36, 48 Am. Rep. 364, and our own decisions on the subject are in full recognition of the principle. In re Hedgepeth, 150 N. C. 245, 63 S. E. 1025; Cox v. Lumber Co., 124 N. C. p. 78, 32 S. E. 381; Floyd v. Herring, 64 N. C. 409.

[2] As shown in some of the cases cited, for defendant (Blue v. Ritter, 118 N. C. 580, 24 S. E. 356), there is, at times, a presumption against partial intestacy; that is, when it is established that an ancestor has made a will, it is presumed, in the first instance, that he intended to make disposition of all of his property, but on the facts of this record the presumption is in favor of lands descended, and there is no burden on the heir at law to show that there was no will.

For the error indicated, there must be a new trial of the cause; and it is so ordered.  
New trial.

(178 N. C. 676)

## STATE v. SOUTHERLAND. (No. 90.)

(Supreme Court of North Carolina. Sept. 24, 1919.)

### 1. CRIMINAL LAW §1148—GRANTING SEVERANCE WITHIN DISCRETION OF COURT.

The granting of a severance when two or more are indicted in the same bill rests in the sound discretion of trial court, and from his determination there is no appeal.

### 2. CRIMINAL LAW §1144(14)—IN ABSENCE OF EXCEPTIONS INSTRUCTIONS PRESUMED CORRECT.

In the absence of exceptions to the charge, the Supreme Court, hearing an appeal from a conviction of murder of one of defendants tried jointly, must conclude the trial court charged correctly in relation to the consideration of testimony against the two defendants or any one of them against whom it was pertinent.

### 3. INDICTMENT AND INFORMATION §82 — CHARGE OF CONSPIRACY UNNECESSARY TO JOINT INDICTMENT.

There is no constitutional or statutory requirement that in order to try two persons on the same indictment there must be a charge added of conspiracy.

Appeal from Superior Court, Wayne County; Kerr, Judge.

Ashley Southerland was convicted of murder in the second degree, and appeals. No error.

The prisoner was indicted jointly with Mabel Howard for the murder of Millard L. Parker, the indictment being in the usual form. He was convicted of murder in the second degree, and sentenced to ten years in the state's prison. From this sentence he appealed to this court, assigning only one error. Upon his arraignment he moved for severance on the grounds there would be no

evidence offered tending to show the joint commission of the offense; that the defense of Mabel Howard would be that the defendant, Ashley Southerland, committed the offense, and that necessarily evidence would be admitted which, though competent against Mabel Howard, would not be competent against the defendant, Ashley Southerland. The court overruled this motion, and the defendant, Ashley Southerland excepted.

Kenneth C. Royal and J. L. Barham, both of Goldsboro, for appellant.

J. S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

CLARK, C. J. [1] There is no exception to evidence or the charge. The sole assignment of error is the refusal of the motion to sever. From *State v. Smith*, 24 N. C. 402 (1842), down to the present day, this court has uniformly held that the granting of a severance when two or more are jointly indicted in the same bill rests in the sound discretion of the trial judge, and from his determination there is no appeal. *State v. Smith*, 24 N. C. 402; *State v. Collins*, 70 N. C. 241, 18 Am. Rep. 771; *State v. Underwood*, 77 N. C. 502; *State v. Gooch*, 94 N. C. 987; *State v. Oxendine*, 107 N. C. 783, 12 S. E. 573; *State v. Finley*, 118 N. C. 1161, 24 S. E. 495; *State v. Moore*, 120 N. C. 570, 26 S. E. 697; *State v. Barrett*, 142 N. C. 565, 54 S. E. 856; *State v. Carrawan*, 142 N. C. 575, 54 S. E. 1002; *State v. Holder*, 153 N. C. 606, 69 S. E. 66; *State v. Millican*, 158 N. C. 617, 74 S. E. 107.

There are other cases, among them the very recent case of *State v. Kirkland & Wilson*, 175 N. C. 771, 94 S. E. 725, which was a conviction of a secret assault with a deadly weapon with intent to kill. The defendants contended that much of the evidence in that case was competent against one defendant and not competent against the other, and that, "although the court charged the jury that much of this was not evidence against Kirkland, or not evidence against Wilson, yet it had its weight with the jury, and the defendants seriously insist that the court should have ordered a severance so that the cases might be tried upon the proper testimony as against each defendant. It has been frequently held that a motion for a separate trial of defendants charged in the same bill of indictment is a matter that must necessarily be left to the sound discretion of the trial judge. To undertake to review such rulings is impracticable, and would result in great delay in the disposition of criminal actions. It is only when there appears to have been an abuse of such discretion that this court will entertain such exceptions and review the rulings of the trial judge. Nothing of that nature appears in this record. *State v. Dixon*, 78 N. C. 558; *State v. Parish*, 104 N. C. 689 [10 S. E. 457]; *State v. Hastings*, 86 N. C. 597; *State v. Haney*, 19 N. C. 390; *State v. Murphy*, 84 N. C. 742."

In *State v. Finley*, 118 N. C. 1161, 24 S. E. 495, the facts as presented to the court on the motion for a severance are very similar to those in this case. The court in that case (118 N. C. 1163, 24 S. E. 496) says:

"The defendant alleged that the defenses of each of the accused were in antagonism as the foundation of the motion. An exception was filed, on the ground that the denial of the motion was a gross breach of discretion on the part of the court. Unless the accused suffered some apparent and palpable injustice in the trial below, this court will not interfere with the decision of the court on the motion for a severance. Although the defenses were in conflict and involved the admission of testimony which was competent as against one of the defendants and not against the other, yet his honor, with entire certainty and clearness, carefully instructed the jury in the application of the evidence, explaining to them, by a proper analysis of the same, what part of it was competent against both and what part competent against one and not against the other, and guarding them against being influenced against either of the defendants by such evidence as he had instructed them was only competent against the other one. We therefore refuse to interfere with the ruling of the court below. The matter was in the sound discretion of his honor, and from what appears it is certain that there was no abuse of that discretion." *State v. Oxendine*, 107 N. C. 783, 12 S. E. 573; *State v. Gooch*, 94 N. C. 987.

[2, 3] In this case there are no exceptions to the charge, and therefore we must conclude that the court charged correctly according to the ruling laid down in *State v. Oxendine*, supra. Indeed the prisoner's counsel states his exception that—

"The trial judge has no power to permit the defendant to be jointly tried for the commission of a single act where there is neither allegation nor evidence tending in any way to show concerted action."

There is neither precedent nor ground to sustain this proposition, which would make every trial a separate one unless there is a charge of conspiracy. This indictment is in the statutory form, and charges that—

"Ashley Southerland and Mabel Howard, on December 20, 1919, with force and arms, at and in the county aforesaid, willfully, unlawfully, feloniously, and with malice aforethought did kill and murder Millard L. Parker." Revisal, § 3245.

This was held constitutional. *State v. Moore*, 104 N. C. 743, 10 S. E. 183; *State v. Brown*, 106 N. C. 645, 10 S. E. 870; *State v. Arnold*, 107 N. C. 861, 11 S. E. 990. There is no requirement that in order to try two persons in the same indictment there must be a charge added of conspiracy, and the court cannot make such statute.

The judge is not a mere moderator, and it would detract very much from the efficiency and economy of the administration of justice if he were unnecessarily hampered with arbi-

trary rules as to matters which have always been committed to his sound discretion, such as the granting or refusal of continuances and of motions for severance and the like of which a learned and impartial trial judge on the spot is the best judge. He is selected for his fitness, and if there should be patent abuse he can be reviewed which is full protection. There is no indication of such abuse in this case.

This murder occurred in a house of ill fame where there were several persons present, but the evidence is that shots were fired by both these two persons, and, nothing else appearing, it was decidedly to the public interest to investigate the whole transaction in one trial. Two trials would have taken double the expense and time. Cases have occurred where, there being a severance, the party acquitted on the first trial has come into court on the trial of the other party and sworn that he himself was the guilty party. No error.

(178 N. C. 52)

**CLEMENTS v. ELIZABETH CITY ELECTRIC LIGHT & POWER CO.**  
(No. 26.)

(Supreme Court of North Carolina. Sept. 17, 1919.)

**1. MASTER AND SERVANT ⇨103(1)—EMPLOYER CANNOT DELEGATE DUTY TO FURNISH SAFE PLACE TO WORK AND SAFE APPLIANCES.**

The employer's duty to provide the employé with a reasonably safe place to work and reasonably safe tools and appliances, is nondelegable.

**2. MASTER AND SERVANT ⇨103(2)—MASTER CANNOT DELEGATE DUTY TO FURNISH SAFE TOOLS TO EMPLOYÉ.**

Employer cannot delegate his duty to furnish employé with a reasonably safe place to work and reasonably safe tools and appliances by a contract with employé, requiring latter to furnish his own tools and appliances.

**3. MASTER AND SERVANT ⇨234(4)—LINEMAN USING HIS OWN LEATHER GLOVES GUILTY OF CONTRIBUTORY NEGLIGENCE.**

Where an experienced lineman, who used his own tools, including gloves, having told his employer when hired that he preferred to so do, undertook to make repairs on high power wires in his own way and with his own tools, using leather instead of rubber gloves, and placing the wires near each other instead of keeping them apart, so that he was killed when he touched them, he was guilty of contributory negligence barring recovery.

**4. MASTER AND SERVANT ⇨273, 274(4)—ON DEATH FROM LIVE WIRE EVIDENCE OF WARNING TO EMPLOYÉ ADMISSIBLE.**

In an action for the death of a lineman from touching a highly charged wire, testimony that

he had been warned that the current would kill him, and that he furnished his own gloves and used leather instead of rubber gloves held admissible on the issues of contributory negligence and assumption of risk.

Appeal from Superior Court, Pasquotank County; Devin, Judge.

Action by John R. Clements, as administrator, against the Elizabeth City Electric Light & Power Company. Judgment for defendant, and plaintiff excepts and appeals. No error.

See, also, 96 S. E. 652.

This is an action to recover damages for the wrongful death of the plaintiff's intestate, caused, as the plaintiff alleges, by the negligence of the defendant, in that it failed to furnish the intestate with reasonably safe tools and appliances with which to do his work, to wit, rubber gloves; (2) that it failed to furnish sufficient help for the work that was being done.

The evidence tended to prove that the plaintiff's intestate was an experienced lineman, and had been engaged in that work for several years; that at the time he was employed by the defendant, some two or three weeks before his death, it was the understanding between him and the superintendent of the defendant that he was to furnish all his equipment, including gloves; that at the time of his death he was engaged in removing from one of the company's poles "a dead arm," by which is meant a rotten arm, and replacing it with a new one; that he had been sent to do this work by the general manager of the defendant; that after taking the rotten arm from the pole and either lowering it or throwing it down he unloosed his safety belt, and started down the pole, and as he passed through the wires his hand, on which were leather gloves, came in contact with one of the wires charged with 2,300 volts; that he was then seen to throw back his head, hang for an instant while fire flashed from his hands, and then fall; and that he was killed; that the insulation on the wires where the intestate was working was badly worn; that they had been permitted to remain in this condition for a long time; that an arm cannot be removed and replaced by one man.

It was also in evidence for the defendant that the intestate was employed to do extra work and not regularly; that at the time of his employment he stated that he had all the necessary appliances for his work, tools, climbers, gloves, etc., and that he preferred to work with his own tools; that at the place where he was killed there was a high power wire of opposite polarity on each side of the pole; that at this point the wires crossed the street on an angle which caused one of the wires when removed from the arm

to rest against the pole, and caused the other to swing off unless tied to the pole before removing from the arm; that the intestate removed both wires and allowed one to rest against the pole and instead of tying the other lifted it over the top of the pole, and allowed it to rest close to the other wires; that in doing this he came in contact with both wires, and, not having his safety belt fastened, and having on leather gloves, he was shocked by the voltage of the wires, and was thrown to the ground, crushing his skull and causing his death.

Upon the trial one Bains, a witness for the defendant, was permitted to testify over the objection of the plaintiff, and he told the intestate not long before his death that he had better be careful, that the current he was then working on would kill him, and that the intestate replied that this current would not hurt him; that he was not afraid of it; that he could bite it in two; that he had been working on wires in Norfolk carrying 11,000 volts. Also that the intestate used leather gloves nearly all the time, and that they were worthless as a protection from shock. The plaintiff excepted to the admission of this evidence.

One Lewis, a witness for the defendant, who was an expert, was permitted to testify, over the objection of the plaintiff, that there was no occasion for another man to help the plaintiff, and the plaintiff excepted.

At the conclusion of the evidence the plaintiff asked the court to charge the jury that, even if the intestate contracted to furnish his own gloves, this would not release the defendant of its duty to furnish reasonably safe appliances, which was refused, and the plaintiff excepted.

His honor charged the jury fully as to the duty to furnish the plaintiff reasonably safe place in which to do his work and reasonably safe tools and appliances, and, among other things, as follows:

"But if you find from the evidence that the plaintiff's intestate undertook to provide his own gloves and that he was injured by reason of their being defective gloves there would be no liability resting upon the defendant; he was injured by reason of these being defective gloves. If the defendant did not furnish them and intestate used his own gloves defendant could not be held responsible for their condition."

And again:

"Now upon the other hand the defendant contends you ought to answer the first issue, 'No;' that there was no negligence on the part of the defendant; or if you answer the first issue, 'Yes,' you should answer the second and the third issue, 'Yes,' or one or more of them; that as a matter of fact that the man's death was not attributed to the fault of this defendant, but entirely to his own act and deed; that he furnished his own tools, not only his own gloves, but spurs and belt and pliers and other instruments which are used by a lineman; that they

never furnished him any gloves; he furnished his own gloves; that they had an agreement between them, whether that would be binding in some respects or not; that they were not responsible for the condition of the gloves, and they invoke that principle of law, and contend that you should observe that they are not liable on account of defective gloves."

The jury returned the following verdict:

"(1) Was plaintiff's intestate killed by the negligence of the defendant, as alleged in the complaint? A. No.

"(2) Did plaintiff's intestate, by his own negligence, contribute to his own injury and death as alleged in the answer? A. Yes.

"(3) Did plaintiff's intestate assume the risk of injury and death, as alleged in the answer? A. Yes.

"(4) What damage, if any, is plaintiff entitled to recover? A. —."

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

Ehringhaus & Small, of Elizabeth City, for appellant.

Hughes, Little & Seawell, of Norfolk, Va., and W. A. Worth, of Elizabeth City, for appellee.

ALLEN, J. [1, 2] The rule is well established that the duty imposed upon the employer to provide a reasonably safe place to work and reasonably safe tools and appliances is nondelegable (*Mincey v. R. R.*, 161 N. C. 470, 77 S. E. 673), and so important and necessary do we regard this principle that we would not permit it to be modified or weakened by contract between the employer and employé, requiring the employé to furnish his own tools and appliances.

Indeed if this should be allowed the rule could be easily abrogated, and the employer would be afforded the opportunity to contract against his own negligence.

We would therefore be inclined to grant a new trial if the verdict stopped with the first issue, but the jury has gone further, and has answered the issues of contributory negligence, and assumption of risk against the plaintiff, and in the consideration of these last issues it was proper to have before the jury all the facts and circumstances, including the use of leather gloves, and upon the second and third issues the use by the plaintiff of the leather gloves, belonging to him, was given no effect except as a circumstance tending to establish the defendant's contention on the issues of contributory negligence and assumption of risk.

In *Hicks v. Cotton Mills*, 138 N. C. 320, 50 S. E. 703, and *Pressly v. Yarn Mills*, 138 N. C. 415, 51 S. E. 71, two leading authorities on the respective duties of employer and employé, after holding that the duty of the employer to furnish a reasonably safe place to work and reasonably safe tools and appli-

ances is absolute, the court says in the latter case:

"On the second issue, that addressed to the question of contributory negligence, the judge charged the jury in substance that if they should find from the evidence that the injury would not have happened if the defendant had supplied the machine with a shifter, and this was the proximate cause of the injury, this would be continuing negligence, and they should answer the second issue, 'No,' though the plaintiff may have been negligent in the use of the machine. As we have held in *Hicks v. Cotton Mills*, supra, this is not a correct proposition as to every negligent failure on the part of the employer to furnish a safe appliance by reason of which the injury occurs, and is not the law in cases of the character we are now considering. The employé is not in such instances absolved from all obligation to act with reasonable care and prudence, and if there is negligence on his part, concurring as the proximate cause of the injury, the plaintiff cannot recover."

It has also been held that:

"When the danger is obvious and is of such a nature that it can be appreciated and understood by the servant as well as by the master or by any one else, and when the servant has as good an opportunity as the master or any one else of seeing what the danger is, and is permitted to do his work in his own way and can avoid the danger by the exercise of reasonable care, the servant cannot recover against the master for the injuries received in consequence of the condition of things which constituted the danger. If the servant is injured, it is from his own want of care." *Covington v. Furniture Co.*, 138 N. C. 374, 50 S. E. 761; *Mace v. Mineral Co.*, 169 N. C. 146, 85 S. E. 152.

[3] Applying these principles we find the evidence on the issue of contributory negligence full and almost uncontradicted; and, as it has been submitted to the jury under instructions free from error, the finding thereon is sufficient to sustain the judgment.

The intestate of the plaintiff was a line-man of 10 or 12 years' experience. He knew the dangers of his employment and the tools and appliances he ought to use. He represented to the manager of the defendant at the time of his employment he had the tools and appliances necessary for his work, and that he preferred to use his own. He discovered the need of repairs at the place where he was injured, and undertook to do the work in his own way and with tools selected by himself. He used leather, instead of rubber, gloves, and after he had detached the high power wires on each side of the pole from the arm, instead of keeping them apart, which he could have done, thereby rendering them harmless so far as he was concerned, he placed them near each other, which was very dangerous, and thus brought about his death by his own want of care.

The statement in the former opinion as to

the use of gloves furnished by himself, thus considered in connection with the other circumstances, which are now fully developed, is free from criticism when restricted to the second issue.

[4] The evidence of Bains was competent to show special notice to the intestate of the danger of the work he was doing, and that he used a defective appliance of his own selection.

The evidence of Lewis is immaterial in the view we take of the appeal, as it has no bearing on the second issue.

No error.

(178 N. C. 66)

DILLON v. BROEKER. (No. 28.)

(Supreme Court of North Carolina. Sept. 17, 1919.)

1. RECORDS ⇨9(3)—TORRENS LAW—PURPOSE.

The Torrens Law was enacted, in view of §§ 1-28, to secure, by a decree of court, a title impregnable against attack, to make a permanent and complete record of the exact status of the title, with all liens, incumbrances, and claims against it, and to protect registered owner against all claims or demands not noted on the book for the registration of titles.

2. RECORDS ⇨9(2) — TORRENS LAW—CONSTRUCTION.

Torrens Law, being remedial and not in derogation of common right, will be liberally construed according to its intent so as to advance the remedy and repress the evil.

3. RECORDS ⇨9(1)—TORRENS LAW —"VOLUNTARY TRANSACTION."

A contract to convey is a voluntary transaction within Torrens Law, § 10, requiring voluntary transactions affecting title to be noted in book for registration of titles.

4. RECORDS ⇨9(1)—TORRENS LAW—"CLAIM ADVERSE TO THE TITLE OF THE REGISTERED OWNER."

A contract to convey registered land is a claim adverse to title of registered owner within Torrens Law, § 25, providing for filing of affidavit by person having a "claim . . . adverse to the title of the registered owner."

5. SPECIFIC PERFORMANCE ⇨12 — GROUND FOR REFUSAL—TORRENS TITLE—NONCOMPLIANCE WITH STATUTE.

Where land is registered under the Torrens Law, purchaser, who has not caused contract to convey to be noted in book for registration of titles, as required by section 10, and who has not made and filed an affidavit of his claim under section 25, is not entitled to specific performance of the contract.

Appeal from Superior Court, Washington County; Devin, Judge.

Action by H. T. Dillon against Carl Broeker. Judgment of dismissal, and plaintiff excepts and appeals. Affirmed.



This is an action to compel specific performance of a contract to convey land, the defendant herein being the registered owner of the land under the Torrens Law. Pub. Laws 1913, c. 90.

The plaintiff admitted upon the trial that his contract had not been registered under the Torrens Law, and that the affidavit required by section 25 of said law had not been filed.

The jury returned the following verdict:

"(1) Did the defendant contract in writing to convey to plaintiff the land described in the complaint? Answer: Yes.

"(2) Did plaintiff, within the time provided in said contract, notify the defendant that he would take said land, and on his part do all things required of him to entitle him to a conveyance of said land by defendant? Answer: Yes.

"(3) Has plaintiff at all times been ready, able, and willing to perform said contract on his part, as alleged in the complaint? Answer: Yes.

"(4) Did defendant refuse to perform said contract and to convey said land, as alleged in the complaint? Answer: Yes.

"(5) Was summons duly issued and attachment duly issued and levied on the land described in the complaint, and docketed and indexed in the office of the clerk of the superior court within three days, and were notices of summons and attachment duly published as required by law, and complaint filed, all prior to any transfer of title to or conveyance of said land by defendant? Answer: Yes."

The defendant moved to dismiss the action before the verdict. The court did not then rule upon the motion to dismiss, but reserved the same, and upon the coming in of the verdict allowed the motion and dismissed the action for noncompliance with the Torrens Law, and the plaintiff excepted and appealed.

Small, MacLean, Bragaw & Rodman, of Washington, N. C., for appellant.

Ward & Grimes, of Washington, N. C., for appellee.

ALLEN, J. The Torrens Law is comparatively new in this state, having been enacted in 1913 (chapter 90, Laws 1913), and it marks so wide a departure from the principles before existent, regulating the acquisition of titles to land or any interest therein, that but little, if any, assistance can be had in determining its proper construction by recurrence to former statutes and decisions.

It was first adopted in Australia in 1857 at the instance of Sir Robert Torrens, which accounts for its name, and is now a part of the statute law of many of the states of this country.

As stated in Devlin on Deeds, vol. 3, §§ 1439, 1440:

"The object of the system is, first, to secure by a decree of court, or other similar proceedings, a title which shall be impregnable against any attack, and, when this title is once determined, to provide that all subsequent transfers, incumbrances, or proceedings affecting the title shall be placed on a page of the register and marked on the memorial of title. The object is to secure the evidence of title exclusively by a certificate issuing from public authority.

"When title has been registered, the owner who desires to sell produces his original certificate, as he would the certificate of stock in a corporation, and the buyer may safely purchase on the faith of what the certificate shows. If a sale has been effected, the old certificate is surrendered and a new one received in its place. Under this system title to land is not conveyed by a deed, as such, but only by the registration of the transfer, as in the case of the sale of the shares of stock in a corporation, and the deed if made, is considered as nothing more than a contract between the parties by which the officer intrusted with the duty is authorized to make the transfer. As many times as a sale is made the old certificate is surrendered and a new one given in return. If a mortgage is executed, the transaction is noted on the certificate [and on record] and when it is paid its release is likewise noted. If a trust is created, proper indorsements are made; in a word, the object of the system is to make the certificate the complete repository of all that may affect the title, as there is only one certificate of title on file at any time which shows the state of the title, and to what extent, if any, it is affected by incumbrances."

[1, 2] It was with this object in view—to secure by a decree of court a title impregnable against any attack, and to make a permanent record of the exact status of the title with all liens, incumbrances, and claims against it—that the statute was enacted, which is not in derogation of common right, but is a remedial statute and to be liberally construed, according to its intent "so as to advance the remedy and repress the evil." Lookout Co. v. Gold, 167 N. C. 68, 83 S. E. 3.

When we turn to the statute we find the first nine sections devoted to procedure, and to declaring the effect of the decree at the time of its entry. In the tenth section the county commissioners are required to furnish a book to the register of deeds, "to be called registration of titles, in which said register shall enroll, register and index, as hereinafter provided, the decree of title hereinbefore mentioned and the copy of the plot contained in said petition, and all subsequent transfers of title, and note all voluntary or involuntary transactions in any wise affecting the title to said land, authorized to be entered thereon." It also directs the register to issue "an owner's certificate of title" and prescribes the form.

Section 11 requires that all certificates be numbered, "and a separate page or more,

with appropriate space for subsequent entries, shall be devoted to each title in the registration of titles book for said county."

Sections 12 to 25 regulate the transfers of title in whole or in part, and the creation of liens, trusts, equitable interests, tax sales, etc., with provision for noting on the book for registration of titles instruments elsewhere registered.

Section 25 provides that every registered owner under the act with certain exceptions not material to this appeal, shall "hold the land, free from any and all adverse claims, rights or incumbrances not noted on the certificate of title," and, further:

"Any person making any claim to or asserting any lien or charge upon registered land existing at the initial registry of the same and not shown upon the register, or adverse to the title of the registered owner, and for which no other provision is herein made for asserting the same in the registry of titles may make an affidavit thereof setting forth his interest, right, title, lien or demand and how and under whom derived, and the character and nature thereof. The affidavit shall state his place of residence and designate a place at which all notices relating thereto may be served. Upon the filing of such affidavit in the office of the clerk of the superior court the latter shall order a note thereof as in the case of charges or incumbrances, and the same shall be entered by the register of deeds. Action shall be brought upon such claim within six months after the entry of such note, unless for cause shown the clerk shall extend the time. Upon failure to commence such action within the time prescribed therefor the clerk shall order a cancellation of such note."

Section 27 renders adverse possession of no effect against the registered owner, and section 28:

"The registration shall be the only operative act to transfer or affect the title to registered land, and shall date from the time the writing, instrument or record to be registered is duly filed in the office of the register of deeds, subject to the provisions of this act; no voluntary or involuntary transaction shall affect the title to registered lands until registered in accordance with the provisions of this act: Provided, that all mortgages, deeds, surrendered and canceled certificates, when new certificates are issued for the land so deeded, the other paper writings, if any, pertaining to and affecting the registered estate or estates herein referred to, shall be filed by the register of deeds for reference and information, but the registration of titles book shall be and constitute sole and conclusive legal evidence of title."

The other sections of the act have no bearing on the question now before us. This summary of the act not only manifests a purpose on the part of the General Assembly to establish a title in the registered owner, impregnable against attack at the time of the decree, but also to protect him against all claims or demands not not-

ed on the book for the registration of titles, and to make that book a complete record and the only conclusive evidence of the title.

In section 10 all voluntary and involuntary transactions affecting the title must be noted on the book. In section 14:

"All registered incumbrances, rights or adverse claims affecting the estate represented thereby shall continue to be noted, not only upon the certificate of title in the registration book, but also upon the owner's certificate, until same shall have been released or discharged. And in the event of second or other subsequent voluntary incumbrances the holder of the certificate may be required to produce such certificate for the entry thereon or attachment thereto of the note of such subsequent charge or incumbrance as provided by section twenty of this act."

In section 25 any person making any claim "adverse to the title of the registered owner" is required to file an affidavit before the clerk, who must notify the register that he may note the claim on the book for the registration of titles, and he must then bring action on his claim within six months, unless the clerk extends the time for good cause shown, such as the claim not being due or other good reason made to appear, and if he fails to bring action the note of his claim is canceled. This is as to a claim against the registered owner, and not one against a purchaser from him.

In section 28:

"No voluntary or involuntary transaction shall affect the title to registered lands until registered in accordance with the provisions of this act," and "the registration of titles book shall be and constitute sole and conclusive legal evidence of title."

[3-5] The contract to convey on which the plaintiff declares is a "voluntary transaction" affecting the title, which section 10 says shall be noted, which has not been done. It is a claim adverse to the registered title, and under section 25, in order to maintain an action, he must make an affidavit, and have notation made, which he has failed to do.

And under section 28 registration under the act is the only "operative act" to "affect the title to registered lands"; no voluntary act "shall affect the title to registered lands until registered in accordance with the provisions of this act," and "the registration of titles book shall be and constitute sole and conclusive legal evidence of title."

These provisions clearly indicate the purpose to require all claims against the title to be registered under the act, and to recognize no other, and the fact that the statute was enacted by the General Assembly with full knowledge that for near 100 years as to mortgages, and for 30 years as to deeds, these instruments were valid between the parties without registration, and in-

valid as to creditors and purchasers only from registration, and that no distinction is made in the statute in favor of creditors and purchasers, is strong evidence of the intent to place the owner of the registered title, creditors, and purchasers on the same footing as to registration under the act, and that no claim against either can be maintained until the act is complied with.

It follows necessarily that the judgment must be affirmed, as the plaintiff admits his failure in this respect.

**Affirmed.**

(178 N. C. 88)

**WINBOURNE v. INTERSTATE COOPERAGE CO. (No. 21.)**

(Supreme Court of North Carolina. Sept. 24, 1919.)

**1. MASTER AND SERVANT ⇐123—LIABILITY OF MASTER FOR INJURIES TO SERVANT BY DEFECTIVE SIMPLE TOOL.**

In order for liability to attach to a master for injuries to a servant through the use of simple, everyday tools, it must appear that injury resulted from a lack of such tools or defects therein which the master was required to remedy in the reasonable and proper discharge of his duties, and that the lack or defect was of a kind from which some appreciable substantial injury might reasonably have been expected to occur.

**2. MASTER AND SERVANT ⇐123 — MASTER NOT LIABLE FOR INJURY FROM AX HEAD SLIPPING FROM HANDLE.**

The employer of a carpenter to demolish cars on a logging road, injured when the head from the ax his assistant was using to cut off bolts with a cold chisel slipped off and hit his foot, was not liable for such injury, due to the ax head not having been tight on the handle, nor for failure to furnish a hammer for striking.

Appeal from Superior Court, Beaufort County; Devin, Judge.

Action by E. W. Winbourne against the Interstate Cooperage Company. From judgment for plaintiff, defendant appeals. Reversed.

The action is to recover damages for physical injury, caused by alleged negligence of defendant in not supplying plaintiff, an employé, with sufficient and proper tools with which to do his work. On denial of liability and plea of contributory negligence, there was verdict for plaintiff and assessing damages at \$550. Judgment on the verdict for plaintiff, and defendant appealed, assigning for error, chiefly, the refusal of the motion for nonsuit.

Small, MacLean, Bragaw & Rodman, of Washington, N. C., for appellant.

Ward & Grimes, of Washington, N. C., for appellee.

HOKE, J. [1] There were facts in evidence tending to show that, in August, 1917, plaintiff, employed by defendant for the purpose, was engaged in taking down some cars, situate on a logging road, a few miles out from Belhaven, N. C.; that they were old cars, and, it being desirable to save as much of the iron as possible in shape for further use, it was not infrequently required to cut the iron bolts from the rods used in bracing the woodwork of the cars and serving to hold the frames together; that plaintiff, a carpenter of skill and experience, 63 or 64 years of age, having the ordinary tools for his work, which he was to use as required on the present job, had taken down one or two of the cars, when, finding that he was not making satisfactory progress for lack of a helper and adequate tools for the undertaking, he applied for an assistant and proper tools, and was authorized to procure the help needed, and was given further tools, which he claimed were fit and proper, to wit, a cold chisel and a hack saw frame and blades for cutting iron and a Stillson wrench, according to defendants, this last being the only tool plaintiff had specifically mentioned, and that the hardware store was directed to let him have the tools he selected, and the cold chisel, hack saw, frame and blades were both new and fitted for the work; that, after he, with his assistant, one Wallace, had been engaged on the work for two or three days, while plaintiff was holding the cold chisel in place to cut off an iron bolt, plaintiff directed Wallace to strike the same with an ax of the company which plaintiff says he had found out at the cars, and, as Wallace struck with the ax, it came off the handle, the eye of the ax striking plaintiff's foot and making a bruise thereon which resulted in painful and protracted injury, from which he still suffers. A perusal of our decisions on the subject will show that, in order for liability to attach, in case of simple, everyday tools, it must appear, among other things, that the injury has resulted from a lack of such tools or defects therein, which the employer is required to remedy, in the proper and reasonable discharge of his duties, and that the lack or defect complained of and made the basis of the charge is of a kind from which some appreciable and substantial injury may be reasonably expected to occur. Thus, in the recent case of Rogerson v. Hontz, 174 N. C. 27, 93 S. E. 376, where plaintiff was seriously injured by reason of a defective cant hook which he was using to load and place heavy sawlogs, and of which defect the employer was fully aware, the court, in setting aside an order of nonsuit in the case, and in reference to the rule of liability, said:

"On the facts as now presented, the evidence tends to show that this cant hook was an im-

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

Again, in another very similar case in the same volume (*King v. Railroad*, 174 N. C. 39, 93 S. E. 378), stating the principle as it generally prevails in such cases, it was again said:

"In *Rogerson v. Hontz*, at the present term, the court has held, in approving the decision of *Wright v. Thompson*, 171 N. C. 88 [87 S. E. 963], and other cases, that where an employ  was injured by reason of defective tools supplied him, the employer was not necessarily relieved of all responsibility merely because the tools were of simple structure, but in case there was negligent default in the respect suggested on the part of the employer, and the defect was of a kind importing menace of substantial injury, having due regard to the nature of the work and the manner of doing it, and it was further shown that the employer knew of such defect, or should have found it out under the duty of inspection ordinarily incumbent upon him in such cases, that under certain conditions liability might attach."

And, in the cases of *Wright v. Thompson*, 171 N. C. 88, 87 S. E. 963, *Young v. Fiber Co.*, 159 N. C. 375, 74 N. C. 1051, *Mincey v. Railroad*, 161 N. C. 467-471, 77 S. E. 673, *Reld v. Rees*, 155 N. C. 230, 71 S. E. 315, *Mercer v. Railroad*, 154 N. C. 399, 70 S. E. 742, *Ann. Cas.* 1912A, 1002, and *Cotton v. Railroad*, 149 N. C. 227, 62 S. E. 1093, all of them, so far as examined, where recovery was sustained for lack of simple, ordinary tools or for defects therein, it was shown that the injury resulted from the breach of duty reasonably incumbent on the employer under all the facts of the case, and that the defect was one from which some substantial injury was not unlikely to occur. Accordingly, a further examination of our authorities will disclose that where these elements or either of them are lacking, though there may have been some technical breach of duty, no actionable wrong will be imputed. Thus, in *Dunn v. Railroad*, 151 N. C. 313, 66 S. E. 134, a case almost exactly similar to that before us, an employ  was injured by a hammer flying off the helve, which he had been using several hours, giving him every opportunity to observe its condition, relief was denied. And, in the more recent case of *Morris v. Railroad*, 171 N. C. 533, 88 S. E. 818, a plaintiff, an employ  of defendant com-

pany, was using a heavy hammer, driving spikes into cross-ties to hold the rails secure, he was standing in an uneven position, with one foot on a soft or shelving pile of dirt; the hammer, from continuous use, had become very slick on the head, and the employ  had been promised a new one. In driving a spike in the position indicated, the hammer slipped off, jerking the employ  down and causing a severe and painful injury to his back, for which he sued. In sustaining an order for nonsuit in the case, the Chief Justice thus clearly states the distinction to which we are adverting:

"The whole subject has been very recently reviewed \* \* \* in *Wright v. Thompson*, ante, 88, with full citation of authorities. In that case, in repairing a dredge whose crane and dipper had become loosened, the plaintiff, in driving in the driftpin to fasten them, struck it with a hammer, when a piece of steel from the defective and broken driftpin flew off and struck the plaintiff in his eye and put it out. We set aside the nonsuit because it was shown that the driftpin furnished the plaintiff had been broken off and had remained so at least 30 days, and the plaintiff had notified the foreman of its defective condition. Injury might reasonably have been expected from such cause. That was certainly a very different case from the present. Here the tool was a hammer, and it could not be anticipated that on striking the spike to drive it into the cross-tie the hammer would slip, nor that by its going 2 inches further the plaintiff's back would be sprained. His standing upon a loose mound of earth also certainly was a mere incident, and could not have been expected to cause injury."

[2] On a proper application of the principles applied in these cases and the facts appearing in the record, we are of opinion that no recovery can be had by plaintiff, and defendant's motion for nonsuit should have been allowed. True, defendant, when called back to the stand, says, in general terms, "that he couldn't get no tools, and went over there two or three times and begged for tools," but in his principal examination he states very clearly that he had and was using a cold chisel, a hack saw, both frame and blades, all new, and that these were the tools desirable and suitable for the work in which he was engaged. As to the "bolt clipper," while this seems to be a tool recognized and sold in the trade, we do not find that such a tool was in use in this kind of work, nor do we recall that any witness had ever seen one large enough to cut three-fourths bolts, the size that plaintiff was dealing with in this instance, and, in reference to the ax that Wallace was using at the time to drive the cold chisel, that plaintiff had never made any complaint that he needed a different tool for the purpose, and if he had, the injury was not on account of any difference that might have existed between a hammer and an ax, but because the ax had not been

made tight and secure on the handle, a defect that might just as likely have developed had he been using a hammer. He had found the ax there, and had been using it for several days, and had every opportunity to put the ax in better shape and failed to do it.

On consideration of his entire statement and the other uncontradicted testimony, you are forced to the conclusion that plaintiff's injuries are attributable to his own default or that of his collaborer in not keeping his ax in safer condition. As he says himself: "I hadn't looked at the ax; I suppose I didn't take time."

This will be certified, that the verdict and judgment be set aside and defendant's motion for nonsuit be allowed.

Reversed.

(178 N. C. 101)

**RAGAN v. STEPHENS.** (No. 112.)

(Supreme Court of North Carolina. Sept. 24, 1919.)

**USURY**  $\Leftrightarrow$  184—**DOUBLE INTEREST RECOVERABLE WHEN INTEREST PAID; NOT PAID, INTEREST FORFEITED.**

Under Revisal 1905, § 1951, double amount of usury is recoverable as a penalty only where usurious interest has been actually paid; the penalty, where usury has been charged but not paid, being merely the elimination of the usury and the forfeiture of the interest.

Appeal from Superior Court, Chatham County; Kerr, Judge.

Action by H. R. Ragan against A. J. Stephens. From judgment for plaintiff, giving him insufficient relief, he excepts and appeals. Modified.

This is an action on three notes; one for \$903 being the only one as to which any question is raised by the appeal. The defendant pleaded usury, and the jury found that \$100 of the \$903 note is usurious. The defendant has paid nothing to the plaintiff. His honor rendered judgment in favor of the plaintiff for \$903, without interest, subject to a credit of \$200, being double the amount of the usury charged in the note, and the plaintiff excepted and appealed.

W. D. Siler, of Siler City, and J. S. Manning, of Raleigh, for appellant.

A. C. Ray, of Pittsboro, and H. E. Norris, of Raleigh, for appellee.

ALLEN, J. The statute relating to usury (Revisal, § 1951) makes a clear distinction between money charged and money paid on a usurious transaction. As to the first, the penalty is the elimination of the usury and the forfeiture of the interest; and as to the second, when usurious interest is actually paid, the additional penalty of recovery of double the amount of the usury. This is not only the plain language of the statute, but it is the construction placed upon it in several of our decisions. In *Rushing v. Bivens*, 132 N. C. 273, 43 S. E. 798, the court says:

"We think that, before the plaintiff can maintain the action, he must pay the usury in money or money's worth. He has done neither. He has paid nothing. It is well settled that the penalty is not incurred by the charging of usurious interest; it is by taking the usury that the party incurs the penalty, and no action lies therefor until it is paid. *Godfrey v. Leigh*, 28 N. C. 390; *Stedman v. Bland*, 26 N. C. 296. The renewal of the note to Griffin falls very far short of the payment of the original debt. If the plaintiff had given in payment and discharge of the note of a third person, it would have been a good payment. *Pritchard v. Meekins*, 98 N. C. 244 [3 S. E. 484]. The plaintiff may never pay the renewal notes."

And again, in *Riley v. Sears*, 154 N. C. 521, 70 S. E. 1002:

"While we hold that the notes sued on are void, because based entirely on a usurious consideration, we think that on the pleadings the demand by the receiver for double the amount of the usurious interest should be disallowed. Both our statutes and authoritative interpretations of it are to the effect that 'usury must be paid in money or money's worth before an action can be maintained therefor, and the renewal of a note, given for usury, does not amount to such payment.' *Rushing v. Bivens*, 132 N. C. 273 [43 S. E. 798]."

It follows, therefore, as no money has been paid, that the \$100 of usury must be taken from the note, and that the plaintiff is entitled to recover the balance, \$803, without interest. The judgment will be modified in accordance with this opinion.

Modified. Costs to be divided.

$\Leftrightarrow$  For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(149 Ga. 304)

## NIX v. STATE. (No. 1133.)

(Supreme Court of Georgia. Sept. 2, 1919.)

*(Syllabus by the Court.)*

## 1. CRIMINAL LAW §522(1), 736(2) — WHEN CONFESSION ADMISSIBLE.

The court did not err in admitting evidence of confessions made by the defendant.

## 2. CRIMINAL LAW §717 — WHEN MISTRIAL PROPERLY DENIED BECAUSE COUNSEL READ FROM LAW REPORTS.

The extracts read from a volume of law reports to the court in the presence and hearing of the jury were not of such character as to require the court, upon motion of counsel for the accused, to grant a mistrial, as they were not so inflammatory in character as to arouse prejudice against the accused, nor did they seek to introduce material facts connected with the case which had not been properly introduced in evidence.

## 3. CRIMINAL LAW §1044 — REMARKS OF SOLICITOR GENERAL NOT GROUND FOR REVERSAL, NO MOTION FOR MISTRIAL BEING MADE.

Other remarks made by the solicitor general in the course of his argument to the jury did not require a reversal of the judgment refusing a new trial; no motion for a mistrial having been made at the time in the trial court.

*(Additional Syllabus by Editorial Staff.)*

## 4. CRIMINAL LAW §719(1) — WHEN INTRODUCTION OF MATERIAL FACT NOT IN RECORD IS ERROR.

The facts not in the record, which it is improper for counsel to introduce in his argument, are material facts which might be considered by the jury as entering into the determination of the main question of facts before them as to defendant's guilt.

Atkinson and Hill, JJ., dissenting in part.

Error from Superior Court, Muscogee County; G. H. Howard, Judge.

Bartow Nix was convicted of murder, his motion for a new trial was denied, and he brings error. Affirmed.

See, also, 22 Ga. App. 136, 95 S. E. 534.

Geo. C. Palmer and Gilbert W. Fincher, both of Columbus, for plaintiff in error.

C. F. McLaughlin, Sol. Gen., of Columbus, Clifford Walker, Atty. Gen., and M. C. Bennett, Asst. Atty. Gen., for the State.

BECK, P. J. Bartow Nix was tried under an indictment charging him with the murder of C. L. Alexander and Jesse Everidge, and the jury trying the case returned a verdict of guilty; there being no recommendation made by them. The defendant made a motion for a new trial, which upon the hearing thereof the court overruled, and the defendant excepted.

[1] 1. The original motion contained the general grounds. In the first ground of the amendment to the motion complaint is made of the admission in evidence of a confession made by the defendant. This evidence, which is set forth in the motion in the form of questions and answers, shows that the prisoner was taken from Muscogee county to Macon, Ga., where he was confined in jail. After he was in jail, according to the testimony of James Palmer, the witness whose testimony was admitted over objection, the accused made a complete confession, sustaining the charge as made in the indictment. In response to questions propounded to him in the course of making the confession, the prisoner fully and in detail stated the circumstances of the killing. This confession was made first in a very short time after the arrival at the Bibb county jail, about 9 o'clock in the evening, and the witness Palmer then testified to a confession substantially the same as made by the accused the next morning. The witness, after having testified to the confession, was interrogated by counsel for the accused as to the circumstances under which it was made, and this questioning of the witness elicited the testimony following:

"Q. What did you say to him on your way to Macon? A. We talked all the way along. He never talked. I told him, before he ever went to talking, that there was one thing sure—that he never would no more in this world do his wife and children any more good. Q. You told him that, and that very naturally frightened him? A. I don't know whether it did or not. Q. You don't suppose that frightened him at all? A. It didn't seem to. Q. Up to that time he never had made any confession, had he? A. No, sir. Q. How come him to open up in the jail and tell you about it? What was said to him there? A. He just opened it himself. Q. Nobody never said anything to him at all? A. Of course he went to talking. Q. Who brought up the conversation? Tell exactly just what you said to him. A. I told him just exactly what I said. Q. No; you haven't. What caused him to talk over there? A. He just went—we all set down there, and he just opened up and went to talking, the same thing over. Q. What same thing over? A. About how he killed him. Q. Thought you said he never had told it before that? A. Oh, I told you before we went over there—before we got to Buena Vista. Q. I understood you to say, when you got to the jail you tried to make him sit down, and he stood up, and that was when he first told you how it happened. A. That was one time. Q. Where did he first tell you? A. Between here and Buena Vista, when I first went through there, he connected Will Howard; and Culver and Clements wanted me to phone back here and get them locked up, and I wouldn't do it, because I didn't believe it. Q. He didn't tell you then he killed them? A. Yes, sir. Q. What caused him to tell it? A. When I told him about his folks."

Defendant's counsel moved to exclude this evidence of a confession, on the ground that, in view of the testimony of the witness on cross-examination, the confession was not freely and voluntarily made, but was induced by fear upon the part of the defendant, generated in his mind by the statement of Palmer to the defendant, before the alleged confession was made, "that one thing was certain, he would never in this world do his wife and children any more good." The court overruled the motion to exclude the testimony, and admitted it. We are of the opinion that the court properly overruled the motion. This confession was made on the next day, when the prisoner was safely lodged in the jail of Bibb county, and apparently safe from any danger whatever. Whether the confession made immediately after the statement to the prisoner, which we have quoted above, would have been admissible, had not substantially the same confession been made the next day in the jail, we do not now rule.

Another witness, Clements, testified to a confession made by the accused on the way from Columbus to Macon, Ga., and also testified in connection that he made the same confession to himself, to Palmer, and Culver after he was in jail at Macon. The statement and confession made by the prisoner was made in response to questions propounded to him. On cross-examination this witness testified as follows:

"Q. You say, going to Buena Vista in the automobile, you commenced talking to him about it? A. Yes, sir. Q. You told him that Albert had told it all, and he had just as well tell it? A. Told him Albert had owned up to it; yes, sir. Q. And he had just as well own up to it? A. Yes, sir."

This testimony of the witness Clements as to the confession made by the prisoner was also objected to, and counsel for the defendant moved to exclude the same on the ground that it appeared that the confession was not freely and voluntarily made, but that the accused was induced to make it by the statement that "Albert had owned up to it, and he might as well own up to it." The person referred to as Albert was Albert Nix, who was jointly indicted with the accused. The motion to exclude the testimony was overruled. In this the court did not err. In view of all the facts and circumstances, we think it was a question for the jury to decide as to whether the confession was freely and voluntarily made. The motion to exclude the testimony of Clements included the confession made in the jail on the next morning after the arrival, as well as the confession made on the way to Macon the day before, and was not directed solely to the admissibility of the alleged confession immediately following the statement made to the prisoner that Albert had confessed and he might as

well "own up." Nor can we say that the statement made by Clements tended to induce the confession. There was no promise that it would be better for him, or that it would inure in any way to his benefit for him, to make a confession. The statement that one jointly indicted had confessed might have caused the prisoner to despair of making a successful defense, but we do not see anything in the circumstances to induce him to confess to anything that was not true, in order to derive a benefit from the confession. In the case of *Dixon v. State*, 116 Ga. 186, 42 S. E. 357, it was said:

"Though evidence of an incriminating statement made by a prisoner to another shortly after the latter had offered an inducement extending a hope of benefit is not admissible, another and entirely different incriminating statement, made hours afterwards to the same person under circumstances tending to show that it was purely voluntary and not elicited by such inducement, may be proved; the question whether or not the statement was in fact free and voluntary being one for determination by the jury."

And in the case of *Waycaster v. State*, 136 Ga. 95, 70 S. E. 883, where the circumstances under which the confession was made tended more strongly than in the present case to show inducement to the confession, the court held that, in view of the time that had elapsed between the time of the statement made by an officer, alleged to be an inducement, and the confession offered in evidence, it was a question for the jury to decide whether or not the testimony of the witness offered to prove the confession should be considered by them. See, also, *Wilson v. State*, 19 Ga. App. 759, 82 S. E. 309. The evidence of confession was prima facie admissible, and there was no complaint that the jury was not properly instructed and cautioned in regard to receiving the confession of guilt, and that it was their duty to reject the confession entirely, if it appeared that it was not freely and voluntarily made.

[2] 2. During his argument the solicitor general read in the presence and hearing of the jury the following extract from the opinion in the case of *Eberhart v. State*, 47 Ga. 598:

"It may be a sign of a tender heart, but it is also a sign of one not under proper regulation. Society demands that crime shall be punished and criminals warned, and the false humanity that starts and shudders when the ax of justice is ready to strike is a dangerous element for the peace of society. We have had too much of this mercy. It is not true mercy. It only looks to the criminal; but we must insist upon mercy to society, upon justice to the poor woman whose blood cries out against her murderers. That criminals go unpunished is a disgrace to our civilization, and we have reaped the fruits of it in the frequency with which bloody deeds occur. A stern, unbending, unflinching

administration of the penal laws, without regard to position or sex, as it is the highest mark of civilization, is also the surest mode to prevent the commission of offenses."

He also read the following extract from another decision of the same court, in *Hawkins v. State*, 25 Ga. 207, 71 Am. Dec. 166:

"Human life is sacrificed at this day, throughout the land, with more indifference than the life of a dog, especially if it be a good dog. Scott may not have been a good citizen; still he was a human creature, under the protection of the laws of the state; and even in his person the punitive power of the government must be vindicated."

The defendant thereupon made a motion for a mistrial, on the ground that the reading of the foregoing extracts in the presence and hearing of the jury was prejudicial to the interests of the defendant and tended to deprive him of a fair and impartial trial. The court overruled this motion, but made the following statement to the jury:

"An objection was made to the reading from some volume of the court report by the solicitor general—some report. The solicitor general was reading from these volumes to the court. The court instructs you that you take no law from the counsel in this case. The court will charge you fully as to the law of the case, and that you should not take the law either from the solicitor general or from counsel for the defendant."

The court did not err in overruling this motion for a mistrial. The reading from a Supreme Court decision of remarks like these may not be helpful to the jury in their effort to arrive at the truth from the evidence in the case; but we do not think that the jury's hearing of these extracts could tend to inflame their minds or arouse in their minds prejudice against the defendant. This differs from cases where it has been held that a mistrial should have been granted where inflammatory remarks were made, and where material facts or circumstances tending to prejudice the cause of the defendant, not contained in the evidence, were stated and brought to the attention of the jury in the argument of counsel for the state. Counsel for plaintiff in error does not undertake to specify the particular passages in the extracts quoted which he criticizes as being inflammatory and incendiary. Certain sentences in the extract quoted, it seems to us, could have been used with perfect propriety by the solicitor general in his argument to the jury. He could certainly say with propriety:

"A stern, unbending, unflinching administration of the penal laws, without regard to position or sex, as it is the highest mark of civilization, is also the surest mode to prevent the commission of offenses."

He could appeal to the jury to show no mercy to crime, but to unflinchingly administer the criminal laws. If the passages were objectionable at all, they were objectionable upon the ground that some of the statements apparently introduced facts; as, for instance, the sentence beginning with the statement that—

"Human life is sacrificed at this day, throughout the land, with more indifference than the life of a dog," etc.

Or again the statement:

"That criminals go unpunished is a disgrace to our civilization, and we have reaped the fruits of it in the frequency with which bloody deeds occur."

But we desire to call attention to the fact that these extracts were read from decisions that were delivered something like a half century ago, and referred to the state of society then; and if counsel for defendant had really thought that these remarks were at all inflammatory or incendiary in their character or prejudiced their client, he surely could have called attention to the fact that the judges who rendered these opinions were speaking of a state of society that existed a half century ago, and, in one case, considerably over a half century ago, and the judges who uttered them have long been moldering in the ground and their bodies have returned to dust. When the later of these two decisions was rendered, we had 47 volumes of Georgia Reports; it was the decision in the case of *Eberhart v. State*. Today we have 148 volumes. And the older of the two decisions, *Hawkins v. State*, was rendered before the Civil War. If counsel thought that the reading of these extracts from our decisions tended to incite the jury, he could easily have asked from what decisions they were read (if he did not know at that time), and could have called the attention of the jury to the date at which the judge was speaking, and the jury could very easily have seen that the state of society that the judge was speaking about was the state of society that existed a half century or more ago. Suppose that counsel had read from some decision in a criminal case, reported in one of the English reports, and the judge used similar remarks about the state of society and the frequency of crime, and it appeared that he was speaking of the state of society that existed two centuries or more ago; could it be claimed that the minds of the jury would be inflamed by reading such statements in their presence? Or suppose that counsel for the state, as a part of his address to the jury, had read or recited passages from some chapter in the Book of Isaiah, wherein the prophet had bewailed the prevalence of sin and misery and crime and bloodshed, and had read the scathing denunciations of these offenses against



God and against righteousness; surely this could not be ground for granting a mistrial. It would not be said that facts were introduced by the reading of these statements which were calculated to injure the defendant. Attempts to arouse indignation against crime are permissible. In the case of *W. & A. Railroad Co. v. York*, 128 Ga. 687, 58 S. E. 183, which was an action for damages, counsel for the plaintiff, in the course of his argument before the jury, used the following language:

"Man is the noblest creation of God. God made no greater creation than man. He is the grandest product of divine handicraft; and He hedged about him the law, 'Thou shalt not kill.' God told Cain that the blood of his brother Abel cried to him from the ground. The most eloquent sermon I ever heard in my life was from the text, 'The statutes of the Lord are right.' 'Thou shalt not kill' is the statute of the Lord God Almighty. It was made for the protection of the lord of creation—for man; and it applies to a railroad corporation just as much as it does to an individual. If a man is dead by the reckless negligence of the servants and agents of the railroad corporation, the full consequences to him are the same; he is just as dead as if he had died by the uplifted and directed and murderous hand of his brother man. The shedding of innocent blood is just the same—just the same. Our land is defiled when innocent blood is shed therein, whether it be by the hand of a railroad corporation or whether it be by the murderer's hand or some one contending in a death grapple with his brother man; and the curse of God, which is charged against that, is upon it just the same. Gentlemen of the jury, when George W. York died on that public crossing in the city of Acworth, last October was a year ago, his innocent blood stained the right of way of this defendant."

Whereupon counsel for the defendant moved the court to declare a mistrial upon the ground that the remarks by counsel for the plaintiff were improper. He refused to declare a mistrial, and exception was taken to this ruling. In discussing the ground of the motion for a new trial in which this exception is dealt with, this court said:

"We do not think the remarks of counsel were of such character as to require the court to declare a mistrial. A mere flight of oratory of counsel, when addressing the jury, is not ground for mistrial. Counsel may bring to his use in the discussion of the case well-established historical facts, and may allude to such principles of divine law relating to transactions of men as may be appropriate to the case. It is not impassioned oratory which the law condemns and discredits in the advocate, but it is the introduction of facts not disclosed by the evidence, which requires the judge to use his power of declaring a mistrial. In this connection, see *W. & A. R. Co. v. Cox*, 115 Ga. 719 [42 S. E. 74]; *Patterson v. State*, 124 Ga. 409 [52 S. E. 534]; *Taylor v. State*, 121 Ga. 354 (7) [49 S. E. 303]; *McNabb v. Lockhart*, 18 Ga. 507, and *cit.* An examination of the remarks of counsel which are complained of will show

that there was no effort to introduce any fact not disclosed by the evidence."

[4] Here, as will be observed, the court states the rule to be that "it is the introduction of facts not disclosed by the evidence which requires the judge to use his power of declaring a mistrial." And the facts not in the record, which the court is ruling that it is improper for counsel to introduce in his argument, are material facts which might be considered by the jury as entering into a determination of the main question of fact before them; that is, whether in a criminal case the defendant on trial is guilty or not guilty. Now, who will suppose for a moment that what a judge said about the frequency of crime in the state of society which existed here before and immediately after the Civil War will be considered by the jury in making up their minds upon the evidence in the case before them? And counsel for the defendant could, in a word or two, have called attention to the date of these utterances; it cannot be imagined that the court would have refused him permission to do this, if he had asked it. At any rate, the statements in the opinions referred to were not of any facts which could have been connected with the facts of the case on trial, so as to influence the jury in their deliberations; and the denunciation of crime and the appeal for a righteous verdict and an unflinching administration of the law was not improper from any standpoint.

[3] 3. Complaint is made, in another ground of the motion for a new trial, that during the course of his argument to the jury the solicitor general turned to the defendant and in the presence and hearing of the jury said:

"Are you defending this case out of the money you got from the pockets of your victim?"

Counsel for the defendant immediately objected to this conduct upon the part of the state's counsel, and the court thereupon said:

"I don't think, Mr. Solicitor, it is a good idea to address your remarks to the man on trial. I think that is improper. Address your remarks to the jury. I think, when counsel asks defendant a question, that defendant's counsel has a right to reply to it."

While the remark of counsel for the state to the defendant in the presence of the jury was improper, we think that the court's saying to him that it was improper was of the character of a rebuke. To say to counsel in the presence of the jury, "Your conduct is improper," cannot be regarded otherwise than as a rebuke to counsel. And in view of this rebuke administered by the court, thereby showing to the jury that the remark of counsel was improper and that the court disapproved of it, we do not think that the improper remark of counsel requires the,

grant of a new trial. Whether it would have been error to refuse the grant of a mistrial on motion by counsel is a different question not made in this record, as there was no motion made for a mistrial upon this ground.

The evidence authorized the verdict, and the court did not err in refusing a new trial.

Judgment affirmed.

All the Justices concur; except

ATKINSON and HILL, JJ. (dissenting as to the ruling in the second division of the opinion of the court). The case of *Styles v. State*, 129 Ga. 425, 59 S. E. 249, 12 Ann. Cas. 176, was one complaining of the judgment of the trial court in refusing a new trial to the defendant after he had been convicted of murder. Shortly before the trial, Lyle had been tried in the same court, and, commenting upon the trial of that case, the Savannah Morning News published an editorial as follows:

"The Opinion of a Solicitor General.

"Commenting upon the outcome of the Lyle murder trial at Waycross, Solicitor General Bennett was quoted as saying: 'I have given the matter a great deal of thought, and I have come to the conclusion that human life is too cheap in this country, due to the fact that juries are too lax in enforcing the law.' Further along in his talk he said: 'There are entirely too many homicides in this and other counties. Take the Dominion of Canada, divided from this great country only by an imaginary line, and you will find that there are nearly 100 homicides in the United States to one in Canada. There is but one explanation. In Canada the law is enforced, and in the United States it is not. The law says that the punishment of a person convicted of murder shall be death, and it does seem to me that if this law were enforced, and the punishment meted out to persons where there is no doubt of their guilt, it would prove a great benefit, and deter others who are inclined to commit like crimes.' The foregoing is safe and sound doctrine. If it had the approval of juries generally, there wouldn't be an account of a homicide in the newspapers of this state every day or two. Only last Saturday we commented upon the need of a stricter enforcement of the law against carrying concealed weapons, the occasion being reports of two homicides in the state on the previous day. Yesterday there was another homicide at Macon, the victim having just been indicted for the alleged cause of the crime. As to the truth or falsity of the charge that led to the shooting, we do not undertake to express an opinion, but we do know that the law should have been permitted to take its course. We cannot have safety for life and property, if men are permitted to take the law into their own hands when they feel they have a grievance. As a rule there are two sides to every case, and the safety and well-being of society requires that a jury shall decide which is the right side, and measure out punishment to the guilty. It is impossible to predict where this thing is going to stop, if men are permitted

to go about their daily duties carrying concealed weapons, which they use promptly on various degrees of provocation, because they believe that the danger of being punished is very remote. We do not comment on the Lyle trial, because it is probable that the accused will have to face a jury again within a very few days; but we are free to say that there are scores of persons in this state, guilty of shedding human blood, who would now be in the penitentiary, or would have paid the penalty of their crimes on the scaffold, if absolute justice had been meted out to them. And what is true as to this state is true as to about every other state. It is true, as Solicitor General Bennett says, life is so cheap in this country that it is a difficult matter to get a jury to find a verdict of guilty, even when the evidence of guilt is overwhelming. In Canada the law against murder is enforced vigorously and swiftly. The consequence is, the number of homicides is small in comparison with the number in this country. What is needed is a stirring of the consciences of the people. They must have impressed upon them the sacredness of human life. When they have a proper regard for it, juries will not be swayed by sentiment or seek excuses to avoid their duty."

The paper containing the above editorial was read by members of the jury after they had been impaneled to try *Styles*; and that fact, having come to the knowledge of the defendant and his counsel for the first time after rendition of the verdict, was made the basis of one of his grounds for motion for new trial. It was held, in effect, that the matter contained in the editorial got before the jury improperly, and, being calculated to prejudice the jurors against *Styles*, that it was error requiring a reversal for the judge to refuse a new trial based on that ground. In the course of the opinion it was said, among other things:

"An examination of the editorial will show clearly that it is argumentative in favor of convictions in capital cases such as the one on trial. Either a casual or a most scrupulous reading of the article will lead to that conclusion, and to none other. It was not only argumentative, but almost of coercive character, in that it criticized juries for failure to convict. The charge inferentially made was that the conditions in this country were such that jurors would not convict in murder cases, 'even where the evidence of guilt was overwhelming.' It was stated that the remedy needed was a 'stirring of the consciences of the people.' What effect this appeal actually had upon the minds of the jurors it is impossible to say. That it was an irregularity follows from the fact that the article was read by the jurors after they had qualified, without the knowledge or consent of the court, or of the defendant or his counsel. It was read after the jurors had been put upon their voir dire. Whether, after reading the article, the jurors would again have said that their minds were perfectly impartial between the state and the accused, or that there was no bias or prejudice resting upon their minds, either for or against the accused, we have no means of knowing. Those questions

were not again put to the jurors. It is possible that the minds of the jurors may have been so influenced by the article as to render them unable to answer the statutory questions in such way as to leave them competent to try the accused. Again, treating the article as an address to the jurors, it would be improper for at least two reasons: First, because it was made by one not authorized to participate in the trial in an advisory or any other way; second, because it was made without the knowledge or consent of the defendant or his counsel, and there was no opportunity to reply. The possible harm to the defendant that could result from an editorial is incalculable. It was well said by Wood, J., in *Cartwright v. State*, 71 Miss. 82, 14 So. 526, that 'this method of communicating to and impressing upon the jury, or any member of it, the opinion of others, is open to the same condemnation which would be visited upon oral expressions of opinion touching a defendant, injected into the body of the jury by some designing intermeddler. The widely read and influential daily journal, speaking for, as well as to, the public, reflecting popular sentiment, as well as making it, must be held to be much more powerful in influencing the average man than any expression of opinion by a single, private individual.'

"It is insisted that the defendant could not have been injured, because the article did not make reference to the particular case on trial. The fact that the case is not specially named does not necessarily deprive the argument for convictions, as contained in the editorial, of its injurious effect. The argument made no exceptions, and was addressed to all prosecutions in murder cases, which in general terms embraced the case under consideration. The subject of the editorial was of the same class as the subject of the case on trial. The editorial was apparently from a disinterested source, and for that reason may have produced an effect even more harmful to the defendant than if the case had been specially named; for in the latter case the jury might at least have attributed to the writer the interest of a partisan. The whole tendency of the editorial was to play upon the passions and emotions of those who read it, and to encourage juries to convict in capital cases. An appeal of that character, whether made by a writer, an orator from the pulpit, or an actor upon the stage, may be made with such effect as to influence the mind while acting upon any particular matter, without direct reference thereto. When a juror enters upon the trial of a criminal case, the law contemplates his withdrawal from the public, and makes no provision for addresses to him from outside sources, for his entertainment or otherwise, which are calculated, directly or indirectly, to excite any passions or emotions with respect to the matter upon which he is to sit in judgment. Perfect impartiality in the juror is the object of the law. Anything not legitimately arising out of the trial of the case, which tends to destroy the impartiality of the juror, should be discountenanced. Whether beneficial to the state or to the accused, such things, upon the ground of irrelevancy, should be suppressed, and not given the opportunity of influencing the minds or exciting the passions of the jurors. Verdicts should be the result of calm deliberation, founded upon the law and evidence. The accomplishment of that ob-

ject can never be assured where irrelevant things, which tend to destroy the impartiality of the jurors, are allowed to creep into the trial.

"We know of only three cases which have been before this court where it was argued that a new trial should have been granted upon the ground that the jurors, after having been impaneled, had been permitted to read newspapers. *Fogarty v. State*, 80 Ga. 450 [5 S. E. 782]; *Flanagan v. State*, 64 Ga. 52; *Hunter v. State*, 43 Ga. 483 (6). In the two cases first mentioned this court declined to interfere with the discretion of the trial court in refusing to grant a new trial, because it was not shown that any harm had resulted to the defendant by the reading of the newspaper. In the *Fogarty* Case the opinion recites that 'the record discloses that the copies of the paper which the jurors were reading contained nothing about the case, except the fact that the case was on trial.' It was not made to appear in either of those cases, other than as just stated with reference to the *Fogarty's* Case, what the paper contained, and therefore it was not affirmatively shown by the movant, upon whom the burden rested to show error, that anything appeared in the paper which it was improper for the jury to see. Those cases were different from the case under consideration in that respect, because in the present case it was affirmatively shown what the paper contained, and that the article in question was of such character as tended to render the jurors incompetent to serve in the case. In this way it is made affirmatively to appear that harm has been done to the defendant. In the last of the three cases cited (*Hunter v. State*, 43 Ga. 483), the article contained in the paper was one referring to the case by name as an important case, and severely criticizing counsel for the accused because of certain language employed by counsel in his argument for a change of venue. The paper was read by the jurors in the presence of the court and of counsel for the accused, who, although seeing them reading the paper, made no objection until after the verdict. In dealing with that ground of the motion for new trial, the court, speaking through Chief Justice Lochrane, said: 'In relation to a portion of the jury, before the completion of the panel, reading the *Quitman Banner*, it appears that this newspaper contained no portion of the testimony either for or against the prisoner, but contained a diatribe against one of the counsel of the accused for a speech made on a motion to change the venue. It is difficult to draw any line sufficiently well marked to constitute a rule upon this subject, and we can readily appreciate the propriety of keeping the jury, from the moment they are sworn in chief, away from all influences and communications which might, in the most remote degree, influence their verdict; but we are not prepared to say that the reading of a mere newspaper under the circumstances, being known to the counsel of the accused, not excepted to by him then and there, and transpiring in open court, would constitute a ground of error sufficient to set aside a verdict. On the contrary, we hold that it would not.' It will be observed that the court in that case 'appreciated the propriety of keeping the jury \* \* \* away from all influences and communications which might in the most remote degree influ-

ence their verdict,' but placed the ruling refusing to order a new trial mainly upon the proposition that counsel did not move at the proper time. This was in accordance with the rule, which is now better recognized, that when a party moves for a new trial on the ground of misconduct of a juror, he must aver and show affirmatively that both he and his counsel were ignorant of the misconduct charged, until after the verdict. *Wynn v. City & Suburban Ry.*, 91 Ga. 344 [17 S. E. 649]; *Cogswell v. State*, 49 Ga. 103; 12 Enc. Pl. & Pr. 553, 558. While *Hunter's Case*, supra, did not comply with this rule, *Styles*, the defendant in the present case, did comply by making the affirmative showing.

"There are other cases in which new trials have been ordered upon the ground of misconduct upon the part of the jurors. These cases do not involve the question of the propriety of the jurors reading newspapers, but the rulings made in them go to the preservation of the purity of jury trials, and the principles announced in them are applicable to the facts in this case. We will deal with some of them. The case of *Shaw v. State*, 83 Ga. 92 [9 S. E. 768], was where the misconduct complained of consisted in the jury attending a prayer meeting conducted by the prosecutor in the case. Upon arrival the jurors were shown their seats by the prosecutor, separate and apart from the remainder of the congregation. The prosecutor led the services and addressed the congregation. Prayers were offered for the court and its officers, but no reference was made to the particular case on trial. There was shouting at the meeting. In passing upon this case, the following was announced in the headnote: 'Where misconduct of a juror or of the jury is shown, the presumption is that the defendant has been injured, and the onus is upon the state to remove such presumption by proper proof. While reviewing courts are loth to interfere with the decision of the trial judge that the presumption has been removed, such decision is in this state subject to review. The misconduct of the jury and of the officer in charge of them in this case was of such character as to require a new trial.' In the course of the opinion it was said by Mr. Justice Simmons: 'There are many things which can be done by individual members of the jury, or by the whole jury, which are susceptible of such clear explanation that the trial judge would be authorized in refusing to set the verdict aside. There are other things, however, which, if done by an individual member of the jury, or by the whole jury, are so contrary to the public policy of the state in the procurement of fair and impartial trials for the citizens of the state, as to require that a verdict rendered by such jury be set aside, whether the defendant has been injured thereby or not; and in our opinion the case under consideration belongs to this class. The state is jealous of the rights and liberties of its people. When one of its citizens is accused of crime, it throws around him all the safeguards that are possible, in order to procure him a fair and impartial trial. It requires the officer who has charge of the particular jury to swear, in substance, in open court, to take them to the jury room and there keep them safely, and not to communicate with them himself or suffer any one else to communicate with them, un-

less by leave of the court. The law contemplates that, when a jury are selected and sworn to try a citizen for felony, they shall be entirely separated from the world, and that no communication whatever shall be had with them from the beginning of the trial until the verdict is reached, unless by leave of the court. It contemplates that no outside influence shall be brought to bear on the minds of the jury, and that nothing shall occur outside of the trial which shall disturb their minds in any way; that the minds of the jury shall be entirely occupied with the consideration of the case which they are sworn to try.' The case of *Smith v. State*, 122 Ga. 154 [50 S. E. 62], presents another instance where the judgment of the lower court was reversed because it refused to grant a new trial upon the ground of misconduct upon the part of the jurors. It is unnecessary here to make further reference to the misconduct complained of. In this case it was said: 'This court, from the time of its organization to the present time, has striven to protect the purity and impartiality of jury trials; and wherever there have been irregularities, unless fully explained and the court satisfied that the accused has not been injured, new trials have been granted. Where the misconduct of the officers and jury has been gross, this court and others have held that a new trial should be granted on account of public policy, whether the accused was injured or not.' The case of *Obear v. Gray*, 68 Ga. 182, presents another instance where a new trial was granted because the court refused to set aside a verdict because of improper conduct of the jurors. In this case Mr. Justice Crawford, speaking for the court, said: 'But other and quite as serious complaints are made in reference to allowing the jury to be carried to the public park, a place of great resort, especially on Sundays, and allowing them whilst there to pass about and to separate for some considerable time. Every jury is to be carried to the jury room, or some other private and convenient place, where they are not to be spoken to by the officer having them in charge or others, unless by leave of the court. To take them, therefore, to a park, which is said to be a place of great public resort, especially on the Sabbath day, where they are almost sure to hear something said about the case, whether they would or not, is most clearly a violation of the spirit and purpose of the law in withdrawing them from the body of their fellow citizens until they have agreed upon their verdict. We think that this was a good ground upon which to set aside the verdict, unless it was clearly shown that no such things occurred while they were in the presence and hearing of other visitors. It is true that the affidavits offered show everything necessary to purge them, except that it does not appear but that they heard bystanders make remarks about the case. To make the purgation complete, this should affirmatively appear. [*Stix v. Pump*] 37 Ga. 332; [*Blaock et al. v. Phillips*] 38 Ga. 216; [*Daniel v. State*] 56 Ga. 653.' We do not deem it necessary to make further reference to any of the cases cited in the several cases to which we have alluded.

"Under the view we take of the case the editorial complained of dealt with a subject so related to the case on trial as to make its reference applicable to that case; and, because of

its argumentative character and its tendency, through appeals to the emotions and passions of jurors, to displace the element of impartiality in the minds of the jurors, it was harmful to the accused, in that it tended to deprive him of a fair and impartial trial. He brought himself under the rule by making complaint in the manner and at the time authorized by law, and the judge should have granted a new trial."

In this connection see *Alabama Great Southern Railroad Co. v. Brown*, 140 Ga. 792, 79 S. E. 1113, Ann. Cas. 1915A, 1159. In *Smoot v. State*, 146 Ga. 76, 90 S. E. 715, it was held:

"It was error requiring a new trial to refuse to grant a mistrial on account of remarks of counsel for the state in regard to bad character of the accused, when he had not put his character in issue."

The basis of the ruling was that the argument of counsel for the state put before the jury irrelevant matter prejudicial to the accused, which was not in evidence and could not have been introduced by the state. In the course of the opinion it was said:

"In this case \* \* \* the objectionable remarks of the prosecuting attorney injected before the jury substantive matter which could not have been introduced by the state, and which was prejudicial to the accused and was calculated to have the same effect as if evidence thereof had been improperly admitted and the attorney had argued it for consideration by the jury. The introduction of such facts by the speech of an attorney is outside of the latitude of speech to which he is entitled. *Morris v. Maddox*, 97 Ga. 575 (2), 581, 25 S. E. 487; *W. & A. R. Co. v. York*, 128 Ga. 688, 58 S. E. 183; *W. & A. R. Co. v. Cox*, 115 Ga. 715, 42 S. E. 74; *Augusta, etc., R. Co. v. Randall*, 85 Ga. 297, 11 S. E. 706. Like other irrelevant evidence calculated to prejudice the jury against the accused, it has a tendency to injure him before the jury. In some cases the injurious effect may be averted by appropriate action and instructions from the court (Civil Code, § 4957); but what would be sufficient in any case would depend on the character of the remarks, the nature of the case, and the action or instructions from the court relied on to counteract the effect of the improper remarks. *O'Dell v. State*, 120 Ga. 152 (6), 154, 47 S. E. 577. These may differ in each case. It is not erroneous to refuse to grant a mistrial on account of improper remarks by counsel, if it is certain that no injury could have resulted therefrom to the accused. *Lee v. State*, 116 Ga. 563, 42 S. E. 759. But, if it can be reasonably inferred that the jury were thereby in any way unfavorably affected against the accused, a mistrial should be ordered or a new trial granted. *Hudson v.*

*State*, 101 Ga. 520 (3), 524, 28 S. E. 1010; *Ivey v. State*, 113 Ga. 1062, 39 S. E. 423, 54 L. R. A. 959. In the interest of fair trials, it should clearly appear that there was no probability of injury to accused likely to result from the misconduct. The character of the remarks in this case was such as to put before the jury facts of a substantive nature, irrelevant, but tending to unduly prejudice the jury against the accused, as already pointed out; but how firmly they may have found lodgment in the minds of the jury and influenced the verdict can only be left to conjecture. The judge was unsuccessful in his attempt to stop the attorney before completing the objectionable remarks. While he attempted, by reprimanding the attorney and giving instructions, to prevent the minds of the jury from being affected by the statements, the instructions did not clearly inform the jury that the character of the accused, which the attorney had stated was bad, was not in issue; but from the statement 'that, in the absence of proof of bad character by the defendant, it must be presumed that there was nothing derogatory to his character,' the jury might have inferred that the character of the accused had some bearing upon the case. Considering the character of the remarks, the circumstances of their delivery, and the instructions of the court in regard thereto, it cannot be said that the accused had a fair trial."

We have quoted at length from the decisions in the cases above cited, because the discussions in them are helpful in the consideration of the present case. While the cases are not alike in all respects, they are sufficiently so to render the principles applied in the cases cited applicable to the case under consideration. The excerpts from the decisions of this court read by the solicitor general had no relevancy to the case on trial, and could not have been introduced as evidence; yet they were put before the jury and embodied statements of facts irrelevant to the case on trial, tending to prejudice the jury against the accused, and arguments tending to influence the jury against the accused. By that method the solicitor general put before the jury remarks of this court not relevant to the case on trial, and which should no more have been permitted than similar remarks by any outside individual. They were all, all the more harmful to the accused because they were the expressions of this court. Under the circumstances it cannot be said that the defendant had the fair and impartial trial to which he was entitled under the law, and the judgment of the trial court should be reversed upon that ground.

(149 Ga. 325)

WILSON et al. v. WARD. (No. 1151.)

(Supreme Court of Georgia. Sept. 2, 1919.)

*(Syllabus by the Court.)***1. ACTION  $\S$ 50(5) — FRAUDULENT CONVEYANCES  $\S$ 237(2)—PLEADING  $\S$ 193(3)—PETITION SHOWING NO COMMON RIGHT BETWEEN PARTIES MULTIFARIOUS.**

The petition in this case was subject to the grounds of demurrer complaining that the petition was multifarious, and did not allege grounds for ancillary equitable relief, and that the court was without jurisdiction as to certain of the defendants.

*(Additional Syllabus by Editorial Staff.)***2. CONTRACTS  $\S$ 97(2) — TRANSFEEE OF NOTES, IN ACTION THEREON, RATIFIED ORIGINAL CONTRACT.**

Plaintiff, as transferee of notes of an insolvent bank, by suing on such notes, ratified the contracts out of which they arose.

**3. FRAUDULENT CONVEYANCES  $\S$ 241(1) — PLAINTIFF MUST BE JUDGMENT CREDITOR TO OBTAIN EQUITABLE RELIEF.**

In order to obtain ancillary equitable relief against transfers as in fraud of creditors, plaintiff must be a judgment creditor, or be entitled to obtain a judgment giving a lien upon the property in the same action.

Error from Superior Court, Crisp County; D. A. R. Crum, Judge.

Suit by J. A. Ward against J. A. Wilson and others. Separate orders were taken overruling demurrers to the petition and defendants bring error. Reversed.

In an equitable suit instituted in Crisp county the petition as amended, considered in connection with certain exhibits, alleged the following in substance:

The Farmers' State Bank, a corporation of Crisp county, being insolvent, was placed in the hands of a receiver on March 15, 1915. By order of the court the receiver was directed, upon payment of 50 per cent. of the outstanding deposits of the bank and obtainment of the consent of all the depositors, to sell and convey unto the plaintiff all the personal property of every description belonging to the bank. The conditions named in the order having been complied with, the receiver duly executed a transfer of the property, in pursuance of the order, on January 3, 1917; and the plaintiff thereby became transferee of the choses in action hereinafter mentioned, and as such transferee complains. On separate designated dates shortly before the appointment of the receiver, J. A. Wilson, of Crisp county, executed two several promissory notes for stated amounts, payable respectively to W. D. Wilson & Bro. Company (a firm composed of W. D. Wilson, J. A. Wilson, and Clyde Wilson) and the Farmers' State

Bank, upon which J. A. Wilson is now indebted to plaintiff as transferee. On separate designated dates shortly before the appointment of the receiver, the firm of W. D. Wilson & Bro. Company, above mentioned, executed several promissory notes for stated amounts, payable respectively to the Farmers' State Bank, to W. D. Wilson, and to their own order, duly indorsed by them, upon which notes they are now indebted to plaintiff. On May 1, 1914, Wilson-Roberts Company, a firm composed of W. D. Wilson, J. A. Wilson, Clyde Wilson, and J. A. Roberts, executed a promissory note for a stated amount payable to the Farmers' State Bank, upon which note the makers are now indebted to plaintiff as transferee. On December 31, 1913, and March 4, 1914, respectively, R. L. Wilson, of Bibb county, executed two promissory notes for stated amounts, payable respectively to the Farmers' State Bank and to J. F. Calhoun, upon which notes the maker is now indebted to petitioner as transferee. At the dates of the execution of the several promissory notes J. A. Wilson was the president of the Farmers' State Bank. In July next after the appointment of the receiver, and on a subsequent stated date, J. A. Wilson, being insolvent, executed two deeds, purporting to convey separate parcels of land to R. L. Wilson. On May 15, 1914, July 1, 1915, February 15, 1916, and April 11, 1916, R. L. Wilson, being at the time insolvent, executed separate deeds purporting to convey described real estate to George Miller, to Crisp Hardware Company (of which J. A. Wilson was manager), to Mrs. Sallie B. Wilson (wife of R. L. Wilson), of Bibb county, and to Macon Trust Company, of Bibb county, of which R. L. Wilson was president. On April 23, 1916, Sallie B. Wilson executed a deed purporting to convey to the Crisp Hardware Company some of the lots included in the above-mentioned deed from R. L. Wilson to herself. W. D. Wilson & Bro. Company, the Wilson-Roberts Company, and the several members of each firm are insolvent. The several conveyances above mentioned were void on account of having been made without consideration and as part of a conspiracy to enable R. L. Wilson and J. A. Wilson to hinder, delay, and defraud creditors of each of them. On the subject of conspiracy it is specially alleged:

"Said conspiracy consisted in negotiating said evidences of indebtedness with the said Farmers' State Bank by common consent of all parties interested in each of said obligations, and at the instance and through manipulation of the said R. L. Wilson, and with knowledge of each other, procuring thereon money and other thing of value from said Farmers' State Bank, without giving therefor any security, and done with the fraudulent intent to resist and defeat the payment of the same by hiding, conveying, and concealing the live and available assets of the makers of said obligations, in the manner here-

in described, and in the conveyances hereinbefore described; and said conspiracy consisted further in so shifting the titles to the properties herein described as to clear all of said property out of the said J. A. Wilson and the said R. L. Wilson, and with fraudulent intent to defeat the collection of their several obligations hereinbefore described, and to hinder, delay, and defraud the creditors of the said Farmers' State Bank and this petitioner. The transfers of property alleged to have been made were made subsequent to the creation and during the existence of the indebtedness set forth, the notes and obligations set out, and which do not themselves antedate the transfers complained of, being, as petitioner is informed and believes, in renewal of indebtedness previously existing and obligations previously given to the said Farmers' State Bank. The fraudulent character of said acts and transfers was well known to each and all of said defendants concerned therein, and the illegal purpose to defraud coexistent in the mind of all of said defendants. The defendants J. A. Wilson, R. L. Wilson, W. D. Wilson & Bro. Company, W. D. Wilson, Clyde Wilson, J. A. Wilson, Crisp Hardware Company (of which J. A. Wilson, Mrs. J. A. Wilson, and R. L. Wilson are practically the only stockholders), Macon Trust Company (of which R. L. Wilson is the controlling and owning stockholder), and Mrs. R. L. Wilson, wife of R. L. Wilson, otherwise known in said transfers [as] Sallie B. Wilson, are all related, not only in blood, but also by the closest affinity in all personal and business relations, and each and all were cognizant of and participating in the plans and actings of the other, and of one another, as complained of in said petition, and all of said acts were done in furtherance of the general scheme and conspiracy to defraud the said Farmers' State Bank, its creditors and assigns, and the assigns of its creditors, and to save themselves harmless from the default and failure of the said Farmers' State Bank. The said R. L. Wilson, defendant, was the real controlling and managing head of the said Farmers' State Bank, de facto, if not de jure, and was not only cognizant of the affairs of said bank and the relations of the other defendants thereto, but was approving and directing all its actings and doings, the other officers of said bank being mere instruments of the said R. L. Wilson, pliant to do his bidding; and the making of the obligations herein set out, and the making of the transfers named, were done by said named defendants, respectively, in furtherance of the grand scheme and conspiracy of all of said defendants, under the leadership of the said R. L. Wilson, fraudulently to appropriate the live and available assets of said bank to their own use and benefit, in fraud against the creditors of said bank, and their assigns, and to so conceal their own individual and available assets as to prevent the creditors of said Farmers' State Bank, their assigns, and this petitioner from realizing value or any part thereof on said obligations."

The prayers of the petition were: (a) That process issue against the defendants, J. A. Wilson, George Miller, Crisp Hardware Company, R. L. Wilson, Sallie B. Wilson, W. D. Wilson & Bro. Company, W. D. Wilson, J. A. Wilson, Clyde Wilson, Wilson-Roberts Company, W. D. Wilson, J. A. Wilson, Clyde Wil-

son, J. H. Roberts, J. F. Calhoun, and the Macon Trust Company; (b) that petitioner "have judgment against each of the several obligors on account of the debts and obligations set out" in the petition; (c) that each of the conveyances described in the petition be canceled; (d) that the several grantees named in the conveyances be restrained from conveying or encumbering the property described in the conveyances; (e) that the plaintiff have general relief.

A separate demurrer was filed by J. A. Wilson, on the ground that there was a misjoinder of causes of action. R. L. Wilson and his wife, Sallie B. Wilson, filed a joint demurrer on the grounds (a) that the petition failed to set out any cause of action; (b) that the petitioner is attempting to subject property alleged to have been fraudulently conveyed by some of his alleged debtors, without first obtaining judgment on his demands against such debtors; (c) from the petition it appears that the court has no jurisdiction of these defendants, it affirmatively appearing from the petition that they reside in a different county from that in which the suit was brought; (e) there is a misjoinder of causes of action and parties defendant, and the petition is multifarious. The Macon Trust Company filed a separate demurrer, based on similar grounds to those made by the demurrer of R. L. Wilson and his wife. J. A. Wilson, George Miller, W. D. Wilson & Bro. Co., W. D. Wilson, Clyde Wilson, Wilson-Roberts Company, J. H. Roberts, and J. F. Calhoun filed a general demurrer on the grounds (a) that the petition set forth no cause of action; that the petition attempts to subject the property of J. A. Wilson and R. L. Wilson, alleged to have been fraudulently transferred, without having first obtained a judgment or lien of any sort upon the property; (b) that the petition is multifarious; and (c) that R. L. Wilson and his wife, the Crisp County Hardware Company, and the Macon Trust Company are improperly joined as parties defendant. A separate demurrer was filed by the Crisp Hardware Company, on the same grounds as set forth in the demurrer last mentioned. Separate orders were taken overruling each demurrer, and the defendants excepted.

Dorris & Brown, of Cordele, and Harde-man, Jones, Park & Johnston and Harry S. Strozler, all of Macon, for plaintiffs in error.

M. M. Eakes and E. F. Strozler, both of Cordele, for defendant in error.

ATKINSON, J. [2, 3] The petition alleges separate causes of action against several of the defendants for money judgments, and seeks ancillary equitable relief (the cancellation of deeds and injunction to prevent transfer or incumbrance of property) against two of the debtor defendants and others. A conspiracy is alleged, in the course of which the

debtor defendants are alleged to have fraudulently obtained money from the bank. The suit does not proceed against such defendants as joint wrongdoers, but the plaintiff, as transferee of the bank, sues on separate notes of such defendants, which they executed separately to the bank for money obtained by them. By suing on the notes the plaintiff ratified the contracts out of which they arose, and the action was resolved into one upon contract, rather than in tort, based upon the conspiracy. In this respect the case differs from *Greer v. Andrew*, 133 Ga. 199, 65 S. E. 410, and citations, and similar cases unnecessary to mention. The contracts are separate and distinct from each other, and the defendants could not be joined in one action to recover the amount due on all of them. Civil Code, § 5515; *White v. North Georgia Electric Co.*, 128 Ga. 539, 58 S. E. 33; *Ansley v. Davis*, 140 Ga. 615, 79 S. E. 454. In order to obtain the ancillary equitable relief the plaintiff must be a judgment creditor, as in *Conley v. Buck*, 100 Ga. 187, 28 S. E. 97, and similar cases, or be entitled to obtain a judgment giving a lien upon the property in the same action. *De Lacy v. Hurst*, 83 Ga. 223, 9 S. E. 1052; *Booth v. Mohr*, 122 Ga. 333, 50 S. E. 173.

[1] Under the circumstances of this case there is no common right or interest in any question between all the parties to be settled, which would be ground for uniting the several claims in one action. Among other things, the petition seeks a money judgment against J. A. Wilson, a resident of the county, and ancillary equitable relief against persons claiming property under an alleged fraudulent transfer by him; also a money judgment against R. L. Wilson, a nonresident of the county, and ancillary equitable relief against persons claiming under an alleged fraudulent transfer executed by him. As R. L. Wilson could not be joined with J. A. Wilson or the other resident defendants against whom money judgments were sought, the court would be without jurisdiction to render a money judgment against him, or to grant the ancillary equitable relief of cancellation and injunction against him and those claiming by transfer under him. Upon such cause of action it would be necessary to sue them in Bibb county, where R. L. Wilson resides. *Fourth National Bank v. Mooty*, 143 Ga. 137, 84 S. E. 546; *Parker v. Parker*, 148 Ga. 196, 96 S. E. 211. From what has been said, it follows that the petition was multifarious on account of misjoinder of causes of action for money judgments, and, being so, it did not allege a cause of action for any of the ancillary equitable relief, and the court was without jurisdiction of the nonresident defendants.

Judgment reversed. All the Justices concur.

(149 Ga. 345)

## HOLMAN v. ATHENS EMPIRE LAUNDRY CO. (No. 1058.)

(Supreme Court of Georgia. Sept. 4, 1919.)

## (Syllabus by the Court.)

## 1. PUBLIC NUISANCE—PRIVATE ACTION.

If a public nuisance causes special damage to a private citizen, he has a right of action therefor.

If a private nuisance causes injury to the person or property, or both, of another, a cause of action accrues.

## 2. STATUTORY DEFINITION OF "NUISANCE."

"A nuisance is anything that worketh hurt, inconvenience, or damage to another; and the fact that the act done may otherwise be lawful does not keep it from being a nuisance."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Nuisance.]

## 3. NUISANCE ⇐ 1, 3(3)—USE OF PROPERTY SO AS NOT TO INJURE ANOTHER BY POLLUTION OF AIR.

Every person has the right to have the air diffused over his premises, whether located in the city or country, in its natural state and free from artificial impurities.

(a) By air in its natural state and free from artificial impurities is meant pure air consistent with the locality and character of the community.

(b) The pollution of the air, so far as reasonably necessary to the enjoyment of life and indispensable to the progress of society, is not actionable.

(c) The privilege of use incident to the right of property must not be exercised in an unreasonable manner, so as to inflict injury upon another unnecessarily.

(d) The maxim "Sic utere tuo ut alienum non laedas," considered and applied.

## 4. NUISANCE ⇐ 3(3)—TO CONSTITUTE SMOKE A NUISANCE SUBSTANTIAL INJURY OR INTERFERENCE WITH USE MUST BE SHOWN.

Smoke is not per se a nuisance.

To constitute smoke a nuisance, it must be such as to produce either actual, tangible, and substantial injury to neighboring property itself, or such as to interfere sensibly with its use and enjoyment by persons of ordinary sensibilities.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Nuisance Per Se.]

## 5. NUISANCE ⇐ 19, 23(1, 2), 25(1, 2) — INJUNCTION GRANTED AGAINST SMOKE WHEN RELIEF AT LAW INADEQUATE.

The jurisdiction of equity to restrain nuisances is in aid of the legal right, when the legal right is inadequate, and to prevent a multiplicity of suits.

In cases of nuisances, the foundation for the interference of equity rests in the necessity of preventing irreparable injury and multiplicity of suits.

(a) There is in principle no distinction between any of the cases, whether it be smoke, smell, noise, or gas.



(b) The doctrines of "de minimis," "balance of injury," or "public interest," and "discretion" considered.

(c) In a suit to enjoin the continuance of a nuisance created by smoke alone, the plaintiff cannot be denied injunctive relief, his case being otherwise made out, because it would injure the defendant or the public to grant it. In such a case the chancellor has no discretion at the final trial.

(d) The injuries may be balanced, and the discretion of the chancellor exercised in the grant or refusal of an interlocutory injunction.

#### 6. NUISANCE $\Leftrightarrow$ 34—WHETHER USE OF SOFT COAL IS A NUISANCE IS FOR THE JURY.

Under the pleadings and evidence, the court erred in directing the jury to return a verdict for the defendant.

Error from Superior Court, Clarke County; A. J. Cobb, Judge.

Suit for damages, injunction, etc., by W. S. Holman against the Athens Empire Laundry Company. Directed verdict for defendant, motion for new trial denied, and plaintiff brings error. Reversed.

W. S. Holman is the owner of a nine-story brick building located on the corner of Clayton and Lumpkin streets in the city of Athens, known as the Holman Building. The building was completed in January, 1914. The exterior construction of the building is of tapestry brick. The ground floor of the building is occupied by a café and lunch room, ice cream and candy factory, cigar factory, and a gas company. The other floors are designed for office purposes. Immediately across Lumpkin street from the Holman Building, and on the corner of Clayton and Lumpkin streets, is the two-story brick building of the Athens Empire Laundry Company. This building has been occupied by a steam laundry for about 18 years. In the building is a 35 horse power steam boiler, used in the operation of the laundry. The smokestack on the west side of the laundry is about 140 feet away from the Holman building. The top of the stack, which is about 60 feet in height, is on a level with the sixth floor of the Holman building.

In July, 1917, W. S. Holman filed an equitable petition in the superior court of Clarke county, in which he alleged that until recently the laundry company had used coke for the purpose of firing its boiler; that coke did not give off any considerable quantity of smoke, and could be used for fuel without financial loss or inconvenience to the laundry company, and is obtainable in the necessary quantities in the local market. He also alleged that the laundry company, at the time of the filing of the suit, was using soft coal for fuel and emitting "a very black, dense smoke, which smoke is a nuisance to the portion of the city affected (the

business section), but is especially injurious to petitioner." He charged that the smoke entered the windows of the building and blackened the walls and casing of the building itself, to the special injury of the building, as well as to the inconvenience and discomfort of the occupants thereof. His tenants were compelled to keep the windows down on the west and north fronts of his building, during the hot weather of the summer, in order "to exclude the immense volumes of smoke blowing therein" from the stack of the laundry building. A number of the plaintiff's tenants and especially the tenant operating a millinery and hairdressing establishment, have complained and threatened to leave his building unless the smoke nuisance was abated. The defendant would continue to use soft coal, and the damage from the nuisance created thereby would be irreparable, a multiplicity of suits would result, and the intervention of a court of equity was necessary to the adequate protection of the plaintiff's rights. The prayers of the petition were for judgment for the damage sustained by the plaintiff up to the filing of the suit, for injunction restraining the defendant from operating its plant "with such coal as throws out a black, dense smoke," for general relief, and for process.

The laundry company answered, and admitted the location of the respective buildings and of its smokestack, substantially as set out in the petition. It also admitted that at the time of the filing of the suit it was using soft coal, and that it had in the past, and for some years, used coke as a fuel; but it averred that coke could be obtained in the Athens market only from a tenant (a gas company) of the plaintiff, that recently it had been unable to obtain coke except at prohibitive prices, that no more smoke was emitted from its boiler than was absolutely necessary in the proper operation of its plant, that its plant was operated by a skilled fireman and engineer and in a proper manner, and that its use of soft coal did not work appreciable hurt or damage to the plaintiff. It denied substantial injury and damage to the plaintiff's building, denied substantial injury to the plaintiff's tenants, denied that the injury, if any, to the plaintiff's building, the plaintiff's tenants, and the property of the latter was irreparable in damages, but, on the contrary, averred that the plaintiff had an adequate and complete remedy at law.

On the trial the plaintiff, by amendment, waived "his right to damages up to the time his suit was filed." The evidence on behalf of the plaintiff tended to show injury to the building as alleged in the petition, extreme inconvenience and discomfort to the plaintiff's tenants, and complaints and threats by

the tenants to vacate the building. Whenever the wind was blowing from the laundry in the direction of the plaintiff's building, dense volumes of black smoke from the laundry's stack were blown directly into the building. Prior to the summer of 1917, at which time the defendant abandoned the use of coke as a fuel and commenced to use soft coal, some smoke came from the laundry's stack into the plaintiff's building. This smoke was, however, of a "yellowish color," was not particularly offensive to the plaintiff's tenants, and did not substantially damage the walls of the building. Since the defendant commenced to use soft coal as a fuel, the dense smoke from the defendant's stack was blown directly against the plaintiff's building whenever the wind was from the direction of the laundry, in such quantity as to necessitate the closing of the windows on both the west and north sides of the plaintiff's building. During the hot weather of the summer it was necessary to keep the windows of the building open. The tenants complained, not only on the ground of inconvenience and discomfort, but on the ground that the soot carried into the building and deposited upon the books, papers, furniture, and merchandise discolored and permanently injured the same. Even in winter the dense volume of smoke from the defendant's stack was blown in around the windows and openings of the building. Some of the plaintiff's tenants demanded offices on the opposite side of the building and away from the laundry. The plaintiff was compelled to make these changes in order to hold his tenants, to his financial loss. Coke, of suitable quality and in sufficient quantities, and at reasonable prices, could be had and used by the defendant. There was also some evidence to the effect that the volume of smoke thrown off by soft coal could be gradually reduced and controlled by the use of modern appliances.

The defendant's evidence was to the effect that its laundry and the plaintiff's building were located in the business section of the city; that its laundry had been in operation several years before the plaintiff erected his building in close proximity thereto; that it had used coke as a fuel as long as it could reasonably obtain it in necessary quantities and quality; that in the summer of 1917 coke could only be obtained in Athens from a tenant of the plaintiff, and then at prohibitive prices. Its evidence also tended to show that the plaintiff's building, by reason of its height, caused downward eddies in the air currents; that smoke, sand, trash, and other particles were blown against the building and carried down in the air currents and thrown into the Holman Building and into the neighboring buildings, including the laundry building, to the inconvenience and injury of the defendant; that several

other smokestacks in the immediate locality emitted large volumes of black smoke, and that the smoke from these stacks was also blown against and into the plaintiff's building, and carried down into the defendant's building. The witnesses for the defendant gave evidence that the boiler was fired by competent and careful persons, and that every reasonable and practicable effort had been made and every practicable appliance had been used to reduce and control the smoke. It also appeared that soft coal was used as a fuel in the furnace of the Holman Building, and that dense black smoke was emitted from the plaintiff's stack, and that whenever the atmosphere was damp and humid the smoke was inclined to settle into the defendant's laundry. It further appeared that there was no state statute or city ordinance regulating the emission of smoke in the city of Athens.

At the conclusion of the evidence, briefly outlined above, and after argument of counsel, the court instructed the jury at some length, finally directing a verdict for the defendant. The plaintiff filed a motion for a new trial, and to the judgment overruling the motion he excepted.

W. M. Smith and John J. & R. M. Strickland, all of Athens, for plaintiff in error.

Erwin, Rucker & Nix, of Athens, for defendant in error.

GEORGE, J. (after stating the facts as above). [1] 1. As a general rule a public nuisance gives no right of action to any individual, but must be abated by process instituted in the name of the state. Civil Code, § 4454. If a public nuisance causes special damage to a private citizen, he has a right of action therefor. Civil Code, § 4455; *Trust Co. of Georgia v. Ray*, 125 Ga. 485, 487, 54 S. E. 145; *Savannah, Florida & Western Railway Co. v. Gill*, 118 Ga. 737, 45 S. E. 623; *Richmond Cotton Oil Co. v. Castellaw*, 134 Ga. 472, 67 S. E. 1126(3). The fact that the plaintiff waived his claim to damages alleged to have been suffered prior to the filing of the suit is of no special consequence. *Tate v. Mull*, 147 Ga. 195, 197, 93 S. E. 212. If the alleged nuisance be regarded as a public one, the evidence in the case is sufficient to authorize the jury to find special injury and damage to the plaintiff, and, therefore he may maintain the action. If the alleged nuisance be considered a private one, there can be no question of the plaintiff's right to sue under section 4456 of the Code, which declares:

"A private nuisance may injure either the person or property, or both, and in either case a right of action accrues."

[2] 2. In *Bonner v. Welborn*, 7 Ga. 296, 311 (before the Code), Jude Nisbet, speaking for the court, said:

"A private nuisance is anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another. 3 Blackstone, 170. . . . If one does any other act, in itself lawful, which yet being done in that place, necessarily tends to the damage of another's property, it is also a nuisance."

In *Coker v. Birge*, 9 Ga. 425, 427 (54 Am. Dec. 347) (before the Code), Judge Warner said:

"Blackstone defines a nuisance to be anything that worketh hurt, inconvenience, or damage. 3 Bl. Com. 215."

Section 4457 of the Civil Code declares:

"A nuisance is anything that worketh hurt, inconvenience, or damage to another; and the fact that the act done may otherwise be lawful does not keep it from being a nuisance. The inconvenience complained of must not be fanciful, or such as would affect only one of fastidious taste, but it must be such as would affect an ordinary reasonable man."

[3, 4] 3, 4. Theoretically, every person has the natural right to have the air diffused over his premises in its natural state, free from all artificial impurities. Wood on Law of Nuisances (3d Ed.) § 495. If this rule were literally applied, its application would seriously disturb business, commerce, and society itself. Hence, by air in its natural state and free from artificial impurities is meant pure air consistent with the locality and nature of the community. Wood on Law of Nuisances (3d Ed.) § 496, and cases cited; Joyce on Law of Nuisances, § 136, and cases cited. The use of fuel in the home, the place of business, and the manufacturing establishment is necessary. In proportion as the population thickens, the impurities thrown into the air are increased. The pollution of the air, so far as necessary to the reasonable enjoyment of life and indispensable to the progress of society, is not actionable; but the right and so it must be exercised must not be exercised in an unreasonable manner so as to inflict injury upon another unnecessarily. *Embrey v. Owen*, 4 Eng. Law & Eq. 476, 477. Every one has the right to use his property as he sees fit, provided that in so doing he does not invade the rights of others unreasonably, judged by the ordinary standards of life and according to the notions of reasonable men. The right to use one's property as he pleases implies a like right in every other person, and is qualified by the doctrine that the use is the first instance must be a reasonable one. The maxim is "sic utere tuo ut alienum non laedas." See the elaborate judgment of Blackburn J. in *Fletcher v. Rylands*, 35 L. J. Rep. 284 L. R. 1 Exch. 285 3 H. L. 329. Whether the property be a dwelling-house or manufacturing enterprise is immaterial. Smoke is not per se a nuisance. *Paul v. Gault*, 36 Minn. 285 22 N. W. 22.

In *Crump v. Lambert*, L. R. 3 Eq. 408, 412, Lord Romilly, M. R., said:

"With respect to the question of law, I consider it to be established by numerous decisions that smoke, unaccompanied with noise or noxious vapor, that noise alone, that offensive vapors alone, although not injurious to health, may severally constitute a nuisance to the owner of adjoining or neighboring property."

To constitute smoke a nuisance, according to the authorities, it must be such as to produce a visible, tangible, and appreciable injury to property, or such as to render it specially uncomfortable or inconvenient, or to materially interfere with the ordinary comfort of human existence. *Joyce on Law of Nuisances*, § 137; *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567. With respect to dwelling houses, the rule is stated in Wood on Nuisances (3d Ed.) § 505, as follows:

"The rule is that the comfortable enjoyment of the premises must be sensibly diminished, either by actual, tangible injury to the property itself, or by the promotion of such physical discomfort as detracts sensibly from the ordinary enjoyment of life."

See, also, *Ross v. Butler*, 19 N. J. Eq. 24 97 Am. Dec. 654; *Duncan v. Hayes*, 22 N. J. Eq. 26.

That the business itself is offensive to others, or that property in the neighborhood of such business is necessarily adversely affected thereby, or that persons of fastidious taste would prefer its removal, is insufficient. Applying the foregoing principle to the case in hand, the defendant may use of its property, and carry on any business not per se a nuisance, that produces unnecessary, unreasonable, unusual or extraordinary impregnation of the air with smoke or soot, to the sensible annoyance and discomfort of plaintiff's premises, or the actual, tangible, and substantial injury to plaintiff's realty.

[5] 5. Whether a nuisance is to be determined in the circumstances of this case is at least a question of fact for the jury. *Hill v. McBurney*, 101 Cal. 212 34 P. S. E. 42 32 L. R. A. 2867. When a verdict was granted on account of the same. We do not understand this to be a judge acted upon a contrary view, but a verdict for the defendant, in the course of his remarks to the jury.

"If smoke creates a nuisance, and the party that creates the nuisance is liable in money any one that is injured by the creation or maintenance of the nuisance."

While the trial judge doubtless intended the extent of the plaintiff's injury, nevertheless finally concluded that a verdict should not be entered for smoke in the business districts of communities or cities. The judge followed the rule announced in *Paul v. Gault*, 36 Minn. 285 22 N. W. 22.

Union Planters' Bank & Trust Co. v. Memphis Hotel Co., 124 Tenn. 649, 139 S. W. 715, 39 L. R. A. (N. S.) 580. The Tennessee Supreme Court in that case held that injunction will not lie to prevent a property owner in a densely populated portion of the city, from causing smoke to issue from the chimneys of his building at an elevation lower than the roofs of neighboring buildings, although permitting it to issue at a lower level constitutes a nuisance to the occupants of such buildings. In the course of the opinion, by Green, J., it was said:

"There can be no doubt, upon the proof before us, that complainant has sustained injury by reason of the operation of the plant of the defendants."

He then dealt with the feasibility of requiring the defendants to extend their smokestack, and concluded that this could not be practically accomplished; that the further extension of the stack "would be a greater menace to a greater number of people." He then added:

"We prefer, however, to put our decision on a broader ground than the particular facts of this case, which we have stated. The annoyance and damage which complainant sustains from this smokestack is no doubt serious, but in undertaking to find a remedy we must consider the effects and results of that remedy. The situation existing between complainant's property and the defendants' property is by no means uncommon in any city. Such conditions are the rule rather than the exception. The buildings in none of our cities are of uniform height. All buildings in this day, which house any establishments of any considerable importance, are equipped with boilers, use coal, and make smoke. This smoke has to escape, and there must be smokestacks, and wherever one building is higher than another it will suffer from the smoke issuing from the stacks of the lower, unless some means could be devised whereby all stacks could be made a uniform height, and even this would not obviate the trouble, because of the tendency of smoke to descend in damp weather, and because of downward eddies in the air currents, which exist in the neighborhood of all high buildings. . . .

"If the chancellor's decree were followed, it would commit the courts of this state to a policy that would prove embarrassing in the extreme. Any owner of a higher building could compel the adjacent owner of a lower building to run a smokestack up to a point on a level with the first owner's roof. The height of the extension demanded in this case is 50 feet, and no doubt if that could be safely accomplished. It is true that, instead of being a 15-story building, the Tennessee Trust Building was 30 stories high. Upon the same principle, it could demand the extension of this Peabody stack to the level of a 30-story roof. Furthermore, both of these buildings are located in the heart of the city of Memphis, as has been the case with a 15-story building is hardly the limit of architectural development of this section of the city. There will in time doubtless be many more buildings erected in this immediate neighbor-

hood much higher than the Tennessee Trust Building or the Peabody Hotel. Upon the principle of the chancellor's decree, if it were adopted, when these new buildings were erected, they could compel the defendants to again extend their smokestack into the air, and could compel the Tennessee Trust Building to extend its smokestack, and so this process might be repeated indefinitely."

In the course of the opinion the court observed (and we think the observation an important one) that—

"It is not even urged that they [the defendants] should be required to use any fuel different from the kind which they now use. Complainant could make no such insistence as this, for the proof shows that in its own plant it uses the same character of fuel that defendants use, namely, bituminous or soft coal."

In the instant case the burden of the complaint is the use of soft coal, instead of coke. It is true that the plaintiff himself uses soft coal. He denied that he used soft coal exclusively. But, conceding that he used soft coal exclusively, the plaintiff's stack protrudes from the roof of his 9-story building, and the smoke only occasionally settles, under certain atmospheric conditions, into the defendant's laundry. If it be further conceded that such occasional infringement of the defendant's rights worked hurt and injury to it, the plaintiff is not for that reason alone, under the circumstances of this case, to be denied appropriate relief. In *Robinson v. Baugh*, 31 Mich. 290, it was held that—

"It is no defense to a bill to enjoin a nuisance caused by the manner in which a business is conducted in a neighborhood that some of the complainants have establishments in the same vicinity to which similar objections lie as are made to the one in question."

In the opinion by Graves, C. J., the case of *Gilbert v. Showerman*, 23 Mich. 448 (cited approvingly by the Tennessee Supreme Court in *Union Planters' Bank & Trust Co. v. Memphis Hotel Co.*, supra), is distinguished. *Robinson v. Baugh* involved both smoke from the use of soft coal and noise, and also jars from steam hammers, resulting in sensible inconvenience to the plaintiffs and appreciable injury to the plaintiffs' dwellings. There the right to injunctive relief was fully sustained. See, also, *Georgia R., etc., Co. v. Berry*, 78 Ga. 744, 4 S. E. 10(3); *Brimberry v. Savannah, Florida & Western Ry. Co.*, 78 Ga. 641, 3 S. E. 274.

Is there in case of nuisance produced by smoke alone any satisfactory reason upon which the court of equity can withhold injunctive relief and remit the injured party to his action at law? The importance of the question justifies a further examination of the decided cases. In *Crump v. Lambert*, supra, *Romilly, M. R.*, said:

(b) The doctrines of "de minimis," "balance of injury," or "public interest," and "discretion" considered.

(c) In a suit to enjoin the continuance of a nuisance created by smoke alone, the plaintiff cannot be denied injunctive relief, his case being otherwise made out, because it would injure the defendant or the public to grant it. In such a case the chancellor has no discretion at the final trial.

(d) The injuries may be balanced, and the discretion of the chancellor exercised in the grant or refusal of an interlocutory injunction.

#### 6. NUISANCE ¶34—WHETHER USE OF SOFT COAL IS A NUISANCE IS FOR THE JURY.

Under the pleadings and evidence, the court erred in directing the jury to return a verdict for the defendant.

Error from Superior Court, Clarke County; A. J. Cobb, Judge.

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In July, 1917, W. S. Holman filed an equitable petition in the superior court of Clarke county, in which he alleged that until recently the laundry company had used coke for the purpose of firing its boiler; that coke did not give off any considerable quantity of smoke, and could be used for fuel without financial loss or inconvenience to the laundry company, and is obtainable in the necessary quantities in the local market. He also alleged that the laundry company, at the time of the filing of the suit, was using soft coal for fuel and emitting "a very black, dense smoke, which smoke is a nuisance to the portion of the city affected (the

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The laundry company answered, and admitted the location of the respective buildings and of its smokestack, substantially as set out in the petition. It also admitted that at the time of the filing of the suit it was using soft coal, and that it had in the past, and for some years, used coke as a fuel; but it averred that coke could be obtained in the Athens market only from a tenant (a gas company) of the plaintiff, that recently it had been unable to obtain coke except at prohibitive prices, that no more smoke was emitted from its boiler than was absolutely necessary in the proper operation of its plant, that its plant was operated by a skilled fireman and engineer and in a proper manner, and that its use of soft coal did not work appreciable hurt or damage to the plaintiff. It denied substantial injury and damage to the plaintiff's building, denied substantial injury to the plaintiff's tenants, denied that the injury, if any, to the plaintiff's building, the plaintiff's tenants, and the property of the latter was irreparable in damages, but, on the contrary, averred that the plaintiff had an adequate and complete remedy at law.

On the trial the plaintiff, by amendment, waived "his right to damages up to the time his suit was filed." The evidence on behalf of the plaintiff tended to show injury to the building as alleged in the petition, extreme inconvenience and discomfort to the plaintiff's tenants, and complaints and threats by

the tenants to vacate the building. Whenever the wind was blowing from the laundry in the direction of the plaintiff's building, dense volumes of black smoke from the laundry's stack were blown directly into the building. Prior to the summer of 1917, at which time the defendant abandoned the use of coke as a fuel and commenced to use soft coal, some smoke came from the laundry's stack into the plaintiff's building. This smoke was, however, of a "yellowish color," was not particularly offensive to the plaintiff's tenants, and did not substantially damage the walls of the building. Since the defendant commenced to use soft coal as a fuel, the dense smoke from the defendant's stack was blown directly against the plaintiff's building whenever the wind was from the direction of the laundry, in such quantity as to necessitate the closing of the windows on both the west and north sides of the plaintiff's building. During the hot weather of the summer it was necessary to keep the windows of the building open. The tenants complained, not only on the ground of inconvenience and discomfort, but on the ground that the soot carried into the building and deposited upon the books, papers, furniture, and merchandise discolored and permanently injured the same. Even in winter the dense volume of smoke from the defendant's stack was blown in around the windows and openings of the building. Some of the plaintiff's tenants demanded offices on the opposite side of the building and away from the laundry. The plaintiff was compelled to make these changes in order to hold his tenants; to his financial loss. Coke, of suitable quality and in sufficient quantities, and at reasonable prices, could be had and used by the defendant. There was also some evidence to the effect that the volume of smoke thrown off by soft coal could be gradually reduced and controlled by the use of modern appliances.

The defendant's evidence was to the effect that its laundry and the plaintiff's building were located in the business section of the city; that its laundry had been in operation several years before the plaintiff erected his building in close proximity thereto; that it had used coke as a fuel as long as it could reasonably obtain it in necessary quantities and quality; that in the summer of 1917 coke could only be obtained in Athens from a tenant of the plaintiff, and then at prohibitive prices. Its evidence also tended to show that the plaintiff's building, by reason of its height, caused downward eddies in the air currents; that smoke, sand, trash, and other particles were blown against the building and carried down in the air currents and thrown into the Holman Building and into the neighboring buildings, including the laundry building, to the inconvenience and injury of the defendant; that several

other smokestacks in the immediate locality emitted large volumes of black smoke, and that the smoke from these stacks was also blown against and into the plaintiff's building, and carried down into the defendant's building. The witnesses for the defendant gave evidence that the boiler was fired by competent and careful persons, and that every reasonable and practicable effort had been made and every practicable appliance had been used to reduce and control the smoke. It also appeared that soft coal was used as a fuel in the furnace of the Holman Building, and that dense black smoke was emitted from the plaintiff's stack, and that whenever the atmosphere was damp and humid the smoke was inclined to settle into the defendant's laundry. It further appeared that there was no state statute or city ordinance regulating the emission of smoke in the city of Athens.

At the conclusion of the evidence, briefly outlined above, and after argument of counsel, the court instructed the jury at some length, finally directing a verdict for the defendant. The plaintiff filed a motion for a new trial, and to the judgment overruling the motion he excepted.

W. M. Smith and John J. & R. M. Strickland, all of Athens, for plaintiff in error.

Erwin, Rucker & Nix, of Athens, for defendant in error.

GEORGE, J. (after stating the facts as above). [1] 1. As a general rule a public nuisance gives no right of action to any individual, but must be abated by process instituted in the name of the state. Civil Code, § 4454. If a public nuisance causes special damage to a private citizen, he has a right of action therefor. Civil Code, § 4455; *Trust Co. of Georgia v. Ray*, 125 Ga. 485, 487, 54 S. E. 145; *Savannah, Florida & Western Railway Co. v. Gill*, 118 Ga. 737, 45 S. E. 623; *Richmond Cotton Oil Co. v. Castellaw*, 134 Ga. 472, 67 S. E. 1126(3). The fact that the plaintiff waived his claim to damages alleged to have been suffered prior to the filing of the suit is of no special consequence. *Tate v. Mull*, 147 Ga. 195, 197, 93 S. E. 212. If the alleged nuisance be regarded as a public one, the evidence in the case is sufficient to authorize the jury to find special injury and damage to the plaintiff, and, therefore he may maintain the action. If the alleged nuisance be considered a private one, there can be no question of the plaintiff's right to sue under section 4456 of the Code, which declares:

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Section 4457 of the Civil Code declares:

"A nuisance is anything that worketh hurt, inconvenience, or damage to another; and the fact that the act done may otherwise be lawful does not keep it from being a nuisance. The inconvenience complained of must not be fanciful, or such as would affect only one of fastidious taste, but it must be such as would affect an ordinary reasonable man."

[3, 4] 3, 4. Theoretically, every person has the natural right to have the air diffused over his premises in its natural state, free from all artificial impurities. Wood on Law of Nuisances (3d Ed.) § 495. If this rule were literally applied, its application would seriously disturb business, commerce, and society itself. Hence, by air in its natural state and free from artificial impurities is meant pure air consistent with the locality and nature of the community. Wood on Law of Nuisances (3d Ed.) § 496, and cases cited; Joyce on Law of Nuisances, § 136, and cases cited. The use of fuel in the home, the place of business, and the manufacturing establishment is necessary. In proportion as the population thickens, the impurities thrown into the air are increased. The pollution of the air, actually necessary to the reasonable enjoyment of life and indispensable to the progress of society, is not actionable; but the right (and such it must be conceded) must not be exercised in an unreasonable manner so as to inflict injury upon another unnecessarily. *Embrey v. Owen*, 4 Eng. Law & Eq. 476, 477. Every one has the right to use his property as he sees fit, provided that in so doing he does not invade the rights of others unreasonably, judged by the ordinary standards of life and according to the notions of reasonable men. The right to use one's property as he pleases implies a like right in every other person, and is qualified by the doctrine that the use in the first instance must be a reasonable one. The maxim is, "Sic utere tuo ut alienum non laedas." See the elaborate judgment of Blackburn, J., in *Fletcher v. Rylands*, 35 L. J. Exch. 154, L. R. 1 Exch. 265, 3 H. L. 330. Whether the property be a dwelling-house or manufacturing enterprise is immaterial. Smoke is not per se a nuisance. *St. Paul v. Gillilan*, 36 Minn. 298, 31 N. W. 49.

In *Crump v. Lambert*, L. R. 3 Eq. 409, 412, Lord Romilly, M. R., said:

"With respect to the question of law, I consider it to be established by numerous decisions that smoke, unaccompanied with noise or noxious vapor, that noise alone, that offensive vapors alone, although not injurious to health, may severally constitute a nuisance to the owner of adjoining or neighboring property."

To constitute smoke a nuisance, according to the authorities, it must be such as to produce a visible, tangible, and appreciable injury to property, or such as to render it specially uncomfortable or inconvenient, or to materially interfere with the ordinary comfort of human existence. Joyce on Law of Nuisances, § 137; *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567. With respect to dwelling houses, the rule is stated in Wood on Nuisances (3d Ed.) § 505, as follows:

"The rule is that the comfortable enjoyment of the premises must be sensibly diminished, either by actual, tangible injury to the property itself, or by the promotion of such physical discomfort as detracts sensibly from the ordinary enjoyment of life."

See, also, *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654; *Duncan v. Hayes*, 22 N. J. Eq. 28.

That the business itself is offensive to others, or that property in the neighborhood of such business is necessarily adversely affected thereby, or that persons of fastidious taste would prefer its removal, is not sufficient. Applying the foregoing principles to the case in hand, the defendant may make use of its property, and carry on any business not per se a nuisance, that produces no unnecessary, unreasonable, unusual or extraordinary impregnation of the air with smoke or soot, to the sensible inconvenience and discomfort of plaintiff's tenants, or to the actual, tangible, and substantial injury of plaintiff's realty.

[5] 5. Whether a nuisance in fact existed, in the circumstances of this case, was at least a question of fact for the jury. See *Hill v. McBurney Oil, etc., Co.*, 112 Ga. 788, 38 S. E. 42, 52 L. R. A. 398(3), where an injunction was granted on account of noise alone. We do not understand that the trial judge acted upon a contrary view in directing a verdict for the defendant. In the course of his remarks to the jury he said:

"If smoke creates a nuisance, and it can, then the party that creates the nuisance must compensate in money any one that is damaged by the creation or maintenance of the nuisance."

While the trial judge doubtless had in mind the extent of the plaintiff's injury, he nevertheless finally concluded that a court of equity should not undertake to regulate smoke in the business districts of populous communities or cities. The judge expressly followed the rule announced in the case of

Union Planters' Bank & Trust Co. v. Memphis Hotel Co., 124 Tenn. 649, 139 S. W. 715, 39 L. R. A. (N. S.) 580. The Tennessee Supreme Court in that case held that injunction will not lie to prevent a property owner in a densely populated portion of the city, from causing smoke to issue from the chimneys of his building at an elevation lower than the roofs of neighboring buildings, although permitting it to issue at a lower level constitutes a nuisance to the occupants of such buildings. In the course of the opinion, by Green, J., it was said:

"There can be no doubt, upon the proof before us, that complainant has sustained injury by reason of the operation of the plant of the defendants."

He then dealt with the feasibility of requiring the defendants to extend their smokestack, and concluded that this could not be practically accomplished; that the further extension of the stack "would be a greater menace to a greater number of people." He then added:

"We prefer, however, to put our decision on a broader ground than the particular facts of this case, which we have stated. The annoyance and damage which complainant sustains from this smokestack is no doubt serious, but in undertaking to find a remedy we must consider the effects and results of that remedy. The situation existing between complainant's property and the defendants' property is by no means uncommon in any city. Such conditions are the rule rather than the exception. The buildings in none of our cities are of uniform height. All buildings in this day, which house any establishments of any considerable importance, are equipped with boilers, use coal, and make smoke. This smoke has to escape, and there must be smokestacks, and wherever one building is higher than another it will suffer from the smoke issuing from the stacks of the lower, unless some means could be devised whereby all stacks could be made a uniform height, and even this would not obviate the trouble, because of the tendency of smoke to descend in damp weather, and because of downward eddies in the air currents, which exist in the neighborhood of all high buildings. \* \* \*

"If the chancellor's decree were followed, it would commit the courts of this state to a policy that would prove embarrassing in the extreme. Any owner of a higher building could compel the adjacent owner of a lower building to run a smokestack up to a point on a level with the first owner's roof. The height of the extension demanded in this case is 50 feet, and we doubt if that could be safely accomplished. Suppose that, instead of being a 15-story building, the Tennessee Trust Building was 30 stories high. Upon the same principle, it could compel the extension of this Peabody stack up to the level of a 30-story roof. Furthermore, both of these buildings are located in the heart of the city of Memphis, as has been stated. A 15-story building is hardly the limit of the architectural development of this section of the city. There will in time doubtless be buildings erected in this immediate neighbor-

hood much higher than the Tennessee Trust Building or the Peabody Hotel. Upon the principle of the chancellor's decree, if it were adopted, when these new buildings were erected, they could compel the defendants to again extend their smokestack into the air, and could compel the Tennessee Trust Building to extend its smokestack, and so this process might be repeated indefinitely."

In the course of the opinion the court observed (and we think the observation an important one) that—

"It is not even urged that they [the defendants] should be required to use any fuel different from the kind which they now use. Complainant could make no such insistence as this, for the proof shows that in its own plant it uses the same character of fuel that defendants use, namely, bituminous or soft coal."

In the instant case the burden of the complaint is the use of soft coal, instead of coke. It is true that the plaintiff himself uses soft coal. He denied that he used soft coal exclusively. But, conceding that he used soft coal exclusively, the plaintiff's stack protrudes from the roof of his 9-story building, and the smoke only occasionally settles, under certain atmospheric conditions, into the defendant's laundry. If it be further conceded that such occasional infringement of the defendant's rights worked hurt and injury to it, the plaintiff is not for that reason alone, under the circumstances of this case, to be denied appropriate relief. In *Robinson v. Baugh*, 31 Mich. 290, it was held that—

"It is no defense to a bill to enjoin a nuisance caused by the manner in which a business is conducted in a neighborhood that some of the complainants have establishments in the same vicinity to which similar objections lie as are made to the one in question."

In the opinion by Graves, C. J., the case of *Gilbert v. Showerman*, 23 Mich. 448 (cited approvingly by the Tennessee Supreme Court in *Union Planters' Bank & Trust Co. v. Memphis Hotel Co.*, supra), is distinguished. *Robinson v. Baugh* involved both smoke from the use of soft coal and noise, and also jars from steam hammers, resulting in sensible inconvenience to the plaintiffs and appreciable injury to the plaintiffs' dwellings. There the right to injunctive relief was fully sustained. See, also, *Georgia R., etc., Co. v. Berry*, 78 Ga. 744, 4 S. E. 10(3); *Brimberry v. Savannah, Florida & Western Ry. Co.*, 78 Ga. 641, 3 S. E. 274.

Is there in case of nuisance produced by smoke alone any satisfactory reason upon which the court of equity can withhold injunctive relief and remit the injured party to his action at law? The importance of the question justifies a further examination of the decided cases. In *Crump v. Lambert*, supra, *Romilly, M. R.*, said:



"The law on this subject is, I apprehend, the same, whether it be enforced by action at law or by bill in equity. In any case where a plaintiff could obtain substantial damages at law, he is entitled to an injunction to restrain the nuisance in this court. There is, I apprehend, no distinction between any of the cases, whether it be smoke, smell, noise, vapor, or water, or any other gas or fluid. The owner of one tenement cannot cause or permit to pass over, or flow into, his neighbor's tenement any one or more of these things in such a way as materially to interfere with the ordinary comfort of the occupier of the neighboring tenement, or so as to injure his property. \* \* \* The owner of the adjoining or neighboring tenement, whether he has or has not previously occupied it—in other words, whether he comes to the nuisance or the nuisance comes to him—retains his right to have the air that passes over his land pure and unpolluted, and the soil and produce of it uninjured by the passage of gases, by the deposit of deleterious substances, or by the flow of water."

And in that case an injunction was granted to—

"restrain the issuing of smoke and effluvia from a factory chimney, and the making of noise in the factory, although it was situated in a manufacturing town; it being proved that such smoke, effluvia, and noise were a material addition to previously existing nuisances."

The doctrine of this case has been adopted by the English courts, and generally by the courts of this country. Wood on Nuisances, § 507, and cases cited in notes.

In *Lord Colchester v. Ellis*, 2 Starkie's Ev. 538, the defendant, who was the owner of a building in London, erected a chimney in his building for the purpose of having a fire in his saddle room. The smoke from this chimney entered the plaintiff's dwelling about 50 yards distant, to the great annoyance of the plaintiff and his family and to the injury of his furniture. It appeared that the chimney was lower than the surrounding buildings and lower than the plaintiff's building. It was held that, if the plaintiff would have a fire in his establishment, he must construct his chimney so as not to injure his neighbor's property or impair its comfortable enjoyment.

In *Sampson v. Smith*, 8 Sim. 272, the plaintiff was the owner of a dwelling house and shop. He had valuable furniture in his dwelling house and also a stock of merchandise in the shop. The defendants owned a manufacturing establishment on the opposite side of the street from the plaintiff's house and shop. In the manufacturing establishment were steam engines. Dense volumes of smoke issued from the defendants' flue, and the soot and cinders descended in volumes into the streets, and into the shop and dwelling house of the plaintiff, so as to injuriously affect the goods in the store and the furniture in the house, and to sensibly impair the

comfortable enjoyment of the dwelling. It was held that the use of the steam engine with such results was a nuisance, and that the plaintiff was entitled to an injunction restraining the use of the same in the manner shown. The case is based upon the fact that the defendants' flue was not as high as the roof of the plaintiff's building and other buildings in the vicinity.

*Cartwright v. Gray*, 12 Grant's Ch. (Ont.) 400, is an illustrative and instructive case. It there appeared that the nuisance arose principally from the fuel used by the defendant in running his steam engine located near the dwelling houses of the plaintiffs, and from the failure on the part of the defendant to employ the best known appliances for discharging the smoke. *Mowat, V. C.*, in delivering the opinion of the court, after citing and applying the doctrine laid down in *Walter v. Selfe*, 4 Eng. Law & Eq. 15, and *St. Helen's Smelting Co. v. Tipping*, 4 B. & S. 608, concludes as follows:

"My opinion on the whole case is that the defendant has a right to use steam for propelling his machinery, but is bound to employ such reasonable precautions in the use of it as may prevent unnecessary danger to his neighbors' property from sparks, and unnecessary annoyance or injury to them from the noise or smoke; that though he seems, since the bill was filed, to have performed this duty as respects these sparks and noise, he has done nothing in respect to the smoke; and that the plaintiffs' complaint in reference thereto is well founded. The decree will therefore require the defendant to desist from using his steam engine in such a manner as to occasion damage or annoyance to the plaintiffs, or either of them, as owning or occupying the houses mentioned in the bill."

The case of *Galbraith v. Oliver*, 3 Pittsb. (Pa.) 79, was an action to restrain the defendants, the proprietors of a flouring mill, from using soft coal to run their steam engine. In the course of the opinion by *Johnson, J.*, it was said:

"No occupation is more legitimate and no erection more careful than that of a flouring mill. There can be no denial of the owner's right to build one and to run it by steam. So of any other manufacturing establishment. They may not be agreeable to his next neighbor. He is not bound to consult the taste, pleasure, or preference of others; but he is bound to respect his neighbor's rights. \* \* \* While mills and manufactories are legal and necessary, it is neither legal nor necessary that they be so located as to interfere with the rights of others in the enjoyment of their possessions. When, therefore, they create noises that prevent sleep, or taint the atmosphere with vapors prejudicial to health or nauseous to the smell, or fill it with a smudge that depreciates its use for every purpose, they trench on the rights of persons affected thereby. Just here is where the line must be drawn. At this point they become nuisances."

In *Wood on Nuisances*, § 502, the author, after reviewing many cases, English and American, says:

"Thus it will be seen that, even in the ordinary uses of buildings, the owners and occupants are bound, not only to see to it that their chimneys are so arranged as to carry off the smoke developed therein, but are also bound to use such fuel as will produce the least obnoxious smoke."

This doctrine is supported by many cases. See *Rhodes v. Dunbar*, 57 Pa. 274, 98 Am. Dec. 221; *Sullivan v. Royer*, 72 Cal. 248, 13 Pac. 655, 1 Am. St. Rep. 51; *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567; *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654; *Tuebner v. Cal. Street R. Co.*, 66 Cal. 171, 4 Pac. 1162; *Hurlbut v. McKone*, 55 Conn. 31, 10 Atl. 164, 3 Am. St. Rep. 17; *Wesson v. Washburne Iron Co.*, 13 Allen (Mass.) 95, 90 Am. Dec. 181; *Hutchins v. Smith*, 63 Barb. (N. Y.) 252; *Hyatt v. Myers*, 71 N. C. 271. See, also, *Joyce on Law of Nuisances*, § 136 et seq., and cases cited in notes.

The case of *Austin v. Augusta Terminal Ry. Co.*, 108 Ga. 671, 34 S. E. 852, 47 L. R. A. 755, was a suit by the owner of property to recover damages caused by the tracks of the railway company running in the rear of the plaintiff's premises. Injury from smoke and noise was claimed by the plaintiff. The suit really involved the construction of the clause of the Constitution which protects private property from being "taken or damaged" for public purposes without just compensation. This court held, in the majority opinion by Chief Justice Simmons, that the plaintiff's property was not "taken or damaged" within the meaning of the Constitution, under the special facts of the case. The Chief Justice was careful to note that—

"While holding that a lawfully constructed and lawfully operated railroad is not a nuisance, we are very far from holding that it may not be so operated in streets or on its private property as to become a nuisance. \* \* \* But when they do so they will get no protection from their charter; for the Legislature does not legalize nuisances, whether they are maintained by manufacturing companies, railroads, municipalities, or private individuals."

In the majority opinion much is said, *arguendo*, on the question of nuisances produced by noise and smoke. It was, however, observed that "the evidence does not show any unlawful, improper, or unusual noise, smoke, or movement of cars." Two justices (*Lumpkin, P. J.*, and *Lewis, J.*) dissented in that case. The dissenting opinion, by *Lewis, J.*, discusses at length many English and American cases in line with the general doctrine laid down by *Wood on Nuisances*, heretofore referred to in this opinion. This court has said that—

"The foundation for the interference of equity in restraint of nuisances rests in the necessity of preventing irreparable mischief and

multiplicity of suits. \* \* \* There must be such an injury as from its nature is not susceptible of being adequately compensated at law, or such as from its continuance or permanent mischief must occasion a constantly recurring grievance, which cannot be otherwise prevented but by injunction. \* \* \* By continuing nuisance or constantly recurring grievance or permanent injury is not meant a constant and unceasing nuisance or injury, but a nuisance which occurs so often, and is so necessarily an incident of the use of property complained of, that it can be fairly said to be continuous, although not constant or unceasing."

See *Central Ry. Co. v. Americus Construction Co.*, 133 Ga. 392, 397, 65 S. E. 855. See, also, *Farley v. Gate City Gas-Light Co.*, 106 Ga. 323, 337, 338, 81 S. E. 193; *Richmond Cotton Oil Co. v. Castellaw*, 134 Ga. 472, 67 S. E. 1126(4).

"If the injury caused to the adjacent property be continuing so as to cause a constantly recurring grievance, injunction is an available remedy." *Tate v. Mull*, 147 Ga. 195, 93 S. E. 212 (2).

The rule is well stated by *Pitney, V. C.*, in *Hennessy v. Carmony*, 50 N. J. Eq. 616, 620, 25 Atl. 374, 377:

"The familiar ground on which the extraordinary power of the court is invoked in such cases is that it is inequitable and unjust that the injured party should be compelled to resort to repeated actions at law to recover damages for his injury, which, after all, in this class of cases, are incapable of measurement; and I presume to add the further ground that in this country" such recovery "must result in giving the wrongdoer a power not permitted by our system of constitutional government, viz. to take the injured party's property for his private purposes upon making, from time to time, such compensation as the whims of a jury may give. This ground of equitable action is of itself sufficient in those cases where the injury, though not irreparable, promises to be repeated for an indefinite period, and so is continuous in the sense that it will be persevered in indefinitely."

The English courts, it would seem, have not hesitated to grant injunctive relief in cases of nuisances produced by smoke alone. Many American courts, in such cases, have, upon various grounds, denied the right to such relief, and have remitted the complaining parties to their actions at law. The principal and usual grounds upon which injunctive relief has been denied may be referred to as the "de minimis," the "balance of injury," or the "public benefit," and the "discretionary" doctrines. With respect to the first it is sufficient if the injury be appreciable, within the meaning of the term heretofore indicated in this opinion. With respect to the second: In *Richards' Appeal*, 57 Pa. 105, 98 Am. Dec. 202, it was said:

"The chancellor will consider whether he would not do a greater injury by enjoining than would result from refusing, and leaving

the party to his redress at the hands of the court and jury."

In *Campbell v. Seaman*, 2 Thomp. & C. 231, the Supreme Court of New York said of this case that it was in direct conflict with the authorities of the state of New York, and could not be there adopted as the law. The case is also criticized and explained in *Wood on Nuisances* (3d Ed.) § 532. In line with *Richards' Appeal* is also *Huckenstine's Appeal*, 70 Pa. 102, 10 Am. Rep. 669. These cases have been distinguished and in part disapproved in the later Pennsylvania case of *Sullivan v. Jones & L. Steel Co.*, 208 Pa. 540, 57 Atl. 1065, 66 L. R. A. 712. The doctrine of comparative injuries is of course clearly applicable in the grant or refusal of interlocutory injunctions to restrain nuisances. The doctrine has generally been applied in such cases, or in cases involving special facts. The weight of authority is to the effect that at the final trial the right to injunctive relief is not discretionary. See *Clark's Equity*, §§ 213, 214, 215, and numerous cases cited in notes. The discretionary doctrine is well disposed of by *Pitney, V. C.*, in *Hennessy v. Carmony*, *supra*, when he says:

"I have never been able to see how the question of the right of the complainant to an injunction on final hearing could ever be a matter properly resting in the 'discretion' of the chancellor, as I understand the force of that word in that connection. If by 'discretion' is here meant that the judge must be discreet, and must act with discretion, and discriminate, and take into consideration and give weight to each circumstance in the case, in accordance with its actual value in a court of equity, then I say that that is just what he must do in every case that comes under his consideration—no more and no less. \* \* \* But if the word 'discretion,' in this connection, is used in its secondary sense, and by it is meant that the chancellor has the liberty and power of acting, in finally settling property rights, at his discretion, without the restraint of the legal and equitable rules governing those rights, then I deny such power. It seems to me that the true scope of the exercise of this latter sort of discretion in the judicial field is found in those matters which affect procedure merely, and not the ultimate right."

The discretionary doctrine is not peculiar to proceedings to abate or enjoin nuisances, but applies generally to the grant of injunctions and other extraordinary equitable remedies. This court has said that—

"The exercise of the jurisdiction of courts of equity to decree a specific performance or the rescission of a contract is not a matter of right in either party, but is a matter of sound and reasonable discretion in the court, which governs itself, as far as it may, by general rules and principles, but at the same time withholds or grants relief according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice between the parties."

See, also, *Bagwell v. Bagwell*, 72 Ga. 92 (2), *Swint v. Carr*, 76 Ga. 322, 2 Am. St. Rep. 44; *Kirkland v. Downing*, 106 Ga. 530, 32 S. E. 632.

However, in *Franklin v. Newsom*, 53 Ga. 580, it was ruled:

"Whilst it is a general rule that the right to specific performance is in the sound discretion of a court of equity, yet, in this state, that power is to be exercised by the jury under the evidence and charge of the court."

This ruling was followed in *Miller v. Watson*, 139 Ga. 29, 31, 76 S. E. 585. See *Lan drum v. Rivers*, 148 Ga. 744, 98 S. E. 477.

This court has applied the doctrine in case where the plaintiff prayed for the specific performance of a fraudulent, illegal, or hard and unconscionable contract. It would seem to be a misapplication of the doctrine to deny one his equitable rights solely upon the ground of inconvenience to the opposite party or to the public. Neither the opposite party nor the public has the right, legal or equitable, to invade the clear legal rights of another. It has been said that the final settlement of property rights does not lie in the broad discretion of the chancellor, but in the clear legal and equitable rules which bind the chancellor himself. The case of *Somerset Water, Light & Traction Co. v. Hyde*, 129 Ky. 402, 111 S. W. 1005, where an injunction to restrain the defendant from discharging sewerage upon the plaintiff's land was denied, and the case of *City of Wheeling v. Natural Gas Co.*, 74 W. Va. 372, 82 S. E. 345, where the city was refused an injunction to restrain the defendant from supplying gas in violation of its franchise, because of the inconvenience it would cause to the public, forcefully illustrate what we believe to be a misconception of the extent of equitable power. The following cases, among others, support what we believe to be the true rule: *Bristol v. Palmer*, 83 Vt. 54, 74 Atl. 332, 31 L. R. A. (N. S.) 881, and note; *Smith v. Rochester*, 38 Hun (N. Y.) 612; 5 *Pomeroy's Equity Jurisprudence*, 530, 531; *Kerr on Injunctions*; \*166; 1 *High on Injunctions*, § 739.

[6] 6. The case in hand is purely one for injunctive relief against a nuisance in consequence. Equity is asked to do no more than to restrain the defendant from using soft coal, that is, "such coal as throws out a black, dense smoke," and the evidence in the record is such as to authorize a finding by the jury that the use of coke was at once convenient and practical. The court is not asked to abate the defendant's laundry. If a case be otherwise made out, injunctive relief cannot be denied the plaintiff, although the nuisance results from smoke alone. Whether the plaintiff was entitled to an injunction was a question for the jury.

Judgment reversed. All the Justices concur.

(24 W. Va. 417)

## STATE ex rel. BRANDON v. BOARD OF CONTROL.

(Supreme Court of Appeals of West Virginia.  
Sept. 8, 1919.)*(Syllabus by the Court.)*1. FISH  $\S$ 11 — GAME  $\S$ 6 — WOODS AND FORESTS  $\S$ 7 — APPOINTMENT — CONSTITUTIONAL PROVISIONS.

The act creating the office of forest, game and fish warden being silent as to the manner of filling the same after the making of the initial appointment thereto, all future appointments to fill said office must be made in accordance with the provisions of section 8 of article 7 of the Constitution; that is, by the Governor, with the advice and consent of the Senate.

2. STATUTES  $\S$ 218 — CONTEMPORANEOUS CONSTRUCTION BY EXECUTIVE OFFICERS.

Where a statute is of doubtful meaning, the contemporaneous construction placed thereon by the officers of government charged with its execution is entitled to great weight, and will not be disregarded or overthrown, unless it is clear that such construction is erroneous.

Original mandamus by the State on the relation of C. W. Brandon, against the Board of Control, etc. Writ refused.

Wm. T. George, of Philippi, for relator.

E. T. England, Atty. Gen., for respondent.

RITZ, J. The relator seeks by this proceeding to compel the respondent to approve his accounts as forest, game and fish warden, in order that he may secure the payment of the same out of the public fund provided for the maintenance of that office.

[1] It appears that the relator was appointed to the office of forest, game and fish warden by the Governor on the 20th of February, 1918; that he immediately entered upon the duties of said office, and performed the same until the month of May, 1919, when Clare W. Harding was appointed by the Governor to fill said office. Relator's term of office, as provided by the statute, was for four years, and he, contending that his term had not expired, and the board of control refusing to approve his accounts for expenses incurred by him and for his salary after the issuance of a commission to Harding, brought this writ seeking to compel the respondent to approve said accounts in order that the same might be paid. The respondent, by its return to the writ, challenges the right of the relator to hold the office, for the reason that his appointment thereto was by the Governor submitted to the Senate at the regular 1918 session, and by that body rejected, and the Governor being of opinion that this left the office vacant thereupon appointed said Harding and commissioned him thereto. The relator's contention is that his appointment

is not required to be confirmed by the Senate, and that the action of the Governor in submitting the same to the Senate for confirmation was without authority of law, and that the rejection of the same by the Senate had no force or effect. On the other hand, the respondent contends that under the law it was incumbent upon the Governor to submit this appointment to the Senate for its action, and of course if this contention is correct the refusal of the Senate to confirm the same left the office vacant, and the appointment of Harding thereto was clearly authorized by law. The solution of this question depends upon the construction of the act of the Legislature creating the office of forest, game and fish warden, as well as upon the construction of section 8 of article 7 of the Constitution. Section 8 of article 7 of the Constitution provides as follows:

"The Governor shall nominate, and by and with the advice and consent of the senate (a majority of all the senators elected concurring by yeas and nays), appoint all officers whose offices are established by this Constitution, or shall be created by law, and whose appointment or election is not otherwise provided for; and no such officers shall be appointed or elected by the Legislature."

The act creating the office of forest, game and fish warden (section 1, ch. 62 [sec. 3449] of the Code), so far as the same is pertinent to the matter of the appointment of that officer provides:

"The Governor shall between the first day of June and the first day of July, one thousand nine hundred and nine, appoint some person, a citizen of this state, whose term of office shall begin on the first day of July, one thousand nine hundred and nine, to the office of forest, game and fish warden. Said warden shall hold his office for four years and until his successor has been appointed and qualified, unless sooner removed for cause by the Governor."

It will be observed that section 8 of article 7 of the Constitution provides that the officers created by that instrument shall be appointed by the Governor, with the advice and consent of the Senate, and further that all appointments to fill offices created by law, subsequent to the enactment of the Constitution, shall be filled by appointment by the Governor, with the advice and consent of the Senate, unless other provision is made therefor. The contention of the relator is that as to the office of forest, game and fish warden the Legislature has made provision for the appointment of this officer by the Governor alone, without requiring the concurrence of the Senate therein, while it is contended by the respondent that the act creating the office does not make any such provision. It will be observed by so much of said act as is above quoted that it provides for the appointment of a forest, game and fish warden at a certain time for the term of four years.

The act does not even create the office by express terms, but by necessary implication it may be said that the office is permanently created. However, neither by implication nor by express terms is there provision made for the appointment of such officer by any person or tribunal, except as to the individual who shall be appointed thereto in the first instance. As to how his successor shall be appointed, or as to how the office shall be filled after the expiration of that four years, the act is entirely silent. This being the case, we must look to the constitutional provision for authority to fill the same, and when we do this we find that the same shall be filled by appointment by the Governor, by and with the advice and consent of the Senate.

[2] We are therefore of the opinion that under the act, as it now stands, it was necessary to the validity of this appointment that the same be submitted to the Senate for its action thereon, and that the refusal of the Senate to confirm the relator's appointment to the office determines his title thereto. Under the constitutional provision the Governor could not reappoint him thereto by a recess appointment, but must appoint another person to the office. This construction is in keeping with the uniform interpretation of the act by the legislative and executive departments of the government ever since the office was created, as averred by the respondent in its return, and in all cases where a statute is of doubtful meaning, the contemporaneous construction placed thereon by the officers of government charged with its execution is entitled to great weight, and will not be disregarded or overthrown, except for strong reasons, or unless it is clear that such construction is erroneous. *United States v. Johnston*, 124 U. S. 236, 8 Sup. Ct. 448, 31 L. Ed. 389.

The relator, however, contends that, even though he is not the forest, game and fish warden de jure, he is so de facto. He avers in his petition that he is performing the duties of the office; that he has possession of the seal, and of the books and records of the same. The return alleges that Harding is now, and has been since his appointment, performing the duties of the office, but does not say anything about the possession of the seal and other insignia of office. This return was demurred to, without other reply, so that it may be said from the state of the pleadings here that the relator has possession of the insignia of office, but it is not quite clear as to who is performing the duties thereof. It seems that the weight of authority is that a de facto officer cannot ordinarily maintain a suit to recover the salary belonging to the office which he is filling. Usually the salary belongs to him who has the title. 22 R. C. L. p. 599; *Constantineau on the*

*De Facto Doctrine*, § 219. But we are not called upon to decide this question, inasmuch as it does not appear who has been exercising the duties of the office since the appointment of Harding, and, in the absence of a clear and unequivocal showing in this respect, it will not be presumed that the same are being performed by one other than the person who is entitled by right to perform the same.

It follows from what we have said that the writ of mandamus prayed for will be refused.

(84 W. Va. 432)

STATE, for Use of PINGLEY, v. PINGLEY et al.

(Supreme Court of Appeals of West Virginia. Sept. 9, 1919.)

(Syllabus by the Court.)

1. PLEADING  $\S$  216(2)—EXHIBITS CANNOT BE CONSIDERED ON DEMURRER TO DECLARATION.

Papers annexed or attached to a declaration, as for exhibits or parts thereof, are not parts of it, and cannot be considered upon a demurrer thereto.

2. INJUNCTION  $\S$  250—WHEN DECLARATION ON INJUNCTION BOND STATES CAUSE OF ACTION.

A declaration on an injunction bond, alleging procurement of an injunction to have been the sole purpose of the suit in which the bond was given, dissolution of the injunction, expenditure of money in payment of attorney's fees in effecting such dissolution and not otherwise, and nonpayment of such fees and of the penalty of the bond by the defendant, states a good cause of action.

3. INJUNCTION  $\S$  250—IN SUIT ON BOND, ALLEGATION OF NONPAYMENT OF ATTORNEY'S FEES SUFFICIENT.

The allegation of such nonpayment may be general and awkwardly expressed, in so far as it relates to the persons to and by whom payment should have been made, if it is broad enough to include all of such persons.

4. INJUNCTION  $\S$  250—ON DEMURRER TO DECLARATION ON BOND DISPOSITION OF CAUSE ON APPEAL DISREGARDED.

Upon such a demurrer, the disposition of the chancery cause, on an appeal from the decree of dissolution and dismissal, cannot be considered.

Case Certified from Circuit Court, Randolph County.

Action by the State of West Virginia, for the use of George W. Pingley against D. W. Pingley and others. Demurrer to amended declaration overruled, and decision certified. Order adjudging correctness of decision to be entered, and certified to circuit court.

A. M. Cunningham, of Parsons, for plaintiff.

W. B. & E. L. Maxwell, of Elkins, for defendants.

POFFENBARGER, J. Having overruled a demurrer to an amended declaration claiming by a single count, right of recovery, upon an injunction bond, of attorney's fees, as part of the damages occasioned by the injunction and as an item within the indemnity afforded by the bond, the trial court has certified its decision upon the question of the sufficiency of the declaration to this court for review, upon the joint request of the parties. Being of the opinion that the declaration, as originally filed, was insufficient, the court sustained a demurrer to it. Thereupon the plaintiff amended it at the bar of the court in material respects, and the court overruled a demurrer to the amended declaration.

[1] Fundamental differences between law and equity procedure render it impossible to consider the bill and final decree in the equity cause, attached to the declaration, as exhibits filed therewith and parts thereof. In actions at law, the pleadings are always for the court, and the evidence goes to the jury primarily. In equity causes, both the pleadings and the evidence go to the court for consideration. Consequently the annexation of documents, constituting the basis of right of action, to the declaration as for exhibits therewith and parts thereof, has never been recognized. In so far as a document is relied upon to fix and determine the rights of the parties by contract, adjudication, or legislation, the declaration should set forth its legal purport and effect, and then the document goes to the jury as evidence. Upon an inquiry as to the sufficiency of a pleading, the court is not supposed to look to the evidence at all. Nor does good pleading countenance a narration or statement of the evidence in a pleading. *Snyder v. Wheeling Electrical Co.*, 43 W. Va. 661, 28 S. E. 733, 39 L. R. A. 490, 64 Am. St. Rep. 922. "In the absence of a statute, the annexing and filing of papers as exhibits to a pleading does not make them a part thereof, and they cannot be referred to for the purpose of supplying the omission of a material allegation or curing a fatal defect." 8 Ency. Pl. & Pr. 740. This text is well sustained by authority. The rule is not relaxed in even the Code practice states. *Burkett v. Griffith*, 90 Cal. 542, 27 Pac. 527, 13 L. R. A. 707, 25 Am. St. Rep. 151; *Brooks v. Paddock*, 6 Colo. 36. This conclusion disposes of the argument founded upon the so-called exhibits and the printed record of the chancery cause.

[2] Admitting payment of the costs incurred by the defendant in the chancery cause, and claiming no damages other than those represented by the payment of attor-

ney's fees, the declaration charges that the plaintiffs in the chancery cause sought no relief therein other than an injunction; that the injunction awarded therein had been dissolved; that the plaintiff in this action had been compelled to retain, hire, and employ attorneys to answer, implead, defend, take depositions, appear at the taking of depositions, and otherwise defend him in the suit; and that the attorney's fees and expenses paid out and expended by him in said suit were so paid out and expended solely for the purpose of procuring dissolution of the injunction. It then avers nonpayment of attorney's fees, after request for payment.

Uniform decisions of this court, commencing with *State v. Medford*, 34 W. Va. 633, 12 S. E. 864, and ending with *State v. Nash*, 72 W. Va. 812, 79 S. E. 829, recognize right of recovery of attorney's fees, as damages within the meaning of the condition of an injunction bond, under the circumstances alleged in the declaration. It is sanctioned by the great weight of authority throughout the country also. The argument submitted in the brief filed for the defendants does not seem to controvert this proposition. Recognizing the difficulty incident to a definition of the limits within which such recoveries are allowed, the brief seems to invoke, in support of the demurrer, the facts and circumstances disclosed by the bill and the decree annexed to the declaration and the printed record of the chancery cause. For reasons stated, none of these papers can be considered upon the demurrer. The argument submitted will be appropriate and applicable only when the case reaches the court or the jury upon the evidence.

[3] The attack made upon the assignment of the breach of the condition of the bond is not well founded. The bond produced and read on over thereof, before the demurrer was interposed, shows by a recital that the injunction was obtained by David W. Pingley and French L. Pingley and others. The bond was executed by D. W. Pingley, F. L. Pingley, and Charles Gibson. The alleged defect in the assignment of the breach is failure to show who the other parties referred to in the bond were, and negative payment of the damages by them. But the allegation of nonpayment, though expressed in general and awkward terms, is amply sufficient in breadth to include the parties not specifically named. It says: "The said D. W. Pingley and F. L. Pingley, nor no one for them or either of them, nor no other parties thereto, nor no one for them," have not paid and satisfied the damages aforesaid or any part thereof, though well advised of the premises and often requested so to do. This is supplemented by an allegation of nonpayment of the penalty of the bond by the defendants or any of them. Though an allegation of nonpayment is essential, and omission thereof is fatal, it is

well settled that an allegation of nonpayment in general terms, sufficiently broad to include all the parties upon whom the duty of payment rests, suffices. *Moundsville, etc., R. Co. v. Wilson*, 52 W. Va. 647, 44 S. E. 169; *Cobbs v. Fountaine*, 3 Rand. 484.

[4] The brief closes with an inquiry as to whether the disposition of the chancery cause in this court, on the theory of extinguishment of the controversy by acts of the parties, while the appeal was pending, does not bar the plaintiff in this action. It suffices to say the trial court could not, and this court cannot, take any cognizance of that matter upon a demurrer to the declaration. It may be relevant and pertinent matter on the trial, but, as to this, we express no opinion.

The ruling complained of is right, and an order adjudging its correctness will be entered and certified to the circuit court.

(84 W. Va. 442)

**TAYLOR v. CHESAPEAKE & O. RY. CO.**

(Supreme Court of Appeals of West Virginia.  
Sept. 9, 1919.)

*(Syllabus by the Court.)*

**1. WATERS AND WATER COURSES ⇨171(2)—  
DEFENDANT NOT NEGLIGENT NOT LIABLE  
FOR FLOOD DAMAGES.**

In the absence of some initial or intervening act of negligence on his part contributing thereto one is not liable for damages arising from an act of God, such as an unprecedented flood of waters of great force and volume caused by a cloud burst at the head waters of a creek or river.

**2. WATERS AND WATER COURSES ⇨51—  
RIPARIAN OWNER HAS RIGHT TO UNOB-  
STRUCTED FLOW OF STREAM.**

A riparian proprietor has as a general rule the right to have the waters of a stream or water course pass his land in its natural flow unobstructed and to render anyone violating or interfering with such right liable to him in damages sustained thereby.

**3. WATERS AND WATER COURSES ⇨171(1)—  
RIPARIAN OWNER MAY CONSTRUCT BAR-  
RIERS TO KEEP FLOOD WATERS IN STREAM.**

The only limitation on such right of a riparian owner is that any other riparian owner may erect barriers or dykes on his own land on the banks of such water course or on the interior of his land for the purpose of confining flood waters within the natural banks of the stream although such action may result in injury to another riparian owner.

**4. WATERS AND WATER COURSES ⇨171(1)—  
RIPARIAN OWNER MAY NOT OBSTRUCT  
STREAM, FLOODING LAND OF ANOTHER.**

But such limitation upon the general rule will not justify a riparian owner or other person in erecting or placing within the channel or banks of such stream any obstruction or

barrier which will interfere with the free flow of the waters therein or cause the same to be backed up and to flood the land or property of a riparian owner along such stream.

**Case Certified from Circuit Court, Kanawha County.**

Action by W. O. Taylor against the Chesapeake & Ohio Railway Company. Demurrer to declaration sustained, and questions presented, with circuit court's rulings thereon, certified for review. Judgment reversed, demurrer overruled, and cause remanded.

J. Howard Hundley and H. W. Houston, both of Charleston, for plaintiff.

Fitzpatrick, Campbell, Brown & Davis, and C. W. Strickling, all of Huntington, for defendant.

**MILLER, P.** The sufficiency of plaintiff's declaration was challenged by defendant's demurrer. The court below sustained the demurrer, and has certified the questions presented with its rulings thereon to us for review.

The substantial averments are that the plaintiff was owner of certain real estate and personal property in the town of Eskdale, situated upon and near the banks of Cabin Creek, a non-navigable stream, and about one hundred yards above the trestles or bridges of the defendant company crossing said creek; that on or about August 9, 1916, there was a cloud burst on the head waters of said creek which caused a flood therein of unprecedented volume and violence to sweep down the valley and channel of said creek and through said town of Eskdale and Cane Fork and over and through said trestles or bridges of the defendant company, carrying large quantities of wreckage and debris before it; and that defendant through its agents, servants and employees acting within the scope of their employment and with full knowledge that the said flood was sweeping down the channel of said creek toward its said railroad trestles or bridges, and in disregard of its duty not to divert, impede or obstruct the natural flow of the waters in said creek so as to cause them to flow back, over and upon the plaintiff's property and damage it, and for the purpose and with the object of protecting its said trestles or bridges from being washed away and destroyed by said flood, wrongfully, negligently, knowingly and unlawfully ran or caused to be run and propelled a large railroad engine, owned and controlled by it, out upon one of said trestles or bridges just below the said town of Eskdale and just below plaintiff's property, and in the course and path way of the waters of said flood, and there to remain and to obstruct the natural flow of the waters in said creek, and causing the wreckage and debris then being conveyed down said stream,

and thereby causing the water to be dammed and backed up stream and over and upon plaintiff's said property, whereby it was damaged and destroyed and whereby he sustained great damage and loss, amounting to ten thousand dollars.

[1] It is conceded on both sides that the cloud burst causing the flood and the waters of unprecedented volume and force to flow down the creek as alleged constituted an act of God for which the defendant without some initial act of negligence on its part could not be rendered liable in damages to plaintiff. This is a well settled proposition of law in this State and elsewhere. *Williams v. Columbus Producing Co.*, 80 W. Va. 683, 93 S. E. 809, L. R. A. 1918B, 179; *Atkinson v. Chesapeake & Ohio Ry. Co.*, 74 W. Va. 633, 82 S. E. 502.

But counsel for plaintiff contend that with knowledge on the part of defendant of the oncoming flood waters, the placing of its engine on the trestle or bridge in the middle of the creek and in the way of the stream so as to obstruct the natural flow of the water therein, which together with the wreckage and debris caught thereby caused the water to be dammed and backed up upon plaintiff's property as alleged, constituted an original act of negligence and invasion of his rights for which defendant is liable to account to him in damages.

[2] The right of a riparian proprietor to have the waters of a stream or water course pass his land in its natural course unobstructed and to hold anyone violating this right liable for damages sustained thereby is not controverted. This proposition is well settled and recognized not only by the decisions of this court but elsewhere. *Roberts v. Martin*, 72 W. Va. 92, 77 S. E. 535; *Williams v. Columbus Producing Company and Atkinson v. Chesapeake Ry. Co.*, supra; *Cline v. Norfolk & Western Railway Co.*, 69 W. Va. 436, 71 S. E. 705; *Cubbins v. Mississippi River Commission*, 241 U. S. 351, 36 Sup. Ct. 671, 60 L. Ed. 1041.

[3, 4] The only limitation upon this right is that each riparian owner for his own protection may erect barriers or dykes so as to confine the flood waters within the natural banks of the stream, a right pertaining to all such proprietors, and when exercised no one has the right to complain of another, although the effect of the thing done may have caused some injury to him or his property. *Cubbins v. Mississippi River Commission*, supra, 241 U. S. page 364, 36 Sup. Ct. 671, 60 L. Ed. 1041, and cases cited.

The contention of counsel for demurrant is that because of the accidental and extraordinary conditions existing at the time of the alleged injury, the defendant had the right to run its engine upon the trestle or bridge,

not for the purpose of restraining the flood waters to the natural banks of the creek and thereby protecting its property, but to hold in place works constructed by it across the stream, though the result of that act was to obstruct the free flow of the waters in the channel, catching the wreckage and debris therein, and to dam up the water and throw it back upon plaintiff. We find no warrant for this position in *C. & O. Ry. Co. v. Meriwether*, 120 Va. 55, 91 S. E. 92, nor in *Cubbins v. Mississippi River Commission*, supra, nor in *Jackson v. United States*, 230 U. S. 1, 33 Sup. Ct. 1011, 57 L. Ed. 1363, cited and relied on by counsel. The only right recognized in these cases is the defensive one accorded owners to protect themselves against damages by defensive works constructed at or upon the borders of rivers or creeks or on the interior of their own lands against such extraordinary conditions. This is the limitation recognized by very ancient authority and in the federal and other cases cited. But they furnish no precedent for the position of counsel that the defendant might lawfully in the emergency existing cast the burden of loss on plaintiff in order to protect its own property. Section 50, subd. 6 of chapter 54 (sec. 2949) of the Code gives railroad companies the right to cross with their railroads along or upon any stream or water course, but specifically requires them to restore such stream or water course to its former state so as not to injure or impair its usefulness.

The case presented by the declaration, in our opinion comes clearly within the principles of *Williams v. Columbus Producing Company and Atkinson v. Chesapeake & Ohio Ry. Co.*, supra, and *Neal v. Railroad Co.*, 47 W. Va. 316, 34 S. E. 914. The first of these cases cited originated or grew out of the same flood conditions on Cabin Creek involved in the case at bar. The only material difference in the facts is that in the *Williams* case the injury resulted from the building of an oil well derrick and oil tanks within the banks of the creek, while in this case the alleged negligence consisted in placing a railroad engine across the stream in view of the approaching waters to avoid damages to the trestles or bridges of the railroad company. The latter was as much an initial act of negligence as the other.

Counsel for defendant also rely on cases involving the blowing up of buildings to prevent the spread of fire; such as *Keller v. Corpus Christi*, 50 Tex. 614, 32 Am. Rep. 613, and *Surocco v. Geary*, 3 Cal. 69, 58 Am. Dec. 385, all involving the exercise of the police power of the State. We think these cases have no application to the case at bar.

Our conclusion is to reverse the judgment below, to overrule the demurrer to the declaration and to remand the case to the circuit court.



(84 W. Va. 413)

**PITTSBURGH & WEST VIRGINIA GAS CO. v. RICHARDSON.**

(Supreme Court of Appeals of West Virginia. Sept. 9, 1919.)

*(Syllabus by the Court.)***1. MINES AND MINERALS Ⓒ79(5) — GAS LEASE—FREE USE BY LESSOR FOR DOMESTIC PURPOSES.**

An owner of real estate, who has leased the same for the production of oil or gas therefrom, with a stipulation in such lease that he shall be allowed to use at his residence gas from any well drilled upon the premises for domestic purposes, free of charge, is entitled, in case a producing well is drilled upon such premises, to such quantity of gas produced therefrom as is reasonably necessary for his domestic uses, for the purposes to which such natural gas is ordinarily devoted.

**2. MINES AND MINERALS Ⓒ79(7) — GAS LEASE—RESERVATION OF FREE GAS FOR DOMESTIC PURPOSES—METERS.**

A regulation by a lessee in an oil and gas lease for the establishment and maintenance of meters upon lines furnishing free gas to the lessor, under the terms of the lease providing that such lessor is entitled to the use of gas free of charge for domestic purposes, is a reasonable and proper regulation, and a court of equity will enjoin such lessor from interfering with or obstructing such lessee in the installation, maintenance, or reading of such meters.

**3. GAS Ⓒ2—LESSOR'S FREE USE OF NATURAL GAS—REPORT AS TO AMOUNT—INJUNCTION.**

A regulation by the Public Service Commission of West Virginia, requiring all producers of natural gas who furnish any of their product to persons free of charge to measure such part thereof by a meter, and to report the amount thereof to the commission at certain intervals, is a reasonable and proper regulation, and any interference or obstruction upon the part of such free user of gas to the carrying out of such regulation will be enjoined by a court of equity.

Case Certified from Circuit Court, Marion County.

Suit for injunction by the Pittsburgh & West Virginia Gas Company against Elmus P. Richardson. Demurrer to bill sustained, and temporary injunction dissolved, and question as to sufficiency of bill certified. Decree reversed, temporary injunction reinstated, and cause remanded.

H. H. Rose, of Fairmont, and Law & McCue, of Clarksburg, for plaintiff.

RITZ, J. Plaintiff is the owner of a lease for oil and gas purposes on a certain tract of land owned by the defendant, by the terms of which lease the defendant is entitled to have free gas for domestic purposes for one

house from any gas well drilled or utilized on said premises. A gas well was drilled upon the premises, and in accordance with the terms of said lease defendant was allowed to make connection with plaintiff's gas line in order to secure a supply of gas for his domestic purposes, and the same has been continuously furnished to him under the terms of said lease for many years. In July, 1915, the Public Service Commission of West Virginia adopted a rule providing that all gas furnished without charge within the state should be metered, and that reports should be made to it monthly of the quantities of gas so furnished. The plaintiff's bill alleges that in order to comply with this provision, as well as in order to be in a position to protect itself against the waste of gas by the defendant, it desired to install a meter upon the pipe supplying gas to the defendant's residence. To this the defendant objected, and, the plaintiff having installed said meter, the defendant removed the same. This suit was then brought and an injunction asked to restrain the defendant from interfering with the plaintiff in the installation of a meter upon his supply line, and the maintenance and reading of the same at proper intervals. A temporary injunction was granted, but subsequently, when the defendant appeared and demurred to the bill, the demurrer was sustained, and the temporary injunction dissolved. The question arising upon the sufficiency of said bill is now certified to this court.

[1, 2] The plaintiff insists that it is entitled to establish a meter upon the defendant's supply line, entirely at its own expense, as one of the practicable ways of securing information for the proper regulation of its business, and also in order that it may comply with the regulation made by the Public Service Commission of West Virginia. It is a little difficult to understand why the defendant objects to having the quantity of gas used by him ascertained in this manner. It involves no expense to him, nor does it appear how it can in any manner inconvenience him in the exercise of his right. The quantity of gas to which the defendant is entitled under this free gas clause in his lease is not unlimited, but is only such amount as is customary and reasonable for his domestic uses. *Hall v. Philadelphia Co.*, 72 W. Va. 573, 78 S. E. 755; *Harbert v. Hope Natural Gas Co.*, 76 W. Va. 207, 84 S. E. 770, L. R. A. 1915E, 570. It cannot be said that the plaintiff has any arbitrary right to determine such amount. Neither has the defendant the right to say that he may use the gas produced to any extent which he wants, real or capricious, may demand. He is entitled under his contract only to so much gas free of charge as is ordinarily used, and as

is reasonably necessary for such domestic purposes as natural gas is usually devoted to. This being true, it is entirely proper for the plaintiff to adopt such regulatory measures as may be practicable and appropriate for the purpose of determining that its product is not being wasted. Whatever production of gas remains after the free use thereof by the defendant is the property of the plaintiff. If the defendant uses more gas than his reasonable wants require, if gas is wasted by him, either because of defective appliances, or because of excessive use thereof, to the extent that such quantity exceeds his reasonable ordinary requirements, he is taking the property of the plaintiff. It is represented by the plaintiff that this free gas is in many instances furnished through pipe lines constructed by the users thereof. These lines become out of order; they leak, and much gas is wasted in this way. These leaks can only be determined by a system of continuous inspection, unless meters are allowed to be installed, in which case such meters will give information as to any excessive use and waste, and lead to the repair of any defects or leaks in the supply line, or the correction of any wasteful use of the substance. We are very clearly of the opinion that inasmuch as it appears from the allegations of the bill that the attachment of this meter to the supply line of the defendant is a practicable and appropriate way of detecting any loss of gas by leaks, or wasteful consumption of the same, and further that it will not in any way hinder or obstruct the defendant in the full and free exercise of his rights, the plaintiff had and has a right to enforce such regulation, and that the attempt of the defendant to interfere with it in the installation, maintenance and reading of such meter is an invasion of its right in this regard, which a court of equity will prevent.

[3] Aside from the right of the plaintiff to protect its property by this regulatory measure, it would seem that the authority of the Public Service Commission to make the regulation which it has made is entirely justified. It is shown by the bill that the amount of gas delivered to free gas consumers, so far as it has been able to be accurately measured, is something like 30 times as much as is delivered to other consumers for similar service. One of the duties devolved upon the Public Service Commission is to regulate the distribution of natural gas, and undoubtedly the purpose of the regulation it has adopted is to prevent the waste or improper use thereof to the end that as large an amount as possible may be devoted to the beneficial uses of the inhabitants of the state. The regulations adopted by the Public Service Commission are appropriate,

to say the least, for the effectuation of this purpose, and it may be said that not only does the plaintiff have the right to install these meters with the view of giving effect to the Public Service Commission's regulation, but it is its duty to do so, and it is entirely competent for a court of equity to restrain any one who interferes with the discharge of such duty.

We are, therefore, of opinion to reverse the decree of the circuit court sustaining the demurrer and dissolving the injunction, overrule the demurrer, reinstate the temporary injunction, and remand the cause for further proceedings.

(84 W. Va. 446)

LOUIS STIX & CO. et al. v. YORK et al.

(Supreme Court of Appeals of West Virginia.  
Sept. 9, 1919.)

(Syllabus by the Court.)

EXECUTION  $\Leftrightarrow$  403 — SUIT IN EQUITY SOLE  
REMEDY AGAINST PROPERTY INCAPABLE OF  
SEIZURE.

The remedy given by section 15 of chapter 141 (sec. 5137) of the Code of 1913 to enforce the lien of an execution upon property owned by the judgment debtor not capable of manual seizure, possession, and delivery, and sale by the officer under the execution, that is, by suit in equity by or in the name of the officer, is exclusive of all other remedies. A judgment creditor cannot in his own name maintain such suit.

Case Certified from Circuit Court, Wayne County.

Bill by Louis Stix & Co. and others against J. F. York and others. Demurrer to amended bill overruled, and correctness of the ruling certified. Reversed and remanded.

Williams, Scott & Lovett, of Huntington, for defendants.

MILLER, P. We pass the questions presented by the demurrer, sustained, to the original bill. The plaintiffs have by their amended bill waived any questions arising thereon, and rely solely on the amended bill.

The court below overruled defendant's demurrer to the amended bill, and the correctness of that ruling has been certified to us, pursuant to the statute.

Plaintiffs allege recovery by them of certain judgments against the defendant J. F. York, and the docketing thereof in the clerk's office of the county court in the judgment lien docket, and the suing out of executions thereon, the placing of the same in the hands of the proper officer, and the return thereof by him indorsed "No property found."

They furthermore allege that the judgment debtor owns a large amount of the stock of the defendant York Realty Company, a cor-

poration, and that their said judgments, which have not been paid, constitute valid liens on all of the property of the said York. It was probably intended to allege that by virtue of their said executions plaintiffs had a valid lien on the shares of stock of said York in the York Realty Company, but this fact is not otherwise distinctly alleged, except by the allegation that said judgments constitute liens on all the judgment debtor's property located in Wayne County, where they were so recovered and docketed.

The proposition of law relied on to reverse the decree of the circuit court is that a suit to enforce the lien of an execution can be brought and maintained only by or in the name of the officer in whose hands the execution was placed, and that this remedy given by section 15 of chapter 141 (sec. 5137) of the Code is the exclusive remedy in such cases. If this proposition be correct, the demurrer to the amended bill should also have been sustained.

Stock in a corporation being by statute personal estate, a personal judgment against the stockholder constitutes no lien thereon, and without some ground of equitable jurisdiction other than the supposed lien, equity has no jurisdiction to enforce payment thereof out of such personal estate. But by execution a lien may be created on personal estate, such as stock in a corporation, not susceptible of being reduced to possession by the officer and sold and disposed of by him, under chapter 140, §§ 1-17 (secs. 5106-5122), of the Code, which may be enforced by the specific remedy provided by section 15 of said chapter 141. Manifestly the view of the circuit court was that a judgment creditor independently of the officer may maintain the suit and enforce the lien of his execution.

We are cited to no case in which this exact point has ever been adjudicated. But we are disposed to hold that the remedy prescribed by the statute is exclusive of all others and must be pursued. The statute gives the lien and prescribes the remedy. The only case cited and relied on by counsel for demurrants is *Lambert v. Huff, Andrews & Thomas Co.*, 96 S. E. 1031, 1 A. L. R. 650. The extent to which that case goes in point of decision is that though an execution creates a lien upon shares of the capital stock of a corporation owned by a debtor, being intangible property and of the nature of choses in action and not capable of manual seizure, possession and delivery, they cannot be seized and sold under an execution by the officer. Wherefore the necessity of resorting to the remedy of a suit by or in the name of the officer, as prescribed by the statute. This statute empowers the officer holding the execution to sue in his own name for enforcement of the lien, and makes it his duty to do so if indemnified, and permits the credi-

tor to sue in the name of the officer at his own costs and expense. At common law stock in a corporation by reason of its character as property was not subject to execution or attachment. *Lipscomb's Adm'r v. Condon*, 56 W. Va. 416, 49 S. E. 392, 67 L. R. A. 670, 107 Am. St. Rep. 938. But as the cases all hold, the statute has changed this, both as to executions and attachments. It is not subject to attachment or execution but in the manner and by the remedies prescribed.

The right of a shareholder in a corporation is not to any specific property, but to such a proportion of it all which the owner has in the management of the corporation, in the surplus profits, and upon dissolution in all the assets remaining after paying the debts, an equitable right. In *Swann, Adm'r, v. Summers*, 19 W. Va. 115, it was decided that the remedy to enforce a purely equitable liability is provided in said section 15 of chapter 141, by suit in equity in the name of the sheriff or of such other officer as the court may designate.

Our conclusion is that the demurrer to the amended bill should have been sustained, and that the decree below must be reversed and the cause remanded.

(84 W. Va. 407)

### BONHAM v. CITY OF CHARLESTON.

(Supreme Court of Appeals of West Virginia.  
Sept. 9, 1919.)

(Syllabus by the Court.)

#### 1. MUNICIPAL CORPORATIONS §408(1)—SPECIAL ASSESSMENT—CONSTRUCTION OF STATUTE.

A statute purporting to impose liability upon one or more property owners to the relief of other taxpayers, by way of a special assessment for the improvement or maintenance of a public road, street or alley, is to be construed strictly, and, if its scope is doubtful, such doubt will be resolved against the public and in favor of the property owners.

#### 2. MUNICIPAL CORPORATIONS §413(2)—SPECIAL ASSESSMENT—STATUTE.

Where, as in this case, the amendment of a city charter omits a provision theretofore contained therein imposing liability upon abutting property owners, by way of special assessment, for the cost of paving street intersections and of setting curbing, and provides further that the city council shall fix the amount of the assessment and do all other things in connection therewith as is provided in a preceding section of the charter, which specifically states that such costs shall be borne and paid by the city and shall not be included in the amount chargeable to abutting owners, such omission and specific reference to a different provision will be deemed and treated as made with the intention thereafter to exonerate abutting owners from such liability.

Appeal from Circuit Court, Kanawha County.

Suit for injunction by S. F. Bonham, who sues, etc., against the City of Charleston. From a decree making perpetual an injunction, the defendant appeals. Affirmed.

Donald O. Blagg, of Charleston, for appellant.

E. B. Dyer and Morgan Owen, both of Charleston, for appellee.

LYNCH, J. Complaining of a decree of the circuit court of Kanawha county which made perpetual an injunction restraining the city of Charleston from assessing against the property of the plaintiff and the property of others similarly situated, in proportionate shares, certain portions of the cost of grading and paving Monongalia street in said city, namely, the cost of curbing along the same and of paving the street intersections, the defendant city prosecutes this appeal. The sole question to be determined is whether or not under section 88 of the charter of the city of Charleston, as amended by the Legislature of 1919, the city is authorized to assess against abutting property owners the cost of the entire improvement, including curbing and street crossings or intersections.

[2] Prior to the amendment of 1919 the city charter (chapter 1, Acts 1915, Municipal Charters) provided two methods for paving the streets of the city:

(1) Under section 61, known as the "bond issue plan," by which the city council was authorized to cause any street or alley in said city to be paved when it deemed it expedient so to do, and upon completion of the work to pay the contractor the full cost of the work out of the city's funds, and to reimburse itself by means of an assessment against the owners of property abutting on the street improved. It was expressly provided in that section, however, that—

"The cost of such paving or improvement chargeable to the abutting owners is not to include any portion of the amount paid for paving of squares at intersection of streets or for curbing, which shall in all cases be borne and paid by the city."

(2) Under section 88, known as the "certificate plan," which in part was as follows:

"Upon the petition in writing of the owners of not less than sixty per cent. of the lineal feet of the property abutting upon any block of any avenue, street or alley in said city, asking the city council to grade, curb, pave or macadamize, or otherwise permanently improve such avenue, street or alley, or to construct a sewer in front of said block, and offering in said petition to have their property so abutting \* \* \* assessed not only with their part of the cost of such improvements abutting upon their property, \* \* \* but also \* \* \* to have their said property proportionately assessed with the total costs of paving, grading, curb-

ing or macadamizing, or other permanent improvements, of the intersection at the end of said block of the avenue, street or alleys so \* \* \* improved, \* \* \* the council may order the block of such avenue, street or alley \* \* \* to be paved or otherwise permanently improved as prayed for therein, and the council may order the mayor and city clerk to issue to the contractor doing the paving or other said improvement a certificate for each installment of the amount of the assessment to be paid by the owner of any lot or fractional part thereof fronting on such block, \* \* \* and the council shall fix the amount of such assessments, advertise for bids, and do all other things in connection therewith as is provided for paving or permanently improving any street or alley or any portion thereof in this act, and such certificates shall be issued in the same number of installments and payable at the same time as other paving of (or) permanent improvements are provided to be paid for. \* \* \*"

Under that section it was not necessary for the city to provide funds in the first instance, by a bond issue or other means, to pay for the improvement. Instead, upon completion of the work, it issued and delivered to the contractor certificates against each abutting owner for his proportionate share of the total expenditure, including the street curbing and the paving of street intersections. But action under this section was dependent upon the petition in writing of the owners of 60 per cent. of the lineal feet of the property abutting on the street. The petitioners thereby expressly consented to be charged with the entire cost of the improvement.

Because of the difficulty frequently experienced in obtaining the requisite number of petitioners, the city having no funds with which to pave under the "bond issue plan," section 88 was amended and re-enacted by the Legislature of 1919, omitting all reference to the necessity of a "petition in writing by the owners of \* \* \* the property abutting upon any block," and providing simply that "council may order" the same to be paved, provided "two-thirds of all the members elected to council shall concur therein." It was under this amended section 88 that the paving and curbing involved here were done. The material parts of section 88, as so amended, are:

"In addition to the method provided for paving streets by section 61 of the charter, \* \* \* the council may order any block, street, avenue or alley to be paved or otherwise permanently improved, and \* \* \* the mayor and city clerk to issue to the contractor \* \* \* a certificate for each installment of the amount of the assessment to be paid by the owner of any lot or fractional part thereof fronting on such street, avenue or alley, \* \* \* and \* \* \* shall fix the amount of such assessment, advertise for bids and do all other things in connection therewith as is provided for paving or permanently improving any street or alley or any portion thereof in section 61. \* \* \*"

Section 88, as it stood before the amendment of 1919, authorized the assessment of the entire cost of paving, including the setting of curbing and the paving of street intersections, upon abutting property owners, but only upon the petition of the prescribed percentage of such owners. Section 88, as amended, omits reference to curbing and street intersections. It is contended by the city, however, that it was the intention of the Legislature to continue in effect the method of paving streets as formerly provided by section 88 and again to include in the assessment the cost of curbing and of paving intersections; in other words, that no material change was made except by dispensing with the necessity of a petition by property owners.

This construction seems to us not to comport with the language employed in that section, as amended. It materially changes the old method of procedure in that it empowers the city council to order the paving and improvement of any street or alley without the necessity of a petition by abutting property owners, and irrespective of their wishes, provided two-thirds of the members of the council concur in the passage of the ordinance. It also omits that provision of the section as it originally stood whereby the cost of curbing and of the paving of street intersections was charged to abutting owners and expressly requires that—

"The city council shall fix the amount of such assessment, advertise for bids, and do all other things in connection therewith as is provided for paving or permanently improving any street or alley, or any portion thereof, in section 61."

The section last referred to clearly states that the cost of curbing and of paving intersections "shall in all cases be borne and paid by the city," and not included in the amount chargeable to abutting owners. This, when considered with the omission of the provision from section 88 authorizing the inclusion of such costs in the assessment when the abutting owners petitioned therefor, seems to evince a legislative intent not to impose that burden upon such owners. Under the section as it originally stood, it was only when the owners petitioned for the improvement and included in their petition the offer to pay the total cost thereof that such burden could be imposed. The Legislature may have had reasons of its own for omitting the last-named costs when it provided for the paving of streets upon the order of the city council without the necessity of a petition therefor by abutting owners and irrespective of their wishes. New and additional powers are thereby bestowed upon the council, and the reference made in section 88, as amended, to the provisions of section 61 strengthen the conclusion that the Legislature intended to impose only such burdens upon abutting own-

ers under that section as are imposed by section 61.

[1] It is only by a forced construction, if at all, departing from the natural meaning of words, that the contention of appellant can be sustained. Such construction we are unwilling to approve, especially in view of the rule that statutes which impose burdens generally are to be construed strictly. 2 Lewis' Sutherland, *Statutory Construction* (2d Ed.) §§ 536-538. In *Fox's Adm'rs v. Com.*, 16 Grat. (Va.) 1, 11, the court says:

"It is a well-settled rule of law that every charge upon the citizen must be imposed by clear and unambiguous language. Statutes which impose a duty upon the public will be critically construed with reference to the particular language in which they are expressed. When there is any ambiguity found, the construction must be in favor of the public; because it is a general rule that where the public are to be charged with a burden, the intention of the Legislature to impose that burden must be explicitly and distinctly shown."

"Laws imposing a license or tax are strictly construed, and whenever there is doubt as to the meaning or scope of such laws they are construed more strongly against the government and in favor of the citizen." *Brown v. Com.*, 98 Va. 366, 370, 36 S. E. 485, 487; *Jamison v. Com.*, 120 Va. 137, 149, 90 S. E. 640.

See, also, *State v. County Court*, 60 W. Va. 339, 55 S. E. 382.

While it is true that statutes conferring power of taxation should not be construed so strictly as to defeat the manifest purpose or intent thereof, or to withhold or deny powers plainly given (*County Court v. Brammer*, 68 W. Va. 25, 69 S. E. 450; *State v. Board of Education*, 68 W. Va. 40, 69 S. E. 378), it is sufficient to state here that, upon a fair construction of the charter involved, the power alleged to exist in the city council to include in its assessment against abutting property owners the cost of curbs and the paving of intersections is not manifest or plainly authorized within the meaning of the two cases just cited.

Nor is *Hager v. Melton*, 66 W. Va. 62, 66 S. E. 13, inconsistent with the result reached in this case. There the charter provided that the owners of abutting property should pay two-thirds "of the total cost of grading and paving said street, alley, or portion thereof," exclusive of the cost of curbing, which was expressly made a charge against the city. The court held the language thus used to be sufficient to authorize the inclusion of the cost of paving street intersections in the estimate as part of the total cost. Here, however, the reference to the provisions of section 61 seems clearly to evince an intention that they should govern; and they by their express terms exclude the cost of paving intersections and of setting curbs.

For these reasons we affirm the decree.

(24 Ga. App. 170)

SWIFT MFG. CO. v. CUNNINGHAM.  
(No. 10106.)(Court of Appeals of Georgia, Division No. 2.  
Sept. 18, 1919. Rehearing Denied  
Oct. 1, 1919.)*(Syllabus by the Court.)*

## 1. RULINGS ON THE PLEADINGS.

The court did not err in any of its rulings on the pleadings.

## 2. EXCERPTS FROM CHARGE.

There is no error in any of the excerpts from the charge of which complaint is made that would require the grant of a new trial.

## 3. REQUESTED CHARGE—GIVEN CHARGE.

As far as legal and pertinent, the principles embraced in the requests to charge were sufficiently covered by the charge given.

## 4. MOTION FOR NEW TRIAL.

Ground 13 of the motion points out no error that would require the grant of a new trial.

## 5. APPEAL AND ERROR ¶=1058(1)—ERROR IN EXCLUSION OF EVIDENCE CURED BY SUBSEQUENT ADMISSION.

Granting, but not conceding, that the court erred in rejecting the evidence of O. A. Sweet, as complained of in the last ground of the motion for a new trial, this error is not of sufficient materiality to require this court to set aside the verdict, as practically the same evidence, without objection, went to the jury from this same witness and from witnesses Glass, J. M. Hancock, Bugg, and Jinright. In addition, a model of the machine and pictures thereof were introduced in evidence, and were with the jury during the consideration of the case.

## 6. SUFFICIENCY OF EVIDENCE.

There is evidence to support the verdict, and the judgment is affirmed.

Error from Superior Court, Muscogee County; G. H. Howard, Judge.

Action between the Swift Manufacturing Company and J. W. Cunningham. Judgment for the latter, and the former brings error. Affirmed.

Battle & Hollis, of Columbus, for plaintiff in error.

Thos. H. Shanks, of Columbus, for defendant in error.

BLOODWORTH, J. Affirmed.

BROYLES, P. J., and STEPHENS, J., concur.

(24 Ga. App. 174)

CAREY v. AMICABLE LIFE INS. CO.  
(No. 10166.)(Court of Appeals of Georgia, Division No. 2.  
Sept. 18, 1919.)*(Syllabus by the Court.)*

## 1. INSURANCE ¶=349(3), 362—ON FAILURE TO PAY NOTE FOR PREMIUM, POLICY FORFEITED.

Where a life insurance policy provides that, "upon failure to pay a premium on or before the date when due, or any note [italics ours] or other obligation given therefor, this policy shall thereupon cease without any action or notice by the company, and all right shall be forfeited to the company, except as herein provided," the policy becomes forfeited by failure to pay upon maturity a note given in payment of a premium. *Stephenson v. Empire Life Insurance Co.*, 139 Ga. 82, 76 S. E. 592.

(a) Under the allegations of the petition in a suit brought by the beneficiaries of a life insurance policy to recover for the death of the insured which occurred on the 25th day of May, 1915, it being alleged that the insured had paid the first premium and in full payment of the second annual premium due the 21st day of February, 1914, paid to the insurance company a certain sum of money in part payment thereof, and gave to the company a promissory note for the balance, maturing November 1, 1914, and received in return the company's official receipt, and that before the maturity of the note the insurance company did, for a valuable consideration extend the date of maturity of such note until February 21, 1915, upon which latter date the note was not paid, and there being no allegation of any tender to the company, or effort by the insured to make payment of the amount due on the note at or before the last-mentioned date, the policy of insurance became forfeited. That the insurance company, through its authorized agent, did, before such note became due, fraudulently procure from the insured a surrender of the policy was no excuse for a failure upon the part of the insured to afterwards pay such note at maturity.

## 2. DEMURRER TO PETITION.

The petition set out no cause of action and was properly dismissed on demurrer.

Error from City Court of Americus; W. M. Harper, Judge.

Action by Frank Carey, next friend, etc., against the Amicable Life Insurance Company. Petition dismissed on demurrer, and plaintiff brings error. Affirmed.

Hixon & Pace, of Americus, for plaintiff in error.

Ellis, Webb & Ellis, of Americus, for defendant in error.

STEPHENS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(24 Ga. App. 189)

**SILVER v. COLLIER.** (No. 10181.)(Court of Appeals of Georgia, Division No. 2  
Sept. 19, 1919.)*(Syllabus by the Court.)***RECOVERY BY LANDLORD.**

Under the facts of this case it was error for the trial judge to instruct the jury that if the landlord kept the store in good repair he would be entitled to recover.

Error from City Court of Zebulon; E. F. Dupree, Judge.

Action between S. Silver and J. C. Collier. Judgment for the latter and the former brings error. Reversed.

Jas. M. Smith, of Barnesville, for plaintiff in error.

Jas. R. Davis, of Thomaston, for defendant in error.

STEPHENS, J. Judgment reversed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(24 Ga. App. 171)

**ALEXANDER v. ATLANTIC COAST LINE R. CO.** (No. 10160.)(Court of Appeals of Georgia, Division No. 2  
Sept. 18, 1919.)*(Syllabus by the Court.)***SUFFICIENCY OF PETITION — DISMISSAL ON GENERAL DEMURRER.**

The petition, construed most strongly against the pleader, failed to set out a cause of action, and the court did not err in dismissing it on general demurrer.

Error from Superior Court, Charlton County; J. I. Summerall, Judge.

Action by P. Z. Alexander against the Atlantic Coast Line Railroad Company. Petition dismissed on general demurrer, and plaintiff brings error. Affirmed.

Oliver & Oliver, of Savannah, for plaintiff in error.

Bennet, Twitty & Reese, of Brunswick, and Wilson & Bennett, of Waycross, for defendant in error.

STEPHENS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(24 Ga. App. 186)

**JONES et al. v. McMILLAN.** (No. 10134.)(Court of Appeals of Georgia, Division No. 2  
Sept. 19, 1919.)*(Syllabus by the Court.)***1. MOTION TO DISMISS BILL OF EXCEPTIONS.**

The motion to dismiss the bill of exceptions, upon the ground that the assignments of error therein are not properly made, is without merit, and is therefore denied.

**2. PLEA—DEMURRER.**

The plea of the defendant as amended set forth no legal defense to the plaintiff's suit, and the court erred in not sustaining the demurrer interposed, and in not striking the entire plea.

**3. FURTHER PROCEEDINGS.**

The error in the ruling upon the demurrer rendered the further proceedings nugatory.

Error from Superior Court, Habersham County; J. B. Jones, Judge.

Action by G. P. Jones, administrator, and others, against J. W. McMillan. Demurrer to plea overruled, and plaintiffs bring error. Reversed.

J. C. Edwards & Sons, of Clarkesville, for plaintiffs in error.

McMillan & Erwin, of Clarkesville, for defendant in error.

STEPHENS, J. Judgment reversed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(24 Ga. App. 170)

**DOWNS v. BERRYMAN.** (No. 10103.)(Court of Appeals of Georgia, Division No. 2  
Sept. 18, 1919.)*(Syllabus by the Court.)***1. TROVER AND CONVERSION — 31, 66—ON ELECTION TO TAKE MONEY VERDICT—NON-SUIT PROPER WITHOUT PROOF OF VALUE.**

In an action of trover where the plaintiff elects to take a money verdict, a nonsuit is properly awarded where there is no proof of the value of the property. *Moats v. Farkas*, 17 Ga. App. 778, 88 S. E. 685, and cases there cited. The defendant in such action, by the giving of a replevy bond, which is required by law to be in "double the amount sworn to" by the plaintiff as the value of the property in the latter's application for bail, does not thereby admit the value of the property, and such bond is not prima facie evidence of such value.

**2. EVIDENCE — 113(16) — AGREED PRICE IN CONTRACT OF SALE NOT PROOF OF VALUE IN TROVER.**

The agreed price of property as stated in a contract of sale is not evidence of the value of the property in a trover suit against one who was not a party to the contract of sale.

Error from Superior Court, Madison County; W. L. Hodges, Judge.

Action of trover by J. H. Downs against Mrs. J. B. Berryman. Judgment of nonsuit, and plaintiff brings error. Affirmed.

B. T. Moseley, of Danielsville, and Erwin, Rucker & Nix, of Athens, for plaintiff in error.

Alex. S. Johnson, of Royston, for defendant in error.

STEPHENS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(24 Ga. App. 188)

WEBB et al. v. SLATON, Governor.  
(No. 10165.)

(Court of Appeals of Georgia, Division No. 2.  
Sept. 19, 1919.)

(Syllabus by the Court.)

1. APPEAL AND ERROR  $\S$ 302(3) — ADMISSION OF DOCUMENTARY EVIDENCE, NOT IN RECORD ON NEW TRIAL, NOT REVIEWABLE.

Complaint is made that the court erred in admitting certain documentary evidence. This evidence is not set out, either literally or in substance, in the motion for new trial, nor is it attached thereto as an exhibit. Under the repeated and uniform rulings of this court and the Supreme Court, such a ground of the motion for a new trial cannot be considered. *Waltton v. Busby*, 147 Ga. 487, 94 S. E. 562 (1); *Smith v. Leverett*, 22 Ga. App. 290, 96 S. E. 8 (2).

2. CHARGE—DIRECTED VERDICT.

The court did not err in any of its rulings on the pleadings, nor in the charge of which complaint is made, nor in directing a verdict for the plaintiff.

Error from Superior Court, Brooks County; W. E. Thomas, Judge.

Action by J. M. Slaton, Governor, against J. C. Webb and others. Judgment for plaintiff upon a directed verdict, and defendants bring error. Affirmed.

Bennet & Harrell and Branch & Snow, all of Quitman, for plaintiffs in error.

C. E. Hay, Sol. Gen., of Thomasville, and E. K. Wilcox, of Valdosta, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., and STEPHENS, J., concur.

(24 Ga. App. 185)

BARBER v. ATLANTIC COAST LINE RY. CO. (No. 10127.)

(Court of Appeals of Georgia, Division No. 2.  
Sept. 19, 1919.)

(Syllabus by the Court.)

1. CHARGE OF COURT.

None of the excerpts from the charge excepted to, when considered in the light of the entire charge and the facts of the case, contain material error.

2. SUFFICIENCY OF EVIDENCE.

The verdict was authorized by the evidence.

Error from Superior Court, Grady County; W. M. Harrell, Judge.

Action between S. A. Barber and the Atlantic Coast Line Railway Company. Judgment for the latter, and the former brings error. Affirmed.

W. V. Custer, of Bainbridge, and Bell & Weathers, of Cairo, for plaintiff in error.

W. J. Willie and S. P. Cain, both of Cairo, and Pope & Bennet, of Albany, for defendant in error.

STEPHENS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(24 Ga. App. 198)

HUFFMASTER et al. v. JONES BROS. et al.  
(No. 10118.)

(Court of Appeals of Georgia, Division No. 2.  
Sept. 20, 1919.)

(Syllabus by the Court.)

APPEAL AND ERROR  $\S$ 1022(2), 1140(3) — JUDGMENT OF TRIAL COURT ON EXCEPTIONS TO AUDITOR'S REPORT AFFIRMED.

The trial judge having by consent of counsel passed upon exceptions of fact and of law to an auditor's report, and the evidence being sufficient to support his findings upon the facts, and no error of law appearing, the judgment is therefore affirmed.

It appearing, however, that the award of \$1,138.49 to Jones Bros. should be debited with \$407.80 (already paid to them by the sheriff), which the trial judge inadvertently failed to deduct, it is directed (counsel for defendants in error having already consented to the modification) that the sum of \$407.80 be written off the amount of the award to Jones Bros., and that the judgment be modified accordingly.

Error from Superior Court, Campbell County; C. W. Smith, Judge.

Action between J. B. Huffmaster and others and Jones Bros. and others. Judgment



for the latter, and the former bring error. Affirmed, with direction.

Hall & Jones, of Newnan, for plaintiffs in error.

S. Holderness and Boykin & Boykin, all of Carrollton, for defendants in error.

STEPHENS, J. Judgment affirmed, with direction.

BROYLES, P. J., and BLOODWORTH, J., concur.

(24 Ga. App. 185)

**WINSHIP v. STATE. (No. 10627.)**

(Court of Appeals of Georgia, Division No. 2. Sept. 18, 1919.)

*(Syllabus by the Court.)*

**1. EXCERPTS FROM CHARGE OF COURT.**

The excerpts from the charge of the court, complained of in the first two special grounds of the motion for a new trial, when considered in connection with the entire charge and the facts of the case, are not erroneous.

**2. ASSIGNMENTS OF ERROR.**

In the light of the notes of the judge, qualifying his approval of the remaining special grounds of the motion for a new trial, the other assignments of error are without merit.

**3. CRIMINAL LAW §1160—COURT OF APPEALS CANNOT REVIEW VERDICT APPROVED BY TRIAL JUDGE.**

The verdict was authorized by the evidence, and, having been approved by the judge, this court is without authority to set it aside.

Error from City Court of Macon; Du Pont Guerry, Judge.

Proceeding between the State and Ike Winship. From the judgment, Winship brings error. Affirmed.

Roland Ellis and C. A. Glawson, both of Macon, for plaintiff in error.

Will Gunn, Sol., of Macon, for the State.

BROYLES, P. J. Judgment affirmed.

BLOODWORTH and STEPHENS, JJ., concur.

(24 Ga. App. 186)

**HOBGOOD v. STATE. (No. 10447.)**

(Court of Appeals of Georgia, Division No. 2. Sept. 19, 1919.)

*(Syllabus by the Court.)*

**1. OBSCENITY §11—INDICTMENT FOR INDECENT EXPOSURE INSUFFICIENT.**

The accusation in this case charged that the accused "did commit the following acts of

public indecency, consisting of the exposing of his private parts, in a public place, said public place being near the public bathing pool in the city of Tifton, said county, said exposure being where said R. Hobgood might have been seen by many persons, and where in fact where he, the said R. Hobgood, was seen by W. W. Reynolds, Jim Webb, Earnest Sellers, Willie Powell, Roy Shaw, and others." To the accusation a demurrer was filed. The accusation is defective, in that it alleges that Hobgood, instead of the indecent exposure, was seen by certain persons and might have been seen by others.

**2. FURTHER PROCEEDINGS.**

As the demurrer should have been sustained and the accusation quashed, the further proceedings were nugatory.

Broyles, P. J., dissenting.

Error from City Court of Tifton; J. H. Price, Judge.

R. Hobgood was convicted of public indecency, and he brings error. Reversed.

John Henry Pool, of Tifton, for plaintiff in error.

J. S. Ridgdill, Sol., of Tifton, for the State.

BLOODWORTH, J. Judgment reversed.

STEPHENS, J., concurs.

BROYLES, P. J., dissents.

(24 Ga. App. 169)

**ROGERS v. MURRAY. (No. 10086.)**

(Court of Appeals of Georgia, Division No. 2. Sept. 18, 1919.)

*(Syllabus by the Court.)*

**1. APPEAL AND ERROR §1005(2)—VERDICT APPROVED BY TRIAL JUDGE WILL NOT BE DISTURBED.**

There was evidence sufficient to authorize the jury to find that the defendant was negligent in setting out the fire on a very windy day in close proximity to plaintiff's property, and in failing to adequately protect or guard the fire, so as to prevent its spread to plaintiff's property, and that such negligence on the part of the defendant was the proximate cause of the destruction of the plaintiff's property. The verdict, having the approval of the trial judge, will not be disturbed.

**2. SPECIAL ASSIGNMENTS OF ERROR.**

The special assignments of error are but amplifications of the general assignments.

Error from City Court of Oglethorpe; R. L. Greer, Judge.

Action by J. B. Murray against H. L. Rogers. Judgment for plaintiff, and defendant brings error. Affirmed.

J. J. Bull & Son, of Oglethorpe, for plaintiff in error.

John B. Guerry, of Montezuma, for defendant in error.

STEPHENS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(24 Ga. App. 174)

WHATLEY et al. v. MITCHELL  
(No. 10163.)

(Court of Appeals of Georgia, Division No. 2.  
Sept. 18, 1919.)

(Syllabus by the Court.)

1. GIFTS  $\S$ 18(1), 19(1), 49(3) — ACTUAL MANUAL DELIVERY UNNECESSARY TO GIFT OF PERSONALTY.

While delivery is essential to a valid gift of personalty, actual manual delivery is not required. The mere fact that the donee of personalty allows possession of the property to remain with the donor will not necessarily defeat the gift. Accordingly, where the evidence shows that a grandfather, whose grandchild lived in the house with him, had stated that he had given to such grandchild a certain heifer, and the heifer continued to remain on the premises and in the lot of the donor, where both the donor and the donee resided, the donee and his wife working for the donor, such evidence is sufficient to authorize the inference that the subject-matter of the alleged gift was delivered to the donee, and that the donor parted with his title and relinquished all dominion and ownership over the property, thereby constituting a valid gift.

2. CHARGE OF COURT.

For the reasons above stated, the exceptions to the charge of the court contained in the sole special ground of the motion for a new trial is without merit.

Error from City Court of Monroe; A. C. Stone, Judge.

Action between J. F. Whatley and others and J. P. Mitchell. Judgment for the latter, and the former bring error. Affirmed.

R. L. & H. C. Cox, of Monroe, for plaintiffs in error.

E. W. Roberts, of Monroe, for defendant in error.

STEPHENS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(24 Ga. App. 188)

KING et al. v. RODGERS et al. (No. 10140.)

(Court of Appeals of Georgia, Division No. 2.  
Sept. 19, 1919.)

(Syllabus by the Court.)

1. OVERRULING EXCEPTION OF LAW TO AUDITOR'S REPORT.

The court did not err in overruling the exceptions of law to the auditor's report.

2. DIRECTED VERDICT ON EXCEPTIONS OF FACT TO AUDITOR'S REPORT.

The court erred in directing a verdict against the defendant upon the first, second, fourth, fifth, sixth, and seventh exceptions of fact to the auditor's report, and in thereafter refusing to grant a new trial.

Error from Superior Court, Muscogee County; J. R. Terrell, Judge.

Action by L. J. Rodgers and others against Vesta King and others. Directed verdict for plaintiffs on exceptions of fact of auditor's report, motion for new trial denied, and defendants bring error. Reversed.

Hatcher & Hatcher, of Columbus, for plaintiffs in error.

J. E. Chapman and A. W. Cozart, both of Columbus, for defendants in error.

STEPHENS, J. Judgment reversed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(24 Ga. App. 201)

CITIZENS' BANK v. TOWN OF LUDOWICI et al. (No. 10193.)

(Court of Appeals of Georgia, Division No. 2.  
Sept. 20, 1919.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS  $\S$ 955(2)—IN ACTION ON NOTE, PETITION MUST SHOW POWER TO CONTRACT DEBT.

The petition as originally filed showed an action in three counts against a municipal corporation and its mayor and aldermen, individually, to recover on a promissory note given to secure a loan to the municipality. One of the counts attempted to plead an action for money had and received, and, while so designated by the pleader, its recitals plainly evidence an action on a contract.

(a) The petition, failing to show that the debt evidenced by the note sued on was within the municipality's power to contract or within the saving exceptions of Const. art. 7, § 7, par. 1 (Civ. Code 1910, § 6563), was subject to the general demurrer interposed. See *Whigham v. Gulf Refining Co.*, 20 Ga. App. 428, 93 S. E. 238 (5, 6).

**2. MUNICIPAL CORPORATIONS** ¶955(2) — **PLEADING** ¶8(3), 251 — **PETITION FOR MONEY HAD AND RECEIVED, WITHOUT ALLEGATIONS AS TO AUTHORIZED USE, INSUFFICIENT.**

The defect stated above was not cured by the amendment seeking to elaborate the third count of the petition, and to convert the action into one for money had and received (even if such procedure were permissible), and the amendment was properly disallowed. The statement therein that "the money had and received by said defendants from petitioner . . . became money actually and beneficially applied by the said defendants to the authorized objects and lawful municipal uses of the said town of Ludowici, or for which revenue or money of the said town of Ludowici may be lawfully used and applied by said town of Ludowici," was a mere conclusion of the pleader; there being no facts recited to authorize it. See, in this connection, *Butts County v. Jackson Banking Co.*, 129 Ga. 801, 810, 811, 60 S. E. 149, 15 L. R. A. (N. S.) 567, 121 Am. St. Rep. 244; *Tate v. City of Elberton*, 136 Ga. 301, 71 S. E. 420 (2); *City of Dawson v. Waterworks Co.*, 106 Ga. 697 (6), 707, 734, 32 S. E. 907.

Error from Superior Court, Liberty County; W. W. Sheppard, Judge.

Action by the Citizens' Bank against the Town of Ludowici and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Oliver & Oliver and Seabrook & Kennedy, all of Savannah, for plaintiff in error.

Melville Price, of Ludowici, and Parker & Parker, of Waycross, for defendants in error.

PER CURIAM. Judgment affirmed.

(24 Ga. App. 200)

**STRICKLAND v. STRICKLAND.**  
(No. 10157.)

(Court of Appeals of Georgia, Division No. 2.  
Sept. 20, 1919.)

(Syllabus by the Court.)

**1. PROCESS** ¶53—**SHERIFFS AND CONSTABLES** ¶20 — **SERVICE OF WRIT BY CONSTABLE, SWORN IN AS DE FACTO SHERIFF, VALID.**

Where a constable is specially deputized by the sheriff, and sworn in, for the purpose of serving a particular writ, he becomes a de facto deputy sheriff, and service by him is legal. *Twiggs v. Hardwick*, 61 Ga. 273; *Hinton v. Lindsay*, 20 Ga. 746; *Blount v. Wells*, 55 Ga. 282. See, also, *Hartshorn v. Bank*, 15 Ga. App. 173, 82 S. E. 805, where it is held that when a constable, although irregularly appointed or qualified as a deputy sheriff, assumes to act as a lawful deputy sheriff, his acts are those of a de facto officer, and therefore legal.

**2. DISMISSAL OF LEVY.**

The court did not err in refusing to dismiss the levy.

Error from Superior Court, Gordon County; M. C. Tarver, Judge.

Action between M. H. Strickland and C. E. Strickland. Judgment for the latter, and the former brings error. Affirmed.

Starr & Paschal, of Calhoun, and Maddox, McCamy & Shumate, of Dalton, for plaintiff in error.

Mark Bolding, of Atlanta, and F. A. Cantrell, of Calhoun, for defendant in error.

PER CURIAM. Judgment affirmed.

(24 Ga. App. 135)

**REAMS v. STATE.** (No. 10230.)

(Court of Appeals of Georgia, Division No. 2.  
July 23, 1919. Rehearing Denied  
Sept. 18, 1919.)

(Syllabus by the Court.)

**1. HOMICIDE** ¶134 — **INDICTMENT AND INFORMATION** ¶189(8)—**UNDER INDICTMENT FOR MURDER CONVICTION OF INVOLUNTARY MANSLAUGHTER MAINTAINABLE.**

Under an indictment for murder the accused may be convicted of a lesser offense, if the latter is one involved in the homicide and is sufficiently charged in the indictment. *Watson v. State*, 116 Ga. 607, 43 S. E. 32, 21 L. R. A. (N. S.) 1.

(a) Where such an indictment contains an allegation that the defendant "unlawfully" killed a named person by driving an automobile upon and against such person, then and there giving to such person a mortal wound with said automobile, from which mortal wound such person died, there is sufficiently charged the offense of involuntary manslaughter in the commission of an unlawful act. It is a sufficient allegation of an unlawful act that the automobile was driven upon and against the person alleged to have been killed.

**2. DEMURRER TO INDICTMENT—EXCEPTIONS TO CHARGE.**

For the reasons above stated the demurrer to the indictment was, upon all of the grounds thereof, properly overruled, and the exceptions to the charge of the court and to the admission of evidence upon the ground that same were not germane to an indictment, which failed to charge involuntary manslaughter, are wholly without merit.

**3. HOMICIDE** ¶340(4) — **ERROR IN CHARGE ON MURDER HARMLESS ON CONVICTION OF MANSLAUGHTER.**

The portions of the charge of the court relative to the law governing a conviction of the offense of murder were harmless to the defendant, since he was, upon conviction of involuntary manslaughter, acquitted of the offense of murder. *Land v. State*, 11 Ga. App. 761, 76 S. E. 78 (2).

**4. HOMICIDE**  $\S$ 170, 174(1) — **IN PROSECUTION FOR KILLING IN AUTOMOBILE COLLISION, EVIDENCE ADMISSIBLE TO IDENTIFY CAR.**

Evidence that the defendant was seen, shortly after the homicide, running his car in the same peculiar manner in which the car which ran over and killed the deceased was being run at the time of the homicide, was relevant for the purpose of identification, and to further illustrate the issue.

**5. ASSIGNMENTS OF ERROR.**

The assignments of error not dealt with above are not insisted upon.

**6. CRIMINAL LAW**  $\S$ 1160 — **VERDICT — EVIDENCE—REVIEW.**

The evidence supports the verdict, which has the approval of the trial judge; and, since no error of law was committed, this court will not reverse the judgment overruling the motion for a new trial.

Error from Superior Court, Lowndes County; W. E. Thomas, Judge.

A. F. Reams was convicted of involuntary manslaughter, his motion for new trial was denied, and he brings error. Affirmed.

Bennet & Harrell, of Quitman, and Whitaker & Dukes, of Valdosta, for plaintiff in error.

Clifford E. Hay, Sol. Gen., of Thomasville, for the State.

STEPHENS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(24 Ga. App. 184)

DAVIS v. POTTS. (No. 10540.)

(Court of Appeals of Georgia, Division No. 2. Sept. 18, 1919.)

*(Syllabus by the Court.)*

**1. APPEAL AND ERROR**  $\S$ 1046(3)—**TRIAL**  $\S$ 25(7)—**ERROR IN REFUSING RIGHT TO OPEN AND CLOSE HARMLESS.**

The defendant's plea having admitted the execution of the note sued on and the right of possession thereof in the plaintiff, and the defendant, prior to the introduction of any evidence, having demanded the opening and conclusion, the court erred in denying him this right, and allowing the plaintiff first to introduce his evidence. However, this error does not require a new trial, since upon the conclusion of the plaintiff's evidence the court reversed its ruling, and gave the defendant the opening and conclusion of the argument.

**2. APPEAL AND ERROR**  $\S$ 1062(1)—**SUBMISSION OF ISSUE AS TO ATTORNEY'S FEE CURED BY WRITING OFF AMOUNT FROM JUDGMENT.**

The error in submitting to the jury the question of attorney's fees was cured by the plain-

tiff's writing off from the judgment, upon direction of the court, the amount found for attorney's fees.

**3. TRIAL**  $\S$ 171—**REFUSAL TO DIRECT VERDICT.**

The court did not err in refusing to direct a verdict for the defendant. It has been repeatedly held, by this court and the Supreme Court, that the refusal to direct a verdict is never error.

**4. REFUSAL OF NEW TRIAL.**

The verdict was authorized by the evidence, and the court did not err in refusing a new trial.

Error from City Court of Newnan; W. A. Post, Judge.

Action by W. A. Potts against C. M. Davis. Judgment for plaintiff, and defendant brings error. Affirmed.

J. C. Newman and Stanford Arnold, both of Newnan, for plaintiff in error.

Garland M. Jones, of Newnan, for defendant in error.

BROYLES, P. J. Judgment affirmed.

BLOODWORTH and STEPHENS, JJ., concur.

(24 Ga. App. 175)

WESTERN & A. R. CO. v. JARRETT.  
(No. 10177.)

(Court of Appeals of Georgia, Division No. 2. Sept. 18, 1919.)

*(Syllabus by the Court.)*

**1. TRIAL**  $\S$ 260(10) — **REQUESTED INSTRUCTIONS, COVERED BY CHARGE GIVEN, NEED NOT BE GIVEN.**

The trial judge, having fully and fairly instructed the jury upon the law relative to a reduction in damages by reason of contributory negligence on the part of plaintiff, did not err in failing to again instruct the jury in this connection, when charging upon plaintiff's right to recover for pain and suffering.

**2. CHARGE OF COURT.**

The charge of the court fully and fairly submitted all the issues to the jury, and is not subject to any of the exceptions thereto.

**3. SUFFICIENCY OF EVIDENCE.**

The evidence authorized the verdict, and no error of law was committed.

**4. RELATED CASE.**

See, in this connection, Western & Atlantic R. R. Co. v. Jarrett, 22 Ga. App. 313, 96 S. E. 17, a suit by the same plaintiff, growing out of the same transaction.

Error from Superior Court, Bartow County; M. C. Tarver, Judge.

Action by J. F. Jarrett against the Western & Atlantic Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Tye, Peeples & Tye, of Atlanta, and Neel, Finley & Neel, of Cartersville, for plaintiff in error.

Atkinson & Born, of Atlanta, and J. R. Whitaker, of Cartersville, for defendant in error.

STEPHENS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(24 Ga. App. 176)

ADAMS v. ELBERT COUNTY. (No. 10187.)

(Court of Appeals of Georgia, Division No. 2. Sept. 18, 1919.)

*(Syllabus by the Court.)*

1. CHARGE OF COURT.

When considered in connection with the entire charge of the court and in the light of the evidence, there is no error harmful to the defendant in the excerpt from the charge of which complaint is made in the motion for a new trial.

2. APPEAL AND ERROR §987(2)—GEORGIA COURT OF APPEALS CANNOT GRANT NEW TRIAL FOR INSUFFICIENCY OF EVIDENCE.

"This court, by the constitutional amendment creating it, is limited in jurisdiction to the correction of errors of law alone, and therefore has no power to grant a new trial on the ground that the verdict is strongly contrary to the weight of the evidence, if there is any evidence at all to support it." *Edge v. Thomas*, 9 Ga. App. 559, 71 S. E. 875; *Cook v. McMurria*, 19 Ga. App. 491, 91 S. E. 785; *Toole v. Jones*, 19 Ga. App. 24, 90 S. E. 732; *McCarty v. Keys*, 19 Ga. App. 494, 91 S. E. 875.

3. EVIDENCE TO SUPPORT VERDICT.

There is some evidence to support the verdict, and the judgment is affirmed.

Error from City Court of Elberton; W. D. Tutt, Judge.

Action between E. L. Adams and Elbert County. Judgment for the latter, and the former brings error. Affirmed.

J. T. Sisk, of Elberton, for plaintiff in error.

Z. B. Rogers, of Elberton, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., and STEPHENS, J., concur.

(24 Ga. App. 183)

WOODARD v. STAMOS & STRATOS.  
(No. 10537.)

(Court of Appeals of Georgia, Division No. 2. Sept. 18, 1919.)

*(Syllabus by the Court.)*

1. DIRECTED VERDICT.

The sole issue raised by the dispossessory warrant and the counter affidavit was whether the defendant was holding the premises over and beyond the term of his lease. On this issue the evidence demanded a finding in favor of the plaintiffs, and the court did not err in directing a verdict for them.

2. LANDLORD AND TENANT §18(3)—EVIDENCE INSUFFICIENT TO SHOW NEW LEASE, BUT PROMISE ONLY FOR FUTURE.

The lease under which the defendant held the property expired on January 1, 1919. The evidence does not authorize a finding that a new lease contract was made by the parties, but shows merely that in September, 1918, one of the two members of the plaintiff partnership verbally promised the defendant that, if the defendant would surrender part of the property, he would give him a three-year lease after the expiration of the then existing lease, and that on the strength of this promise, and the reduction of his rent by \$15 per month, the defendant relinquished a part of the property to the partnership. Conceding that this partner had a right to make such a lease on behalf of the partnership (which right, however, was expressly denied by the undisputed testimony of the other partner), the evidence clearly showed that no actual lease contract was made, but a mere promise to contract at a future date. See, in this connection, *Steininger v. Williams*, 63 Ga. 476(3). The defendant himself testified as follows: "I did not continue to use the store under the agreement to lease for three years, but remained there under the old lease from Sheehan expiring January 1, 1919, and in giving back the keys and surrendering the corner I was operating under the lease expiring January 1, 1919."

Under this ruling, the amendment to the motion for a new trial is without merit.

Stephens, J., dissenting.

Error from Superior Court, Laurens County; J. L. Kent, Judge.

Dispossessory warrant proceedings by Stamos & Stratos against J. C. Woodard, with counter affidavit by defendant. Judgment for plaintiffs on a directed verdict, and defendant brings error. Affirmed.

R. Earl Camp, of Dublin, for plaintiff in error.

BROYLES, P. J. Judgment affirmed.

BLOODWORTH, J., concurs.

STEPHENS, J. (dissenting). I am of the opinion that the surrender by the tenant of a part of the rented premises before the ex-

piration of his lease, in consideration of the verbal agreement of his landlord to lease to him the remaining part of the premises, occupied by such tenant and not surrendered, for a period of three years from the date of the expiration of the old lease, and the acceptance by the landlord of such surrender, and the actual taking over by him of the part of the premises surrendered by the tenant, constituted a complete contract at the time, to commence in the future, and was not a mere promise to contract at a future date. *Steininger v. Williams*, 63 Ga. 475 (1). While this perhaps constituted such a part performance as would take the contract out of the operation of the statute of frauds, yet, being a parol agreement respecting the renting of lands for a period longer than one year, it became, under section 3693 of the Civil Code, a tenancy at will, to commence on January 1, 1919. The tenant could not on that date, the date of the issuance of the warrant to dispossess him, while in possession as a tenant at will, be dispossessed as a tenant holding over. It was error, therefore, to direct a verdict in favor of the landlord.

(24 Ga. App. 177)

**CENTRAL OF GEORGIA RY. CO. v. SCRIVENS.** (No. 10197.)

(Court of Appeals of Georgia, Division No. 2.  
Sept. 18, 1919.)

(*Syllabus by the Court.*)

**1. CARRIERS** — 185(1) — SHIPMENT IN GOOD CONDITION, PRESUMABLY DELIVERED IN SAME CONDITION TO CONNECTING INTERSTATE CARRIER.

In a suit against a connecting carrier in interstate commerce to recover for damage to goods received by it from a preceding carrier and delivered by the connecting carrier at the point of destination in a damaged condition, proof that the goods were delivered in a good condition to the initial carrier raises a presumption that they were received in a good condition by the connecting carrier. There is nothing in the acts of Congress, including the Carmack Amendment (Act June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 595 [U. S. Comp. St. §§ 8604, 8604aa]), fixing the liability for interstate carriers for goods damaged in transit, which relieves a connecting carrier of this presumption.

**2. CARRIERS** — 185(3), 187 — IN ABSENCE OF CONTRARY SHOWING, SHIPMENT WHEN RECEIVED BY CONNECTING CARRIER, IN GOOD CONDITION.

The presumption that goods delivered in good condition to the initial carrier were in good condition when received by the connecting carrier is not conclusive as a matter of law, but may be rebutted by proof. In the absence of competent evidence rebutting this presumption, and showing that the goods were not in good condition when received by the connecting carrier,

the evidence is sufficient, where there is proof of the other material allegations in plaintiff's petition, to support a verdict against the connecting carrier. *Capital City Oil Co. v. Central of Ga. Ry. Co.*, 16 Ga. App. 750, 86 S. E. 57.

(a) Where the only evidence introduced in rebuttal of this presumption was that of the baggage master of the connecting carrier, who testified that the goods were received by such connecting carrier from the preceding carrier in bad condition, and that he knew this only from his records, the jury had a right to conclude that the witness was testifying to a conclusion merely, and had no actual personal knowledge of the circumstances. In view of the presumption, it cannot be said that as a matter of law this evidence was conclusive of the fact that the carrier had received the goods in a bad condition. *Nashville, Chattanooga & St. Louis Ry. v. Truitt Co.*, 17 Ga. App. 236, 240, 86 S. E. 421.

**3. CARRIERS** — 187 — PRESUMPTION THAT SHIPMENT WAS RECEIVED IN GOOD CONDITION BY CONNECTING CARRIER REBUTTABLE.

The charge of the court as a whole instructed the jury that the defendant carrier would not be liable unless the goods were damaged while in defendant's possession, and that the presumption as to the receipt of the goods in good condition by the defendant was one of fact and subject to rebuttal. This issue was fairly submitted to the jury. The charge of the court was not erroneous for any reason assigned, and the evidence authorized the verdict.

Error from City Court of Americus; W. M. Harper, Judge.

Action by Lulu Scrivens against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

R. T. Hawkins, of Americus, and Yeomans & Wilkinson, of Dawson, for plaintiff in error.

Hixon & Pace, of Americus, for defendant in error.

STEPHENS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(24 Ga. App. 197)

**HURLEY v. DISTRICT GRAND LODGE NO. 1; INDEPENDENT BENEVOLENT ORDER.** (No. 10096.)

(Court of Appeals of Georgia, Division No. 2.  
Sept. 20, 1919.)

(*Syllabus by the Court.*)

**1. SUITS AGAINST INSURANCE COMPANIES — STATUTES.**

"Whenever any person may have any claim or demand upon any insurance company having agencies, or more than one place of doing business, it shall be lawful for such person to institute suit against said insurance company within the county where the principal office of

Action by J. F. Jarrett against the Western & Atlantic Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Tye, Peeples & Tye, of Atlanta, and Neel, Finley & Neel, of Cartersville, for plaintiff in error.

Atkinson & Born, of Atlanta, and J. R. Whitaker, of Cartersville, for defendant in error.

STEPHENS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(24 Ga. App. 176)

ADAMS v. ELBERT COUNTY. (No. 10187.)

(Court of Appeals of Georgia, Division No. 2. Sept. 18, 1919.)

*(Syllabus by the Court.)*

1. CHARGE OF COURT.

When considered in connection with the entire charge of the court and in the light of the evidence, there is no error harmful to the defendant in the excerpt from the charge of which complaint is made in the motion for a new trial.

2. APPEAL AND ERROR §987(2)—GEORGIA COURT OF APPEALS CANNOT GRANT NEW TRIAL FOR INSUFFICIENCY OF EVIDENCE.

"This court, by the constitutional amendment creating it, is limited in jurisdiction to the correction of errors of law alone, and therefore has no power to grant a new trial on the ground that the verdict is strongly contrary to the weight of the evidence, if there is any evidence at all to support it." *Edge v. Thomas*, 9 Ga. App. 559, 71 S. E. 875; *Cook v. McMurria*, 19 Ga. App. 491, 91 S. E. 785; *Toole v. Jones*, 19 Ga. App. 24, 90 S. E. 732; *McCarty v. Keys*, 19 Ga. App. 494, 91 S. E. 875.

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There is some evidence to support the verdict, and the judgment is affirmed.

Error from City Court of Elberton; W. D. Tutt, Judge.

Action between E. L. Adams and Elbert County. Judgment for the latter, and the former brings error. Affirmed.

J. T. Sisk, of Elberton, for plaintiff in error.

Z. B. Rogers, of Elberton, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., and STEPHENS, J., concur.

(24 Ga. App. 183)

WOODARD v. STAMOS & STRATOS.  
(No. 10537.)

(Court of Appeals of Georgia, Division No. 2. Sept. 18, 1919.)

*(Syllabus by the Court.)*

1. DIRECTED VERDICT.

The sole issue raised by the dispossessory warrant and the counter affidavit was whether the defendant was holding the premises over and beyond the term of his lease. On this issue the evidence demanded a finding in favor of the plaintiffs, and the court did not err in directing a verdict for them.

2. LANDLORD AND TENANT §18(3)—EVIDENCE INSUFFICIENT TO SHOW NEW LEASE, BUT PROMISE ONLY FOR FUTURE.

The lease under which the defendant held the property expired on January 1, 1919. The evidence does not authorize a finding that a new lease contract was made by the parties, but shows merely that in September, 1918, one of the two members of the plaintiff partnership verbally promised the defendant that, if the defendant would surrender part of the property, he would give him a three-year lease after the expiration of the then existing lease, and that on the strength of this promise, and the reduction of his rent by \$15 per month, the defendant relinquished a part of the property to the partnership. Conceding that this partner had a right to make such a lease on behalf of the partnership (which right, however, was expressly denied by the undisputed testimony of the other partner), the evidence clearly showed that no actual lease contract was made, but a mere promise to contract at a future date. See, in this connection, *Steininger v. Williams*, 63 Ga. 476(3). The defendant himself testified as follows: "I did not continue to use the store under the agreement to lease for three years, but remained there under the old lease from Sheehan expiring January 1, 1919, and in giving back the keys and surrendering the corner I was operating under the lease expiring January 1, 1919."

Under this ruling, the amendment to the motion for a new trial is without merit.

Stephens, J., dissenting.

Error from Superior Court, Laurens County; J. L. Kent, Judge.

Dispossessory warrant proceedings by Stamos & Stratos against J. C. Woodard, with counter affidavit by defendant. Judgment for plaintiffs on a directed verdict, and defendant brings error. Affirmed.

R. Earl Camp, of Dublin, for plaintiff in error.

BROYLES, P. J. Judgment affirmed.

BLOODWORTH, J., concurs.

STEPHENS, J. (dissenting). I am of the opinion that the surrender by the tenant of a part of the rented premises before the ex-

piration of his lease, in consideration of the verbal agreement of his landlord to lease to him the remaining part of the premises, occupied by such tenant and not surrendered, for a period of three years from the date of the expiration of the old lease, and the acceptance by the landlord of such surrender, and the actual taking over by him of the part of the premises surrendered by the tenant, constituted a complete contract at the time, to commence in the future, and was not a mere promise to contract at a future date. *Steinger v. Williams*, 63 Ga. 475 (1). While this perhaps constituted such a part performance as would take the contract out of the operation of the statute of frauds, yet, being a parol agreement respecting the renting of lands for a period longer than one year, it became, under section 3693 of the Civil Code, a tenancy at will, to commence on January 1, 1919. The tenant could not on that date, the date of the issuance of the warrant to dispossess him, while in possession as a tenant at will, be dispossessed as a tenant holding over. It was error, therefore, to direct a verdict in favor of the landlord.

(24 Ga. App. 177)

**CENTRAL OF GEORGIA RY. CO. v. SCRIVENS.** (No. 10197.)

(Court of Appeals of Georgia, Division No. 2.  
Sept. 18, 1919.)

*(Syllabus by the Court.)*

**1. CARRIERS** ⇨185(1) — SHIPMENT IN GOOD CONDITION, PRESUMABLY DELIVERED IN SAME CONDITION TO CONNECTING INTERSTATE CARRIER.

In a suit against a connecting carrier in interstate commerce to recover for damage to goods received by it from a preceding carrier and delivered by the connecting carrier at the point of destination in a damaged condition, proof that the goods were delivered in a good condition to the initial carrier raises a presumption that they were received in a good condition by the connecting carrier. There is nothing in the acts of Congress, including the Carmack Amendment (Act June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 595 [U. S. Comp. St. §§ 8604, 8604aa]), fixing the liability for interstate carriers for goods damaged in transit, which relieves a connecting carrier of this presumption.

**2. CARRIERS** ⇨185(3), 187—IN ABSENCE OF CONTRARY SHOWING, SHIPMENT WHEN RECEIVED BY CONNECTING CARRIER, IN GOOD CONDITION.

The presumption that goods delivered in good condition to the initial carrier were in good condition when received by the connecting carrier is not conclusive as a matter of law, but may be rebutted by proof. In the absence of competent evidence rebutting this presumption, and showing that the goods were not in good condition when received by the connecting carrier,

the evidence is sufficient, where there is proof of the other material allegations in plaintiff's petition, to support a verdict against the connecting carrier. *Capital City Oil Co. v. Central of Ga. Ry. Co.*, 16 Ga. App. 750, 86 S. E. 57.

(a) Where the only evidence introduced in rebuttal of this presumption was that of the baggage master of the connecting carrier, who testified that the goods were received by such connecting carrier from the preceding carrier in bad condition, and that he knew this only from his records, the jury had a right to conclude that the witness was testifying to a conclusion merely, and had no actual personal knowledge of the circumstances. In view of the presumption, it cannot be said that as a matter of law this evidence was conclusive of the fact that the carrier had received the goods in a bad condition. *Nashville, Chattanooga & St. Louis Ry. v. Truitt Co.*, 17 Ga. App. 236, 240, 86 S. E. 421.

**3. CARRIERS** ⇨187 — PRESUMPTION THAT SHIPMENT WAS RECEIVED IN GOOD CONDITION BY CONNECTING CARRIER REBUTTABLE.

The charge of the court as a whole instructed the jury that the defendant carrier would not be liable unless the goods were damaged while in defendant's possession, and that the presumption as to the receipt of the goods in good condition by the defendant was one of fact and subject to rebuttal. This issue was fairly submitted to the jury. The charge of the court was not erroneous for any reason assigned, and the evidence authorized the verdict.

Error from City Court of Americus; W. M. Harper, Judge.

Action by Lulu Scrivens against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

R. T. Hawkins, of Americus, and Yeomans & Wilkinson, of Dawson, for plaintiff in error.

Hixon & Pace, of Americus, for defendant in error.

STEPHENS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(24 Ga. App. 187)

**HURLEY v. DISTRICT GRAND LODGE NO. 1, INDEPENDENT BENEVOLENT ORDER.** (No. 10096.)

(Court of Appeals of Georgia, Division No. 2.  
Sept. 20, 1919.)

*(Syllabus by the Court.)*

**1. SUITS AGAINST INSURANCE COMPANIES — STATUTES.**

"Whenever any person may have any claim or demand upon any insurance company having agencies, or more than one place of doing business, it shall be lawful for such person to institute suit against said insurance company within the county where the principal office of



such company is located, or in any county where said insurance company may have an agent, \* \* \* or in any county where such agent \* \* \* was located at the time the cause of action accrued, or the contract was made out of which said cause of action arose." Civ. Code 1910, § 2563.

**2. INSURANCE ¶811—IN SUIT AGAINST INSURER, DIRECTED VERDICT FOR WANT OF JURISDICTION IN COUNTY OF SUBORDINATE LODGE ERRONEOUS.**

In a suit against a fraternal benefit society by a beneficiary of a policy issued by the society, where it is shown that, while the Supreme Lodge of the society had its head office in another county within the state, it had a subordinate lodge in the county in which suit was pending, in which subordinate lodge the deceased had applied for membership and had been initiated, and had paid his dues to the secretary of the same, who sent them to the head office, and that the subordinate lodge had a place in the county where it met regularly, the jury were authorized to infer that the subordinate lodge was the agent of the defendant in the county in which the suit was pending, and that the court had jurisdiction. It follows, therefore, that upon the trial of an issue formed upon a plea to the jurisdiction, where the evidence showed the above facts, it was error for the trial judge to direct a verdict in behalf of the defendant, sustaining the plea to the jurisdiction. Supreme Circle of Benevolence v. Beall, 18 Ga. App. 425, 89 S. E. 630.

**3. INSURANCE ¶811—SUIT AGAINST BENEFIT SOCIETY IN ONLY COUNTY WHERE IT HAD AN AGENT PROPER.**

The jurisdiction of the superior court of Wilkes county, in which the suit was pending and where the defendant had an agent, was not ousted by an agreement signed by the insured in his application for the issuance of the policy, or by its being stipulated on the back of the policy issued, that "suit shall be instituted on said policy against said district grand lodge only in the state court of Fulton county, as the order has no agent or agency in any other county of said state." Supreme Circle of Benevolence v. Smith, 21 Ga. App. 678, 94 S. E. 1034. See Benson v. Eastern Bldg. Ass'n, 174 N. Y. 83, 86 N. E. 627.

Error from Superior Court, Wilkes County; B. F. Walker, Judge.

Action by Willie Hurley against the District Grand Lodge No. 1, Independent Benevolent Order. Judgment for defendant, and plaintiff brings error. Reversed.

C. E. Sutton, of Washington, Ga., for plaintiff in error.

R. B. Russell and Holbrook & Corbett, all of Atlanta, and Colley & Colley, of Washington, Ga., for defendant in error

STEPHENS, J. Judgment reversed.

BROYLES, P. J., and BLOODWORTH, J. concur.

(24 Ga. App. 180)

**BAZEMORE v. STEPHENSON. (No. 10531.)**

(Court of Appeals of Georgia, Division No. 2. Sept. 18, 1919.)

(Syllabus by the Court.)

**BANKRUPTCY ¶437 — EVIDENCE INSUFFICIENT TO SHOW MALICIOUS TORT IN COLLISION BETWEEN AUTOMOBILES.**

The sole question in this case is whether the evidence authorized a finding by the jury that the defendant willfully and intentionally drove his automobile against the automobile in which the plaintiff was riding, so as to constitute such a malicious tort as would come within section 17a(2) of the Bankruptcy Act of July 1, 1898 (30 Stat. 550, c. 541 [U. S. Comp. St. § 9601]). The record fails to disclose any evidence which would have authorized such a finding. The plaintiff himself testified, in effect, that he did not know, and could not say, that the defendant deliberately or intentionally did so. The court, therefore, did not err in directing a verdict for the defendant. See, in this connection, Collier on Bankruptcy (11th Ed.) 402, 441; Tinker v. Colwell, 193 U. S. 473, 481, 24 Sup. Ct. 505, 48 L. Ed. 758, 11 Am. Bankr. Rep. 568.

Stephens, J., dissenting.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by T. C. Bazemore against S. E. Stephenson. Judgment for defendant on a directed verdict, and plaintiff brings error. Affirmed.

Mayson & Johnson, of Atlanta, for plaintiff in error.

Little, Powell, Smith & Goldstein, of Atlanta, for defendant in error.

BROYLES, P. J. Judgment affirmed.

BLOODWORTH J., concurs.

STEPHENS, J. (dissenting). If there is any evidence to authorize the inference that the defendant willfully and intentionally drove his automobile into the automobile in which the plaintiff was riding, there would then be an issue of fact for determination by the jury, and the direction of a verdict by the trial judge was error. There is evidence in this case that the two automobiles were approaching each other along a public road; that the defendant held his course and failed to turn out, although there was ample room in the road for him to do so and a suitable roadbed to his right for his car to pass over; that the defendant was driving the larger car; and that the defendant, after the collision, continued on without stopping. Without reference to the rest of the evidence, this, it would seem, is sufficient to authorize the

inference that the defendant was acting willfully and intentionally.

"Assault and battery may be committed by striking another with an automobile intentionally, or by driving the machine so recklessly as to justify a jury in finding that there was a reckless disregard of human life and safety. *Dennard v. State*, 14 Ga. App. 485, 81 S. E. 378. And see *Gallery v. State*, 92 Ga. 464(2), 17 S. E. 863; *Collier v. State*, 39 Ga. 31, 34 [99 Am. Dec. 449]. The same is true where, under like circumstances, the automobile is driven against another vehicle in which persons are riding, whereby the collision occasions bruises, blows, and similar physical injuries to persons in the vehicle so struck." *Tift v. State*, 17 Ga. App. 663, 88 S. E. 41 (1), and authorities there cited.

In the *Dennard Case*, *supra*, it was said:

"A reckless disregard of human life may be the equivalent of a specific intent to kill; and whether it existed \* \* \* was a question for the jury."

That the plaintiff in this case was unable to say that the defendant deliberately and intentionally drove into him does not eliminate the issue as raised by the other testimony in the case.

(24 Ga. App. 182)

**SIMMS v. MASSENGALE ADVERTISING AGENCY.** (No. 10534.)

(Court of Appeals of Georgia, Division No. 2. Sept. 18, 1919.)

*(Syllabus by the Court.)*

1. EVIDENCE  $\S$ 471(2) — EVIDENCE THAT CREDIT FOR ACCOUNT WAS GIVEN DEFENDANT, AND NOT CORPORATION, ADMISSIBLE.

The court did not err in admitting in evidence the testimony of an officer of the plaintiff advertising agency that credit for the account sued on was given to the defendant, and not to the milling company, of which the defendant was vice president. *Reynolds v. Simpson & Ledbetter*, 74 Ga. 454 (1), 460.

2. TRIAL  $\S$ 330(2)—IN ACTION ON SINGLE CONTRACT, RULE AS TO MINGLING ITEMS NOT APPLICABLE.

It does not appear, from the evidence, that there were two separate and distinct transactions, or "orders," between the plaintiff and the defendant; but it appeared that the defendant guaranteed the payment of a single contract for newspaper advertising, and later, by mutual consent, there was merely a substitution of certain newspapers for those originally named in the order. The doctrine, therefore, that where a plaintiff mingles items upon which he is entitled to recover with items upon which he is not entitled to recover, and does not furnish to the jury means to separate them, a verdict and judgment in his favor is contrary to law, is not applicable in this case.

### 3. EVIDENCE TO SUPPORT VERDICT.

The defendant paid a part of the account, and the verdict for the balance was authorized by the evidence.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by the Massengale Advertising Agency against J. H. Simms. Judgment for plaintiff, and defendant brings error. Affirmed.

Little, Powell, Smith & Goldstein, of Atlanta, for plaintiff in error.

Rosser, Slaton, Phillips & Hopkins, of Atlanta, for defendant in error.

RROYLES, P. J. Judgment affirmed.

BLOODWORTH and STEPHENS, JJ., concur.

(24 Ga. App. 145)

**JOHNSON v. STATE.** (No. 10605.)

(Court of Appeals of Georgia, Division No. 2. July 23, 1919. Rehearing Denied Sept. 19, 1919.)

*(Syllabus by the Court.)*

### 1. CHARGE OF COURT.

The court did not err in charging as complained of in the first and second grounds of the amendment to the motion for a new trial.

### 2. CRIMINAL LAW $\S$ 823(1), 828—INSTRUCTION AS TO PUNISHMENT NOT ERRONEOUS FOR FAILING TO STATE COURT COULD IGNORE RECOMMENDATION OF JURY.

Error is assigned on the following part of the charge of the court: "The larceny of an automobile, locomobile, motor cycle, or other like vehicle propelled by electricity or gasoline in this state shall be a felony, and any person convicted thereof shall be punished in the penitentiary for a term not less than 1 year nor longer than five years. So you see the offense charged in this indictment is a felony, made so by a special act of the Legislature. However, it is a felony that may be reduced to a misdemeanor. Should the jury believe this defendant guilty beyond a reasonable doubt, and if they so find, they may recommend him to the mercy of the court, in which case, should the court approve the recommendation, the defendant would be punished as for a misdemeanor; that is to say, he would receive a sentence on the chain gang for a term of not more than 12 months, or in the county jail nor more than 6 months, or to pay a fine of not more than \$1,000, any one or more, in the discretion of the court." This charge, which is excepted to "for the reason that the trial judge omitted to charge the jury in this connection that if they recommended defendant to the mercy of the court, to be punished as for a misdemeanor, that the court could ignore

their recommendation altogether and put the defendant in the penitentiary." This charge was correct and pertinent, and is not rendered erroneous by failure to give other instructions appropriate to the case in connection therewith. *Grimsley v. Singletary*, 133 Ga. 56, 57, 65 S. E. 92 (3), 134 Am. St. Rep. 196; *Western & Atlantic Railroad Co. v. Watkins*, 14 Ga. App. 388 (4), 392 (80 S. E. 916), and cases cited. In addition, the judge told the jury: "If you believe the defendant guilty of the offense of larceny of an automobile, the verdict will be: 'We, the jury, find the defendant Leon Johnson guilty.' To which you may add a recommendation, should you see fit."

In *Lingerfelt v. State*, 125 Ga. 4, 53 S. E. 803 (15 Ann. Cas. 310), the fourth paragraph of the decision is as follows: "Where the court charged that, if the jury should find the defendant guilty generally, he would be subject to confinement in the penitentiary for a time not less than 2 years nor longer than 10 years; that they would have the right to reduce the punishment to that appropriate to a misdemeanor; that, 'if the judge should approve that, he would be punished as for a misdemeanor;' and that the form of verdict proper for that purpose would be to find the defendant guilty and recommend that he be punished as for a misdemeanor—in the absence of any request to charge more specifically on the subject, there was no error in failing to explain to the jury that, in the event they should find the defendant guilty with the recommendation referred to, the judge could disregard such recommendation and punish him as for a felony." In the case of *Taylor v. State*, 14 Ga. App. 492, 81 S. E. 372, the judge failed to charge the jury that they could recommend that the defendant be punished as for a misdemeanor, and to inform the jury that such a recommendation, to be effective, would have to meet with the approval of the judge. The judgment was reversed because of the total failure of the judge to charge these propositions. However, in discussing this error, Judge Russell said (14 Ga. App. 499, 81 S. E. 376): "In *Lingerfelt's Case*, it is true, the instructions of the trial judge were not held to be erroneous; and this was because the jury were told that 'if the judge should approve [the recommendation] he would be punished as for a misdemeanor.' The court held only that, in the absence of a request for a more specific charge on the subject, there was no error in failing to explain to the jury that the judge could disregard the recommendation and punish as for a felony; and it is therefore clear to our minds that the instruction was held sufficient because further explanation would only have made more plain the negative pregnant couched in the language used by the trial judge. When the judge, in *Lingerfelt's Case*, told the jury that the accused would be punished as for a misdemeanor if he approved the recommendation, it was easily to be inferred by the jury that, if the recommendation as to misdemeanor punishment was not approved, the accused would be punished as for a felony." In *Frazier v. State*, 15 Ga. App. 365, 83 S. E. 273, Judge Wade said in the opinion: "If the judge presiding at the trial of one accused of a felony, where under

the law the jury may recommend that he be punished as for a misdemeanor, informs the jury of their right so to recommend, and clearly indicates to them in unmistakable language that the recommendation will not be effective unless it meets with his approval, this is sufficient, though he may not couch the instruction in the precise words set out in the headnote quoted from *Taylor v. State*, supra." Applying the rule announced in the *Lingerfelt Case*, and approved in the *Taylor* and *Frazier Cases*, it will be seen that, in the absence of a timely and proper written request, there was no error in the failure of the judge to give a more specific charge on this branch of the case.

### 3. CRIMINAL LAW §1160—VERDICT APPROVED BY JUDGE WILL NOT BE DISTURBED, IN ABSENCE OF ERROR AT LAW.

There was evidence to support the verdict, and, under the uniform and repeated rulings of this court and of our Supreme Court, the verdict approved by the trial judge, where no error of law is committed, will not be disturbed.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Leon Johnson was prosecuted for larceny, and from the judgment he brings error. Affirmed.

John R. Cooper, H. F. Rawls, and W. O. Cooper, Jr., all of Macon, for plaintiff in error.

C. H. Garrett, Sol. Gen. pro tem., of Macon, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., and STEPHENS, J., concur.

(24 Ga. App. 178)

HARMONY GROVE TELEPHONE CO. v. POTTS. (No. 10204.)

(Court of Appeals of Georgia, Division No. 2, Sept. 18, 1919.)

(Syllabus by the Court.)

### 1. DEPOSITIONS §109 — EXCEPTION TO OPENING AND READING INTERROGATORIES FOR WANT OF POSTMASTER'S CERTIFICATE OF RECEIPT OVERRULED.

During the trial objection was made to the opening of certain interrogatories and to the reading of the same to the jury, on the ground that "there was no entry upon said envelope as required by law, showing that the postmaster at Jefferson, Ga., had received said interrogatories by due course of mail." The court properly overruled the objection. The record does not show that the interrogatories had been in the clerk's office less than 24 hours prior to the trial, or that the exception to the execution and return was made in writing and notice given to the opposite party before the case was submitted to the jury. Civ. Code 1910, § 5904; Rog-

ers v. Truett, 73 Ga. 386 (1, a); Roper v. Roberts, 143 Ga. 128, 84 S. E. 553 (1).

**2. TRIAL  $\Leftrightarrow$ 252(7)—IN ACTION FOR LOSS OF MULE HIRED, INSTRUCTION REQUIRING EXTRAORDINARY CARE OF HIREE ERRONEOUS.**

Where suit was brought to recover damages from one to whom a mule was hired, the petition alleging that the mule was taken sick while in the possession of the hirer, and that knowing this fact he "continued to work said mule, mistreated and neglected it, until the mule died," it was error requiring the grant of a new trial for the court to charge: (a) "Extraordinary diligence is that extreme care and caution which every prudent and thoughtful person use in securing and preserving their own property. The absence of such diligence is termed slight neglect." In *Evans v. Nail*, 1 Ga. App. 45, 57 S. E. 1021, Chief Judge Hill said: "The contract of hire being one of mutual benefit, the hirer is bound only for ordinary diligence, and is responsible only for ordinary negligence. Civil Code [of 1895] § 2907 [Civil Code of 1910, § 3480]; *Mayor and Council of Columbus v. Howard*, 6 Ga. 218. The judge should have confined his instructions on the subject of negligence to that degree of care which by law was applicable to the case." (b) "In cases of loss the presumption of law is against the bailee, and no excuse avails him unless it was occasioned by the act of God. In order for a bailee to avail himself of this defense, the act of God, he must establish, not only that the act of God occasioned the loss, but that his own negligence did not contribute thereto." This charge is composed of parts of paragraphs 2712 and 2713 of the Civil Code of 1910, which apply to railroads as common carriers and to other like carriers, and is not applicable to the facts of this case, and was likely to confuse and mislead the jury. The illness from which the mule died was not in a legal sense "the act of God." In *Central Line of Boats v. Lowe*, 50 Ga. 509, Judge McCay said (page 511): "There is, doubtless, a distinction between an 'act of God' and an 'unavoidable accident.' The former covers only natural accidents, such as lightning, earthquakes, tempests, and the like, and not accidents arising from the negligence or act of man." See, also, *Cannon v. Hunt*, 113 Ga. 509, 38 S. E. 983.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Act of God; Extraordinary Diligence; Second Series, Slight Care.]

**3. OTHER GROUNDS.**

The remaining grounds of the motion for a new trial are of such character that it is not necessary to pass upon them. Indeed, most of them are not discussed in the brief of plaintiff in error.

Error from City Court of Jefferson; J. A. B. Mahaffey, Judge.

Action between the Harmony Grove Telephone Company and E. C. Potts. To review a judgment for the latter, the former brings error. Reversed.

R. L. J. & S. J. Smith, Jr., of Commerce, and E. M. & G. F. Mitchell, of Atlanta, for plaintiff in error.

J. S. Ayers, of Jefferson, for defendant in error.

BLOODWORTH, J. Judgment reversed.

BROYLES, P. J., and STEPHENS, J., concur.

(178 N. C. 114)

WALLACE v. MOORE. (No. 174.)

(Supreme Court of North Carolina. Sept. 24, 1919.)

**1. RAILROADS  $\Leftrightarrow$ 62—CANNOT ACQUIRE LAND NOT FOR RAILROAD PURPOSES.**

Railroad under its charter (Laws 1852, c. 136), and Revisal 1905, § 2566, and section 2567, subsecs. 2, 3, could not acquire land for other than railroad purposes.

**2. PUBLIC LANDS  $\Leftrightarrow$ 164—ON ENTRY OF LAND AS TRUSTEE COURTS WILL EXECUTE TRUST.**

Where one makes entry upon land as a trustee, court will execute the trust, under the statutes.

**3. RAILROADS  $\Leftrightarrow$ 62—CANNOT ENTER LAND BY TRUSTEE UNLESS INTENDED FOR RAILROAD PURPOSES.**

Railroad, having no right under its charter (Laws 1852, c. 136), or under general law (Revisal 1905, § 2566 and section 2567, subsecs. 2, 3), to acquire land for other than railroad purposes, cannot acquire land by procuring a trustee to make entry upon the land in its behalf, in absence of showing that land is to be use for railroad purposes.

**4. CONSTITUTIONAL LAW  $\Leftrightarrow$ 205(6)—CORPORATIONS NOT "CITIZENS" WITHIN PROVISIONS GUARANTEEING PRIVILEGES.**

Corporations are not considered "citizens" within the meaning of constitutional and statutory provisions guaranteeing the privileges and immunities of citizenship.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Citizen.]

**5. STATUTES  $\Leftrightarrow$ 190—WHETHER "PERSON" INCLUDES CORPORATIONS DEPENDS ON CONTEXT.**

Whether the word "person," as used in statute, includes corporations may depend largely on the context and the extent and purpose of the statute.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Person.]

**6. PUBLIC LANDS  $\Leftrightarrow$ 164 — WHERE GRANTS ARE AUTHORIZED TO "CITIZENS" AND "PERSONS," CORPORATIONS NOT INCLUDED.**

The words "citizens" and "persons," within Revisal 1905, § 1692, authorizing issuance of grants for state lands to any "citizen" of the state and to "persons" who shall have come into the state, do not include corporations.

Appeal from Superior Court, Carteret County; Daniels, Judge.

Proceeding for entry of land by L. I. Moore, trustee, protested by Charles S. Wallace. Judgment dismissing entry, and enterer excepts and appeals. Affirmed.

This is an application for an entry of land instituted by defendant, in which there was protest by plaintiff on possession of said land claiming the same as owner, the ground of his claim being fully set forth in his written protest, duly filed in the proceedings. The facts pertinent to the case are sufficiently shown in the judgment of his honor dismissing the cause as follows:

This cause coming on to be heard before his honor, F. A. Daniels, judge and a jury, counsel for protestant requested in open court that the enterer, L. I. Moore, as trustee, should disclose to the court in whose behalf he was trustee. Without ruling of the court, counsel for the enterer stated that the entry was made as trustee for the Atlantic & North Carolina Railroad Company, and for the purpose of protecting their property adjacent to the water which they claim has been filled in. Thereupon the protestant denied that the property entered was filled in property, or that the entry was for the purpose of protecting the property now owned by the railroad company. The protestant moved to dismiss the entry upon the ground that same could not be made by a trustee in behalf of the railroad company. His honor, being of the opinion that the railroad company in the first instance could not make the entry, ruled that the entry could not be maintained by a trustee for the benefit of the railroad company. The court sustained the motion and dismissed the entry, to which the enterer excepted and appealed.

J. F. Duncan, of Beaufort, and Moore & Dunn, of Newbern, for appellant.

D. L. Ward, of Newbern, and Luther Hamilton, of Morehead City, for appellee.

HOKE, J. The position is very generally recognized here and elsewhere that a railroad corporation is without power to acquire and hold real estate except by statutory authority, either expressly conferred or necessarily implied from the powers contained in the charter or arising to it under the General Laws. *Cross v. Railroad*, 172 N. C. 119, 90 S. E. 14; *Case v. Kelly*, 133 U. S. 21, 10 Sup. Ct. 216, 33 L. Ed. 513; *Pacific Railway v. Seely*, 45 Mo. 212, 100 Am. Dec. 369; *Coe v. Railroad*, 10 Ohio St. 372, 75 Am. Dec. 518; 1 *Elliott on Railways*, §§ 390, 391, 392, etc.; 22 R. C. L. p. 813, title, Railroads, § 66.

In the citation to *Elliott*, supra, the general principle is stated as follows:

"The rule is well established that a railroad corporation cannot acquire and hold lands for any purposes except such as are authorized by statute. The authority must be conferred by legislation or it does not exist. It is, how-

ever, not necessary that the authority should be expressly conferred. It may be implied."

And in answer to the suggestion that the question is one that concerns the state alone, and may not avail as between the corporation and individuals, Associate Justice Miller, delivering the opinion in the case of *Case v. Kelly*, supra, said:

"We need not stop here to inquire whether this company can hold title to lands, which it is impliedly forbidden to do by its charter, because the case before us is not one in which the title to the lands in question has ever been vested in the railroad company, or attempted to be so vested. The railroad company is plaintiff in this action, and is seeking to obtain the title to such lands. It has no authority by the statute to receive such title and to own such lands, and the question here is, not whether the courts would deprive it of such lands if they have been conveyed to it, but whether they will aid it to violate the law and obtain a title which it has no power to hold. We think the questions are very different ones, and that while a court might hesitate to declare the title to lands received already, and in the possession and ownership of the company, void on the principle that they had no authority to take such lands, it is very clear that it will not make itself the active agent in behalf of the company in violating the law and enabling the company to do that which the law forbids."

In the present case, a careful examination fails to disclose that the charter (chapter 136, Laws 1852) confers upon the A. & N. C. R. R. Co. any power to acquire and hold real estate for general purposes or otherwise, except for the purposes of constructing and operating its road, restricted usually to a proper right of way and the necessary terminal facilities. In section 5 the power is given to acquire real estate by purchase, lease, etc., and the same is immediately restricted by the express limitation, "So far as shall be necessary for the purposes embraced within the scope, object, and intent of this charter and no farther," etc.

In section 25, conferring power to condemn land when same cannot be acquired by agreement, the same limitation appears, and in section 28 the right of way is limited to 100 feet on either side of the line of road as permanently located. Nor is the power in question in any way enlarged by the general law on the subject. Revisal, c. 61, § 2566, and section 2567, subsecs. 2, 3. In the first named section it is enacted that the provisions of the general law shall apply and affect railroad charters unless the charter itself otherwise especially provides, but the powers thereby conferred in reference to locating real estate as shown in the section that follows section 2567 and subsections are in no wise different from the special charter containing substantially the same restrictions on that subject. Thus in subsection 2 as to donations it is provided:

"To take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its railroad; but the real estate received by voluntary grant shall be held and used for the purposes of such grant only."

And in subsection 3 as to purchases:

"To purchase, hold and use all such real estate and other property as may be necessary for the construction and maintenance of its railroad and the stations and other accommodations necessary to accomplish the object of its incorporation."

[1-3] This being the law applicable, and the proponent having instituted the proceedings for himself as trustee generally, and having avowed in open court that he was acting for the railroad and intended to hold as trustee for it, a trust that our statute appertaining to this subject would at once execute (*Cameron v. Hicks*, 141 N. C. 21, 53 S. E. 728, 7 L. R. A. [N. S.] 407; *Smith v. Proctor*, 139 N. C. 314, 51 S. E. 889, 2 L. R. A. [N. S.] 172), this cause should be properly dealt with as if the company itself was the actor in the proceedings and in accord with the authorities heretofore cited, and in the absence of any claim or suggestion that the land applied for is required for the purposes of the road, or that it comes within the powers and privileges as to realty, contained in the charter or general laws, we concur in his honor's view and approve the ruling that proponent is without right to proceed further.

It is contended for defendant that although the charter and general law applicable to railroads may not confer the power to acquire this property, it arises to the company by virtue of the very general terms of the statute authorizing the issuance of grants for the state lands (Revisal, c. 37, § 1692), to the effect that—

"any citizen of this state, and all persons who \* \* \* shall come into this state with the bona fide intent of becoming \* \* \* citizens thereof, shall have the right and privilege of making entries of, and obtaining grants for, vacant and unappropriated lands."

[4-6] Although it is held that corporations are to be regarded as citizens under the statutes conferring jurisdiction on the federal courts by reason of diversity of citizenship, they are not so considered within the meaning of the constitutional and statutory provisions guaranteeing the privileges and immunities of citizenship, nor do they come generally within this meaning of that term. *Orient Insurance Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552; *Insurance Co. v. Commonwealth*, 5 Bush (Ky.) 68. And while the word "person" is more usually held to extend to corporations, this may depend largely on the context and the extent and purpose of the particular law (7 R. O.

L.), citing *Overland Cotton Mill Co. v. People*, 32 Colo. 263, 75 Pac. 924, 105 Am. St. Rep. 74, and other cases. A perusal of the statute in question here will disclose that it applies primarily to natural persons, having general capacity to take and hold real estate; and, if it extends to corporations at all, it is subject to the restrictions and limitations established by the charter or the general law.

There is no error, and the judgment dismissing the proceedings is affirmed.

Affirmed.

(178 N. C. 679)

## STATE v. SIMONS. (No. 162.)

(Supreme Court of North Carolina. Sept. 24, 1919.)

### 1. CRIMINAL LAW §1144(14)—CHARGE NOT EXCEPTED TO, PRESUMED CORRECT.

A charge not excepted to will be presumed to have been made in accordance with law.

### 2. INTOXICATING LIQUORS §233(2)—IN PROSECUTION FOR ILLEGAL POSSESSION, EVIDENCE OF POSSESSION OF WHISKY STILLS ADMISSIBLE.

In prosecution for having possession of intoxicating liquor for purpose of sale, evidence that, two months after such liquor had been found in defendant's possession, defendant had constructed a new still, and was working on another, was competent.

### 3. CRIMINAL LAW §371(1)—IN PROSECUTION OF CRIMES FOR PROFIT, INTENT SHOWN BY EVIDENCE OF SIMILAR ACTS.

In prosecutions for illicit dealing in intoxicating liquor, and crimes committed for profit it is competent to prove intent by showing matters of like nature before and after the offense, such crimes having been committed with deliberation, in defiance of law, and for the ignoble motive of making profit thereby.

### 4. INTOXICATING LIQUORS §233(1)—CRIMINAL LAW §371(10)—IN PROSECUTION FOR ILLEGAL POSSESSION, EVIDENCE OF STILL ADMISSIBLE.

In prosecution for having possession of intoxicating liquor for purpose of sale, where more than one gallon of liquor was found in defendant's possession at time of arrest, creating presumption that liquor was for purpose of sale, under Pub. Laws 1913, c. 44, § 2, evidence of defendant's denial of possession, his attempt to shoot officer making arrest, and his being found later making a still, is competent in support of the presumption.

### 5. INTOXICATING LIQUORS §140 — POSSESSION FOR PURPOSE OF SALE VIOLATION OF PROHIBITION LAW.

If a person has liquor in his possession for the purposes of sale he is guilty of the crime of having possession of liquor with intent to sell it, whether he makes a sale or not.

Appeal from Superior Court, Pitt County; Kerr, Judge.

W. L. Simons was convicted of having whisky in his possession with intent to sell the same, and he appeals. No error.

The defendant was convicted on a charge that he "did unlawfully and willfully have in his possession illicit whisky, three gallons, with the intent to sell, and did unlawfully and willfully receive at one time and in one package more than one quart of intoxicating liquor, contrary to law." Verdict and sentence. Appeal by defendant.

The evidence was that a constable with a search warrant for whisky went to defendant's house; that he read the warrant to the defendant, who also read it. The defendant asked the officer to go in the house with him. They went through a narrow passage, to a back room, when the defendant reached up and grabbed his pistol from a shelf; but the officer was too quick for him, and, presenting his own pistol, made the defendant put his down. The defendant then said that he did not have but one quart of whisky, and he would be damned if any man was going to search his house or have it. The officer, however, did search his house. The defendant pulled out one quart from behind the bureau, and after some conversation he also handed out 3 gallons of corn whisky. The other officer who was with the constable gave the same evidence. The defendant did not put on any testimony, and the above evidence was not contradicted.

Albion Dunn, of Greenville, for appellant.  
Frank Nash, Asst. Atty. Gen., for the State.

CLARK, C. J. The statute (Laws 1913, c. 44, § 2) makes "the possession of more than one gallon of spirituous liquors at any one time," whether in one or more places "prima facie evidence of having it for the purpose of sale."

[1] The defendant makes no exception to the charge, and therefore it is presumed that the judge charged in accordance with the law. The defendant put on no evidence whatever to contradict the testimony that he had three gallons and a quart, though he had denied having any, and he attempted to shoot the officer.

The sole exception is to the testimony of the sheriff that in August, 1919, he was at the defendant's house, and "found a new still, almost completed, on which the defendant was working, and he had nearly enough copper for another one."

[2] The exception is upon the ground that, as the whisky had been found in possession of the defendant on 2d June, this testimony was "irrelevant and incompetent." The evidence of the finding of the three gallons and

a quart being uncontradicted, the jury found in accordance with the prima facie presumption, corroborated, as it was, by defendant's denial and his attempt to shoot. The evidence excepted to, at the most, was unnecessary, but not incompetent.

[3] There are offenses which are committed in sudden temper, or under violent provocation, or by the impulse of passion. As to these, the only competent evidence is what took place at the time. *State v. Norton*, 82 N. C. 630. But the crime of illicit dealing in intoxicating liquor is in the same class with larceny, counterfeiting, forgery, obtaining money under false pretenses, and burglary; which are all committed with deliberation, in defiance of law, and for the ignoble motive of making profit thereby. In all such cases it is competent to prove intent by showing matters of like nature before or after the offense. If one is found in possession of counterfeit money, it would be competent to show that in a reasonable time thereafter he was working on an apparatus for counterfeiting or had passed other counterfeit notes, even though it should fix him with guilt of another offense. *State v. Twitty*, 9 N. C. 248. And the same is true as to the counterfeiting coin. If the charge is forgery, evidence is competent that the defendant was found not long afterwards in possession of other forged notes, or had passed other forged notes, or was in possession of chemicals and other apparatus used for that purpose. 2 Whart. Cr. Law (11th Ed.) § 920, note 7. Or if there was evidence that the defendant was found at night in a dwelling house with burglary tools, the fact that he was found not long afterwards fashioning and shaping such tools, this would be competent evidence.

The question when evidence of other crimes is competent is discussed in *People v. Molineux*, 168 N. Y. 284, 61 N. E. 286, which is reprinted with an admirable analytical table and very full notes (62 L. R. A. 193-357), which leaves nothing to be added. The subject is fully discussed in a line of decisions in this state. In *State v. Murphy*, 84 N. C. 742, it is held:

"Evidence of a 'collateral offense' of the same character, and connected with that charged in an indictment, and tending to prove the guilty knowledge of the defendant, when that is an essential element of the crime, is admissible."

This is a very clear discussion by Judge Ashe as to the instances in which such evidence is competent to show the *quo animo*, intent, design, guilty knowledge, and scienter. That case has been cited in many cases with approval, among them the following:

In *State v. Parish*, 104 N. C. 692, 10 S. E. 462:

"The rule is that testimony as to other similar offenses may be admissible as evidence to establish a particular charge, where the intent

is of the essence of the offense, and such testimony tends to show the intent or guilty knowledge. *State v. Murphy*, 84 N. C. 742."

In *State v. Weaver*, 104 N. C. 761, 10 S. E. 487, it is said:

"This court has gone further, and allowed evidence of a different offense of the same character, and connected with that charged in the indictment, in order to show guilty knowledge, where the intent is of the essence of that charge" (citing the above cases).

In *State v. Walton*, 114 N. C. 783, 18 S. E. 945, *McRae, J.*, says:

"In the trial of an indictment for obtaining money under false pretenses it is competent, in order to show the scienter and intent, to prove other similar transactions by the defendant."

In *State v. Graham*, 121 N. C. 623, 28 S. E. 409, it is held that, when the evidence tends to prove guilty knowledge of the defendant, the *quo animo*, the intent or design, evidence of other acts of the defendant are competent, as, for instance, passing counterfeit money of like kind, sending a threatening letter, and the like. In the latter case it is said:

"Prior and subsequent letters to the same person are competent in order to show the intent and meaning of the particular letter in question."

In *State v. Adams*, 138 N. C. 693, 50 S. E. 787, *Walker, J.*, says:

"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. Proof of another offense is competent to show identity, intent or scienter, and for other purposes" (citing *State v. Murphy*, *supra*).

The same is stated by *Connor, J.*, in *Johnson v. R. R.*, 140 N. C. 586, 53 S. E. 362.

In *State v. Leak*, 156 N. C. 646, 72 S. E. 568, *Allen, J.*, says:

"It was competent for the state to prove that the defendant placed his hands on the prosecutrix at another time on the day of the assault, as evidence of another assault of which the defendant could have been convicted under the indictment, and as tending to prove the animus and intent of the defendant" (citing *State v. Murphy*, *State v. Parish*, and *State v. Adams*, *supra*).

In the very late case of *Gray v. Cartwright*, 174 N. C. 49, 93 S. E. 432, *Walker, J.*, held:

"In an action to recover damages for malicious prosecution of a criminal action for the larceny of a cow, evidence is competent to show that the defendant in the criminal action, and the plaintiff in the civil one, had taken at other times cattle to his premises, under sim-

ilar circumstances, when relevant to his criminal intent in the matter under consideration in the present action" (*State v. Murphy*, 84 N. C. 742, and *State v. Walton*, 114 N. C. 783, 18 S. E. 945, being cited and approved).

In *State v. Bush*, 177 N. C. 551, 98 S. E. 281, the court, speaking of the illicit sale of whisky, or possession of it for purposes of sale, said that, like the crime of larceny, it is "generally done furtively, and direct evidence is not easily had. It is usually an inference to be drawn by the jury from a combination of circumstances."

[4] The evidence in this case of the denial by the defendant of possession, his attempt to shoot the officer, and his being found later making a still, are all competent in support of the presumption raised by his possession of liquor, that he had the liquor in his possession for the illicit purpose of sale.

[5] If a person had liquor in his possession for the purposes of sale, he is guilty whether he makes a sale or not. *State v. Davis*, 168 N. C. 144, 83 S. E. 345.

No error.

(178 N. C. 683)

#### STATE v. STANCILL. (No. 161.)

(Supreme Court of North Carolina. Sept. 24, 1919.)

#### 1. CRIMINAL LAW $\S$ 423(1)—ACTS AND DECLARATIONS OF DEFENDANTS IN FURTHERANCE OF CONSPIRACY ADMISSIBLE.

In prosecution of three defendants for larceny of leaf tobacco, where there was evidence tending to show that they had formed a conspiracy to commit the theft, the acts and declarations of the defendants in furtherance of the conspiracy were competent.

#### 2. CRIMINAL LAW $\S$ 1144(14) — WHERE CHARGE IS NOT IN RECORD, PROPER INSTRUCTIONS PRESUMED.

Where the charge is not in the record, it must be presumed, upon appeal, that the jury were correctly instructed as to the competency and relevancy of the evidence, and as to circumstances and extent to which evidence may be considered by them.

#### 3. CRIMINAL LAW $\S$ 425—DECLARATIONS OF DEFENDANT INADMISSIBLE AGAINST CODEFENDANT.

In prosecution for larceny of leaf tobacco, testimony as to what one of the defendants had told witness about the stealing of the tobacco by such defendant and a codefendant was incompetent against codefendant.

#### 4. CRIMINAL LAW $\S$ 1169(7)—ERROR IN ADMISSION OF TESTIMONY HARMLESS WHERE ACCUSED TESTIFIED TO SAME FACTS.

The admission of evidence as to what one of the defendants had told witness about the commission of crime by such defendant and a codefendant was cured, or at least was ren-



dered harmless, where defendant who had told witness of the crime subsequently testified to same facts himself.

**5. CRIMINAL LAW §824(8)—REQUEST NECESSARY TO CONFINE EVIDENCE TO CERTAIN POINT.**

Defendant who desires to have evidence confined to a single purpose should ask court to have it so confined.

**6. CRIMINAL LAW §1162—HARMLESS ERROR NO GROUND FOR REVERSAL.**

Judgment will not be reversed for error which does no harm and is free from prejudice.

**7. CRIMINAL LAW §680(1)—ORDER OF TESTIMONY IS IN DISCRETION OF COURT.**

The order of testimony is regulated by the discretion of the court.

**8. CRIMINAL LAW §1153(3)—UNLESS DISCRETION ABUSED ORDER OF PROOF NOT REVIEWED.**

Supreme Court will not interfere with court's exercise of its discretion in regulating order of testimony, in absence of clear and gross abuse of discretion.

**9. CRIMINAL LAW §372(5)—EVIDENCE OF SIMILAR CRIMES ADMISSIBLE TO SHOW INTENT.**

In prosecution of three defendants for larceny of leaf tobacco, where there was evidence of a conspiracy to plunder the tobacco barns in the neighborhood, testimony as to the theft by the defendants of tobacco other than that for the theft of which they were indicted, but in same neighborhood, was admissible to show the intent with which they stole the tobacco, and not to prove the accusation substantively, the theft of such tobacco being a series of transactions carried out in pursuance of the original design.

**10. CRIMINAL LAW §370, 371(1, 12)—EVIDENCE OF OTHER LIKE CRIMES ADMISSIBLE TO SHOW MOTIVE OR INTENT.**

Proof of 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.

**11. CRIMINAL LAW §693 — OBJECTIONS TO QUESTION NECESSARY BEFORE ANSWER.**

Counsel should object to question before it is answered, since the right to object after it is answered, if given, would give him an advantage in the opportunity of objecting only if answer is unfavorable.

**12. WITNESSES §248(1)—ANSWER NOT RESPONSIVE MAY BE STRICKEN.**

If answer is not responsive, and contains unfavorable new matter, counsel can move to strike it out.

Appeal from Superior Court, Pitt County; Daniels, Judge.

Garland Stancill was convicted of larceny and receiving property knowing it to have been stolen, and he appeals. No error.

The appellant, Garland Stancill, was jointly indicted with Ernest Perry and Raymond Stancill for the larceny of a lot of leaf tobacco of the value of \$250, property of J. H. Little and others, and for receiving the same knowing it to have been stolen.

The evidence for the state tended to show that on Friday night, October 25, 1918, the defendants Ernest Perry and Garland Stancill took and carried away from the packhouse of J. H. Little 49 sticks of tobacco, the property of J. H. Little. They were driving the car of Raymond Stancill, and carried the tobacco thus stolen to the home of Raymond Stancill, where it was received by said Raymond. The testimony of the defendant's witnesses tended to show that both Garland and Raymond Stancill were not guilty. Both of them admitted the fact that Little's tobacco was carried to Raymond Stancill's house by Perry and Garland Stancill, but both disclaim guilty knowledge.

Garland Stancill testified as follows:

"That he went with Perry, but had never been in that territory before, and Perry told him that he was going to his Uncle Bob Parker's after the tobacco; that Perry got out of the car and went up to the house, which he told witness was his uncle's house, came back, and stated to the witness that his uncle said go ahead and get the tobacco; that the witness had no idea that Perry was not telling the truth, and did not know that the tobacco was not Perry's tobacco."

At the trial Ernest Perry submitted to a verdict of guilty, and Raymond Stancill was acquitted, while Garland Stancill was convicted. From the judgment upon such conviction, Garland Stancill appealed to this court.

Albion Dunn, of Greenville, for appellant. James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

WALKER, J. (after stating the facts as above). It will be perceived from the foregoing statement that the issue in the case, and it was clear-cut and sharply drawn by the contention of both the Stancills, was, Did the Stancills know that Ernest Perry had stolen the tobacco? The errors assigned by the defendant relate to the competency of testimony. It appears that the three defendants were jointly indicted for stealing tobacco from J. F. Harris and others, and the evidence tends to show that they had formed a conspiracy to commit the theft, and this was the substance of the offense, as shown by the bill and the testimony. They had combined together, at least two of them—and there was evidence against the third, who was finally acquitted,—to do an unlawful act; that is, to steal from the prosecutors.

[1] The acts and declarations of those who were parties to the common design, in furtherance of the conspiracy, were competent. *State v. Anderson*, 92 N. C. 732; *State v. Brady*, 107 N. C. 822, 12 S. E. 325.

[2] As the charge is not in the record, it must be presumed that the jury were correctly instructed as to the competency and relevancy of such evidence, and as to the circumstances under which it could be used by them, and as to what extent it could be considered.

[3] The testimony of Ed. Marks, as to what the defendant Ernest Perry had said to him about the stealing of the tobacco by Garland Stancill and himself, was, standing by itself, an unsworn declaration of Ernest, incompetent against Garland; but he afterwards took the stand himself as a witness, and testified to the same facts.

[4] If the statement by him was technically incompetent at the time of its introduction—and we will admit that it was so—the error was cured when Ernest Perry testified, substantially at least, to the same thing. (*Albert v. Insurance Co.*, 122 N. C. 92, 30 S. E. 327, 65 Am. St. Rep. 693; *Strother v. Railroad Co.*, 123 N. C. 197, 31 S. E. 386; *Beaman v. Ward*, 132 N. C. 68, 43 S. E. 545; *Summerlin v. Railroad Co.*, 133 N. C. 550, 45 S. E. 898; *Turner v. Commissioners*, 127 N. C. 153, 37 S. E. 191); or, in any view, it was harmless error (see cases above). It was immaterial whether he made the statement to Ed. Marks or to any other person; the important fact was whether he made it at all.

[5] That he made it was merely corroborative of his own testimony, and, if defendant desired it to be confined to that single purpose, he should have asked the judge to do so. But, as we have said, it is but harmless, when considered with the testimony of Ernest Perry. *Rawls v. White*, 127 N. C. 17, 37 S. E. 68.

[6] We do not reverse for error which does no harm and is free from prejudice.

[7, 8] The statement came first, before Ernest Perry testified; but the order of the testimony is regulated by the discretion of the judge, and, when there is no clear and gross abuse of it, we will not interfere. *Worth v. Ferguson*, 122 N. C. 381, 29 S. E. 574. It may be that the court admitted this testimony at the time it appears to have come into the case, in anticipation of similar and sworn testimony of Ernest Perry, when he took the stand as a state's witness, and as corroborative of it. Besides, it appears that the objection was not offered until the question was answered. This was too late. *Beaman v. Ward*, 132 N. C. 68, 43 S. E. 545; *Dobson v. Railroad Co.*, 132 N. C. 900, 44 S. E. 593. But, as already shown by the authorities, slight error, where there is no prejudice, works no harm, and does not jus-

tify a reversal. *Griffin v. Railroad Co.*, 138 N. C. 55, 50 S. E. 516; *West v. Grocery Co.*, 138 N. C. 166, 50 S. E. 565.

[9] The testimony as to the theft of the Wilkinson Tobacco was offered merely to show the intent with which the defendants stole this tobacco, and not to prove the accusation substantively. 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.

[10] 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. In *Wharton's Cr. Ev.* (10th Ed.) p. 60, such testimony is thus classified:

"First, as part of the *res gestæ*. *State v. Freeman*, 49 N. C. 5; *State v. Murphy*, 84 N. C. 742; *State v. Thompson*, 97 N. C. 496, 1 S. E. 921; *State v. Mace*, 118 N. C. 1244, 24 S. E. 798; *State v. Adams*, 138 N. C. 688, 50 S. E. 765. Second, to prove identity of person or crime. *State v. Thompson*, *supra*; *State v. Weaver*, 104 N. C. 758, 10 S. E. 486. Third, to prove guilty knowledge. *State v. Twitty*, 9 N. C. 248; *State v. Walton*, 114 N. C. 783, 18 S. E. 945; *State v. Hight*, 150 N. C. 817, 63 S. E. 1043; *Insurance Co. v. Knight*, 160 N. C. 592, 78 S. E. 623. Fourth, to prove intent. *State v. Weaver*, 104 N. C. 758, 10 S. E. 486. Fifth, to prove motive. *State v. Plyler*, 153 N. C. 630, 69 S. E. 269. Sixth, to prove system. *State v. Wilkerson*, 98 N. C. 696, 3 S. E. 683; *State v. Winner*, 153 N. C. 602, 69 S. E. 9. Seventh, to prove malice. Eighth, to rebut special defenses."

We think that several of these classes embrace the objections made here, and that the latter are answered by the law as there stated by Wharton. It is said in *State v. Murphy*, 84 N. C. 742:

"Evidence of a 'collateral offense' of the same character and connected with that charged in an indictment, and tending to prove the guilty knowledge of the defendant, when that is an essential element of the crime, is admissible; therefore on the trial of an indictment for the larceny of a hog, where the prosecutor testified that he identified the property as his in an inclosure of the defendant, and demanded its delivery to him, it was held competent for the state to prove by the testimony of another witness that at the same time and place, and in the presence of the prosecutor and defendant, such witness said that the other hog therein

was his, and he then and there claimed and demanded it of defendant."

In that case the court says, in an opinion by Justice Ashe, who always wrote clearly, accurately, and vigorously, and reviews the law at length:

"Where the question of identity or intent is involved, or where it is necessary to show a guilty knowledge on the part of the prisoner, evidence may be received of other criminal acts than those charged in the indictment" (citing and approving *Yarborough v. State*, 41 Ala. 405; *Tharp v. State*, 15 Ala. 749).

The whole question is considered and fully reviewed, in *Gray v. Cartwright*, 174 N. C. 49, 93 S. E. 432, where the authorities are collected. This question is fully discussed by the Chief Justice in *State v. Simons*, 100 S. E. 239, at this term, and evidence of the kind admitted in this case is held there to be competent to show knowledge, intent, and motive.

The testimony of Oscar Bryant was competent as corroborative of the witness Henry Crowell. It was also competent as rebutting Garland Standill's special defense, that he was not familiar with that neighborhood, and that he was deceived by Perry as to the latter's purpose. In going to "his Uncle Bob Parker's house."

[11] It may be said generally that the objections to testimony were taken after the questions had been answered. This is not the proper course, and the reason is that it gives the objector two chances; if the answer proves to be favorable to him, he would not need an objection, but if unfavorable he would. He can be silent if he likes it, or object when he finds that he does not.

[12] He should object to the question, and then, if the answer is not responsive, and contains unfavorable new matter, he can move to strike it out. *Beaman v. Ward*, supra; *Dobson v. Railroad Co.*, supra.

The prisoner was ably defended, but, with all the light shed upon the case at the trial below and in this court, we deem the criticisms of counsel in regard to the rulings of the court to be unsound.

We can discover no tenable ground for reversal.

No error.

(178 N. C. 92)

**PARKER et al. v. BOARD OF COM'RS OF JOHNSTON COUNTY.** (No. 97.)

(Supreme Court of North Carolina. Sept. 24, 1919.)

COUNTIES  $\Leftrightarrow$  195—PROVISION THAT PROCEEDS OF SALE OF STOCK LAW FENCES SHALL GO TO COUNTY FUND CONSTITUTIONAL.

Pub. Loc. Laws 1915, c. 466, § 4, providing that the commissioners of Johnston county

are authorized to sell for cash all stock law fences in the county, and directing that the proceeds, with any stock law funds on hand, be returned to the general fund of the county, *held* constitutional; the landowners assessed for stock law fences having no paramount right to refund.

Walker, J., dissenting.

Appeal from Superior Court, Johnston County; Kerr, Judge.

Action by James D. Parker and others against the Board of Commissioners of Johnston County. From judgment for defendant, plaintiffs appeal. Affirmed.

S. S. Holt, of Smithfield, and Parker & Parker, of Graham, for appellants.

Abell & Ward, of Smithfield, for appellee.

CLARK, C. J. This is an action, upon facts agreed, to compel the commissioners of Johnston county to distribute and refund the surplus of the fund which had been collected in said county to construct and maintain a stock law fence. The whole of Johnston county having been placed under the stock law by legislative enactment, the necessity for the continuance of said fence had ceased. Thereupon by section 4, c. 466, Public Local Laws 1915, it was provided:

"The board of commissioners of Johnston county is hereby authorized to sell for cash at public or private sale all stock law fences in the county, and the proceeds derived from the sale of the same, together with any stock law funds now on hand, shall be returned to the general fund of said county."

This statute is clearly mandatory.

The plaintiffs claim that this statute is unconstitutional, and seek to have the fund distributed to the landowners from whom it has been collected as a special assessment. The surplus consists of something over \$4,000 accumulated, in the several years beginning in 1912, and probably \$1,500 from the sale of the fence made in compliance with the statute. As to the latter it is clearly county property, as much so as proceeds from the sale of an abandoned courthouse, or a discarded bridge, or any other kind of property. As to the accumulated excess the bounds of the stock law have been changed from time to time and besides some of those paying the assessment have died, and their estates have been settled and others have moved away. If the commissioners should have desired to refund the surplus to those who paid it in, this would have been difficult.

The cost of calculating and dividing the sums to refund to each of those who from 1912 down to this time have paid assessments for the stock law fence would be considerable. Almost the only benefit that would accrue

to any one would be the commissions to the tax collectors for again collecting the same sum for necessary county purposes.

But the only question really before us is whether there is any restriction in the Constitution forbidding the General Assembly to direct that the surplus of a fund in the county treasury collected for any purpose shall be used by the county for any necessary expenses. We know of no such provision. Suppose this fund had been raised by a special tax authorized by the Legislature to build a jail or a courthouse or for any other purpose, is there any constitutional restriction which forbids the Legislature from directing afterwards that the surplus which may happen instead of being returned to the taxpayers shall be used by the county for any other necessary purpose. In the absence of a statute officers have no power to refund taxes, though illegally collected. 27 A. & E. 756.

It is true that this particular fund was collected from the real estate owners for the purpose of building a stock law fence. But there are other taxes which have been collected from certain specified sources, and in like manner applied to special purposes. For instance, the license tax derived from automobiles is appropriated to the highway commission for the purpose of building and maintaining public roads. Should there be any unused excess of such fund by reason of funds derived from the federal government, or from the general property tax, or otherwise, would not the Legislature have power to direct its application to general purposes?

There is also a fertilizer tax which has been appropriated to the use of the Agricultural Department, and 25 cents per bale on all cotton ginned in the state to provide for a warehouse system. If for any reason there should be an excess in these funds, or if the warehouse system were abandoned, the Legislature could certainly direct that the unused surplus of these funds should be applied to other purposes, and it would not be necessary on constitutional grounds to divide up this remnant of the fund and to return dividends therefrom to the companies paying the fertilizer tax or to the farmers paying the gin tax.

There have been many other instances of taxes raised from special sources and appropriated by the act creating them to special purposes, among them the retail liquor license which went to the schools. Would it be necessary to return the surplus if any, of such fund to the barkeepers? Whenever there is an excess, which rarely happens, it is in the power of the sovereign either to redistribute this surplus to the parties paying it in, or (as probably has always been done) direct that it shall be applied to other purposes. Whether the fund has been accumu-

lated in the state treasury, or in the county treasury, it is in the discretion of the General Assembly whether that in the state treasury shall be applied to other state purposes and whether the funds accumulated in the county treasury shall be applied to other necessary county purposes.

It is true that the stock law funds were collected by an assessment upon real estate only, but whether it was collected from real estate, or from all property or from property and polls or from license and other taxes is an immaterial circumstance which cannot affect the power of the General Assembly to direct that any fund in the county treasury unused shall be applied to general county purposes. If so applied, it will go to schools, roads, and bridges and all other necessary expenses of the county. If it were returned to the real estate owners who are among the largest taxpayers, the amount returned would have to be again assessed and collected. The difference between the small dividend refunded to each of the 2,600 taxpayers in this case and the amount which would be again collected out of them to make good the deficit thereby caused in the county treasury would be almost infinitesimal.

In Connor and Cheshire on the Constitution, 282, it is said:

"Where a statute, authorizing the levy of a tax beyond the constitutional limit, for a special purpose, is *infra vires*, the taxes collected beyond the requirement of the special purpose may be turned into the general fund and used for general purposes."

In Long v. Com'rs, 76 N. C. 280, the court says:

"We know of no statute nor any rule of law or of public policy, which prevents county commissioners from applying a tax raised professedly for one purpose to any other legitimate purpose."

In Williams v. Com'rs, 119 N. C. 520, 26 S. E. 150, the court held that where a statute authorized the levy of a tax for a lawful purpose, but beyond the constitutional limit, the taxes collected beyond the requirements of the special purpose may be turned into the general fund and used for general purposes, but where the act will authorize the levy partly for a legal purpose and partly for an illegal purpose, it is *ultra vires* and no part of the levy can be collected. The court was unanimous as to the application of such taxes after collection. Though there was dissent on another point, there was no difference on the view expressed in the latter opinion that—

"If the levy had been authorized for \* \* \* two purposes only, and a surplus had been raised, it would have gone into the county treasury

to meet current expenses, without any further authorization in the act. *Long v. Com'rs*, 78 N. C. 273."

The plaintiff relies upon *Com'rs v. Com'rs*, 92 N. C. 180, where, Lenoir and Greene counties, having united to erect a stock law fence around a district lying partly in both, and Greene complained that owing to a difference in the assessment of real estate in the two counties an excessive amount had been paid by the taxpayers therein, it was adjudged that the disparity should be corrected by reassessment, and that the surplus wrongfully collected in Greene should be reimbursed by Lenoir, such fund to be held in trust for the former for the reimbursement of those who had overpaid their share.

But in that case there was no statute, as in this, authorizing the fence to be sold and the proceeds thereof and any surplus funds still in hand to be used for general purposes. It was an equalization statute between the contributors to the fund in the two counties.

We find in the Constitution nothing denying to the General Assembly the power to direct that the surplus of this fund in the county treasury (which seems already to have lain there idle for 4½ years, since this act was passed in 1915, at a loss in interest equal to more than a fourth of the fund) shall be used for general county purposes.

In *Parker v. Com'rs*, 104 N. C. 166, 10 S. E. 137, it is held that the requirement in Const. art. 5, § 7, that "every act of the General Assembly levying a tax shall state the special object to which it is to be applied, and that it shall be applied to no other" has no application to taxes levied by the county authorities for county purposes.

In *Railroad v. Com'rs*, 148 N. C. 247, 61 S. E. 699, the court said:

"We do not concur with the suggestion that the commissioners have the power to levy and collect a tax for a specific purpose and apply any part of it to another purpose,"

—giving as a reason that the taxpayer was entitled to an order enjoining the appropriation of any part of the excess over interest on the bonds to any other purpose, for it could be held to meet the interest for the following year or for a sinking fund. This clearly does not apply to cases where, the purpose for which the sum is raised having been completely attained, there is a surplus left in the treasury which must either be applied to general county purposes or be returned to the taxpayers to be collected again for such general purposes, which is avoided by retaining such surplus for that use.

When a tax or assessment is paid into the public treasury of the state or a county, if the purpose expressed in the act is fully accomplished, leaving an unexpended surplus, the state or county has control of it, and bad

faith cannot be imputed by the courts to the Legislature in authorizing such surplus to be "covered into the general fund."

**Affirmed.**

**WALKER, J. (dissenting).** It is a mistake to suppose that this stock fence fund was collected under a levy upon all the taxpayers of Johnston county. It was collected from only a part of them. If this law is enforced, it will, both in theory and in practice, be simply permitting one part of the people to be solely taxed for the benefit of another, and the cases cited in support of the opinion do not sustain such a proposition, or anything like it, but a very different one. It would be clearly violative of the principle declared in the recent case of *Commissioners of Johnston County v. B. R. Lacy*, State Treasurer, 174 N. C. 141, 93 S. E. 482, 2 A. L. R. 726. Justice Hoke, in his opinion delivered for the court, says:

"It is not within the legislative power to tax one community or local taxing district for the exclusive benefit of another, a principle which has been directly approved in several recent decisions of this court and is one very generally accepted"—citing *Keith v. Lockhart*, 171 N. C. 451, 88 S. E. 640, Ann. Cas. 1918D, 916; *Faison v. Com'rs*, 171 N. C. 411, 88 S. E. 761; *Harper v. Com'rs*, 133 N. C. 106, 45 S. E. 526; *Commissioners Prince George v. Commissioners Laurel*, 70 Md. 443, 17 Atl. 388, 3 L. R. A. 528; *Lumber Co. v. Township of Springfield*, 92 Mich. 277, 52 N. W. 468; *People of Salem*, 20 Mich. 452, 4 Am. Rep. 400, citing *Lexington v. McQuillan's Heirs*, 9 Dana (Ky.) 513, 35 Am. Dec. 159; *Cooley on Taxation* (3d Ed.) 420; *Judson on Taxation*, § 254; 37 Cyc. 749.

He adopts what Judge Cooley says upon the subject, as follows:

"The taxing district through which the tax is to be apportioned must be the district which is to be benefited by its collection and expenditure. The district for the apportionment of the state tax is the state, for the county tax the county, and so on. Subordinate districts may be created for convenience, but the principle is general, and in all subordinate districts the rule must be the same." *Cooley on Taxation*, *supra*.

And also the general principle, as stated by another standard text-writer, was approved:

"The constitutional requirement of uniformity of taxation forbids the imposition of a tax on one municipality or part of the state for the purpose of benefiting or raising money for another." 37 Cyc., *supra*.

He further says, and what he says completely covers this case as with a blanket:

"It is a fundamental principle in the law of taxation that taxes may only be levied for public purposes and for the benefit of the public on whom they are imposed, and to lay these burdens upon one district for benefits appertaining

solely to another is in clear violation of established principles of right and contrary to the express provisions of our Constitution (article 1, § 17), which forbids that any person shall be dispossessed of his freehold liberties and privileges or in any manner deprived of his life, liberty or property but by the law of the land."

It would be useless to pursue the discussion further, so apt and pointed are the extracts we have made from that well-considered opinion of this court. Here the tax was a special one, levied upon the inhabitants of a stock law district in Johnston county, in and near Smithfield township, for the purpose of building a fence to surround said district, the same having been created under a special statute and authority also given thereby to levy the tax. It was not a tax levied under legislative authority extending to the entire county of Johnston. If the excess of the tax levy can be given to the other inhabitants of the county for their benefit, it follows that one section of the county, in this indirect way, can be taxed for the benefit of another. Admitting that the surplus of a general tax can be thus constitutionally added to the general funds or revenues of the county, it does not follow that the surplus of a special tax can be thus applied to general county purposes. Every citizen should be made to contribute his full share to the particular burden of taxation resting upon him and those similarly situated, but the state cannot, under our Constitution, or under that of any other well regulated system of government, exact more of the taxpayer. There should always be, as near as may be, an equal distribution of benefit and burden. This may be adjusted, it is true, and it has been so held, upon some equitable principle of apportionment applicable alike to all (8 Cyc. pp. 1071 and 1132), for example by districts or area or by lineal feet, as in the case of local assessments, but in whatever way it is done, it must not amount to the taking of one taxpayer's property and giving it to another, who contributed nothing to the tax. It had might as well be accomplished directly as indirectly. Circumlocution or indirection is no justification of it. In principle and in effect, it is the same to the taxpayer as if the state should reach into his pocket and, against his consent, hand over his money to his neighbor, as a gratuity. It makes little difference to the loser, whether it is taken in one way or the other, if he is wrongfully or inequitably deprived of it. If the surplus of the tax collected in this stock law district cannot be returned to its taxpayers, they should, at least, have the benefit of it in their own district or locality. There is no more reason for giving it to those outside

the district than for giving any surplus of county taxation to this special district, which we said, in the Johnston Case, *supra*, could not be done.

(178 N. C. 98)

**LIPSITZ v. SMITH et al. (No. 103.)**

(Supreme Court of North Carolina. Sept. 24, 1919.)

**1. INTERPLEADER §21 — PAYMENT OF SURPLUS FUND INTO COURT ON SALE OF LAND BY MORTGAGEE PROPER.**

Where mortgagee sold land under power of sale, and brought civil action in nature of bill of interpleader against claimants to balance in his hands after payment of mortgage indebtedness and costs, court properly directed him to pay fund into court or give bond to secure it.

**2. MORTGAGES §334—FORECLOSURE UNDER POWER AFTER DEATH OF PRINCIPAL MORTGAGOR PROPER.**

Mortgagee properly exercised power of sale, notwithstanding death of principal mortgagor.

**3. MORTGAGES §376—DEVISEES OF DECEASED MORTGAGOR PROPER PARTIES IN SUIT FOR DISTRIBUTION OF SURPLUS.**

Where mortgagee sells land under a power of sale after death of principal mortgagor, the devisees under the principal mortgagor's will are the proper, and usually the sufficient, parties in a suit involving a distribution of the surplus.

**4. INTERPLEADER §21—READINESS TO PAY MONEY INTO COURT MUST BE ALLEGED.**

In civil action in nature of bill of interpleader, plaintiff must have the fund in his possession, and must allege his readiness to pay the money into court as a jurisdictional or essential averment.

**5. APPEAL AND ERROR §91(1)—ORDER FOR INTERPLEADER TO PAY MONEY INTO COURT OR GIVE BOND NOT APPEALABLE.**

In civil action in nature of bill of interpleader, order requiring plaintiff to pay money into court or give bond, being interlocutory and in no manner affecting plaintiff's substantial rights, is not appealable.

Appeal from Superior Court, Bertie County; Connor, Judge.

Action by Lewis Lipsitz against William R. Smith and others. From a judgment directing plaintiff to pay fund into court or give a solvent bond to secure the same, plaintiff excepts and appeals. Appeal dismissed.

Gillam & Davenport, of Windsor, for appellant.

Winston & Matthews, of Windsor, and Martin & Winborne, for appellees.

HOKE, J. On the hearing it was made to appear that in 1915 William R. Smith and

his wife, Mary, being indebted to the plaintiff, in order to secure said indebtedness, executed a mortgage on the land of Mary Smith, his wife, with power of sale, and soon thereafter said Mary Smith died, leaving a last will and testament, devising her lands in unequal proportion to her husband, her three daughters, Hattie Hardy, Mariah Hardy, and Joe Alfred Hardy, now intermarried with her codefendant Lonnie Perry; that said indebtedness being due and unpaid as per contract, plaintiff under the power of sale contained in said mortgage sold said land for the price of \$2,030, executed a deed for same to the purchaser, applied the proceeds to payment of the amount due on said debt and costs, etc., amounting to \$284.45, leaving a balance in his hands of \$1,745.55, which plaintiff now holds for distribution among the parties justly entitled to same, and having no other interest in said fund; that William R. Smith, the husband, has acquired the interest in said land devised to two of the daughters, Hattie and Mariah Hardy, and as between William R. Smith and the other daughter, Joe Alfred Hardy Perry, there is a bona fide dispute as to how much of said fund in plaintiff's hands is due to either of said parties, the nature of the dispute being fully set forth in the pleadings; that he cannot with safety pay out this fund to the respective claimants until the correct proportion is determined, etc.

[1] On these facts chiefly relevant we are of opinion that the order directing the payment of money into court was clearly within the power of his honor, and that the same has been providently made.

[2] So far as now appears, and under our decisions applicable, this power of sale contained in the mortgage has been properly exercised, notwithstanding the death of the principal mortgagor. *Carter v. Slocumb*, 122 N. C. 475, 29 S. E. 720, 65 Am. St. Rep. 714.

[3] The devisees under the will, as holders of the equity of redemption therein, are the proper, and usually the sufficient, parties in a suit involving a distribution of the surplus. *Snow v. Warick Institute*, 17 R. I. 68, 20 Atl. 94; 27 Cyc. pp. 1498, 1499, 1792; 2 Jones on Mortgages, §§ 1687, 1929-1931. And the proceedings showing that plaintiff is the holder and in possession of the fund, to which he makes no claim, and that defendants are in a bona fide controver-

sy as to their respective interests, the facts would seem to present a clear case for an original bill of interpleader under the old system, and now disposed of by civil action. In such case, not only is it within the court's power to make all proper orders for the care and supervision of the fund; but the plaintiff in such a bill must have the fund in his possession and allege his readiness to pay the money into court as a jurisdictional or essential averment. *Fox v. Kline*, 85 N. C. 174-176; *Martin, Adm'r, v. Maberry et al.*, 16 N. C. 169; *Look v. McCahill*, 106 Mich. 108, 63 N. W. 898; *Walker et al. v. Aldrich et al.* (*Williams v. Walker*) 2 Rich. Eq. 291, 46 Am. Dec. 53; *Ammendale Institute v. Anderson*, 71 Md. 128, 17 Atl. 1030; *Pomeroy's Equity*, § 59; 23 Cyc. p. 23.

[5] This being true, we are of opinion further that no appeal lies from the order made in this case; the same being interlocutory in its nature and no substantial right of appellant being affected. *Blackwell v. McCaine*, 105 N. C. 460, 11 S. E. 860; *Warren v. Stancill*, 117 N. C. 112, 23 S. E. 216; *Sutton v. Schonwald*, 80 N. C. 20; 2 Beach, *Modern Equity Pr.* § 924. As said in the last citation, it is ordinarily true that—

"A decree that money be paid into court, or that property be delivered to a receiver, or that property held in trust shall be delivered to a new trustee appointed by the court for preserving the property pending litigation, is interlocutory merely, and no appeal lies from it."

The plaintiff, having sought the aid of the court for his own protection in making proper disposition of a fund among several claimants, is required, as stated, to allege as an essential fact that he has the fund in possession and is ready and willing to pay the same into court, or do whatever the court may order concerning it. In no event should he be allowed to maintain a position inconsistent with or directly antagonizing the basic facts of his own suit, or question orders which the court may make in furtherance of his own application. *Brown v. Chemical Co.*, 165 N. C. 421, 81 S. E. 463; *Railroad v. McCarthy*, 98 U. S. 258, 24 L. Ed. 693; *First National Bank v. Dovetail*, 143 Ind. 534-538, 42 N. E. 924.

On the record, defendants' motion to dismiss plaintiff's appeal must be allowed; and it is so ordered.

Appeal dismissed.

(178 N. C. 288)

RADFORD et ux. v. ROSE et ux. (No. 102.)

(Supreme Court of North Carolina. Oct. 1, 1919.)

**1. WILLS ¶470—MUST BE CONSIDERED AS A WHOLE.**

It is the duty of the court to consider a will as a whole, and to reconcile apparently conflicting provisions.

**2. WILLS ¶466—"LOAN" OF LAND TO CHILDREN CONSTRUED A DEVISE.**

Testator's will, providing that he "loaned" realty to certain children, meant that he gave or devised to them.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Loan.]

**3. WILLS ¶608(3)—DEVISE TO CHILDREN FOR LIFE AND THEN TO HEIRS CREATES FEE.**

A devise to children for their lifetime, and then to their heirs, standing alone, would pass an estate in fee, under the rule in Shelley's Case.

**4. WILLS ¶608(3)—DEVISE TO CHILDREN FOR LIFE, AND FAILING BODILY HEIRS TO OTHERS, CREATES DEFEASIBLE FEE.**

A devise to children for their lifetime, and then to their heirs, but, should they have no bodily heirs, with provision that the property should go back to testator's family, made defeasible the children's fee-simple estate on condition they had no bodily heirs, so that with the birth of children to a daughter her fee simple became absolute.

Appeal from Superior Court, Johnston County; Kerr, Judge.

Action by H. H. Radford and wife against W. P. Rose and wife. From a judgment for plaintiffs, defendants appeal. Affirmed.

This is an action to recover \$2,900, the balance due on the purchase money of a tract of land. The defendant admitted the indebtedness, but alleged that the title to the land was defective, and the plaintiff agreed in the pleading to a cancellation of the contract of purchase if the title was not good.

The feme plaintiff, Mrs. H. H. Radford, derived her title under the will of her father, Henry C. Rose, the material parts of which are as follows:

"Home tract of land to be equally divided by number of acres between W. D. Rose, L. T. Rose, W. P. Rose, and my daughter, Mrs. H. H. Radford. I loan to them their lifetime and then to their heirs, provided they have any that have attained the age of 21 years, but should they, my children, have no bodily heirs, the property shall go back to the Rose family. Should they have an heir at their death not 21 years of age, that the said heir shall be in possession at the age of 21 years of its share of the estate."

His honor held, and rendered judgment accordingly, that the plaintiff's deed conveyed

a title in fee to the defendant, and the defendant excepted and appealed.

James D. Parker, of Smithfield, for appellants.

Wellons & Wellons, of Smithfield, for appellees.

ALLEN, J. It is well at the outset to determine the true meaning and legal effect of the clause in the will, "provided they have any that have attained the age of 21 years." If this is dealt with literally, and without association with the other parts of the will, it will operate as a limitation upon the estate devised to the children of the testator, and will deprive them of any interest in the estate of their father under the will, unless children are born who reach the age of 21 years.

That this was not the intent of the testator is shown by the whole scope of the will, from which it appears that his children were the primary objects of his bounty, and that the will was made for their benefit, and after the devise to them the limitation over is, not if they die leaving no bodily heirs, but "should they have no bodily heirs," then to the Rose family, indicating a purpose for them to have the property if children were born, although they did not live to be 21.

The next provision of the will throws much light on the question:

"Should they have an heir at their death not twenty-one years of age, that the said heir shall be in possession at the age of twenty-one years of age its share of the estate."

This can only mean that, if the plaintiff died leaving a child under 21, the child would take, but his right to possession would be postponed, which is entirely inconsistent with the construction that the estate of the plaintiff would be defeated, and would go to the Rose family, if she had no child to reach 21.

[1] It is the duty of the court to consider the will as a whole and to reconcile apparently conflicting provisions (Dunn v. Hines, 164 N. C. 113, 80 S. E. 410), and when this is done the proviso cannot be held to be a limitation on the estate of the plaintiff, but as having the effect of postponing the right of enjoyment by the heirs, and, so understood, the will should read:

"I loan to them their lifetime and then to their heirs, but should they have no bodily heirs the property shall go back to the Rose family, provided heirs under the age of twenty-one shall not take possession until they reach that age."

Under this construction what estate does the plaintiff take?

[2, 3] "Loan," in the connection in which it is used, means the same as "give or devise" (Smith v. Smith, 173 N. C. 124, 91 S. E. 721),



and a devise "to them their lifetime and then to their heirs," under all the authorities, standing alone, would pass an estate in fee under the rule in Shelley's Case (Daniel v. Harrison, 175 N. C. 120, 95 S. E. 37, and cases cited).

[4] The subsequent provision, "but should they have no bodily heirs," has, however, the effect of making this fee-simple estate defeasible, but only upon condition that they have no bodily heirs. *Whitfield v. Garria*, 134 N. C. 24, 45 S. E. 904; *Maynard v. Sears*, 157 N. C. 4, 72 S. E. 609. Note that the language is not "dying without bodily heirs," or "leaving no bodily heirs," but that they "have no bodily heirs" a condition fully met by the fact that the plaintiff has three bodily heirs, to wit, three living children.

The facts and principle involved in *Dunn v. Hines*, supra, sustain this interpretation, as well as the rules of construction stated therein as follows:

"The first taker in a will is presumably the favorite of the testator. *Rewalt v. Ulrich*, 23 Pa. 388; Appeal by *McFarland*, 37 Pa. 300. And in doubtful cases the gift is to be construed so as to make it as effectual to him as possible, or as the language will warrant. *Wilson v. McKeethan*, 53 Pa. 79. And, too, the law favors the early vesting of an estate, to the end that property may be kept in the channels of commerce. *Underhill on Wills*, § 861; *Hilliard v. Kearney*, 45 N. C. 221; *Galloway v. Carter*, 100 N. C. 111 [5 S. E. 4], and cases there cited."

We therefore conclude that the plaintiff took a defeasible fee under the will of her father, which became absolute upon the birth of children.

The case of *Tyson v. Sinclair*, 138 N. C. 24, 50 S. E. 450, 3 Ann. Cas. 397, is almost directly in point, except it is stronger for the plaintiff's position, in that the having bodily heirs was at the death of the first taker, while here it is having no bodily heirs. In that case the devise was to *Thomas B. Tyson* "during the term of his natural life, then to the lawful heirs of his body in fee simple, on failing of such lawful heirs of his body, then to his right heirs," and it was held that *Thomas B. Tyson* took an estate in fee, as the limitation to the right heirs over did not change the course of descent; and this is true of the will before us, because, the plaintiff being a *Rose*, if she died without having had children, her heirs and the heirs of her father, the testator, would be the *Rose* family.

And this fact—that the *Rose* family would be the heirs of the plaintiff, if she had no children—marks the distinction between this case and *Puckett v. Morgan*, 158 N. C. 344, 74 S. E. 15, and *Jones v. Whichard*, 163 N. C. 244, 79 S. E. 503; both of these cases being decided upon the principle that the language of the ulterior limitation carried the estate

to a different line of descent, and was sufficient, when read with the other parts of the will, to show that the words "bodily heirs" were used as a description of the person, and not to denote a class who were to take in succession, and therefore that the rule in Shelley's Case did not apply. *Sessoms v. Sessoms*, 144 N. C. 121, 56 S. E. 687, is also an authority for the position of the plaintiff. Affirmed.

(178 N. C. 655)

**CHAMBERLAIN v. DUNN.** (No. 232.)

(Supreme Court of North Carolina. Oct. 1, 1919.)

**WITNESSES ⇐ 275(2)—CROSS-EXAMINATION OF DEFENDANT, AS TO IDENTITY OF JUDGMENT DEBTOR, RELEVANT TO ISSUE.**

On contest for a fund in custody of the clerk, involving whether plaintiff had been served with process in cases wherein two judgments had been rendered which plaintiff contended were against his son, but which defendant contended were against plaintiff, defendant's testimony on cross-examination as to certain notes secured by mortgage, on which it was alleged the judgments were taken, and about the credits or entries thereon, was relevant on the issue of whom the judgments were against.

Appeal from Superior Court, Lenoir County; Gulon, Judge.

Action by Ben Warren Chamberlain against Charles F. Dunn. From judgment for plaintiff, defendant appeals. No error.

Rouse & Rouse, of Kinston, for appellant. Cowper, Whitaker & Allen and J. L. Hamme, all of Kinston, for appellee.

**PER CURIAM.** The parties contested for the possession of a fund in the custody of the clerk, and the controversy involved the question as to whether the plaintiff had been served with process in the cases wherein two judgments had been rendered. If he was served, the issue should be answered "No," and if he was not, it should be answered "Yes," the issue being, "Is plaintiff entitled to the fund in dispute?" The jury answered it "Yes." The defendant testified in his own behalf to show that plaintiff had been served with process, and was the defendant in the judgments, and he was cross-examined as to certain notes (secured by mortgage) upon which it was alleged that the judgments were taken, and about the credits or entries thereon. This cross-examination was properly permitted, as it tended to throw light upon the questions involved whether the plaintiff was the person who was served with the process in those actions, and whether the judgments were rendered against him. The judge in his charge explained the matter fully to the jury, and stated what was the

object of the cross-examination, and how it bore on the case and to what extent the matters elicited by it could be used by them, that is, only to identify the true defendant in the judgment, whether it was the father (the plaintiff in this action) or his son, who had a somewhat similar name. The defendant alleged that the judgments were against plaintiff, who was always known as Warren Chamberlain, while plaintiff contended that they were against his son, who was named Warren Chamberlain, while his own name is Ben Warren Chamberlain, and by that name he had always been known. The relevancy of the facts disclosed by the cross-examination is apparent from this statement.

There is no fault in the charge.

No error.

(178 N. C. 139)

**PATE v. BANKS. (No. 223.)**

(Supreme Court of North Carolina. Oct. 1, 1919.)

**COVENANTS — 96(8) — DRAINAGE ASSESSMENTS ARE "PUBLIC CHARGES" AND NOT WITHIN COVENANTS AGAINST "INCUMBRANCES."**

Drainage assessments against land in the district sold by a nonresident, both seller and buyer being fixed with legal notice by the statutory proceedings for the formation of the district, held "public charges" on or against the land, and not "incumbrances," as contemplated by the seller's covenant against incumbrances.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Incumbrance; Second Series, Public Charge.]

Appeal from Superior Court, Lenoir County; Gulon, Judge.

Action by George B. Pate against Florence K. Banks. From judgment dissolving a restraining order, plaintiff appeals. Affirmed.

The Moseley Creek drainage district, which lies partly in Craven and partly in Lenoir, was established under chapter 442, Laws 1909, amended by chapter 67, Laws 1911, by proceedings taken out in Craven, but embraced certain lands in Lenoir, among which is part of the tract conveyed by the defendant to the plaintiff August 30, 1913, with covenants of warranty against "incumbrances." The regularity of the drainage proceedings as to this land has been upheld in *Banks v. Lane*, 170 N. C. 14, 86 S. E. 713, which was affirmed on rehearing, 171 N. C. 506, 88 S. E. 754, and certain other questions connected with it were passed upon in *Taylor v. Com'rs*, 176 N. C. 217, 96 S. E. 1027. The drainage district and the amount of the assessments were confirmed on April 17, 1911. These assessments became due and collectible in 10 annual installments, the first of these

maturing in 1914, about one year after the conveyance to the plaintiff by the defendant.

The plaintiff executed to the defendant a mortgage for \$4,000 to secure the balance of purchase money. After the opinion in *Taylor v. Com'rs*, supra, was rendered, the defendant demanded payment of \$2,300, balance due on purchase money, and began advertisement of foreclosure under the mortgage. This action was instituted to restrain such foreclosure. Upon the hearing, the court dissolved the restraining order, holding that on August 30, 1913, no part of said assessments were incumbrances in the scope of the warranty in the deed. The plaintiff appealed.

Rouse & Rouse and Y. T. Ormond, all of Kinston, for appellant.

Dawson, Manning & Wallace, of Kinston, for appellee.

CLARK, C. J. The only question presented is "whether the drainage assessments against the land which was conveyed to the plaintiff by the defendant on August 30, 1913, none of which were due and payable at the time of the conveyance, constitute an incumbrance against said land on that date which was contemplated by the covenant against incumbrances."

In *Taylor v. Com'rs*, 176 N. C. 224, 96 S. E. 1030, the court, while holding that the point was not absolutely necessary to a decision of that case, said:

"But as the case is before us, we think it proper to say that the view of the clerk is correct that the land is liable to the drainage assessments, just as it is liable for other taxes as they fall due from time to time. As owner of the land, he does not have to consent to the assessment of either the drainage tax or county or state taxation. The drainage tax becomes a lien, just as the benefits accrue, i. e., annually. The decree in the drainage district is not a personal liability of Mrs. Banks, nor is it a personal liability of George B. Pate. It is a lien in rem, accruing annually and resting upon the land into whosever hands it may be at that time. Pate, as purchaser, entered into possession of the land nearly 2½ years after the final decree establishing the drainage district, and necessarily with physical knowledge of the drainage district. While such lien was decreed by the final judgment April 17, 1911, the assessments were not liens then, but only became such as they subsequently accrued, respectively. They were not actual liens and collectible till each fell due, in turn, in the years 1914 to 1921, and therefore not incumbrances within the meaning of the warranty clause of the deed, any more than taxes falling due in each future year. We do not see that Mrs. Banks has any cause to restrain the collection of the assessment for drainage, upon the allegation that she would be liable on her warranty. The future benefits are adjudged to be more than 'the charge.'"

Neither the plaintiff nor the defendant, it appears, had actual notice of the drainage district at the time of the conveyance, and the defendant was then a resident of South Carolina. But they were fixed with legal notice by the proceedings which were conducted in the manner, and with the publication of notices, prescribed by statute, and we so held. *Banks v. Lane*, 170 N. C. 14, 88 S. E. 713, affirmed on rehearing, 171 N. C. 505, 88 S. E. 754, and in *Taylor v. Com'rs*, 176 N. C. 217, 96 S. E. 1027. The system of drainage districts was created by the Legislature as a matter of public policy, and, the notices required being a sufficient compliance with constitutional requirements, as we have repeatedly held in numerous cases, the fact that a vendor happens to be a nonresident, or the vendee fails to go upon the land for examination by himself or an agent, cannot vitiate the proceedings, nor can it make the duties and other charges which will accrue, from time to time, upon land in the drainage district an incumbrance. The law makes no exemption for such reasons. If it did so it would make it difficult to sell land lying in those districts.

The lien of the charges for drainage is not a debt of the owner of the land therein, but is a charge solely upon the land and accrues, *pari passu* with the benefits as they shall accrue thereafter. They are not liens until they successively fall due, and are presumed to be paid out of the increased productiveness and other benefits as they accrue from time to time. These assessments are to be levied from time to time to pay, not the indebtedness of the owner of any tract, but to pay the bonded indebtedness of the district, in that they are exactly like bonds issued by the township, county, or state for public benefits and which become liens on property in futuro only to the extent of the taxes falling due each year to pay the interest, and such part of the principal as may become due. One who purchases land in a township, county, or state cannot complain that these successive tax liens will, from time to time, be collectible out of his realty. Whether he knew of the existence of such indebtedness or not makes no difference. They are not incumbrances within the sense of the warranty clause of a deed. The assessments in a drainage district to take the water off the land is simply an annual tax for that purpose, limited in this case to 10 years, just as bonds issued by a township, county, or state become an annual lien to the extent of the amount falling due each year of principal and interest and limited to 10 or 20, or 40 years, as may be prescribed.

In like manner to drainage districts, the government has created irrigation districts in the western part of the Union, the cost of which is charged upon each tract of land for a series of years or in perpetuum. These are not incumbrances, but, like the cost of taking

water off the land, or for payment of bonds issued for roads or other purposes, are a "charge" upon the land, falling due from time to time.

These "public charges" are entirely different from a mortgage, which is to secure an indebtedness of the mortgagor for a benefit such as money borrowed, or other purpose, already received, nor like the laborer's or mechanic's lien, which are for benefit already received, and which are primarily a personal debt of the employer.

"Pavement" assessments, as is said in *Raleigh v. Peace*, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330, are like these assessments for drainage purposes, being "founded upon the principle that the land abutting upon the improvement receives a benefit over and above the property of the citizens generally, and should be charged with the value of such peculiar benefits," and "do not authorize a personal judgment against the owner of the property." Being a public charge, the owner is not liable therefor, and the purchaser takes the land cum onere.

In the case of laying water on the land in an irrigation district, or in taking the water off in a drainage district the benefits will arise anew each year, and the assessments are presumed to be more than counterbalanced by the benefits which shall accrue. It is so adjudged in the decree creating the district. Otherwise, the district would not be made. The annually recurring benefits in an irrigation district, or a drainage district, accrue to the then owners of the property, and can be of no benefit to him who has parted from it by sale. The charge runs with the land, as do the annual benefits. The vendor receiving none of the recurring benefits is not liable for the recurring charges. Both alike are in rem, and accrue to the land in the hands of the then owner.

It is otherwise when the owner of lands gives a mortgage for a benefit already accrued or there is a laborer's or a mechanic's lien for work, or lien for material already furnished.

The drainage system was deemed by the Legislature a measure required for the public benefit. While a drainage district is not a governmental agency like a township or county (*Sanderlin v. Luken*, 152 N. C. 741, 68 S. E. 225; *Com'rs v. Webb*, 160 N. C. 594, 76 S. E. 552; *Leary v. Com'rs*, 172 N. C. 26, 89 S. E. 803) it is a geographical quasi public corporation, and the bonds issued by it for the improvement of the district, like bonds issued for public roads or other purposes, become an indebtedness of the district, and not of any landowner therein. These bonds, as in the case of township and county bonds, are not an "incumbrance," nor yet a lien; they are a "public charge" which falls upon the land in the district in rem, and to be collected in the same manner as all other public charges, but do not become a lien till the

maturity each year of the prescribed amount falling due.

If the drainage district and its assessments and other duties and burdens were an "incumbrance," then the vendor of land lying therein would incur no end of liability, for from time to time other assessments must be called for to maintain, or perhaps extend, the drainage system. The liability, however, is upon the land only, and the grantee takes it just as he takes property subject to the payment of other public bonds, already issued or to be issued, but which are an "incumbrance" for which the vendor is liable only to the extent that any installment of the charge or tax is past due.

Affirmed.

(178 N. C. 111)

DUDLEY et. al. v. JEFFRESS. (No. 172.)

(Supreme Court of North Carolina. Sept. 24, 1919.)

**1. BOUNDARIES** ⇨46(2)—PURCHASER KNOWING AGREED BOUNDARY ESTOPPED TO CLAIM BEYOND IT.

Purchaser, who bought land with knowledge that boundary line had been agreed upon and marked at time of partition of land, and that the parties since the partition, including those under whom purchaser claimed, had recognized and held up to such line, is estopped from claiming beyond line.

**2. BOUNDARIES** ⇨3(6)—LINE MARKED AND SURVEYED PREVAILS OVER DESCRIPTION IN DEED.

Where with a view to make a deed or division the parties go upon the land and have the line marked and surveyed, intending it to be the line and to be included in the deed, the line so surveyed and marked prevails against the description in the deed, where there is a difference between them.

**3. WORDS AND PHRASES**—"PRIVITY" DENOTES SUCCESSIVE RELATIONSHIP TO SAME PROPERTY RIGHT.

The term "privity" denotes mutual or successive relationship to the same right of property (citing Words and Phrases, Privity).

Appeal from Superior Court, Pitt County; Daniels, Judge.

Action by S. I. Dudley and others against R. O. Jeffress. Judgment for defendant, and plaintiffs appeal. No error.

This was an action to establish a boundary line. On December 8, 1904, the defendant and Dr. Moye agreed to partition a tract of land which they held as tenants in common—two-thirds to defendant, and one-third to Dr. Moye—and employed J. D. Cox to survey the land for partition. They were with the surveyor, and the division line was run by him with their approval, and was

marked at the time through the cleared land by a fence and in the woodland by chopped trees and well-defined surveyor's marks to Tar river, and the deed was made at that time. It further appears from the record that from the date of the survey, Dr. Moye occupied only the land lying to the east thereof, and the defendant occupied and cultivated the land to the west of this division line. Dr. Moye conveyed the part which he then held in severalty to Ada M. Cherry and husband in January, 1906, who recognized this division line. They conveyed in October, 1908, to the plaintiff, who went into possession of said land claiming only up to the division line between Jeffress and Moore as marked by the dividing fence and the chopped trees. When the plaintiff purchased said land he had actual knowledge of this boundary line to which Jeffress and Moye and the grantee of the latter had occupied. He made no other claim prior to June, 1916, when Harding, surveyor, suggested to him that if he desired to put his lands on the market for sale it would be wise to have the lands surveyed and platted according to the courses and distances contained in the deed. According to that survey he would obtain the locus in quo, but to do so the line would not only take in land which the defendant had been all the time occupying, but would run through certain buildings which were on the defendant's side of the line, as it had been surveyed and marked on the ground by the surveyor when Moye and Jeffress were present and agreeing upon the division. The jury found that this marked line was the true line, and the plaintiffs appealed.

F. C. Harding, L. W. Gaylord, and Albion Dunn, all of Greenville, for appellants.

Skinner & Whedbee, of Greenville, for appellee.

CLARK, C. J. The sixth assignment of error is to the following charge of the court:

"Now, our court has held that ordinarily a survey or in running the lines of a tract of land shall be governed by the description contained in the deed conveying it, but there are exceptions to that. One of the exceptions is this, that where, with a view to making a deed or a division, the parties go upon the land and have the line marked and surveyed, intending it to be the line and to be included in the deed, then the line so surveyed and marked prevails against the description in the deed where there is a difference between them."

This is in exact accordance with the holding of Hoke, J., in *Clarke v. Aldridge*, 162 N. C. 327, 78 S. E. 216, and numerous cases there cited. This case has been cited with approval since, with full citation of authorities by Brown, J., in *Allison v. Kenion*, 163 N.

C. 586, 79 S. E. 1110, and by Walker, J., in *Lumber Co. v. Lumber Co.*, 169 N. C. 89, 85 S. E. 438; also in *Lee v. Rowe*, 172 N. C. 846, 90 S. E. 222. In a still later case (*Millikin v. Sessoms*, 173 N. C. 725, 92 S. E. 361) it is said:

"It is settled beyond a controversy in this state that a line surveyed and marked out and agreed upon by the parties at the time of the execution of the deed will control the course and distance set out in the instrument. *Adlington v. Jones*, 52 N. C. 582; *Safret v. Hartman*, 50 N. C. 185; *Williams v. Kivett*, 82 N. C. 111."

[1] The plaintiffs while conceding that this would apply as between the original parties, Moye and Jeffress, and their privies contend that it is inequitable as to the plaintiffs, who are innocent purchasers for value. In this case Dudley, however, bought with notice that the line had been agreed upon and marked, and that the parties and their assignees held up to said marked line, and he holds subject to the same estoppel.

[2] This is the chief point in the case, and the jury have found their verdict upon a proper instruction from the court as to the law. The other exceptions do not require discussion.

"Privy means a privy in estate; a property right acquired \* \* \* by contract or inheritance. *Bigelow, Estoppel*, 142," cited with approval, in *Shew v. Call*, 119 N. C. 454, 26 S. E. 33, 56 Am. St. Rep. 678.

[3] "The term 'privy' denotes mutual or successive relationship to the same right of property." 6 Words and Phrases, and the exhaustive citations and authorities there cited, pages 5606-5609. It is there held that privies are of three kinds—in blood, in law, and in estate. A privy in estate is one who derives his title to the property in question by purchase. *Orthwein v. Thomas*, 127 Ill. 554, 21 N. E. 430, 4 L. R. A. 434, 11 Am. St. Rep. 159.

"Privy exists between two successive holders when the later takes under the earlier, as by descent, will, grant, or voluntary transfer of possession." *Sherin v. Brackett*, 36 Minn. 152, 30 N. W. 551. "Privy implies succession. He who is in privy stands in the shoes or sits in the seat of the owner from whom he derives his title, and thus takes it charged with the burden attending it." *Boughton v. Harder*, 46 App. Div. 352, 61 N. Y. Supp. 574.

The plaintiff Dudley having bought and taken the deed with knowledge that the line as claimed by the defendant had been settled and marked on the ground by a fence and a line of chopped trees to the river, and that the parties since said partition, including those under whom he claims, had recognized and held up to that line, can-

not go beyond that boundary by reason of any error of the parties in drawing the deed not in conformity to said line.

No error.

(178 N. C. 129)

# BAGGETT v. LANIER. (No. 116.)

(Supreme Court of North Carolina. Sept. 24, 1919.)

1. EVIDENCE ⇨353(3), 383(3)—RECITALS IN COMMISSIONER'S DEED ARE SUFFICIENT TO SHOW HIS AUTHORITY.

Recitals in commissioner's deed are competent and sufficient to show commissioner's authority to make deed.

2. EVIDENCE ⇨178(3) — COMMISSIONER'S DEED COMPETENT ON PROOF THAT RECORD WAS DESTROYED.

The destruction of the record in which commissioner's deed was recorded must be shown to make deed competent.

3. APPEAL AND ERROR ⇨204(5)—OBJECTIONS NOT MADE TO DEED BELOW WILL NOT BE CONSIDERED.

Objection to competency of deed not made in lower court cannot be urged on appeal.

4. APPEAL AND ERROR ⇨901—BURDEN OF PROOF TO SHOW ERROR IS ON APPELLANT.

Burden of showing error is upon appellant, for in absence of anything to the contrary, appellate court will presume that ruling of lower court was correct, and that the necessary facts to support it had been proved.

5. JUDICIAL SALES ⇨47—REMEDY FOR IRREGULARITY IN PROCEEDING IS BY MOTION IN ORIGINAL CAUSE.

If proceeding pursuant to which commissioner sold land was irregular, the proper remedy is by motion in the original cause to have it set aside, and not by collateral attack.

6. REMAINDERS ⇨17(3) — REMAINDERMEN NOT AFFECTED BY LIMITATIONS DURING LIFE TENANT'S LIFE.

In action for possession of land, court's failure to submit question of whether plaintiff had been in adverse possession for 7 years was not error, where defendant, having purchased interest of remaindermen, went into possession less than 7 years after death of life tenant, since remaindermen, having no right to possession during life tenant's life, are not affected by statute of limitations during such time.

7. TRIAL ⇨256(1)—REQUEST FOR FULLER INSTRUCTIONS NECESSARY.

Party who feels that he needs fuller instructions should ask for them.

Appeal from Superior Court, Harnett County; Kerr, Judge.

Action by Hiram Baggett against J. B. Lanier. Judgment for defendant, and plaintiff appeals. No error.

This is an action to recover the possession of land, for an injunction, and for damages. Defendant disclaimed ownership as to the first tract, but denied plaintiff's title as to the second tract of 17 acres. The plaintiff claimed the land under a grant from the state, issued on December 12, 1898, to one James R. Grady, and mesne conveyances from the latter and others to himself. Defendant asserted his right to the land by adverse possession for more than 30 years prior to the date of the grant to J. R. Grady, and he also proved that N. G. Jones conveyed it to J. R. Grady October 7, 1882; that John A. Green, sheriff, conveyed it to Geo. W. Pegram by deed dated June 1, 1877, which was made by him at a sale pursuant to a levy under an execution against Grady. Geo. W. Pegram died, and his executor, John D. Pegram, sold the land, under a power contained in his will, to J. R. Grady, for life, with remainder to the children of Mary I. Grady, wife of J. R. Grady, four of whom conveyed their interests, as tenants in common, to the defendant. The latter also introduced a deed from D. H. McLean, commissioner, to him, dated July 8, 1911. It was admitted that J. R. Grady resided on the land and occupied it until his death, which occurred June 11, 1906. Defendant testified that he took possession of the land immediately after receiving his deed from D. H. McLean, commissioner.

The court charged the jury that the plaintiff was entitled to recover the land, unless the defendant had satisfied them, by the greater weight of the testimony, that he, and those under whom he claimed or derived his title, had been in possession of the land openly, notoriously, and adversely for 30 years before the grant was issued to J. R. Grady, which, under the presumption that a grant had theretofore been issued, would take the title out of the state, and further he must so prove that he and those under whom he claims had held possession of the land adversely, as above defined, for 20 years of said time, or, in lieu of such proof, he must show that he and those under whom he claims had so held for 21 years under color of title before the state had granted the land to Grady. The verdict was for the defendant, and, judgment being entered thereon, plaintiff appealed.

E. F. Young and Clifford & Townsend, all of Dunn, for appellant.

Chas. Ross and W. P. Byrd, both of Lillington, for appellee.

WALKER, J. (after stating the facts as above). The plaintiff reserved but two exceptions: First, that the deed of D. H. McLean, commissioner, to defendant was competent, but it did not appear that he had authority to make it, and that it does not appear that it covers this land; and, second, that the charge in reference to the possession

of the defendant and those under whom he claims was erroneous.

[1-5] First, we do not see why the recitals in the McLean deed were not competent and sufficient to show his authority to make the deed. *Irvin v. Clark*, 98 N. C. 437, 4 S. E. 30. Plaintiff relies on *Barefoot v. Musselwhite*, 153 N. C. 208, 69 S. E. 71. It may be that the objection was intended to be directed against the competency of this deed, because the preliminary fact, as to the destruction of the record in which it was recorded and which must be shown in order to make it competent, was not established. This is not the form or substance of the objection, and it therefore cannot be urged before us. But if it could, we are of the opinion that such fact was sufficiently shown by the defendant. The authority to make the deed, therefore, must be determined by the sufficiency of the recitals. The statement as to those is not very full or explicit, but enough appears to show it. If the recitals were insufficient, the plaintiff should have had them set out in the case, so that we might know fully what they are. 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 that the necessary facts to support it had been proved. It appears by fair and reasonable inference that the deed of the commissioner was made under a decree in a regularly constituted special proceeding for the sale of the land, in which the heirs of J. R. McLean were the defendants. If the proceeding was irregular, the proper remedy is not by attacking it collaterally, but by a motion in the original cause to have the same set aside. *Rackley v. Roberts*, 147 N. C. 201, 60 S. E. 975; *Hargrove v. Wilson*, 148 N. C. 439, 62 S. E. 520; *Barefoot v. Musselwhite*, supra; *Pinnell v. Burroughs*, 168 N. C. 320, 84 S. E. 364; *Id.*, 172 N. C. 186, 90 S. E. 218.

[6] Second. The charge of the court was correct, as it appears to have been admitted that J. R. Grady was in possession of the land until his death on June 11, 1906, and plaintiff, therefore, could not have had adverse possession for so long a time as 7 years, because the defendant took possession about July 8, 1911, when the deed of D. H. McLean, commissioner, was executed to him. Besides, James R. Grady had but a life estate, and the remaindermen were not affected by the statute of limitations during the period of his life.

We do not overlook *Gilchrist v. Middleton*, 107 N. C. 663, 12 S. E. 85, cited and relied on by the defendant, but, while admitting the correctness of the rule, as to the sources of title, and the different kinds of title under which a party may claim, which is there stated to be that he may assert title by adverse possession under color for 7 years, where the state has been divested of its title by grant or adverse possession for 30 years, as well

as by 20 years of such possession without color, the question at last is, not merely whether that can be done, but whether the plaintiff has brought his case within the rule. No kind of adverse possession will avail the plaintiff, unless it was continued long enough to ripen his title, as against this defendant, claiming a remainder after the life estate of J. R. Grady, for during his lifetime his children, from whom defendant derived his title, could not enter, as they had no right to do so, and consequently their right of entry could not be tolled by adverse possession of the plaintiff. It would not do to forbid one to enter upon land, and at the same time bar his right, because he did not enter and preserve his right against a trespasser, whose possession might have continued for 7 years with color, or 20 years without, and ripen his imperfect title into a good one. In this case, the plaintiff's proof has failed to come up to the standard, in the face of his admission that J. R. Grady continued to occupy the land in dispute until his death. *Henley v. Wilson*, 77 N. C. 216; *Todd v. Zachary*, 45 N. C. 286; *Woodlief v. Webster*, 136 N. C. 162, 48 S. E. 578; *Joyner v. Futrell*, 136 N. C. 301, 48 S. E. 649.

[7] The case of *Logan v. Fitzgerald*, 87 N. C. 308, cited by the plaintiff, is not applicable, as there the judge merely failed to correctly define adverse possession. If the plaintiff felt that he needed fuller instructions, he should have asked for them. *Simmons v. Davenport*, 140 N. C. 407, 53 S. E. 225.

It may be that all of the evidence is not set out in the record, or not distinctly so; but, as it now appears to us, the principles of law we have stated must govern the case, and when they are correctly applied, as was done by the court below, there can be no error upon the facts found by the jury.

No error.

(178 N. C. 133)

**PARRISH et ux. v. HODGES.** (No. 107.)

(Supreme Court of North Carolina. Oct. 1, 1919.)

**DEEDS §127(2)—CONSTRUED TO CONVEY AN ESTATE IN FEE.**

Under Revisal 1905, § 1578, converting estates tail into estates in fee simple, an habendum to the grantee "to have and to hold the aforesaid tract of land and all privileges and appurtenances thereto belonging, to her and the heirs of her body or issue to their only use and behoof forever," created an estate in fee, the words "or issue" being synonymous with "heirs of the body"; "issue" naturally meaning lineal descendants to the remotest generation (citing *Words and Phrases*, First and Second Series, *Heirs of the Body*; *Issue*).

Appeal from Superior Court, Harnett County; Kerr, Judge.

Controversy without action by M. B. Parrish and his wife, Minnie V. Parrish, against M. F. Hodges. From judgment for plaintiffs, defendant appeals. Affirmed.

The controversy involved the right of plaintiffs to collect the purchase money for a piece of land sold by plaintiffs to defendant, which the parties agreed should depend on whether plaintiff's deed conveyed a good title.

G. A. Martin, of Chapel Hill, for appellant.

James D. Parker, of Smithfield, for appellees.

**HOKE, J.** The facts affecting the validity of the title offered are as follows:

"The land in question was owned by J. A. Norris, and on June 4, 1901, said J. A. Norris and wife, Z. A. Norris, conveyed the same, reserving a life estate, to Hattie I. Norris (now Wade) habendum and warranty as follows: 'To have and to hold the aforesaid tract of land to Hattie I. Norris and heirs of her body or issue to their only use and behoof forever. And the said James A. Norris and wife Z. A. Norris covenant with said Hattie I. Norris, heirs of her body, that they are seized of said lands in fee simple; that the same are free and clear from all incumbrances and that they will warrant and defend the title to same against the claims of all persons whatsoever.'" That on November 25, 1912, the life tenants, James A. and Z. A. Norris, his wife, and also Hattie I. Wade, executed a deed in fee for said land to plaintiffs.

It thus appears that the question in controversy depends on the estate conveyed to Hattie I. Norris by the deed from J. A. Norris and wife, and on the facts presented we concur in the ruling of his honor that the deed conveyed an estate of absolute ownership in remainder. And the life tenants and Hattie I. and her husband, James, having joined in the deed conveying the land in fee to plaintiffs, the title offered is a good one, and defendant must comply with the contract of purchase.

Under our statute converting estates tail into estates in fee simple (Revisal, § 1578), this habendum to Hattie I. Norris, "to have and to hold the aforesaid tract of land and all privileges and appurtenances thereto belonging, to her and the heirs of her body or issue to their only use and behoof forever," created an estate in fee, it being clear that the words "or issue" were intended as synonymous with "heirs of the body," and to have the same significance as to the character of the estate conveyed. *Revis v. Murphy*, 172 N. C. 579, 90 S. E. 573; *O'Neal v. Borders*, 170 N. C. 483, 87 S. E. 340; *Perrett v. Bird*, 152 N. C. 220, 67 S. E. 501 and cases cited. This

appears, not only from the language of the habendum, indicating that an estate of inheritance was intended for Hattie, but the interpretation is emphasized by the condition of the parties and the warranty clause, showing that an estate of absolute ownership was being presently conveyed, and Hattie, the grantee named, then unmarried and without children, being evidently the only one considered or who was then in a position to take and hold the interest.

In *Ford v. McBrayer*, 171 N. C. 420, 88 S. E. 736, to which we were referred by counsel in support of defendant's position, it is fully recognized that the word "issue" is not infrequently construed to mean lineal descendants and the equivalent of the "heirs of the body." And while it is said in that case that the courts rather lean to the position that the word should be considered as a word of purchase in the sense of children, etc, this was said in reference to an instrument involving an application of the rule in *Shelley's Case*, where in pursuance of a public policy prevalent at the time the rule was established a life estate, given in express terms to the first taker was entirely disregarded, and a rule which, as well stated in the opinion, the "courts were loath to extend." And in *Puckett v. Morgan*, 158 N. C. 344, 74 S. E. 15, another decision where an estate for life was given the first taker, the application of the rule in *Shelley's Case* was denied by reason of additional words appearing in the limitation in remainder to the "heirs of the body," and tending to show that these words were not used in the general sense of all takers by inheritance, the significance required for a proper application of the rule in *Shelley's Case*, and for that reason the estate for life was allowed to stand as written in the devise.

But in our case, while a life estate is reserved to the grantor, there is no life estate given to Hattie I. Norris, the first and only grantee in remainder, but the estate and interest is conveyed to said grantee "to have and to hold the aforesaid tract or parcel of land and all the privileges and appurtenances thereto belonging, to the said Hattie I. Norris, the heirs of her body or issue to their only use and behoof forever," and in such case we see no reason why this deed should not be held to cover an estate in fee according to its evident intent. Nor why the term "issue" appearing in this habendum should not be allowed its natural and primary significance of "lineal descendants to the remotest generation," and so the equivalent ordinarily of "heirs of the body." *Nobles v. Nobles*, 177 N. C. 243, 98 S. E. 715; *White v. Goodwin*, 174 N. C. 724, 94 S. E. 454; *Revis v. Murphy*, 172 N. C. 579, 90 S. E. 573; *Gold Mining Co. v. Lumber Co.*, 170 N. C. 273, 87 S. E. 40; *Shuford v. Brady*, 169 N. C. 224, 85 S. E. 303;

*Triplett v. Williams*, 149 N. C. 394, 63 S. E. 79, 24 L. R. A. (N. S.) 514; 2 *Bouvier's Law Dic.* (3d Rev.) 1686, 1687; 2 *Words and Phrases* (Second Series) 1213-1214, citing, among other authorities, *Perry v. Bulkley*, 82 Conn. 158, 72 Atl. 1014; *Coates v. Burton*, 191 Mass. 180, 77 N. E. 311; *Robeson v. Cochran*, 255 Ill. 355, 99 N. E. 649; *Dick v. Ricker*, 222 Ill. 413, 78 N. E. 823, 113 Am. St. Rep. 426.

We are of opinion that the deed has been correctly construed, and the judgment of the superior court is affirmed.

Judgment affirmed.

(178 N. C. 189)

McFARLAND v. HARRINGTON. (No. 115.)

(Supreme Court of North Carolina. Oct. 1, 1919.)

1. TRUSTS  $\S$  35(2)—AGREEMENT TO HOLD FOR ANOTHER CREATES ENFORCEABLE TRUST.

If a sister agreed to accept title to land on trust to hold it for her brother as to his half-interest, and she obtained the deed to the land thereby, it created an enforceable trust in favor of the brother.

2. TRUSTS  $\S$  371(8)—IN SUIT TO ENFORCE NO VARIANCE SHOWN BETWEEN ALLEGATION AND PROOF.

In suit to enforce a trust in land, where the complaint alleged a parol trust by agreement with defendant in behalf of plaintiff, her brother, as to half of the land, which was all deeded to her, and there was proof to show such parol trust, there was no variance between the allegation and the proof.

3. TRUSTS  $\S$  44(2)—EVIDENCE SUFFICIENT TO SHOW PAROL TRUST IN LAND.

In a brother's suit to enforce against his sister her agreement to hold in trust for him a half interest in land to which she took title, evidence held sufficient to establish such agreement on her part.

4. TRUSTS  $\S$  41—BURDEN TO ESTABLISH PAROL TRUST IN LAND IS ON PLAINTIFF.

The burden was upon plaintiff, suing his sister, who had taken title to a tract of land, to prove her parol agreement to hold half in trust for him.

5. TRUSTS  $\S$  44(3)—CLEAR EVIDENCE NECESSARY TO ESTABLISH PAROL TRUST IN LAND.

A brother, suing his sister, who had taken title to a whole tract of land, to establish her agreement to hold half in trust for him, could make his case only by clear, strong, and convincing evidence.

Appeal from Superior Court, Lee County; Connor, Judge.

Action by B. J. McFarland against Mrs. Flora Harrington. From judgment for plaintiff, defendant appeals. No error.



Some time before the institution of this action the plaintiff, two brothers, and three sisters, one of them the defendant, were tenants in common of a tract of land, which they inherited from their father, and the plaintiff, with the three sisters and their mother, were living on the land; he being a young man at the time. The plaintiff and his two brothers made a mortgage on their interest in the land to secure food and clothing for the defendant and other sisters, leaving the interest of the sisters unincumbered. The mother joined to bar dower, and has been dead for many years.

The plaintiff was unable to redeem his interest, and the one-half undivided interest (that of the three brothers) was sold under the mortgage and was acquired by J. A. McIver, through a third person who bought at the sale. The original interest of the defendant and her sisters is not in the controversy. Subsequently McIver brought a partition proceeding in the superior court of Lee county against the three sisters, including this defendant. The defendants in that proceeding denied the title of the petitioner, and the cotenancy, raising an issue of fact, and the cause was transferred to the civil issue docket for trial, where it remained for several years without any action being taken in it.

In 1918 the defendant, Mrs. Harrington, employed an attorney to bring the case to a hearing, so that she could get her interest, one-sixth, out of it, stating that they had been defending the proceeding so that her brother, Jones McFarland (this plaintiff) could recover something; that she was still willing to do all she could for him. Later the attorney and the plaintiff were brought together, through Mrs. Harrington, and represented them both. He immediately sought to have this plaintiff made a party to the partition proceeding; but, the petitioner resisting this, he failed. He then interviewed J. A. McIver, the petitioner, in the interest of McFarland, to secure a compromise, and McIver told him whatever his attorney did in the matter would be satisfactory. The attorney also testified that Mr. McIver told him he only wanted to come out without loss, get his money and interest back, and his attorney's fees, but wanted the original mortgagors, or such of them as desired, to get whatever advantage there was in it; that he searched for the mortgagors, found that the widow and one of the brothers were dead, and the other brother, Malcolm (who had not remained on the farm with the mother and sisters) wanted "Jones," the plaintiff, "to have it."

The cause came on for trial, and plaintiff's attorney unsuccessfully renewed his motion to have B. J. McFarland made a party. The jury returned a verdict for the petitioner, for his one-half interest in the land; it being agreed, however, that B. J. McFarland was

to have McIver's interest upon payment of the stipulated amount. It was agreed between the attorneys of McIver and plaintiff (neither of counsel in this case), representing their clients, that, upon payment into court within a given time of this amount, McFarland should have title to the property, and that a judgment should be drawn securing this result; but McFarland was not a party, and it was therefore agreed that if Mrs. Harrington would consent to take title in her name, she being a party and sister of McFarland, the judgment should be so drawn, and she would reconvey to McFarland, this plaintiff. A draft of the judgment was made, and shown to the defendant and explained to her, and she agreed, as plaintiff's attorney testified, to take and hold the title for this plaintiff and reconvey to him. The judgment was then signed, and the attorney delivered to her a copy.

The defendant denied, in her testimony, that she made any agreement about it, but admitted that she saw the judgment after it was signed, and testified that she knew nothing about the transaction before. Both plaintiff and defendant deposited the money with the clerk, where the deed was deposited by McIver, in accordance with the terms of the judgment. The defendant got the deed, refused to convey to the plaintiff, and the plaintiff sued. The following issue was submitted to the jury:

"Did the defendant, Mrs. Flora Harrington, agree to take the title to the land described in the pleadings for the benefit of the plaintiff, B. J. McFarland, and to reconvey the same to him?"

It was answered: "Yes." Judgment for the plaintiff upon the verdict, and defendant appealed.

Williams & Williams, of Sanford, for appellant.

Seawell & Milliken, of Sanford, for appellee.

WALKER, J. (after stating the facts as above). [1] The only question of importance in this case is whether the defendant, Mrs. Harrington, at the time the judgment was drawn, and before or at the time the legal title passed to her, promised and agreed that she would accept the title upon the trust to hold it for her brother (as to the half interest in the land) until he could pay the stipulated amount of money to fully reimburse Mr. McIver, and then convey the half interest to the plaintiff. There was evidence to support the plaintiff's allegation of a trust, such as is above set forth, and it was fairly and correctly submitted to the jury. If such an agreement was made, and she obtained the deed thereby, it created an enforceable trust in favor of the plaintiff. Avery v. Stewart, 136 N. C. 426, 48 S. E.

775, 68 L. R. A. 776. She would not have acquired the legal title, except for the confidence reposed in her by the other parties that she would perform her part of the agreement, and the law declares it inequitable that she should be permitted longer to hold it in violation of her promise. She will not be allowed to keep the title and repudiate the promise. *Sykes v. Boone*, 132 N. C. 199, 43 S. E. 645, 95 Am. St. Rep. 619; *Jones v. Jones*, 164 N. C. 320, 80 S. E. 430; *Allen v. Gooding*, 173 N. C. 93, 91 S. E. 694. In the last-cited case the Chief Justice thus states the law, quoting from the authorities mentioned:

"Where one party has, by his promise to buy, hold, or dispose of real property for the benefit of another, induced action or forbearance by reliance upon such promise, it would be a fraud that the promise should not be enforced." *Bispham's Eq.* § 218. \* \* \* "When a party acquires property by conveyance or devise, secured to himself under assurance that he will transfer the property to or hold and appropriate it for the use and benefit of another, a trust for the benefit of such other person is charged upon the property, not by reason merely of the oral promise, but because of the fact that by means of such promise he had induced the transfer of the property to himself"—citing *Glass v. Hulbert*, 102 Mass. 39, 3 Am. Rep. 418.

This doctrine has been frequently affirmed by this court before and since *Avery v. Stewart*, supra, was decided. Recent cases are *Rush v. McPherson*, 176 N. C. 562, 97 S. E. 613, citing *Cohn v. Chapman*, 62 N. C. 92, 93 Am. Dec. 600; *Boone v. Lee*, 175 N. C. 383, at page 386, 95 S. E. 659, at page 660, where it was said:

"In one aspect of our case, this is a parol express trust, not enforceable under the statute of frauds; but, as it is a solemn declaration of one party that if the legal estate is conveyed to him he will hold it in trust for another, it would be fraudulent and unconscionable for him to acquire the legal title by this engagement to hold it for another, and not comply with his promise, and therefore equity will enforce the trust, as the statute of frauds does not apply to such cases on account of the fraud, and the trust created thereby"—citing *Sykes v. Boone*, supra; *Avery v. Stewart*, supra.

[2, 3] There was not only evidence to establish this trust, but Mr. McIver afterwards expressly ratified what was done by his attorney, and was perfectly willing that the plaintiff should have the full benefit of the transaction. The evidence shows that he did not intend that the defendant should have the half of the land he had acquired through the purchaser at the sale, but that it should go either to all of the former owners of the half in controversy, or to any one

of them who desired it. That was the view he took of it, but the material question is what the defendant agreed to do, and the jury, upon full evidence, have so found against her as to fasten a trust on the title she holds for the benefit of the plaintiff. This seems to us very plain from the record as we have construed it. There was no variance between the allegation and the proof. The complaint alleged a parol trust by agreement with Mrs. Harrington, in behalf of the plaintiff, as to the half of the land, and there is proof to show it. Mr. McIver wanted his money, the whole of it, and was willing that the plaintiff, as one of the original owners and mortgagors, should have the land. He left the matter entirely to his attorney, who made such an agreement, through the plaintiff's attorney, with Mrs. Harrington, and it appears that Mr. McIver afterwards expressed his satisfaction with what had been done by the attorneys. The plaintiff's attorney stated to this defendant that he could get Mr. McIver's half interest for his client, the plaintiff, who was defendant's brother, and it had been suggested to him that he see her and ascertain if this was agreeable to her. She replied, "That is all right; anything on earth that is reasonable; let my brother get his interest in it;" and after telling her that she would have to make a transfer or deed to him, she said, "I will fix that at any time." She denied that she had assented to any such arrangement, or that she had promised to convey the McIver one-half to her brother; but the jury have settled the facts, so it has been found that there was an agreement of all the parties to the settlement of the matter.

Some objections have been urged to the authority of the attorneys, but there is ample evidence of it, and that they kept within the limit of it. This authority was an express one, and not to be implied merely from the fact of the attorneyship, as in the cases cited to us.

[4, 5] The remaining exceptions relate to prayers for instructions tendered by the defendant as to the authority of the attorneys, the burden of proof, and the quantum thereof. We have disposed of the question as to the attorneys' authority, and the judge charged fully and correctly as to the burden of proof, placing it squarely upon the plaintiff, and also as to the quantum of the evidence required to be adduced by him, when he told the jury that it must be clear, strong, and convincing. The charge was singularly clear and comprehensive, and was exceedingly fair to the defendant.

We have searched the record diligently, and no error is to be found therein.

No error.

(178 N. C. 106)

**In re PARHAM'S WILL. (No. 102.)**

(Supreme Court of North Carolina. Sept. 24, 1919.)

**1. WILLS ⇨344 — ADJUDICATION THAT "WILL" IS "DULY PROVED" INCLUDES CODICILS.**

A recorded adjudication reciting that execution of "will" is "duly proved" by the oath and examination of the witnesses to both will proper and codicils, *held* a sufficient recognition of the codicils and a probate thereof, the words "duly proved" carrying with them a legal presumption that everything was properly done, and the word "will" including codicils, according to Revisal 1905, § 2831, subd. 9.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Duly Proved; First and Second Series, Will.]

**2. WILLS ⇨186—EVIDENCE INSUFFICIENT TO SHOW REVOCATION OF CODICIL.**

A letter from testator to lawyer, directing him to "let the will stand" without referring to a codicil, *held* not to revoke codicil.

**3. WILLS ⇨260 — CAVEAT TO CODICIL OF PROBATED WILL BARRED AFTER SEVEN YEARS.**

A caveat to codicils of will admitted to probate is barred by limitations under Revisal 1905, § 3135, where more than seven years have elapsed since the probate.

Appeal from Superior Court; Vance County; Connor, Judge.

Controversy submitted without action upon facts agreed for the construction of the will of Missouri A. Parham. From judgment rendered Luther Parham appeals. Affirmed.

This is a controversy submitted without action upon facts agreed for the construction of the will of Missouri A. Parham. She executed the will on April 28, 1902, and the next day wrote to the draftsman of the will the following letter:

"April 29, 1902.

Captain Shaw: I do not recollect hearing you read it in the will, about the house. I want Locket and Luther to have my house and let them divide it as they please. I want you to put it in the will for Locket's wife to have his part her lifetime if they do not have any children. I was afraid that you did not put it in the will about the house, and I could not go to sleep. Please send me receipt for the five dollars. I will pay you the other.

"Yours respectfully

"Missouri A. Parham."

And later, the following undated letter.

"Captain: I could not get down there last summer. Let the will stand until I come down. If I die before I get there, give my house to Luther; it is too small to divide.

"Missouri A. Parham."

Both letters were produced before the clerk by Capt. Shaw, proofs taken, and probate made as below, and the will and letters were recorded by the clerk on March 17, 1903, promptly after the death of the testatrix, and Locket Parham qualified as executor thereof, and settled up the estate, and the land was divided up agreeably to the terms of the will as modified by the provisions in the said two letters probated as codicils. Luther Parham received the dwelling as part of his share according to the second codicil, modifying the first codicil.

On January 13, 1919, the widow of Locket Parham filed a petition before the clerk, reciting:

"It appears from an inspection of the said will and codicils, together with the probate of the same, that the affidavits of the witnesses to the codicils are incorporated in the probate, but that the codicils are not expressly referred to in the adjudication of probate by the clerk, which petitioner believes was an oversight, since the proofs and codicils are recorded. Yet it is contended that said codicils have not been probated. Your petitioner, by the death of her husband, derived an interest under the said codicils for the term of her life in that portion of the lands devised by the said will and codicils to her said husband, P. L. Parham"

—and asked the court to correct and formally adjudicate the probate of the said codicils.

On this motion, after the notice to Luther Parham, the clerk adjudged that—

"Due proof of the execution of both said letters was taken on March 17, 1903, and that the same were admitted to record as parts of the will of said testatrix. The court doth now, for then, adjudge that they were duly proven, and doth admit them to probate."

The following were the proceedings and decree on said probate:

**Original Probate.**

State of North Carolina, Vance County—ss.:

In the Superior Court. A paper writing, purporting to be the last will and testament of Missouri A. Parham, deceased, is exhibited before me, the undersigned clerk of the superior court for said county, by Locket Parham, the executor therein mentioned, and the due execution thereof by the said Missouri A. Parham is proved by the oath and examination of J. T. Harris, W. B. Shaw, the subscribing witnesses thereto, who, being duly sworn, doth depose and say, and each for himself deposeth and saith, that he is a subscribing witness to the paper writing now shown him purporting to be the last will and testament of Missouri A. Parham; that the said Missouri A. Parham, in the presence of this deponent, subscribed her name at the end of said paper writing, now shown as aforesaid, and which bears date of the 28th day of April, 1902.

And the deponent further saith that the said Missouri A. Parham, the testator aforesaid, did,

at the time of subscribing her name as aforesaid, declare the said paper writing so subscribed by her and exhibited, to be her last will and testament, and this deponent did thereupon subscribe his name at the end of said will as an attesting witness thereto, and at the request and in the presence of the said testator. And this deponent further saith that at the time when the said testator subscribed her name to the said will as aforesaid, and at the time of deponent's subscribing his name as an attesting witness thereto, as aforesaid, the said Missouri A. Parham was of sound mind and memory, of full age to execute a will, and was not under any restraint to the knowledge, information or belief of this deponent. And further these deponents say not.

W. B. Shaw. [Seal.]

J. T. Harris. [Seal.]

Severally sworn and subscribed, this 17th day of March, 1903, before me.

Henry Perry, Clerk Superior Court.

Also two letters, one bearing date the 29th day of April, 1902, the other without date, both addressed to W. B. Shaw, who was the draftsman of her will and at her request the custodian thereof. Said letters speak of changes in said will, and purport to be codicils to the same will of M. A. Parham, deceased, which said will is also exhibited in open court by Locket Parham, the executor therein named. And it is thereupon proved by the oath and examination of W. B. Shaw that he drew the said will and subsequent thereto the said letters were received by him in sealed envelopes from the said Missouri A. Parham through a messenger, and the same were at once deposited and kept in his safe in the same package with the said will until offered in court with the said will; that when he drew the will the testatrix requested him to keep the said will until her death, which he did as aforesaid; that said will and letters were filed in his safe in an envelope, marked "The will of Missouri A. Parham."

And it is further proved by the oath and examination of three competent and credible witnesses, to wit, J. A. Kelly, J. E. Burroughs, and L. W. Burroughs, that they were acquainted with the handwriting of the said Missouri A. Parham, and verily believe that the name of Missouri A. Parham subscribed to the said letters, and the said letters, and every part thereof, is in the handwriting of the said Missouri A. Parham.

W. B. Shaw.

J. A. Kelly.

J. E. Burroughs.

L. W. Burroughs.

Sworn and subscribed to before me, this the 17th day of March, 1903.

Henry Perry, Clerk Superior Court.

#### Order for Probate of Will.

State of North Carolina, Vance County.

In the Superior Court—Before Henry Perry, Clerk. In re Estate of Missouri A. Parham, Deceased. A paper writing purporting to be the last will and testament of Missouri A. Parham, deceased, is exhibited in open court for probate by Locket Parham, executor therein named; and the due execution thereof by the said Missouri A. Parham, deceased, is duly proved by the oath and examination of W. B. Shaw, J. T. Harris, J. A. Kelly, J. E. Bur-

roughs, and L. W. Burroughs, subscribing witnesses thereto, and it is further shown to the satisfaction of the court by said witnesses that the said Missouri A. Parham was, at the time of making said will of sound mind and memory, of full age to execute a will, and under no restraint to their knowledge, information or belief.

It is thereupon considered, adjudged, and decreed that said proof is sufficient and according to law, and that said paper writing is and contains the last will and testament of Missouri A. Parham, deceased. And on motion it is ordered that said will be admitted to probate and recorded in the Book of Wills of Vance County, and as such filed as provided by law in the office of the clerk of superior court of said county.

It is further ordered that said Locket Parham be allowed to qualify as executor as provided by law and enter upon the discharge of the duties imposed by said trust.

Dated this the 17th day of March, 1903.

Henry Perry, Clerk of Superior Court.

On appeal the judge approved and affirmed the order, and Luther E. Parham appealed on the ground: First, that the clerk was without authority to probate said codicils now because the same and all the proofs were before the court at the time the will was admitted to probate in 1903, and the judgment then admitting the will to probate exhausted the jurisdiction of the clerk, and pleaded the statute of limitations of one year, within which a judgment can be corrected for mistake or excusable neglect and the general bar of the statute of ten years; second, that the proofs which appear in the record did not warrant a finding and adjudication that the letters were codicils to said will; third, that the second codicil revokes the first.

Andrew J. Harris and Thomas M. Pittman, both of Henderson, for appellant.

T. T. Hicks, of Henderson, for appellee.

CLARK, C. J. Upon examination of the probate made March 17, 1903, we think the clerk and the judge below were correct in their adjudication that—

"Due proof of the execution of both said letters was taken March 17, 1903, and that the same were admitted to the record as parts of the will of said testatrix."

It is therefore unnecessary to discuss the first exception as to whether they could have been admitted to probate nunc pro tunc.

When the will and two letters were produced before the clerk on March 17, 1903, he took proofs of the execution of the will and separately proofs of the two codicils, and adjudged that they constituted the will, and recorded all three together in the book of wills, and the lands were divided on petition of the parties, Luther taking the house according to the second codicil, and an equal number of the acres of land, though section

6 of the will proper gave the house to Locket and Luther jointly.

At the death of Locket Parham January 26, 1918, his wife claimed her life estate under the codicil, he having no children. Luther claimed that the letters were no part of the will, and had not been probated as such, and that the land became his, while Locket's wife contended that the letters had been probated and recorded and treated and acted upon as parts of the will, and she began this proceeding because of Luther's contention that the probate did not refer to the codicil. We think that her prayer that the clerk should "amend the probate and make it refer to the codicil" was unnecessary, but the judgment rendered was proper "on the facts proven or admitted," *Elliott v. Brady*, 172 N. C. 830, 90 S. E. 951.

[1] The clerk's adjudication March 17, 1903, says "will." He adjudicates that the execution thereof is duly proved by the oath and examination of W. B. Shaw, J. T. Harris (witnesses to the will proper), and J. A. Kelly, J. E. Burroughs, and L. W. Burroughs (witnesses to the codicils). This was a sufficient recognition of the codicils and a probate thereof (In re Will of Deyton, 177 N. C. 495, 99 S. E. 424), and they were then recorded by the clerk with the will. The words "duly proven" carry with them a legal presumption that everything was properly done. *Lumber Co. v. Branch*, 158 N. C. 255, 73 S. E. 164.

The clerk's adjudication of January 28, 1919, that they were part of the will was saying no more than had been said on March 17, 1903.

[2] It is not necessary therefore to discuss the jurisdiction of the clerk to amend the probate or to probate the codicils nunc pro tunc. We do not think the exception that the second codicil revoked the first requires discussion. The second codicil, written several months after the first, was a request to "let the will stand" as modified by the first codicil, for she makes no reference to the first letter or codicil, except that she modifies it in the second letter by giving the whole of the house to Luther Parham, which indicates the extent to which she wished to modify her previous disposition of her property.

[3] It was not open to the respondent to caveat the codicils, if duly proven in 1903, for he has not only filed no caveat to the will or the codicils, but more than seven years have elapsed since they were probated. Revisal, § 3135; In re Dupree's Will, 163 N. C. 256, 79 S. E. 611. The word "will" in the clerk's probate includes codicils. Revisal, § 2831, subsec. 9. It is there referable to the word when used in a statute, but it therefore applies to legal proceedings and in all

cases where a contrary intent does not appear.

We concur in the judgment of his honor that the letters set out in the record have been duly probated and recorded as codicils to the last will and testament of Missouri A. Parham, and that "by virtue of the codicil dated April 29, 1902, the said Rosa E. Parham is the owner of the tract of land described as the share of Locket Parham in the lands of Missouri Parham for the term of her natural life, and to the rents arising therefrom since the death of Locket Parham."

Affirmed.

(178 N. C. 205)

# DIXON v. GREEN. (No. 226.)

(Supreme Court of North Carolina. Oct. 1, 1919.)

## 1. PLEADING $\S$ 34(3)—STATING CAUSE OF ACTION SUFFICIENT THOUGH INARTIFICIALLY DRAWN.

Under Revisal 1905, § 495, requiring liberal construction of a pleading, if in any portion of the pleading or to any extent it presents facts constituting a cause of action, or if sufficient facts can be fairly gathered from it, the pleading will stand, however inartificially drawn, or however uncertain and redundant its statements; every presumption being in favor of the pleader.

## 2. PLEADING $\S$ 9 — ALLEGATION OF FACTS FROM WHICH FRAUD MAY ABISE SUFFICIENT.

An allegation of facts from which the conclusion of fraud or undue influence may result is sufficient in pleading.

## 3. DEEDS $\S$ 72(1)—GRANTOR IMPOSED ON BY FRAUD AND UNDUE INFLUENCE MAY OBTAIN RELIEF.

If defendant's mind was so weak she was unable to guard herself against imposition, or to resist importunity or the use of undue influence, equity will grant her relief against plaintiff, her grantee, if she was in fact imposed on, either by fraud or undue influence, though mere weakness or inadequate consideration is insufficient.

## 4. APPEAL AND ERROR $\S$ 925(2)—ON REVIEW OF REFUSAL TO SUBMIT ISSUES OF FRAUD, SUPREME COURT MUST ASSUME ALLEGATIONS TRUE.

On defendant's appeal, the trial court having refused to submit issues tendered by her as to fraud and undue influence in plaintiff's procuration of a deed from her, the Supreme Court must assume defendant's allegations to be true in determining whether the issues were properly refused to be submitted.

## 5. DEEDS $\S$ 190—ANSWER IN SUIT TO RECOVER LOT SUFFICIENT TO RAISE ISSUES OF FRAUD AND UNDUE INFLUENCE.

In suit to recover a lot in a city, defendant's answer setting up that she was aged, weak, and infirm, and that she had intended only to

lease to plaintiff, instead of to convey to him, etc., held to raise the issues of fraud and undue influence.

# 6. PLEADING $\Rightarrow$ 93(1)—INCONSISTENT OR CONTRADICTION DEFENSES.

In suit to recover a lot, defendant could plead double, and set up inconsistent and contradictory defenses.

Appeal from Superior Court, Lenoir County; Gulon, Judge.

Action by David L. Dixon against Clara Green. From judgment for plaintiff, defendant appeals. New trial.

The plaintiff sued for the recovery of a lot in Kinston. He alleged ownership and right of possession, and the defendant's unlawful withholding of the possession from him. The defendant denied plaintiff's allegations, except as to her possession, and the plaintiff's demand for the possession, and further denied that she executed to the plaintiff the deed under which he claims the land, and averred that, if she did execute it, she did not, at the time, have sufficient mental capacity to do so, being then very old, about 78 years of age, and greatly enfeebled in mind and body, and very decrepit, and her mental faculties impaired by the infirmities of old age and by "wretched physical health"; that her daughter had advised her to come to New York, where she resided, presumably so that she might care for her. We will state the remainder of her averments in her own language. While in this enfeebled mental and physical condition, as above described—

"the question arose as to what would be done with her interest in said lot. She talked the matter over with the plaintiff, who was her next door neighbor, and in whom she had implicit confidence, and she did state to said plaintiff, upon his suggestion that he would take the land while she was away, that she would be willing to let him have it, if she went to New York, at the rate of \$25 per year, and at the same time she expressly stated to the plaintiff that it was her dower right and her only home, and that she had refused many times to sell it for large and valuable considerations, and that under no conditions would she part with her home, so that she could not return to it. That she does remember agreeing that the said plaintiff might have the use of the lot of land during her absence at the rate of \$25 per year, with the understanding that she in no way released her life estate therein, and should have her home returned to her when she returned to Kinston, but she denies that she ever agreed to anything else and she has no knowledge of any other understanding. And furthermore this defendant alleges that the plaintiff expressly stated and promised her in his conversation on the subject that she should not be disturbed in her home, and that the transaction that he referred to was for her protection, and that he was only to have the land during her absence from Kinston, and at the same time he proffered

and offered his help in getting away from Kinston, and promised that, if necessary, he would help her in returning to her home when she desired to return, and that in all these promises and conditions this defendant absolutely and implicitly relied upon the plaintiff to carry same out as same were understood by her and stated to her. That the plaintiff well knew and understood the weak and decrepit physical and mental condition of this defendant at the time hereinbefore mentioned, and well knew that she was a very aged colored woman, and had no knowledge of business transactions, and further well knew that she relied upon him to protect her, and the promises, statements, and representations herein made were made with such knowledge on the part of the plaintiff, were relied upon by the defendant, and served as an inducement upon which she acted; whatever action she took at the time, and the only action which she knows of or understood, however, being the verbal agreement herein referred to. That the said lot of land is a valuable lot in the city of Kinston, on McIlwean street, being one of the principal residential streets of the city, and being in a section where many of the most desirable citizens of Kinston reside, and constituting one of the most desirable residential sections of said city. That the said lot is in dimensions 80 feet front on McIlwean street by 169 feet deep, and that its rental value with the small house upon it in which this defendant resides would be at least \$100 per year. That the consideration appearing in the purported paper writing under which plaintiff claims is so grossly inadequate, and especially considering the conditions hereinbefore set forth, and the difference in station, ability, and standing of the parties, that this defendant is informed, believes, and avers that in equity the said consideration would necessarily shock the conscience of the court, and would not support an absolute deed to the life estate of the defendant to the said lot, even if such deed has been executed, which latter matter of the execution of the said deed is expressly denied. That the defendant is informed, believes, and avers that upon all the facts herein alleged the court of equity will not permit the plaintiff to recover possession of the lot of land by virtue of the purported paper writing herein referred to, and that said paper writing is a cloud upon defendant's life estate, which she is entitled to have removed, and that said paper writing is absolutely invalid and void. That further this defendant, now being 80 years of age, and in weakened physical condition, unable most of the time to leave her bed, has no other property whatever, except her interest in the lot herein set forth. That she is absolutely without any other home, and that if the court should sustain the alleged paper writing, under which the plaintiff claims in this case, it would result in taking from the defendant her home and leave her without any place of abode whatsoever."

There is a prayer for the proper relief. The court refused to submit issues tendered by the defendant as to fraud or undue influence, or to hear evidence offered by the defendant upon any such issues, as defendant has denied the execution of the deed. Defendant ex-

cepted. The court then submitted issues as to the execution of the deed, defendant's mental capacity, and plaintiff's ownership of the land, which the jury answered in favor of plaintiff. Judgment upon the verdict, and defendant appealed.

Cowper, Whitaker & Allen and J. L. Hamme, all of Kinston, for appellant.

Rouse & Rouse, of Kinston, for appellee.

WALKER, J. (after stating the facts as above). [1] The only question before us is the sufficiency of the answer to raise the issues tendered by the defendant regarding fraud and undue influence. We are required by the statute (Revisal, § 495) to construe a pleading liberally, and in enforcing this provision we have adopted this rule: That if in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand, however inartificially it may have been drawn, or however uncertain, defective, and redundant may be its statements, for, contrary to the common-law rule, every reasonable intendment and presumption must be made in favor of the pleader. This is what we held in *Blackmore v. Winders*, 144 N. C. 212, 56 S. E. 874, and more recently in *Brewer v. Wynne*, 154 N. C. 467, 70 S. E. 947, *Renn v. Railroad Co.*, 170 N. C. 128, 136, 86 S. E. 964, and *Lee v. Thornton*, 171 N. C. 209, 88 S. E. 232.

[2] There is no magic in using the word "fraud," as a term, in order properly to plead fraud, nor is it necessary to state "undue influence" in those words, in order to rely upon such a plea. It is sufficient to state the facts from which fraud and undue influence arise. While this has been held in numerous cases, there is a good statement of the doctrine in 12 R. C. L. at page 417, § 164, to this effect. While fraud must be clearly charged, it is not necessary to allege it in terms, if the facts alleged are such as in themselves constitute fraud, or if so alleged that fraud be inferred or presumed, for the acts charged are not less fraudulent because the word "fraud" or "fraudulent" is not employed by the pleader in characterizing them. In other words, an allegation of facts from which the conclusion of fraud may result is sufficient.

[3] Now as to what is sufficient to constitute fraud or undue influence: Although the plaintiff be not a lunatic or insane, yet, if her mind was so weak that she was unable to guard herself against imposition, or to resist importunity, or the use of undue influence, equity will grant her the relief she seeks, provided it be shown that she has been imposed upon by the use of either of the means enumerated. Mere weakness, or inadequate consideration, however, will not be sufficient. A court of equity cannot measure

the understandings or capacities of individuals. Where there is a legal capacity, there cannot be an equitable incapacity, apart from fraud. 1 Fonbl. Eq. B. 1, M. 2, S. 3. If she be of sane mind she has a right to dispose of her property, and her will stands in place of a reason, provided the contract or act justifies the conclusion that she has exercised a deliberate judgment, such as it is, and has not been circumvented, or imposed on by cunning, artifice, or undue influence, means abhorrent to equity, and constituting fraud. *Rippy v. Gant*, 39 N. C. 445.

"The mere fact that a man is of weak understanding, or is below the average of mankind in intellectual capacity, is not of itself an adequate ground to defeat the enforcement of an executory contract, or to set aside an executed agreement of conveyance. But where mental weakness is accompanied by other inequitable incidents—such as undue influence, great ignorance, and want of advice, and inadequacy of consideration—equity will interfere and grant either affirmative or defensive relief." *Eaton on Equity*, p. 317; *Sprinkle v. Wellborn*, 140 N. C. 173, 174, 52 S. E. 666, 3 L. R. A. (N. S.) 174, 111 Am. St. Rep. 827.

Lord Hardwicke, in *Earl of Chesterfield v. Janssen*, 2 Vesey, Sr., 125, said there is a third kind of fraud, in his classification which has been generally adopted, which may be presumed from the circumstances and conditions of the parties contracting, and this goes further than the rule of law, which is that it must be proved, and not presumed; but it is wisely established in this court, to prevent taking surreptitious advantage of the weakness or necessity of another, which knowingly to do is equally against conscience as to take advantage of his ignorance. The subject is fully discussed in *Sprinkle v. Wellborn*, supra, in *Pritchard v. Smith*, 160 N. C. 79, 75 S. E. 803, and in *Hodges v. Wilson*, 165 N. C. 323, 81 S. E. 340, where the cases are collected and the limitation of the doctrine with respect of fraud in conveyances is properly limited. See, also, the following other cases decided by this court: *Smith v. Beatty*, 37 N. C. 456, 40 Am. Dec. 435; *Suttles v. Hay*, 41 N. C. 124; *Mullins v. McCannless*, 57 N. C. 425; *Hartly v. Estis*, 62 N. C. 167; *Myatt v. Myatt*, 149 N. C. 137, 62 S. E. 887; *Bellamy v. Andrews*, 151 N. C. 256, 65 S. E. 963; *Braddy v. Elliott*, 146 N. C. 578, 60 S. E. 507, 16 L. R. A. (N. S.) 1121, 125 Am. St. Rep. 523; *Buffalow v. Buffalow*, 22 N. C. 241, *Futrill v. Futrill*, 58 N. C. 61; *Id.*, 59 N. C. 337. The last case, while slightly different in its facts, and in some respects not so very material, lays down the rule which should govern in cases where there is no technical or well-defined confidential relation, but where there was professed friendship for the grantee, and acquired influence over him, and circumstances of imposition, oppression, and deceit, the grantor having become enfeebled in mind and body, and the deed having been procured when

the grantor was in no condition to understand it, and did not know its contents, and had no sufficient opportunity to obtain the counsel and advice of a disinterested friend, relying upon the trust and confidence he placed in the grantor instead.

[4, 5] With these authorities before us, let us briefly review the facts as alleged in the answer; for the action of the judge in disregarding them as not pertinent, and his refusal to submit issues upon them, were the same as if the plaintiff had demurred to the defense so set up. We must assume these allegations to be true upon this appeal, although it may hereafter so happen that the proof will not substantiate the charge. The defendant was, at the time of this transaction, very old (now 80 years of age) and decrepit, in wretched physical health, unable most of the time to leave her bed, and without such mental capacity as would enable her to execute a deed understandingly. She was going to New York to spend a while with her daughter, and wished to lease her home while she was absent. She had been offered many times a large price for it, and had refused to sell. In this situation she thought of the plaintiff, as being her neighbor who lived next door to her, and who had ostensibly been a friend, in whom she had placed "implicit confidence." She turned to him for succor, and upon his suggestion that he would take the land while she was gone she stated to him that she would take \$25 per year, if she did go to New York, remarking at the time that it was her dower and her only home, and that under no condition would she part with this home, so that she could not return to it, and it was agreed that it should be returned to her when she came back to Kinston, so that she should not be disturbed in her home; that this was the only understanding; that he promised to help her go to New York and return to her home, and she relied upon all those promises when she signed the paper; that the plaintiff well knew of her weak and decrepit condition and of her age, and also that she relied upon him to protect her, and his promises, and his attitude towards her, were the inducements to sign the paper. The said lot is a valuable one, being situated on one of the principal residential streets, and is one of the most desirable lots in the city of Kinston, it being 80 feet in width by 169 feet in length, and its rental value is at least \$100 per year; that the consideration stated in the deed held by the plaintiff is a gross-

ly inadequate one (being only \$25 annually so long as the grantor lives), so gross that it would "shock the conscience and moral sense of the court"; that the difference in the station, ability, and standing of the parties is very great, defendant being the weaker of the two; that if the lot is taken from her she will be left without any place of abode. Upon the allegations, and in accordance with the precedents, we are of the opinion that the case should be submitted to the jury upon both issues, fraud and undue influence. The latter, while generally classed under the title of fraud, is not necessarily a fraudulent influence, though it frequently is so. It is a controlling influence when the weaker succumbs to the stronger and the latter's will is substituted for that of the former. It is a paramount influence and when it is used for the benefit or advantage of him who exercises it for such a selfish purpose, it may well be called "fraudulent," and the law so regards it; but there may be cases where it is not actually fraudulent, but in a moral sense innocent, though not harmless.

In this case we have allegations sufficient to show fraud and undue influence, viz. mental and physical weakness and imbecility, extreme old age, grossly inadequate consideration, greater superiority of the one over the other, the relation of friend and adviser, and consequent full confidence of the weaker in the stronger and reliance on him, the necessary condition of the defendant, and finally an allegation of a virtual misrepresentation as to the contents of the deed, which is an absolute conveyance of the land, and not a lease, founded upon a small consideration.

[6] The defendant could plead double, and set up inconsistent or contradictory defenses. *McLamb v. McPhail*, 126 N. C. 218, 35 S. E. 426; *Williams v. Hutton*, 164 N. C. 216, 80 S. E. 257; *Clark's Code* (3d Ed.) § 245; 1 *Pell's Revisal*, p. 226, § 482, and note, with cases. It may be that, in the development of the case, the defendant's proof may not sustain her allegations of fraud and undue influence; but what she has charged is sufficient in law, and entitles her to be heard before the jury.

As the issues will be somewhat interdependent, and injustice may be done by allowing them as now answered to stand, we direct that they be set aside, and that the whole case be tried again upon all of the issues which are raised by the pleadings; and it will be so certified.

New trial.



(178 N. C. 135)

**WHARTON v. NEW YORK LIFE INS. CO.**  
(No. 173.)

(Supreme Court of North Carolina. Oct. 1, 1919.)

**1. INSURANCE ¶668(12) — CREDIBILITY OF WITNESSES BEING INVOLVED, SUICIDE OF INSURED QUESTION FOR JURY.**

The credibility of witnesses being involved, the question on the affirmative defense of suicide of insured is for the jury.

**2. APPEAL AND ERROR ¶1001(1)—FINDINGS OF FACT NOT REVIEWABLE.**

There being evidence to go to the jury that insured's death was accidental, their finding against suicide is not reviewable.

**3. INSURANCE ¶665(6)—EVIDENCE OF NEGLIGENCE OF PASSENGER NOT PROOF OF INTENT TO COMMIT SUICIDE.**

Evidence that insured, killed by a train, was guilty of negligence, does not of itself prove an intent to commit suicide.

**4. INSURANCE ¶646(7)—BURDEN OF PROOF ON PARTY ALLEGING SUICIDE.**

There is a presumption of law against insured having committed suicide, so that the burden of proof is on the party asserting suicide.

**5. INSURANCE ¶527—INSURED "TRAVELING AS PASSENGER," WITHIN POLICY, WHEN KILLED AT INTERMEDIATE STATION.**

Death of insured was caused by accident while he was "traveling as a passenger," within a life policy providing, in such case, for recovery of double the face of the policy, though he had got off at an intermediate station for a legitimate purpose, while the train was waiting, and was killed in attempting to reboard it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Traveling.]

**6. EXECUTORS AND ADMINISTRATORS ¶29(2) —LETTERS OF ADMINISTRATION NOT SUBJECT TO COLLATERAL ATTACK.**

Letters of administration, issued on a proper finding of residence, cannot be collaterally attacked on the ground of different residence.

Appeal from Superior Court, Pamlico County; Daniels, Judge.

Action by Lovie T. Wharton, administratrix, against the New York Life Insurance Company. Judgment for plaintiff, and defendant appeals. No error.

This was an action on a \$5,000 insurance policy on the life of Raymond M. Wharton, with the following additional provision:

"Or double the face of this policy upon receipt of due proof that the death of the insured was caused directly by accident while traveling as a passenger on a street car, railway train, steamboat, licensed for transportation of passengers, or other public conveyance operated by a common carrier."

And with the further provision:

"In event of self-destruction during the first two years, whether the insured be sane or insane, the insurance under this policy shall be a sum equal to the premium thereon, which has been paid to and received by the company, and no more."

The defendant set up the defense that—

"The death of plaintiff's intestate was caused by his own act of self-destruction."

The jury found the issues as follows:

(1) "Was the death of the said Raymond M. Wharton caused directly by accident while traveling as a passenger on a railroad train operated by a common carrier? Answer: Yes.

(2) "Was Raymond M. Wharton's death due to self-destruction? Answer: No.

(3) "In what amount, if any, is defendant indebted to the plaintiff? Answer: \$10,000, with interest from the 20th day of June, 1917, at the rate of 6 per cent. per annum until paid."

Judgment accordingly. Appeal by defendant.

James H. McIntosh, of New York City, Moore & Dunn, of Newbern, and James H. Pou, of Raleigh, for appellant.

Z. V. Rawls, of Bayboro, and D. L. Ward and Ward & Ward, all of Newbern, for appellee.

CLARK, C. J. It is admitted that the plaintiff's intestate, R. M. Wharton, on June 3, 1917, boarded a train at Greensboro, with ticket to Goldsboro, which train was due to arrive in Raleigh at 4:20 a. m. It was also in proof that the deceased bought a 1000-mile book at Greensboro, and exchanged 189 miles of it for a ticket to Newbern, and rode in the white day coach from Greensboro to Raleigh, and was killed by the same coach as the train was backing out of the Raleigh station about 4:35 a. m., and that he had on his person the mileage book and coupon from Greensboro to Newbern, and was on his way to his farm and home in Pamlico county. It was also in evidence that his family was in Greensboro for the purpose of educating his children, and that he had a small grocery store there. It was also in evidence that he stepped off the coach at Raleigh, but remained in the station, and was walking up and down on the concrete pavement between the tracks, and was some 10 feet from the track when "All aboard!" was called; that he was then either standing or sitting on a box, and started towards the backing train; that in some way he got on the track between the Pullman and the day coach, and was run over and killed.

The defendant offered evidence which it contended should have satisfied the jury that he deliberately crawled under the backing train for the purpose of being run over. The

plaintiff offered evidence, that it contended should satisfy the jury, that the deceased ran to get on the day coach, and, the door of the vestibule to that and to the Pullman being closed, he stumbled or fell, and was caught on the track between that and the Pullman, and was run over and killed. They also offered evidence tending to show that the deceased had no motive to commit suicide, and that his death was entirely accidental.

[1, 2] This evidence was earnestly discussed here, and doubtless before the jury. The jury, however, found that the death of the deceased was caused by an accident, and not as an act of self-destruction. It can serve no purpose to elaborate the testimony, for there was evidence tending to sustain the theory that the death was caused by an accident, and the burden of proof was upon the defendant to establish its allegation that the death was deliberate self-destruction. The function of the jury was to determine the fact. The burden of proof being on the defendant to prove its defense, the court could not adjudge that an affirmative defense is proven, for that involves the credibility of the witnesses, which is a matter for the jury. *Spruill v. Insurance Co.*, 120 N. C. 141, and numerous citations thereto in the *Anno*. Ed., 27 S. E. 39. Besides, there was evidence to go to the jury that the death of the deceased was accidental.

[3, 4] This is not a question whether the deceased was guilty of contributory negligence, for, if it were conceded that he was, this does not of itself prove an intent to commit suicide. The presumption of law also is against self-destruction, and the burden is on the party who is asserting it. The court properly charged the jury that the burden was on the defendant to satisfy the jury by the greater weight of the evidence that the deceased got in the way of the train with the intent to destroy himself, and unless the jury so found to answer the second issue "No."

[5] The court also charged the jury:

"If you find from the greater weight of the evidence that Raymond M. Wharton, the deceased, purchased the ticket from Greensboro to Newbern, and was proceeding on the journey on the train that killed him, and on the arrival of the train at Raleigh, where it had a stop for some little time prior to its proceeding to Goldsboro, and he got off the train for the purpose of getting a cup of coffee, or some breakfast, or for any other legitimate purpose, and with the intent to take the same train at the time of its departure, and continue his journey, and that at the time the conductor or porter cried 'All aboard!' for the departure of the train he was waiting, and undertook to get aboard the cars to continue his journey, and in the effort to get aboard he accidentally fell on the track, and was thus accidentally injured, and died the same day from the effect of the injury so received, you should answer the first issue 'Yes.'"

The defendant also excepted to this, but it is correctly stated.

The defendant further contends that, as the policy provides liability "when the death of the insured was caused directly by accident while traveling as a passenger," the deceased having gotten off the train while it was standing in Raleigh, he was not traveling as a passenger at the time. He cites certain cases where it was so held when the accident occurred under a policy which provided that the injury must occur while the passenger is "*riding on the train*." It is not necessary to consider whether this is not too technical (and in fact it has been overruled), for here the language of the policy was altered, perhaps intentionally, on account of those decisions, and provides, "while the insured is traveling as a passenger."

These words have been construed by this court in *Wallace v. Railroad*, 174 N. C. 171, 93 S. E. 731, which held:

"One who has purchased his ticket to his destination on a passenger train does not relieve the railroad of its duty to him as such passenger by getting off the train during its stop at an intermediate station, without notice to its employees or objection from them, to see some person there on business."

In that case there is a full and well-considered opinion by Allen, J., who held, with citation of authorities, that while there is some conflict—

"The better rule, and one supported by the weight of authority, is that a passenger does not lose his rights as such by leaving the train temporarily at an intermediate station for a lawful purpose. 10 C. J. 624; 4 R. C. L. 1040; *Railroad v. Sattler*, 64 Neb. 636 [90 N. W. 649, 57 L. R. A. 890, 97 Am. St. Rep. 666]; *Dodge v. Railroad*, 148 Mass. 207 [19 N. E. 373, 2 L. R. A. 83, 12 Am. St. Rep. 541]; *Parsons v. Railroad*, 113 N. Y. 355 [21 N. E. 145, 3 L. R. A. 683, 10 Am. St. Rep. 450]; *Railroad v. Coggins* [88 Fed. 455] 32 C. C. A. 1, and other authorities in the note to the citation from *Corpus Juris* and *Ruling Case Law*, *supra*."

He becomes a passenger when he goes on the premises for that purpose, and this relation continues till the termination of the contract of carriage. *Daniel v. Railroad*, 117 N. C. 592, and citation thereto in the *Anno*. Ed., 23 S. E. 327, 4 L. R. A. (N. S.) 485.

[6] The defendant also contends that there is a defect in jurisdiction, in that letters of administration were taken out in Pamlico county. The plaintiff testified that at the time of the accident she had two homes; that she had been living in Greensboro nearly a year, but that her sojourn there was temporary, and for the purpose of educating her children; that her house and home were in Pamlico, and she had returned there soon after the death of her husband. The probate court, having found that the plaintiff's home, and the residence of the deceased, was still

in Pamlico at the time of his death, issued letters of administration there, and they cannot be impeached collaterally. The defendant should have moved in that court to cancel her letters in Pamlico, if it had sufficient proof. *Reynolds v. Cotton Mills*, 177 N. C. 412, 99 S. E. 240.

This point was not made on the trial, nor is it presented by any assignments of error. The defendant attempted to raise it here for the first time on his general exception to the refusal of the motion to nonsuit. Had it been pleaded, or even had exception been taken on the trial, the plaintiff would have had opportunity to put on fuller testimony. The objection cannot be raised collaterally when it is not pleaded, as a defense. It is not seen that the defendant has been prejudiced in any wise by the action having been brought in Pamlico, instead of Guilford.

No error.

(178 N. C. 198)

LEE v. L. J. UPTON & CO. (No. 171.)

(Supreme Court of North Carolina. Oct. 1, 1919.)

**1. CONTRACTS §280(1)—RIGHT TO RECOVER AS FOR BREACH OF AGREEMENT TO FURNISH BARRELS.**

Plaintiff cannot recover damages as for defendant's failure to deliver barrels for crop of potatoes, so that the crop could be delivered by plaintiff between the 1st and 5th of June, where he was not ready to dig the potatoes until the 5th of June, at which time he had 750 barrels on hand from defendant, and did not begin digging until June 11th, and completed delivery of the crop of 1,500 barrels by June 20th.

**2. PLEADING §380 — EVIDENCE NOT SUPPORTED IN PLEADING INADMISSIBLE.**

Evidence unsupported by allegations in the pleadings was properly excluded.

**3. DAMAGES §28—FOR BREACH OF CONTRACT NOT CONTEMPLATED BY PARTIES NOT RECOVERABLE.**

Damage from a breach of contract not reasonably within the contemplation of the parties is not recoverable.

Appeal from Superior Court, Pamlico County; Daniels, Judge.

Action by R. H. Lee against L. J. Upton & Co. From a judgment of nonsuit, plaintiff appeals. Affirmed.

This is an action for the recovery of \$2,000 for breach of contract. The contract which was entered into by the plaintiff and defendant and offered in evidence provides that the defendant was to furnish fertilizer and 100 bags of Irish cobbler seed potatoes at a price to be paid by plaintiff to defendant. The defendant was also to furnish and deliver to plaintiff, f. o. b. Oriental, N. C., one-half

of the empty barrels and covers necessary for harvesting said crop of potatoes. The defendant was also to furnish to plaintiff all the empty barrels and covers necessary for harvesting all of his half of said potatoes. The plaintiff was to furnish the land, properly prepare same for crop of early potatoes, plant, cultivate, and harvest said potatoes under the supervision, direction, and control of defendant, and to deliver same f. o. b. cars at the railroad station at Oriental, where they were to be divided equally by the plaintiff and defendant. The plaintiff was to sell to the defendant his half of his said crop of potatoes for \$2.50 per barrel. The seventh paragraph of the contract is as follows:

"7. The said second party hereby agrees to sell to the said first party, and the said first party hereby agrees to purchase from the said second party, all of the said second party's one-half part, or share, of all strictly No. 1 potatoes and all strictly No. 2 potatoes, which shall be grown from the said crop of Irish potatoes, at the price of \$2.50 per barrel for No. 1's, and \$2.50 per barrel for No. 2's, put up in new standard barrels, filled full and well-rounded, and properly graded, and delivered to the said first party, or its agent, free on board cars at Oriental railroad station, in such quantities from day to day, or from time to time, between June 1 and June 5, 1917, as the said first party, or its agent, may direct. From the purchase price of said second party's one-half share of said potatoes so delivered to the first party the first party shall deduct whatever amount the second party may owe it, and shall pay the balance, if any, to the said second party, promptly after deliveries."

In the complaint the plaintiff alleges a breach of contract, in that the defendant did not furnish him barrels in time for him to deliver the Irish potatoes between June 1st and June 5th, and upon the trial he offered evidence that he intended planting sweet potatoes where he had the Irish potatoes, and that by reason of the delay his sweet potato crop was later and damaged. This evidence was excluded, and the plaintiff excepted. At the conclusion of the evidence his honor held that the plaintiff was not entitled to recover damages for breach of contract, and upon payment into court of the amount due the plaintiff for his part of the potatoes according to the contract entered judgment of nonsuit.

Z. V. Rawls, of Bayboro, and D. L. Ward, of Newbern, for appellant.

Moore & Dunn, of Newbern, for appellee.

ALLEN, J. Conceding that the contract required the defendant to furnish barrels, so the plaintiff could deliver the potatoes between the 1st and the 5th of June, the evidence of the plaintiff shows that the failure to do so was not the cause of the delay, and that the defendant was not damaged because

he did not get the barrels in time. The plaintiff testified in his own behalf:

"I sent word to the defendant that my potatoes were ready for digging, and I wanted to start on the 5th of June. I sent this message on the 4th of June."

He also admitted that he had over 700 empty barrels at his house on the 5th of June, and his brother, M. D. Lee, who was a witness for the plaintiff, testified that he got for the plaintiff from the defendant 500 barrels in one load and 250 barrels in another before June 4th.

[1] If, therefore, the plaintiff was not ready to dig his potatoes until the 5th of June, and he then had 750 barrels, it is difficult to see upon what theory he can hope to recover damages for failure to furnish barrels to enable him to make delivery between the 1st and the 5th of June. The evidence shows also that the plaintiff did not begin digging until June 11th, and that he completed the delivery of his crop of 1,502 barrels by June 20th.

[2, 3] The evidence as to the sweet potato crop is immaterial, as the plaintiff is not entitled to recover damages; but it was also properly excluded upon the ground that there was no allegation to support it, and because there is nothing to prove that such damage was reasonably within the contemplation of the parties.

Affirmed.

(178 N. C. 118)

MOORE v. GREENVILLE BANKING & TRUST CO. (No. 177.)

(Supreme Court of North Carolina. Sept. 24, 1919.)

**1. HUSBAND AND WIFE §14(2)—ON CONVEYANCE TO HUSBAND AND WIFE, THEY TAKE BY THE ENTIRETY.**

When land is conveyed or devised to husband and wife, nothing else appearing, they take by the entirety, an anomalous estate, characterized by five unities, those of person, time, title, interest, and possession, and on the death of either the other takes the whole by the right of survivorship; Revisal 1905, § 1579, abolishing the right of survivorship in joint tenancies, not applying.

**2. HUSBAND AND WIFE §14(10)—NEITHER TENANT BY ENTIRETY CAN CONVEY WITHOUT THE OTHER.**

Neither husband nor wife can dispose of their interest, held by the entirety, or any part thereof, without the assent of the other, and the deed of either, without joinder of the other, is void.

**3. HUSBAND AND WIFE §14(11) — LAND HELD BY THE ENTIRETIES CANNOT BE SOLD UNDER EXECUTION.**

Land held by husband and wife as tenants by the entireties cannot be sold under execu-

tion, nor can the interest of either husband or wife be so sold.

**4. LIMITATION OF ACTIONS §73(5) — ONE TENANT BY THE ENTIRETIES CANNOT BE BARRED FROM RECOVERING LAND UNLESS OTHER IS BARRED.**

One spouse cannot be barred by the statute of limitations from recovering land held by the entireties unless the other is also barred.

**5. HUSBAND AND WIFE §14(2)—TENANCY BY THE ENTIRETY MAY BE DESTROYED BY JOINT ACT OF SPOUSES.**

The unity or entirety of an estate by the entireties held by husband and wife may be destroyed or dissolved by the joint acts of the spouses, and the estate turned into a tenancy in common or into one in severalty.

**6. REFORMATION OF INSTRUMENTS §13(4)—WHERE TENANCY BY THE ENTIRETIES WAS NOT INTENDED, INSTRUMENT MAY BE REFORMED.**

Where it appears that no such estate in husband and wife as that by the entireties was intended, but that it was the purpose they should hold as tenants in common, in proper cases the instrument of conveyance will be reformed to carry out the intention.

**7. HUSBAND AND WIFE §14(7) — UNLESS CONVEYANCE AS TENANTS IN COMMON WAS INTENDED, SPOUSES TAKE BY ENTIRETIES.**

The intention appearing, a conveyance may be made to husband and wife as tenants in common; otherwise, they will take by the entireties, with right of survivorship.

**8. DIVORCE §322 — DIVORCE DECREE CHANGES ESTATE BY ENTIRETIES INTO ONE IN COMMON.**

A divorce a vinculo, as it destroys the unity of an estate by the entireties in husband and wife, will convert it into one in common.

**9. BANKS AND BANKING §134(9) — ON SALE OF ESTATE IN ENTIRETY, ONE-HALF DEPOSITED IN BANK FOR HUSBAND IS SUBJECT TO EXECUTION.**

Where a husband and wife, owners of an estate by the entireties, sold it, agreeing to sever the unity existing between them, and deposited half the proceeds in bank for the wife, and the other half in another bank in her name for the secret benefit of her husband, who was in failing circumstances, such other bank, to which the husband was liable as a surety on his firm's note, was entitled to charge the deposit in it with the amount of his debt to it.

**10. BANKS AND BANKING §154(9) — WHETHER BANK DEPOSIT IN NAME OF WIFE WAS FRAUDULENT AS TO CREDITORS FOR THE JURY.**

In a wife's suit against a bank to recover a deposit, consisting of half the proceeds of sale of a lot held by her and her husband as tenants by the entireties, the husband's share having been deposited in her name, he being in failing circumstances, whether the money was deposited with defendant bank and another, half in each of them, for their accommodation, or was put in under a false designation of the depositor as the wife to defraud defendant bank,

the husband's creditor, *held* for the jury under the evidence.

**11. HUSBAND AND WIFE ⇨14(2)—WHETHER, ON SALE OF ESTATE BY ENTIRETIES, PROCEEDS WERE TO BE HELD IN SEVERALTY FOR THE JURY.**

In a wife's suit against a bank to recover a deposit, consisting of half the proceeds of sale of a lot held by her and her husband as tenants by the entireties, the husband's share having been deposited in her name, he being in failing circumstances, the question whether plaintiff wife expressly or inferentially agreed that any estate by the entireties in the lot should be changed into an estate in severalty in the proceeds of its sale, *held* a question for the jury.

**12. BANKS AND BANKING ⇨134(9)—BANK MAY SET OFF AGAINST FRAUDULENT DEPOSIT IN WIFE'S NAME HUSBAND'S DEBT.**

A bank may set off against a deposit standing in a wife's name a debt due it from her husband, where the deposit was of the husband's funds, and was made in the wife's name to defraud creditors; Revisal 1905, §§ 960-962, invalidating fraudulent transfers.

Appeal from Superior Court, Pitt County; Guion, Judge.

Action by Mrs. M. S. Moore against the Greenville Banking & Trust Company. From judgment for defendant, plaintiff appeals. No error.

The action was brought by the feme plaintiff against the defendant to recover of it an alleged deposit of \$2,090.56, and to recover damages for refusal of defendant to honor plaintiff's check. (This last cause of action, however, has been abandoned.) The facts out of which this controversy arose may be briefly stated as follows:

Prior to the fall of 1915, plaintiff's husband, who is a party to this action, and W. L. Hall, were doing a partnership business in the town of Greenville, and engaged in buying and selling farm products. The firm carried a banking account with defendant, and for the purpose of securing overdrafts executed to defendant company their note for \$2,000, appearing in the record. W. M. Moore signed this note as surety. Thereafter said firm and the said W. M. Moore, as surety, became indebted to defendant bank in the sum of \$2,090.56. The firm became financially distressed, failed, and refused to pay the note. Hall was absolutely insolvent. Moore refused to pay, stating "that all of his property was in his wife's name, and the bank could whistle for its money." Thereupon, the credit of the firm having been given upon the bona fide belief of the bank in Moore's solvency, the bank investigated Moore's financial condition. This investigation disclosed that Moore had had considerable property, the title to all of which had become vested in

his wife, the plaintiff. It found that plaintiff and her husband were the joint owners of a valuable residential lot in the town of Greenville, which they had purchased in 1908, and which they sold in the fall of 1915 for \$12,000 cash, \$6,000 of which was deposited by W. M. Moore in the National Bank of Greenville in the name of the plaintiff, and the other \$6,000 was deposited in the defendant bank by said W. M. Moore in the name of the plaintiff.

The bank finding that Moore did not intend to pay his obligation as surety, and otherwise, sought advice as to how it might protect itself from loss, and was advised that, upon the voluntary conversion of said real estate into cash, the estate by entirety was dissolved; that its common-law incidents no longer applied; that one-half of the purchase price received for said lot, to wit, \$6,000, became the sole property of W. M. Moore, and liable for his debts; that Moore had no legal right to give the plaintiff all of the said purchase price, and thereby defeat the payment of his joint and individual liability to the bank. Thereupon the bank, under date of February 1, 1916, notified the plaintiff of her status at the bank, and of the indebtedness of her husband, and of his refusal to meet his obligation, and further notified her that in order to protect itself from loss it would charge her account with an amount sufficient to pay the indebtedness due by said W. M. Moore; the bank contending that the plaintiff knowingly permitted Moore to perpetrate a fraud upon the bank, and was a party thereto in so far as she accepted all of said purchase price received for said lot in furtherance of the plan of W. M. Moore to defeat his liability to the bank, and thereupon the bank charged the amount of said note and interest to said fund received by virtue of the sale of said lot as aforesaid, and the plaintiff was duly notified that the bank would not honor any check drawn on said account, which reduced the amount of said account below the sum of \$2,090.56. Upon receipt of this notice the plaintiff drew a check on defendant bank, which it refused to pay, and which if it had paid, would have reduced the balance in her name below the amount of defendant's claim, and thereupon the feme plaintiff brought this action to recover said deposit of the bank. Thereafter W. M. Moore, her husband, was made a party, as appears in the record.

When the case was first heard, there was a mistrial, and thereafter the trial judge rendered judgment in favor of the plaintiff upon the pleadings, from which judgment the defendant appealed. This court, on the appeal, granted a new trial, and the case upon the second hearing, having been heard upon its merits, the result was that the jury answered

all of the issues against the plaintiff, finding by its verdict that the money in defendant bank was the sole property of W. M. Moore, and placed by him in plaintiff's name for the purpose of defrauding the bank. Plaintiff appealed.

F. G. James & Son, of Greenville, and W. F. Evans, of Raleigh, for appellant.

Ablon Dunn and Skinner & Whedbee, all of Greenville, for appellee.

WALKER, J. (after stating the facts as above). The case was before this court at the spring term, 1917, and the decision below was reversed. It is reported in 173 N. C. at page 180, 91 S. E. 793. A careful review of that opinion clearly shows that the governing principles of law involved in this litigation have already been passed upon by the court favorably to the defendant. Especially is this so when we take into consideration the full force of the following excerpt from our opinion found on the bottom of page 183 of 173 N. C., on page 795 of 91 S. E.:

"In the present instance, as we have seen, the claim of the defendant bank is against both the partnership and the individual members, who indorsed its note as sureties, and, under the doctrine recognized and approved by these and like authorities [supra] on the subject, if the facts should be established as alleged and contended for by defendant bank, the right of appropriation, to the extent required to satisfy the claim, would arise to the bank and the defendant is therefore entitled, as stated, to have the questions determined on proper issues. And the principle is in no way affected by the fact that the deposit now stands in the name of the plaintiff, the bank having taken it in ignorance of the true conditions affecting its rights. If, as defendant avers, it was in fact and truth the husband's property, and placed in the wife's name with intent to defraud creditors and the husband being insolvent, she was a volunteer, or if she participated in the fraudulent purpose, in such case the attempted appropriation is avoided by our statute to prevent fraudulent gifts and conveyances (Revisal, §§ 960-962), and the question can, for the purposes of this defense, be considered and dealt with as if the deposit stood in the name of the husband, a course pursued with approval in *Citizens' Bank v. Garnett*, 21 Kan. 354, an apt authority for the disposition we make of the present appeal."

On the new trial below, issues submitted, with the annexed answers thereto of the jury, were as follows:

"(1) Is the defendant, W. M. Moore, indebted to the Greenville Banking & Trust Company, and, if so, in what amount? Answer: Yes, \$1,748.

"(2) Was the property purchased of T. E. Hooker paid for with the individual funds of Mrs. M. S. Moore? Answer: No.

"(3) Was W. M. Moore the owner of the money deposited in the defendant bank? Answer: Yes.

"(4) Were the proceeds of the property sold to W. H. Long deposited in the Greenville

Banking & Trust Co., in the name of M. S. Moore for the fraudulent purpose of preventing the Greenville Banking & Trust Co. from collecting the amount due and owing it by W. M. Moore? Answer: Yes."

These issues seem to cover the questions, which this court directed to be submitted to the jury, and the answers thereto all seem to have been in favor of the defendant bank. Whether the deed from Hooker and wife to Moore and wife creates a tenancy in common or an estate by the entirety, it would seem, under the facts, that a conversion of the estate took place, as it was intended that it should do so, upon the execution of the deed to Long. That there was an intention to convert the estate by the entirety into an estate in severalty is evidenced by the fact that the husband attempted to give all of his interest therein to the plaintiff, his wife.

We do not deem it necessary to consider, or to decide, whether the voluntary conversion of the land into money by the sale to W. H. Long, nothing more appearing, divested the proceeds of every attribute of an estate by the entirety, simply by the conversion itself, because we are of the opinion that, by the very conduct of the parties, such a conversion and divestiture resulted, and it was manifestly so intended, as we will show, when the fund was divided into halves and deposited by the mutual consent of the parties, one half thereof in the defendant bank and the other half in the National Bank of Greenville. Mrs. Moore asserts that the deed for the Hooker lot was bought with her own money, which was derived from other property owned by her in Grimesland. We will state this matter more at large and in substantially her own way. She admits, in her reply to the answer of the defendant, that for several years prior to October 22, 1915, the Hooker lot was held in the name of the plaintiff and her husband, W. M. Moore, "by deed in the entirety," but that, in fact, it was bought and paid for with her individual money, and that, when the deed was written, it was by inadvertence of the draftsman conveyed to both husband and wife by the entirety, and that after the discovery of the same she and her husband agreed that it might be so held, as appears in said deed, but for the real use and benefit of the plaintiff; that she sold the property to W. H. Long on October 22, 1915, and that with her husband she joined in a deed conveying the same for \$12,000 to him. She further admits that in payment for the said lot the purchaser, W. H. Long, did draw two checks, made payable to the order of the plaintiff, one in the sum of \$6,000, which was deposited in the National Bank of Greenville, in the name of, and to the credit of, the plaintiff, and another check in the

sum of \$6,000, made payable to her order and deposited in the name of, and to the credit of, the plaintiff in the defendant bank, and that the reason for so doing was to divide said deposit between the two banks, in order that both might share in the benefit of the deposit of said fund equally, which was done at the request of one of the banks.

Now, if it was the purpose to convert the land into money, which should be the sole property of Mrs. Moore, this would destroy the estate by the entirety, and it would thereby become an estate in severalty, or, if this was to be so in form merely, but not in fact, and the intention was that, while the apparent title to the fund stood in the name of Mrs. Moore, the real title was to be in them severally, one-half to belong to each, this was a conversion also into an interest in severalty in the money, or, in other words, a conversion of the land into money and a division into equal shares of the fund. If the latter was the agreement, and such a conversion could be accomplished by their consent, the husband's title to the half deposited in the defendant bank could not be concealed and covered up to defraud his creditors; he being then insolvent and not having other property sufficient and available to pay his then existing creditors. It seems to us that the jury have found this to be the truth of the matter, and the real transaction, though in form it appears to be otherwise, and that Mrs. Moore owned the entire fund; and for the sake of discussion we may concede, without deciding, that when the conversion into money was made they could enter into an arrangement, in defiance of the husband's creditors, by which she should have it all.

Let us see, then, if the jury have sufficiently and conclusively decided that, while Mrs. Moore was to take it all in form, the other was the real purpose, and that her husband was to be the beneficial owner of the half which was deposited in the defendant bank, subject to his check, and that the deposit in her name was a mere shift to deceive, circumvent, and defraud creditors. They have said that the Hooker lot was not bought with the individual funds of Mrs. Moore, and that W. M. Moore was the owner of the funds deposited in the defendant bank, and not only is that true, they further say, but that the deposit was made in the name of his wife for the fraudulent purpose of preventing the defendant bank from collecting the amount of Moore's indebtedness to it. This effectually disposes of the idea that there could have been any "estate by the entirety" in the fund realized by the sale of the Hooker lot in Greenville, and, on the contrary, the jury find as a fact that the former estate by the entirety in the lot had, by the express agreement between the

apparent owners thereof, been converted into an estate in severalty, as the idea is excluded thereby, that it was understood that Mrs. Moore should be the sole owner of the fund.

[1-4] The characteristics of the anomalous estate, which is denominated as one by the entirety, are well understood. Blackstone (book 2, p. 182) defines this estate by these words:

"If an estate in fee be given to a man and his wife, they are neither properly joint tenants nor tenants in common; for, husband and wife being considered one person in law, they cannot take the estate by moieties, but both are seized of the entirety, per tout et non per my, the consequence of which is that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain in the survivor." *Mordecai's Law Lectures* (1907) p. 559.

This court has held that the husband is entitled to the income, increase, or usufruct of the property. *Long v. Barnes*, 87 N. C. 329; *Simonton v. Cornelius*, 98 N. C. 437, 4 S. E. 38; *Bruce v. Nicholson*, 109 N. C. 202, 13 S. E. 790, 28 Am. St. Rep. 562; *Bank v. Gornto*, 161 N. C. 841, 77 S. E. 222; *West v. Railroad Co.*, 140 N. C. 620, 53 S. E. 477, 6 Ann. Cas. 360. The estate was predicated upon the fact that, in law, the husband and wife, though twain, are regarded as one—there being, in other words, a unity of person, which has been called the fifth unity of this estate, the others being of time, title, interest, and possession, which also belonged to an estate by joint tenancy. When land is conveyed or devised to husband and wife, nothing else appearing, they take by the entirety, and upon the death of either the other takes the whole by the right of survivorship. 2 Bl. 182; *Topping v. Sadler*, 50 N. C. 357; *Freeman on Cotenancy and Partition*, § 64; *Harrison v. Ray*, 108 N. C. 215, 12 S. E. 993, 11 L. R. A. 722, 23 Am. St. Rep. 57, and the cases supra, beginning with *Long v. Barnes*. The statute (Laws 1784, c. 204, § 6; Revisal of 1905, § 1579) abolishing the right of survivorship in joint tenancies does not apply to this estate. *Motley v. Whitmore*, 19 N. C. 537; *Todd v. Zachary*, 45 N. C. 286; *Woodford v. Higly*, 60 N. C. 237. One peculiarity incident to this estate is that, if an estate be given to A., B., and C., and A. and B. are man and wife, they, being one person, will take a half interest, and C. will take the other half. This ancient absurdity seems to be the law in this state now. *Hampton v. Wheeler*, 99 N. C. 222, 6 S. E. 236. Another peculiarity of this estate is that neither husband nor wife can dispose of their interest, or any part thereof, without the assent of the other. The deed of either without the joinder of the other is void. *Gray v. Bailey*, 117 N. C. 439, 23 S. E. 318;

2 Blk., 182; Ray v. Long, 132 N. C. 891, 44 S. E. 652. Neither can such land be sold under execution, nor can the interest of either husband or wife be thus sold. Bruce v. Nicholson, 109 N. C. 202, 13 S. E. 790, 26 Am. St. Rep. 562; Gray v. Bailey, supra; Ray v. Long, supra. Nor can one be barred by the statute of limitations unless the other be barred also. Johnson v. Edwards, 109 N. C. 466, 14 S. E. 91, 26 Am. St. Rep. 580. The above rules apply to devises to man and wife (Simonton v. Cornelius, supra), and also to contracts to convey land to man and wife (Stamper v. Stamper, 121 N. C. 251, 28 S. E. 20). They likewise apply to a gift or devise to a man and his wife "during their natural lives." Simonton v. Cornelius, supra; Mordecai's Law Lectures (1907) pp. 559, 560.

In Hairston v. Glenn, 120 N. C. 341, 27 S. E. 32, where money, the separate earnings of husband and wife, was deposited in a bank in their joint names, the husband stating to the cashier, in the presence and hearing of his wife, that it was their joint earnings and that he desired a certificate made out for the whole amount (\$1,500) in their joint names, which was done, and the certificate delivered to the husband, the latter having stated that, when either died, he wanted the survivor of them to have the entire fund, the husband then died, and his widow claimed but half of the fund, it was held that she was entitled to it; the question of survivorship, and her right to the whole of the fund, not being before the court. That case, while very close to the question raised in this one, does not decide it, for the reason stated that she did not claim the whole of the fund. The interest and control of the husband during the existence of the joint estate, or the joint lives of the two parties, is well illustrated in the recent decision of Dorsey v. Kirkland, 177 N. C. 520, 99 S. E. 407, known as "the flume case." Jones v. Smith, 149 N. C. 318, 62 S. E. 1092, 19 L. R. A. (N. S.) 1037, 128 Am. St. Rep. 661, and Bank v. McEwen, 160 N. C. 414, 76 S. E. 222, Ann. Cas. 1914C, 542, where the question of the respective interests and rights of the two parties is fully considered. In the flume case, it is said, citing and quoting from Bynum v. Wicker, 141 N. C. 96, 53 S. E. 478, 115 Am. St. Rep. 675:

"This estate by entirety is an anomaly, and it is perhaps an oversight that the Legislature has not changed it into a cotenancy, as has been done in so many states. This not having been done, it still possesses here the same properties and incidents as at common law \* \* \* [under which] 'the fruits accruing during their joint lives would belong to the husband;' \* \* \* hence the husband could mortgage or convey it during the term of their joint lives, that is, the right to receive the rents and profits, but neither could incumber it so as to destroy

the right of the other, if survivor, to receive the land itself unimpaired."

And in Bank of Greenville v. Gornto, 161 N. C. 342, 77 S. E. 222, a lease for ten years made by the husband was held to be valid, and the court said concerning the nature of the estate and the rights and powers of the husband during the life of the wife:

"As Brady and his wife held, not as tenants in common or joint tenants, but by entireties, their rights must be determined by the rules of the common law, according to which the possession of the property during their joint lives vests in the husband, as it does when the wife is sole seized. Neither can convey during their joint lives, so as to bind the other, or defeat the right of the survivor to the whole estate. Subject to the limitation above named, the husband has the same rights in it which are incident to his own property. By the overwhelming weight of authority the husband has the right to lease the property so conveyed to him and his wife, which lease will be good against the wife during coverture, and will fail only in the event of her surviving him." Bynum v. Wicker, supra; Long v. Barnes, supra; Simonton v. Cornelius, supra; Bank of Greenville v. Gornto, supra.

An interesting discussion of this "unity of person," as pertaining to the relation of husband and wife, by Justice Allen, will be found in Freeman v. Belfer, 173 N. C. 581, 92 S. E. 486, L. R. A. 1917E, 886, where the authorities are collected and reviewed.

[5-8] But this unity, or entirety of the estate, may be destroyed or dissolved by the joint acts of the parties, and the estate which was entire turned into a tenancy in common, or into one in severalty; each taking separately a share thereof to be determined by them. The transaction may be of such a nature, and the conveyance so worded, that they will be decreed to hold as tenants in common, and not by the entirety. Eason v. Eason, 159 N. C. 539, 75 S. E. 797; Highsmith v. Page, 158 N. C. 226, 73 S. E. 998; Stalcup v. Stalcup, 137 N. C. 305, 49 S. E. 210; Speas v. Woodhouse, 162 N. C. 66, 77 S. E. 1000; Isley v. Sellers, 153 N. C. 374, 69 S. E. 279. Where it appears that no such estate as that by the entirety was intended, but it was the purpose that they should hold as tenants in common, it will be so adjudged, and, in proper cases, the instrument will be reformed to carry out the intention. Highsmith v. Page, supra. The intention appearing, a conveyance may be made to husband and wife as tenants in common; but otherwise they will take by the entirety, with right of survivorship. Holloway v. Green, 167 N. C. 91, 83 S. E. 243. A divorce a vinculo, as it destroys the unity, will convert the estate by entirety into one in common. McKinnon v. Caulk, 167 N. C. 411, 83 S. E. 559, L. R. A. 1915C, 396.



[9] In this case it appears from the verdict of the jury that the parties had agreed to sever the unity existing between them as to the estate in this land when it was sold, and in pursuance of that understanding \$6,000 of the fund, or one half thereof, was deposited in a bank for the plaintiff, and in her name, and the other half in the defendant bank, also in her name, but really for the secret benefit of her husband, so that he could hold off the defendant, as his creditor, and hinder the recovery of its claim; he being then in failing and embarrassed circumstances. There was ample evidence of this fact so found by the jury, for the husband checked upon the deposit and treated it as his own with the knowledge and consent of his wife, and while the cashier, Mr. C. S. Carr, was trying to effect a settlement or adjustment of Moore's account with the defendant bank, Mr. Moore, after manifesting some indifference, finally turned to him and said:

"All my property stands in my wife's name, and the bank will have to whistle for its money."

His indebtedness at that time was \$2,000, with interest. The jury have found that the debt is \$1,748, that the property purchased from T. E. Hooker was not paid for with the individual funds of Mrs. Moore, that Mr. Moore was the actual owner of the fund deposited in the defendant bank, and that the deposit was made in the name of Mrs. Moore with the fraudulent purpose of preventing the defendant from recovering upon the note held by it against Mr. Moore. If there was evidence to support this verdict, and there is no error in the charge of the court, or elsewhere in the case, we do not see why the defendant is not entitled to the judgment now being reviewed.

We will now consider briefly if there was any error in the charge or the rulings of the court at the trial. The charge was as clear-cut and as free from any error as it could possibly be, and the jury have found, evidently, when we read the verdict in the light of the evidence and the charge, as we should do, that the parties contributed equally to the purchase of the Hooker property, and that they agreed to divide the proceeds of its sale equally between them; the fund deposited with the defendant being Mr. Moore's half, though not credited on the books of the bank in his name. This was a transaction between husband and wife and a third person, the defendant, who was a creditor of the insolvent husband. There is evidence of facts and circumstances, which give rise to a grave suspicion of fraud, if they were established, and the jury have found upon them that there was an actual intent to defraud the defendant, and there is, therefore, nothing left in the case, that we can see, to defeat the defendant's recovery.

[10-12] On the motion of the defendant, we have excluded exceptions Nos. 13 to 27, both inclusive, because the alleged errors are not properly assigned under the rule of this court. There is no real merit in the remaining assignments. The documentary evidence was plainly competent. As to how the husband intended to hold the property was immaterial, as the deed spoke for itself, and there was no equity for reformation set up. The business transactions of Hall & Moore were irrelevant to the inquiry, as also was the question whether Hall had assumed this debt, without the assent of defendant. This did not discharge W. M. Moore as debtor. Nor did Moore's reason for not paying the note have any proper bearing upon the case. He did not pay, but still owed it to the bank. This was enough, and was embraced by the issues, and it was equally immaterial whether Moore had disposed of his interest in the firm of Hall & Moore. We do not understand how any of these matters, if found for the plaintiffs, could affect the result. The excluded assignments relate to the charge of the court. Although they have been put out of the case, we have carefully examined them, in connection with the instructions of the court, and discover no real merit, or ground for reversal, in any of them. Whether the money was deposited with the banks, half of it in each of them, for their accommodation, or was put there under a false designation of the depositor to defraud the defendant, as Mr. Moore's creditor, was for the jury to decide upon the evidence. The vital and pivotal question was, besides the one just stated, whether the plaintiff agreed, either expressly or by inference from their acts and conduct, that any estate by the entirety, theretofore existing, should be changed into an estate in severalty, one-half of the purchase money paid for the Hooker lot to be the property of each of them, was also a question for the jury. They were not to have one-half of each deposit, but one was to have the whole deposit in the National Bank of Greenville, and the other, Mr. Moore, the whole deposit in the defendant bank. This is what the jury have found to be the fact, upon sufficient evidence, as we think. The last question, whether the defendant may set off the debt due to it by Mr. Moore against his deposit, was decided by the court when the case was here before (173 N. C. 180, 91 S. E. 793), and it was further said that, if in the strictness of law this cannot be done, the defense here pleaded will be treated as a bill, or action, in the nature of an equitable *fi. fa.*, as the property is not available to creditors by the ordinary legal process. Numerous authorities are cited in defendant's brief to sustain the right to set-off in such a case. As the question is an important one, we will cite a few of them: *Hodgin v. Bank*, 124 N. C. 541, 32 S. E. 887, reversed on rehearing, but on a point not material here; *Bank v.*

Armstrong, 15 N. C. 519; Clark v. Bank, 160 Mass. 26, 35 N. E. 108; Coates v. Preston, 105 Ill. 470; Bank v. Bank, 48 N. Y. 82, 7 Am. Rep. 314; Garrison v. Trust Co., 139 Mich. 392, 102 N. W. 978, 70 L. R. A. 615, 111 Am. St. Rep. 407, 5 Ann. Cas. 813; Knapp v. Cowell, 77 Iowa, 528, 42 N. W. 434; Reynes v. Dumont, 130 U. S. 354, 9 Sup. Ct. 486, 32 L. Ed. 934; Gibbons v. Hecox, 105 Mich. 509, 63 N. W. 519, 55 Am. St. Rep. 463; Bank v. Meyer, 56 Ark. 499, 20 S. W. 406; Bank v. W. M. Brewing Co., 50 Ohio St. 151, 33 N. E. 1054, 40 Am. St. Rep. 660; Falkland v. Bank, 84 N. Y. 145.

After a careful review of the entire record, we have not been able to discover that any error was committed by the court at the second trial.

No error.

CLARK, C. J., concurs in all that is so clearly and convincingly stated in the opinion of WALKER, J., and for the additional reason that when the land was converted into money the estate by entireties ceased, for in England, whence was derived this anomalous estate, there was never any estate by entireties in personality. Gooch v. Bank, 176 N. C. 216, 97 S. E. 53. The estate by entireties was not created by statute, either in England or in this state, but was a judicial creation in England, and we adopted it only to the extent that it obtained there. Gaston, J., in Motley v. Whitmore, 19 N. C. 537, says:

"When lands are conveyed to husband and wife, they have not a joint estate, but they hold by entireties. Being in law but one person, they have each the whole estate as one person; and on the death of either of them, the whole estate continues in the survivor."

This was quoted by Hoke, J., in McKinnon v. Caulk, 167 N. C. 412, 83 S. E. 559, L. R. A. 1915C, 396. It was also recognized that entireties did not apply to personality in Hairston v. Glenn, 120 N. C. 341, 27 S. E. 32, where money was deposited in bank in the joint names of husband and wife, and a joint certificate made out for the amount, which was delivered to the husband, but on his death the wife was held entitled to recover one-half of it. While the point was not expressly raised, it is clear that the counsel in that case and the court were aware that there was no estate by entireties in personality.

There was this very good reason for this distinction, for in England, until about 1880, all personality of the wife, whether acquired before or after marriage, became the absolute property of the husband, and there was no occasion for any estate by entireties; and such was the case in this state until the Constitution of 1868, which allowed a wife to retain her property, whether acquired before or after marriage.

As to realty, in England (as in this state till 1868) the realty of the wife became the property of the husband during his lifetime, and therefore for feudal reasons at her death, if he were the longer liver, it went absolutely to him, instead of to her heirs, as the land was burdened with the duty of furnishing a soldier for 40 days each year, if called for in the wars, for there was no standing army. If, however, the wife were the longer liver, it went to her absolutely instead of to his heirs who might be minors. This is the origin of the "antiquated absurdity" of this estate, as Justice WALKER appropriately styles it, but for which there was a good reason as to realty when it was created.

Even as to estates in entireties in realty, they have been abolished in England by the Married Woman's Act of 1882. Thornley v. Thornley, [1893] 2 Ch. Div. 229. It would logically seem that such estate was abolished here by our statute of 1784 (now Rev. § 1579), which converted all joint estates into tenancies in common, and still more conclusively by our Constitution of 1868, which, like the English Married Women's Act, vested a wife with her property, real or personal.

This court, however, held differently, and, though it has often recommended to the Legislature the abolition of this anomaly, it has not been done.

(84 W. Va. 421)

POLLOCK et al. v. HOUSE & HERMANN.  
(Supreme Court of Appeals of West Virginia.  
Sept. 9, 1919.)

(Syllabus by the Court.)

1. CONTRACTS ⇨182(2) — PARTIES ⇨15  
—JOINT CONTRACT—RIGHT OF ACTION.

At common law the right of action on a contract made with several persons jointly passes on the death of each to the surviving co-obligees. Therefore an action on such a contract must be brought in the name of the survivor or survivors alone; it being error to join as plaintiff with them the personal representative of a deceased co-obligee.

2. LANDLORD AND TENANT ⇨228 — JOINT  
LEASE—ACTION FOR RENT—PARTIES.

The proper parties plaintiff to an action to recover rent due under a demise of real estate, and unpaid, are the joint lessors, if living, and the survivor or survivors of them, if any have in the meantime died, whether before the institution of the action or while it is pending.

3. TRUSTS ⇨249 — SUCCESSIVE TRUSTEES  
—JOINT LEASE—ACTION FOR RENT.

But where at the date of the contract one of the joint lessors was acting in a representative capacity as trustee, and later died, and a new trustee was appointed in his stead, and clothed with all the "rights, powers, duties, and responsibilities" of his predecessor, such substituted trustee possesses legal capacity to

sue, and may properly unite as plaintiff with the surviving colessors, not because he was lessor *eo nomine*, but because he is representative of an estate which was party to the original lease in the name of the former trustee, and which continued in existence, despite the nominal change in the representation.

#### 4. TRUSTS ¶169(1) — SUBSTITUTION OF TRUSTEE—POWERS.

Equity will not suffer a trust to fail because of a vacancy in the trusteeship, however occasioned, whether by death, resignation, or otherwise, but will substitute a trustee to execute the trust, with or without authorization by the instrument creating it, especially where, as in this state, a statute authorizes such substitution.

#### 5. LANDLORD AND TENANT ¶228 — JOINT LEASE—ACTION FOR RENT—PARTIES.

Where one of two owners of real estate dies testate, and by his will devises his moiety thereof to his cotenant as trustee for the use and benefit of the testator's wife, while she lives, and others, during the minority of the youngest cestui que trust, a condition which still remains, and the cotenant in his own right and as such trustee and his wife unite in a demise of the real estate for a term of years to begin at a later date, and the trustee dies before such date, his wife surviving him, she and the trustee substituted in lieu of such deceased trustee may, as survivors, unite in the prosecution of an action to recover of and from the lessee arrearages of rent accruing within the term.

Case Certified from Circuit Court, Ohio County.

Action by Thomas Harvey Pollock and others against House & Hermann. Demurrer to declaration sustained, and question as to correctness of the ruling certified. Judgment reversed, and case remanded.

Frank W. Nesbitt and Russell B. Goodwin, both of Wheeling, for plaintiffs.

LYNCH, J. The defendant, House & Hermann, a corporation, having, for some cause not disclosed, refused to pay rent for the use and enjoyment of real estate, due, according to allegations of the declaration, by the express stipulation of a written contract, plaintiffs brought this action to compel payment, and to their declaration defendant demurred assigning as the only ground of objection misjoinder of plaintiffs. Deeming the challenge sufficient, the circuit court sustained the demurrer and certified the case here, to test the correctness of the ruling.

The plaintiffs are Thomas Harvey Pollock and Julius Pollock, Jr., trustees under and executors of the will of Julius Pollock, deceased, Mary A. Pollock, widow of the deceased, Julius, and C. H. Merkel, trustee appointed by the circuit court of Ohio county in lieu of Julius Pollock, deceased, to execute the trust created by the will of Mortimer Pollock, each of which wills was duly probated and admitted to record, and the persons named

as executors therein properly qualified to administer the estates thereby committed to them and to execute the trusts thereby imposed in them.

Mortimer Pollock and Julius Pollock, according to the allegations of the declaration, jointly owned certain real estate located in the city of Wheeling. Mortimer Pollock died testate early in February, 1904. Surviving him were a widow, a daughter, and grandchildren, and by his will he devised his moiety interest in the real estate to Julius Pollock, in trust during the life of the widow of Mortimer Pollock and the life of his daughter, and until the youngest grandchild shall attain the age of 21 years. Such grandchild still remains a minor. He also appointed Julius Pollock to execute the will.

Julius Pollock, as such representative of Mortimer and in his own right, and Mary A. Pollock, his wife, parties of the first part, demised the real estate to defendant for a term of 5 years from and after the 1st day of April, 1915, in consideration of the payment to the lessors of \$50,000, payable in equal quarterly installments, or \$2,500 for each succeeding quarter of the term. Defendant entered upon, used, and occupied the premises as contemplated by the parties to the contract, and for each quarter faithfully performed the covenant respecting the payment of rentals until March 31, 1918; and to recover for the default as of that date, and for a like default as of June 30 of the same year, plaintiffs brought this action.

Before the date fixed for the beginning of the term, Julius Pollock died testate, leaving surviving him Mary A. Pollock, his wife, and devised his moiety in the demised property to the plaintiffs Thomas Harvey Pollock and Julius Pollock, Jr., whom he also appointed executors of the will, in trust for the benefit of his wife and heirs during her life. And on January 30, 1915, the circuit court substituted the plaintiff C. H. Merkel trustee in lieu of Julius Pollock to administer the trust created by the will of Mortimer Pollock, deceased. Apparently this substitution stands upon the authority of section 5, c. 132 (sec. 4939), Code, which also clothes the substituted trustee with all the "rights, powers, duties and responsibilities of the trustee named in said deed" creating the trust.

[4] The will of the decedent doubtless answers the description of the instrument embodied in the statute and falls within the scope of its provisions to the same extent as if it was a deed. But, whether this construction is a fair deduction from the language used or not, equity will not permit a trust to fail for want of a trustee, and in the absence of a provision in the creative instrument, whatever its character may be, a court of equity will substitute another trustee in his stead whenever necessary to carry into full fruition the purpose intended by the

donor. *Whelan v. Reilly*, 3 W. Va. 597. So that, if a will appoints a trustee for infants and he dies, equity will substitute another in his stead, even without authorization by the will itself. *Dunscumb v. Dunscumb* (Va.) 2 Hen. & M. 11.

In ruling upon the sufficiency of the declaration charged to be defective for the cause urged against it, the court found Mary A. Pollock, the widow of Julius, the only plaintiff capable or competent to prosecute the action, because she was the sole surviving lessor when the action was instituted. The order entered embodying the result of the opinion made no disposition of the case other than that indicated by the ruling. The order has no finality rendering it appealable, but it is certifiable to this court pursuant to the provisions of section 1, c. 135 (sec. 4981), Code.

[1, 2] In restricting the right to prosecute the action to one of the plaintiffs only, the court, we think, erred, doubtless inadvertently. Mrs. Pollock, it is true, is the only person, joining in the execution of the lease who survives her colessors. But Julius Pollock also joined therein as lessor, both in his own right as owner of a moiety in the real estate demised, and as trustee holding in trust the legal title of the other moiety for the use and benefit of the cestuis que trust by virtue of the will of Mortimer Pollock. The death of Julius Pollock after the date of the lease and before the breach thereof did not effect a discontinuance of the trust relation or cause its temporary suspension. It remained existent and intact, pending the substitution of another trustee in his stead. There was no disturbance in the continuity of the duties and responsibilities imposed by the testator's will. Merkel, as trustee by virtue of the appointment, was clothed with all the powers inhering in Julius Pollock as regards the real estate under the original appointment by the testator. He took up the duties of the trust unperformed at the death of his predecessor, and his appointment antedated defendant's breach of the rental contract. Why was he not fully competent to join with Mary A. Pollock as coplaintiff? The mere fact that his name nowhere appears in the lease as one of the contracting parties is not decisive. The estate committed to Julius Pollock in trust did not cease to exist upon his death. Though Merkel was not then authorized to act in his stead, his appointment as successor and the duties and responsibilities of the office reverted to that date. Though not so *eo nomine*, Merkel thus became at that date and remained as much a party to the demise as was Julius, so far as concerned the preservation of the rights of the cestuis que trust. Merkel was not named executor of Mortimer Pollock's will, but was vested with the legal title of the testator's moiety in the demised premises, and charged with the duty of administering the trust for the personal benefit

of those entitled to take benefaction of the testator. The change or difference in the names of the persons vested with such title did not affect the qualification of Merkel to join in the prosecution of the action to recover rent becoming due after his appointment, or render him incapable to join as coplaintiff. The trust estate was by the undisturbed representation a party to the contract by virtue of which the rent was due and payable. It survived the death of the trustee named in Mortimer Pollock's will to the same extent and with like effect as did the right of Mary A. Pollock to join in the action. Both were parties to the lease in a justifiable sense, one no more or less than the other, and for that reason both are competent to join in an action to recover for any breach of the lease contract. Such joinder does not fall within the rule forbidding the uniting in a declaration in the same action a representative of a decedent's personal estate and a surviving co-obligee. Merkel had nothing whatsoever to do with the personal estate of the testator. That was not committed to him. He had no duty to perform as regards it. He was trustee of the moiety of the leased premises, and as such held the legal title to such property.

Mary A. Pollock had the legal capacity to sue as one of the lessors, and it was necessary to join her as plaintiff under the holding in *Sandusky v. Oil Co.*, 63 W. Va. 260, 59 S. E. 1082. Merkel possessed the legal capacity to sue, not because he was lessor *eo nomine*, but because he was the representative of an estate which was party to the original lease by representation, and which continued in existence despite the change in representative. While Mrs. Pollock was one of the beneficiaries of the trust created by the will of Julius Pollock, that fact did not give her a remedial interest in the cause of action. It is immaterial whether Merkel had a direct pecuniary interest in maintaining the action, for a court will not stop to inquire whether he has sued in his own behalf or as trustee for some other person. It suffices if he has the legal right to sue, and as representative of a continuing estate which was a party to the original lease he had such right. The case of *Nichols v. Campbell* (Va.) 10 Grat. 560, is not inconsistent with this ruling, for in that case there were two trustees representing the same interest, and upon the death of one the action survived to the other. The surviving trustee represented the trust estate, thus bringing it before the court.

[3, 5] What, then, is the legal status of the other plaintiffs, the executors and trustees of the estate of Julius Pollock—what their rights as to the prosecution of this action? Are they controlled by the common-law rule that the right of action on a contract made with several persons jointly passes on the death of each to the survivors, and on the

death of the last to his representatives, and that, therefore, the action must be brought in the name of the survivor or survivors alone; it being error to join as plaintiff with surviving co-obligees the personal representative of a deceased co-obligee? Dickey on Parties, rule 16, p. 149; *Rowe v. Shenandoah Pulp Co.*, 42 W. Va. 551, 28 S. E. 320, 57 Am. St. Rep. 870; *Henning v. Farnsworth*, 41 W. Va. 548, 23 S. E. 663; 18 Cyc. 960. Casually considered, these questions might be answered agreeably with principles already stated in regard to the trusteeship provided for by the will of Mortimer Pollock. But there is this material and significant difference between the situation of the parties. At the date of the execution of the lease Julius Pollock was living and joined as a party to the contract. The devise of his moiety in trust had not then become effective. It originated only upon his death. Theretofore it did not possess legal vitality. His death was essential to its existence, and since both occurred after the date of the contract the common-law rule obtained, and authorized none other than the survivors to sue for the breach of the contract.

Though extremely technical, the rule as to survivorship as applied to cases of this kind is so thoroughly embedded in the procedural laws of the Virginias as not to warrant departure therefrom. *Henning v. Farnsworth*, supra; *Rowe v. Shenandoah Pulp Co.*, supra. While the beneficiaries of the wills of the Pollocks are entitled to the money sued for, if any is recovered by the plaintiffs or any of them in this or any similar action, not all of them are capable of suing. Those only can maintain the action who were actual or virtual parties to the lease. The beneficiaries own the fund, but only part of them can enforce payment. That right devolves upon the surviving lessors as we have ascertained them to be.

That the rule was nullified and abrogated by section 19, c. 85 (sec. 4006), Code, is the contention of plaintiffs' counsel. But in that view we do not concur. The statute cited is simply declaratory of the common-law rule respecting the right of a personal representative to prosecute an action for the benefit of the estate committed to him for administration and his liability in certain cases to respond in damages for a breach by decedent of a contract occurring in his lifetime. *Knotts v. McGregor*, 47 W. Va. 566, 570, 35 S. E. 899. Before as well as after its enactment an administrator or executor could sue or be sued upon any judgment against his decedent and for the breach of certain contracts in the making of which the decedent participated as covenantor or covenantee. In other words, the statute effected no alteration of the right to sue or be sued on such contracts. It did not widen or narrow the scope of the common-law rule upon that subject.

Plaintiffs also ask us to sanction the argument advanced by them to the effect that all the plaintiffs rightly were joined in the action because of the exception to rule 16, Dickey on Parties, and cases cited thereunder. The first paragraph of the rule states the common-law doctrine as to the sole right of the surviving covenantee to sue on a contract. The second paragraph, by way of exception to the rule so stated, says:

"If there is a joint demise by A. and B., who are tenants in common, and a covenant therein with them, e. g., to repair, an action for the breach of such a covenant must, on the death of B., be brought, not by A., but by A. and M., the representative of B."—citing *Foley v. Adendenbrooke*, 7 Q. B. 197, 114 Eng. Rep. 872; *Thompson v. Hakewill*, 19 C. B. N. S. 713, 144 Eng. Rep. 966.

The cases cited by the author, as analyzed by the learned circuit judge, do not sustain the text. The question here involved seems not to have been raised or decided in the *Foley Case*. As showing the inapplicability of the second citation to the situation confronting us, we merely quote from the opinion this language:

"We, however, are now called on to decide that the benefit of such a covenant, contained in a joint demise originally made by tenants in common, not only may, but must, run with the entire reversion; in other words, that tenants in common so situated not only may, but must, join as plaintiffs in an action of covenant."

Of course, all parties to a joint contract, whatever its character may be, if living, must join as plaintiffs or be joined as defendants, as the case may require. To this general rule some exceptions exist, it is true; but no such exception appears here. Indeed, Dickey himself recognizes the exception which he has stated to his general rule as "only an apparent one."

As the proper disposition of the case resulting from the action upon the demurrer remains undisclosed by the record, this court declines to say what it legitimately may be, namely, whether the language of section 12, c. 125 (sec. 4766) Code, is sufficiently broad to warrant permission to amend the declaration by striking out the plaintiffs improperly joined, or whether it is necessary to dismiss the action without prejudice and institute another, joining in the declaration only the two persons adjudged herein to have the requisite capacity to maintain the action. These procedural questions are to be determined by the circuit court in the first instance, to authorize an expression of opinion thereon here.

Deeming the ruling of the court erroneous to the extent it fails to recognize the right of another plaintiff to prosecute the action, we reverse the judgment and require the case to be remanded for further proceedings, as the parties thereto may elect or the circuit court determine.

(81 W. Va. 429)

**BROWN v. SMITH.**(Supreme Court of Appeals of West Virginia.  
Sept. 9, 1919.)*(Syllabus by the Court.)***1. MECHANICS' LIENS §122—WHEN NOTICE OF LIEN SUFFICIENT.**

In the notice given to the owner by a workman, who has performed work on a building at the instance of the contractor, as required by clause "g," section 3, chapter 75 (sec. 3851b), Code Supp. 1918, the omission of the word "dollars" in the statement of the amount which he claims to be due and for which he claims a lien is not material, when the amount is also stated in figures properly punctuated and preceded by the dollar mark.

**2. MECHANICS' LIENS §157(1)—THAT NOTICE OF LIEN CONTAINS UNNECESSARY MATTER DOES NOT VITIATE IT.**

Such notice, properly verified and recorded, is a sufficient compliance with the statute requiring notice of his lien to be recorded if it contains, in substance, all the matters required by clause "b," section 3, of said chapter. The fact that it contains also the itemized account, not required in the recorded notice, does not vitiate it.

**3. APPEAL AND ERROR §194(6)—EQUITY §231—WHERE QUESTIONS ON DEMURRER ARE CERTIFIED, POINTS NOT RAISED ARE REVIEWED.**

A demurrer to a bill raises the question of its sufficiency for any reason apparent on its face, and where the demurrant states his grounds therefor, omitting to mention a material defect, and the court overrules the demurrer and certifies the questions decided by it for the decision of this court, this court will consider and pass upon the sufficiency of the bill, regardless of whether or not some particular point rendering it defective was decided by the lower court.

*(Additional Syllabus by Editorial Staff.)***4. MECHANICS' LIENS §263(9)—PRINCIPAL CONTRACTOR NECESSARY PARTY IN SUIT TO ENFORCE.**

On bill to enforce a mechanic's lien against defendant's property, based on work performed at the instance of the principal contractor, plaintiff's failure to make such contractor a party to the bill was fatal, and made the bill subject to demurrer.

Case Certified from Circuit Court, Wood County.

Bill by O. M. Brown against W. H. Smith to enforce a mechanic's lien. Demurrer overruled, and questions certified by the circuit court. Decree reversed, with direction that decision be certified back to circuit court.

John W. Martin, of Parkersburg, for plaintiff.

Levin Smith, of Parkersburg, for defendant.

**WILLIAMS, J.** Plaintiff filed his bill to enforce a mechanic's lien against certain property of defendant, and the bill was demurred to on the following grounds: First, because the lien set up does not show that plaintiff is entitled to a lien for the amount of money claimed by him, the notice given and exhibited with the bill omitting the word "dollars" in the statement of the amount claimed as a lien; and, second, because the recorded notice of lien is not according to the form prescribed by the mechanic's lien statute. The court overruled the demurrer, and, under the provisions of section 1, chapter 135 (sec. 4981), Code Supp. 1918, certified these questions to this court for its decision.

[1,2] Neither point stated in the demurrer is well taken. The bill alleges that plaintiff performed labor for one J. K. Atkinson, who had contracted with defendant to erect a building on defendant's lot situated on the corner of Columbia and Smithfield streets in the city of Parkersburg, and exhibited with his bill the notice which he alleges he gave the owner, pursuant to the provisions of the mechanic's lien statute. That notice contains an itemized account showing the dates and number of hours each day that he performed labor on said building and the wage per day, aggregating the sum which he claims as a lien. He also alleges that he caused a notice of said lien to be recorded in the office of the clerk of the county court of Wood county, within the time prescribed by the mechanic's lien law.

A duplicate of the notice served upon defendant was apparently the notice recorded in the clerk's office, and it is claimed by defendant's counsel that the statute provides for the recordation of a different notice from the one served upon the owner. Clause "b," section 3, chapter 75 (sec. 3851b), prescribes the form of notice of lien and verification thereof to be recorded. The notice in this case is almost in the very language of the form prescribed, the only difference being that it contains the itemized account, which the recorded notice need not contain. It is, in substantial effect, a compliance with the statute, and that is all that is necessary. The matter contained in it, not required to be stated, may be treated as surplusage. It states the amount for which a lien is claimed to be \$234.20, and that it has not been paid. It describes the property on which the lien is claimed as a "certain building on the real estate owned by [defendant] situated in the city of Parkersburg, county of Wood, West Virginia, on the corner of Columbia and Smithfield streets, and being what is known as lot No. 48 of J. M. Jackson, Jr., addition to the city of Parkersburg, as shown in the

plat book thereof recorded in the county clerk's office of the said Wood county in Plat Book 42, page 27, the said lot fronting 46 feet more or less on Smithfield street and running back along Columbia street of equal width about eighty (80) feet, and being a part of the same real estate conveyed to [defendant] by I. M. Adams, Jr., by deed bearing date on the 13th of March, 1917, and of record in the said clerk's office of Wood county in Deed Book 167, page 625," and is verified in the manner and form required by statute. It was not necessary that the notice should have contained any further description of the building on which the labor was performed, as plaintiff's lien covered the defendant's interest in the entire lot, 46x80 feet, on which the building stands, by virtue of clause "f," section 2, chapter 75 (sec. 3851a), Code Supp. 1918.

[3, 4] But there appears on the face of the bill a fatal defect to which the court's attention was evidently not directed, and we are of the opinion that section 1, chapter 135, Code Supp. 1918, authorizing questions relating to the sufficiency of a summons or return thereof, or of the pleadings to be certified to this court for its decision, being designed by the Legislature to enable litigants to have all questions relating thereto settled and determined before a trial or hearing of the cause upon its merits, is entitled to a liberal construction, being a remedial statute, and authorizes this court to consider all questions affecting the sufficiency of the pleadings, even though they were not called to the attention of the lower court and were not specifically certified. The demurrer reaches any defect appearing on the face of the bill although the ground assigned fails to mention it, and the certificate brings up the question of the sufficiency of the bill. The plaintiff failed to make the principal contractor, J. K. Atkinson, a party to his bill, and this is the defect to which we refer. Such omission, we held in *Aughr v. Warder*, 74 W. Va. 103, 81 S. E. 708, and *Gist v. Virginian Railway Co.*, 79 W. Va. 167, 90 S. E. 554, to be fatal. For this reason the demurrer should have been sustained, and plaintiff allowed to amend.

We therefore reverse the decree of the lower court, and direct our decision to be certified back to the circuit court of Wood county.

(84 W. Va. 499)

#### WILLIAMS v. SCHEHL

(Supreme Court of Appeals of West Virginia.  
Sept. 16, 1919.)

(Syllabus by the Court.)

#### 1. SERVANT'S KNOWLEDGE OF DEFECTS IN MACHINE—DECLARATION.

The declaration in this case is not bad on demurrer for omitting to aver knowledge of the

defendant of the alleged defective character of the machine doing the injuries complained of. Such knowledge is sufficiently alleged.

#### 2. MASTER AND SERVANT §221(5), 261(4)—DECLARATION NOT DEFECTIVE AS CONFESSING CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK.

Nor do the circumstances of the injuries complained of and averred in the declaration sufficiently negative the ignorance of the plaintiff averred, so as to render the declaration bad as confessing contributory negligence and defeating recovery in such common-law action. But in so far as right of recovery is based on the failure of defendant to provide plaintiff with an instrument to enable him safely to operate the machine, the declaration is defective in failing to also allege plaintiff's reliance on such promise for a reasonable time thereafter.

#### 3. MASTER AND SERVANT §258(12)—WHEN DECLARATION SUFFICIENT IN COMMON-LAW ACTION FOR INJURIES.

Though not good as a declaration for injuries sustained on the theory that defendant's business was controlled by the Workmen's Compensation Law and his failure to comply therewith depriving him of his common-law defenses, the declaration is good in a common-law action for alleged injuries sustained by plaintiff, his employee, for defective machinery furnished by defendant.

#### 4. MASTER AND SERVANT §361—WHEN GROCER SELLING MEAT NOT RUNNING SLAUGHTER AND PACKING HOUSE.

The business of a retail grocer who also butchers cattle, sheep and hogs at a slaughter house operated in another place, for sale to his retail customers, and who at his grocery store cuts the meat, makes sausage and renders lard from such animals, for sale in a small way, is not engaged in the business of operating a slaughter and packing house within the meaning of schedule "n" of section 18 of the Workmen's Compensation Law of this state.

[Ed. Note.—For other definitions, see Words and Phrases, Packing House; Slaughterhouse.]

#### 5. MASTER AND SERVANT §361—WHEN RETAIL DEALER RETAINS COMMON-LAW DEFENSES UNDER WORKMEN'S COMPENSATION LAW.

Nor does schedule "x" of said section, nor the general provisions of section 9 of said law, require one conducting such a retail business voluntarily to apply to the Compensation Commissioner to come under said law, or subject him to the penalty of losing his common-law defenses when sued by an employee for injuries sustained due to his alleged negligence in failing to use due care to provide reasonably safe machines and implements or a reasonably safe place for his servants to work.

#### 6. ERRONEOUS INSTRUCTIONS IGNORING DEFENSE OF CONTRIBUTORY NEGLIGENCE.

Instructions to the jury given at the instance of plaintiff, based on the theory of negligence on the part of defendant, and erroneously assuming that his business was under the Workmen's Compensation Law and his failure to comply therewith and ignoring his theory of contributory negligence on the part of plaintiff, should have been rejected.

**7. TRIAL ¶191(1), 252(2)—INSTRUCTION ASSUMING CONTROVERTED FACT PROVEN ERRONEOUS.**

An instruction to the jury which assumes as proven a fact controverted by the evidence or as to which there is, little if any appreciable evidence, is properly refused.

**8. TRIAL ¶203(3) — CORRECT INSTRUCTION SUPPORTED BY SOME EVIDENCE IMPROPERLY REFUSED.**

An instruction stating a correct legal principle applicable to the theory of the proponent, supported by some appreciable evidence, not binding, should be given to the jury.

**Error to Circuit Court, Brooke County.**

Action by Earl C. Williams against John A. Schehl. Verdict and judgment for plaintiff, and defendant brings error. Reversed, verdict set aside, and defendant awarded a new trial.

Ramsey & Wilkin; T. S. Riley, of Wheeling, for plaintiff in error.

Erskine, Palmer & Curl, of Wheeling, for defendant in error.

MILLER, P. The action is *ex delicto* for the loss of plaintiff's hand, due to the alleged negligence of defendant in furnishing him a defective meat grinder and his failure to furnish him a feeder paddle or other implement necessary safely to operate said machine in the course of his employment.

From the verdict and judgment for plaintiff for one thousand dollars the defendant by writ of error has brought the case here for review.

[1, 2] First, it is complained that the demurrer to the declaration and each of the two counts thereof should have been sustained. We do not find the declaration defective in the first particular pointed out, namely, failure to aver knowledge on the part of defendant of the alleged defective condition of the meat grinder. If necessary to so aver, both counts do charge such knowledge on the part of the defendant.

Secondly, it is argued that if defective, the circumstances of the injury show that plaintiff had as much knowledge of the machine as defendant and with such knowledge continued to operate it, and thereby contributed to his own injury and excused the defendant. But if, as substantially averred, the defendant's business and the plaintiff's employment fall under the operation of the Workmen's Compensation Law (Code Supp. 1918, c. 15P, §§ 1-55 (secs. 657-711), and defendant failed to comply therewith, contributory negligence constituted no defense to the action. However, the declaration avers as to the feeder paddle that plaintiff was in fact ignorant of the defect alleged until he requested defendant to provide him with such implement, which he

failed and neglected to do. If plaintiff as alleged was ignorant of the defects in the machine, of course he could not be chargeable with contributing to his injuries by continuing to work it. We do not think the circumstances averred sufficiently negative his averment of ignorance, as urged by counsel. But as to the feeder paddle the declaration does show knowledge on the part of plaintiff of the alleged need of such an instrument, for he avers that he requested defendant to furnish him with such a paddle, and his promise and failure to do so. But should he not have also averred his reliance on such promise and his belief that defendant would in a reasonable time comply therewith? We are persuaded on authority that such averment should have been made, if plaintiff relied on such negligence as a basis of recovery. *Parfitt v. Veneer & Basket Co.*, 68 W. Va. 438, 449, 450, 69 S. E. 985; *Ashley v. Tri-State Lumber Co.*, 79 W. Va. 726, 91 S. E. 813. If, as these cases hold, a servant continues in the services of his employer after knowledge of the defect in the machinery he is employed to operate he will be presumed to have assumed the risks, when injured thereby. It does not clearly appear whether the verdict and judgment were predicated on the alleged negligence to furnish a safe meat grinder or the omission to furnish a feeder paddle. If under the evidence the pleadings were sufficient, they might be sustained on either theory.

[3] Lastly, it is urged that the demurrer should have been sustained because the business of defendant without his election to come under it, not averred but negatived, does not bring him involuntarily under the Workmen's Compensation Law. Both counts aver that the business of the defendant in which plaintiff was employed to assist him was that of a butcher, and in which he made use of divers pieces of machinery; namely, boilers, engines, motors, pulleys, grinding machines and divers other implements, tools and devices for preparing meats so butchered by him for the market, and more particularly for the grinding of said meat in order to make the same into sausage. But whether the defendant's business so described in the declaration falls within the purview of the Workmen's Compensation Law or not, we think on demurrer it would be good as averring a good common-law action for negligence of the defendant to use due care to furnish plaintiff a safe place to work, a good machine to work with, and to keep it in good repair, and that the demurrer was therefore properly overruled. We should for this purpose treat the averments regarding the Workmen's Compensation Law and defendant's alleged negligence in failing to comply therewith as surplusage.

The remaining points relied on involve the



giving and refusing of instructions to the jury, and the action of the court on the motion of the defendant for a new trial. All six of the instructions requested by plaintiff were given as offered. Of the four requested by defendant, the first and second were given; 3 and 4 were refused. Defendant complains of plaintiff's instructions 2, 3, 4, 5 and 6, and of the action of the court in refusing his instructions 3 and 4.

[4] Instructions 2, 3 and 4, given for plaintiff all assume that the business of the defendant and his liability to plaintiff were governed by Workmen's Compensation Law and his omission to comply therewith by electing to pay the premiums required thereby, and that he was thereby deprived of his common-law defenses, and particularly that of the contributory negligence of the plaintiff. This theory of these instructions, in the light of the averments of the declaration and the facts disclosed by the evidence as to the nature of the defendant's business, constitutes the chief objection of the defendant thereto. As already observed, the declaration avers that the business of defendant was that of a butcher. The plaintiff himself swears that the business of defendant was that of a general store, "that he had a little of everything—meats and groceries, and flour, and everything." And in describing his employment he says:

"I got up in the morning, and done my work up at the slaughter house, worked about half an hour; then I came in to the store, and went out and solicited orders, and worked around the store, and then in the afternoon they sent me down in the basement to grind meats, and cook meats, and that is when I got my hand taken off."

Defendant says his business was that of "meats and groceries," and that the duties of plaintiff were "delivering and taking orders in the forenoon, and in the afternoon taking care of the meat end, such as making sausage, or whatever we were doing; in the store he clerked—received and charged—had full sway, the same as I have or any of the balance of the help." And in describing the circumstances of the accident he says, "He was rendering lard and making this sausage; it was not a large amount—only a small amount—probably fifty pounds;" that to make fifty pounds of sausage on the style of machine used would take probably not more than twenty minutes, even when grinding it a second time.

The question is thus presented, whether the business of "butcher" as alleged in the declaration, or that of a general store in which his business was that of selling meats and groceries at retail with the incidental business of making sausage and rendering lard in the small way described in the evidence, brought the defendant under the involuntary requirements of the statute so as

to render him liable to the plaintiff and the penalties imposed thereby, and the loss of his common-law defenses as assumed in these instructions. The contention of plaintiff is that the business of defendant brought him within sub-section "n" of section 18 of the act (sec. 874), classifying the industries subject to the act; and if not under that section, then it was comprehended within the provisions of sub-section "x," providing that:

"Any industry or business not specified in the foregoing schedules, for which any employer shall voluntarily apply to the commissioner to be brought under the provisions of this act; and the commissioner shall have the authority to classify and place in one of the schedules aforesaid, or any schedule created by him as herein-after mentioned, any industry or business subject to this act not hereinbefore specifically mentioned."

And if not comprehended thereby, the further contention is that it is covered by section 9 (sec. 665) of said act, providing that:

"All persons, firms, associations and corporations regularly employing other persons for profit, or for the purpose of carrying on any form of industry or business in this state (casual employment excepted)," etc., and not falling within the business of employers "in domestic and agricultural service," specifically excepted by the act.

The first inquiry then is, does the business of *butcher* alleged, or that of selling *meats and groceries* in a small retail store, such as the evidence discloses in this case, though the meats sold are in whole or in part of animals slaughtered by such retail merchant, fall within schedule "n" of section 18, namely, "slaughter and packing houses, stock yards, soap, tallow, lard and grease manufactories, tanneries, \* \* \* in which power driven machinery is used"? In our opinion such a business does not come within the provisions of this section. If so, then every little merchant who happens to butcher a few animals whose meat he cuts and retails to his customers in a grocery store, of which there are many, would be brought under the act. Perhaps, as counsel argue, the size of the business ought not to be regarded as controlling in the construction of the statute. A statute like this in derogation of the common law, and imposing restrictions upon common occupations of the people, should receive a strict construction. *Rhodes v. Coal Co.*, 79 W. Va. 71, 90 S. E. 796, point 3 of the syllabus. Unless therefore the words of the statute strictly construed comprehend the business of defendant, it should by no strained construction be held to include it. The words "slaughter and packing houses" readily suggest a business where animals fit for food are slaughtered and their meats packed and prepared for market in considerable quantities, and in which power driv-

en machinery is employed. Would anyone think for a moment that the Legislature by these words meant to include thereunder the business of a corner grocery where the owner does a retail business in meats and groceries and slaughters a few animals and cuts them up and sells their meat at retail in a small way? We do not think so. Strictly speaking the words "slaughter house" may include any place where animals are killed; there is no pretense that the defendant was engaged in packing meats or other products. The proof is that his manufacture of lard and sausage was for the daily sale thereof to his customers in small quantities. When we examine the various schedules in section 18, we find that they relate generally to the business of mining, manufacturing, railroads, operated or propelled by power driven machinery, telegraph and telephone lines, and construction works of various kinds. In none of them do we find dry goods or grocery stores, banks, fruit stands, jewelry stores, or businesses of like character. Counsel for plaintiff cite us to three cases; one from Georgia, one from Indiana, and the other from Louisiana, in support of their construction of the statute. The question in the Georgia case was whether Kehrer, an agent or representative of Nelson Morris & Co., was subject to the occupational tax imposed by the statute upon agents of packing houses doing business in the state. It was decided that he was. There is no question made that Morris & Company were large packers in the state of Illinois. They maintained a distributing house in Georgia, where they were represented by Kehrer as agent or salesman. It was held that notwithstanding Morris & Co. did not slaughter and pack meats in Georgia but sold them there through Kehrer, they were doing business as packers in Georgia; that selling meats in Georgia manufactured and packed in Illinois was doing the business of packers in Georgia; and that Kehrer was subject to the occupational tax. *Stewart v. Kehrer*, 115 Ga. 184, 41 S. E. 680. The Indiana case was an indictment for burning a mill, described as a mill-house, and upon a motion to quash, the question was whether mill-house was sufficiently descriptive of the offence prescribed by the statute. It was held that it was. The court said:

"There are slaughter-houses, packing-houses, smoke-houses, etc., indicating houses in which animals are slaughtered, meats packed and smoked, etc. So, a 'mill-house,' we think, would readily be understood to be a building or house used for milling purposes." *Ford v. State*, 112 Ind. 373, 14 N. E. 241, citing *Dugle v. State*, 100 Ind. 259.

In the Louisiana case the question was whether the defendant was subject to a license tax for "carrying on the business of a slaughter house" imposed by the statute. The evidence showed that he killed one or

two beeves a week, which were raised or pastured on his plantation and sold in his plantation store for which he paid a license as retail merchant and liquor dealer on the public road, and that most of the beeves were purchased originally in New Orleans. The manifest purpose of the statute was revenue, and we think the court rightly held the defendant liable for the tax regardless of the size of his business. *Thibaut, Sheriff, v. Hebert*, 45 La. Ann. 838, 12 South. 931. But our statute must be construed with reference to the legislative intent as manifested by the entire enactment. In two or more of the schedules of section 18 some businesses are exempted. For example, those specified in schedule "m" are limited to factories in which power driven machinery is used; and schedule "v," which includes structural work on buildings, is limited to those over three stories high.

In further support of their proposition counsel for plaintiff rely on the expression of this court in *Louis v. Smith-McCormick Construction Co.*, 80 W. Va. 159, 92 S. E. 249, and *Adkins v. Hope Engineering & Supply Co.*, 81 W. Va. 449, 94 S. E. 506, respecting the broad and inclusive scope of section 9 (sec. 665) of the act. While in these cases reference is made to the wide scope of this section, the business of the defendant in the first case clearly fell within schedules "v" and "w" of section 18; and in the latter case no question was made as to the fact that defendant's business, that of constructing a gas line, was covered by one of the schedules of said section. The principal question was whether on the facts plaintiff was entitled to recover for personal injuries sustained by his infant son fifteen years of age employed by defendant, and whether said infant was an employee as defined by said section 9. The court said that section makes no distinction as to age limit. What was said by the court in these cases should be construed with reference to the questions involved and so as not to do violence to the legislative intent manifested in the enactment.

[5] But what effect should be given to schedule "x", read in connection with said section 9? Clearly this schedule, which is made to cover "any industry or business not specified in the foregoing schedules, for which any employer shall voluntarily apply to the commissioner to be brought under the provisions of this act," does not bring such omitted industry or business under the act without the voluntary application of the employer. To be brought under the act such employer must apply to the commissioner, who must give him a classification and rate of premium, unless, the commissioner, as he possibly may do under a subsequent provision of the schedule, himself bring such employer under the act by exercising the power thereby conferred. In

these provisions the statute clearly recognizes the two classes; namely, first, those brought under the act involuntarily as it were by being named in the several schedules, and required to comply therewith upon pain of being denied their common-law defenses; and second, those submitting themselves voluntarily, and when so doing, all are subject to the act within the meaning of section 9; but the voluntary classes without such submission, or the special act of the commissioner, do not become subject to the act. Nor is such voluntary class of employers denied any of their common-law rights for neglecting voluntary submission to the statute. Analogous to the case presented here, is that of *Barnett, Adm'r, v. Coal & Coke Ry. Co.*, 81 W. Va. 251, 94 S. E. 150, where we held that section 28 (sec. 682) of the statute (Code 1913, c. 15P) did not operate to deprive employers engaged in both intra-state and inter-state businesses, unless and until, from the time they had elected, as they might under section 52 (sec. 708) by the method prescribed, to come under the act. This notwithstanding the broad and comprehensive scope of section 9.

[6] Our conclusion, therefore, is that plaintiff's instructions 2, 3, 4 and 6, ignoring and excluding defendant's theory of contributory negligence, and holding him subject to the Workmen's Compensation Law, were erroneous and should have been rejected.

Plaintiff's instruction No. 5, we think, states the law correctly relative to the liability of the master for failing to comply with his promise to remedy dangerous and defective machinery and to provide a reasonably safe place to work; but as we have already observed, the declaration was defective in not averring reliance of the plaintiff on the defendant's promises and his failure to comply therewith in a reasonable time.

[7] Defendant's instruction No. 3 was, we think, rightly refused. It would have told the jury that if they believed from the evidence plaintiff was a general clerk in defendant's store and performing his duties set forth in the declaration, and as such clerk had access to and right to use the feeders or feeder paddles in said store as are named in the declaration and could have taken and used the same in the performance of his duties, and did not do so at the time of the accident, the jury should find for the defendant. The principal vice of this proposition is that it assumes the fact that there were in the store feeder paddles suitable for such use, or any feeder paddles, facts as to which there was little if any appreciable evidence offered by defendant, and facts which were denied by plaintiff. Whether the defendant was negligent in failing to furnish such an instrument, if one was not provid-

ed, or were in the store at the disposal of plaintiff, were questions which might properly have been submitted to the jury by a proper instruction. But the instruction in question was not competent in this respect.

[8] Defendant's instruction No. 4, we think, states a correct legal proposition applicable to his theory of the case. It would have told the jury that if they believed from the evidence that plaintiff knew there was a rapidly revolving screw at the edge of the lower hopper of the sausage grinding machine testified to in the case, and that his hand was likely to come in contact therewith in attempting to push meat down into the hopper, he must be held to have appreciated the danger and assumed the risk in attempting to do the work. *Louis v. Smith-McCormick Construction Co.*, supra; *Ashton v. Boston & Maine R. R. Co.*, 222 Mass. 65, 109 N. E. 820, L. R. A. 1916B, 1281. The objection of the plaintiff and the ruling of the court thereon are that the instruction ignores the plaintiff's theory of a defective machine and failure to provide a suitable instrument to operate it as the cause of the injury. This would be a good objection if the instruction was a binding one telling the jury to find for the defendant; but it does not do so. It states a correct legal proposition on defendant's theory as to the facts, and was proper to go to the jury.

For the foregoing reasons, the judgment below must be reversed, the verdict set aside, and the defendant awarded a new trial.

(84 W. Va. 437)

#### STATE v. LYNCH.

(Supreme Court of Appeals of West Virginia.  
Sept. 9, 1919.)

(Syllabus by the Court.)

#### 1. INDICTMENT AND INFORMATION $\S$ 110(4)—WHEN INDICTMENT IN LANGUAGE OF STATUTE INSUFFICIENT.

If a statute creating an offense does not by its terms define the particular wrongful act, in such manner and to such an extent as to disclose all of its essential elements, an indictment in the language of the statute is not sufficient. It should expand the words of the statute by such specification of the essentials of the offense as will define it with particularity.

#### 2. OBSTRUCTING JUSTICE $\S$ 11—INDICTMENT MUST ALLEGE THREAT AND AGAINST WHOM MADE.

An indictment under section 30 of chapter 147 (sec. 5283) of the Code of 1913, purporting to charge an attempt to intimidate a witness by means of a threat and to obstruct and impede the administration of justice by such means, should disclose the nature of the threat and the person against whom it was made; and omission of such disclosure is a fatal defect therein.

**8. OBSTRUCTING JUSTICE §11 — EXACT WORDS OF THREAT NOT NECESSARY IN INDICTMENT.**

In such case it suffices to indicate the nature and character of the threat by the use of any appropriate terms, and the exact words in which it was made need not be used.

**4. OBSTRUCTING JUSTICE §11—INDICTMENT MUST ALLEGE SCIENTER.**

Omission from such an indictment of an averment of scienter on the part of the accused is a fatal defect also.

Case Certified from Circuit Court, Mason County.

V. S. Lynch was indicted for an attempt to intimidate a witness summoned to testify before a grand jury, and by means thereof to obstruct the administration of justice. Motion to quash indictment and a demurrer thereto overruled, and question certified. Demurrer and motion to quash sustained, and decision certified to circuit court.

E. T. England, Atty. Gen., and Chas. Ritchie, Asst. Atty. Gen., for the State.

Pendleton, Mathews & Bell, of Spencer, for defendant.

**POFFENBARGER, J.** The question certified in this case is whether an indictment charging an attempt to intimidate a witness summoned to give evidence before a grand jury, and, by means of such intimidation, to obstruct and impede the administration of justice in the circuit court of Mason county, is sufficient. A motion of the accused to quash the indictment and his demurrer to it were overruled.

The indictment purports to charge an offense under section 30 of chapter 147 (sec. 5283) of the Code, reading as follows:

"If any person by threats, force, or otherwise, intimidate or impede, or attempt to intimidate or impede any judge, justice of the peace, juror, witness, arbitrator, umpire, or any officer or member of any court in the discharge of his duty as such, or by any means obstruct or impede, or attempt to obstruct or impede the administration of justice in any court, he shall be guilty of a misdemeanor, and unless otherwise provided by law, he shall be fined not less than twenty-five nor more than two hundred dollars, and be imprisoned in the county jail not exceeding six months."

It avers that the accused "did unlawfully attempt to intimidate by means of threats and otherwise" a certain person, "a witness who was then and there duly and legally summoned to appear and give evidence before the grand jury of Mason county, West Virginia, at the June term, 1915, of the circuit court of said Mason county," for the purpose of preventing "said person" from giving evidence before the said grand jury in obedi-

ence to said summons, whereby the said V. S. Lynch attempted to obstruct and impede the administration of justice in the said circuit court of said Mason county, West Virginia, by attempting by threats and otherwise to intimidate the said "person," and "prevent his appearance before the said grand jury of the said circuit court to give evidence therein," etc.

Two principal grounds of attack upon the indictment are: (1) Its failure to disclose the nature of the threat or other means of intimidation employed in the alleged attempt; and (2) lack of an averment of knowledge on the part of the accused that the person upon whom the attempt is alleged to have been made was a witness before the grand jury.

[1] Ordinarily, it suffices to charge an offense in the language of the statute creating it. *State v. Chafin*, 78 W. Va. 140, 88 S. E. 657; *State v. Jones*, 53 W. Va. 613, 45 S. E. 916; *State v. Boggess*, 36 W. Va. 713, 15 S. E. 423; *State v. Riffe*, 10 W. Va. 797. But this rule has its well-defined exceptions. It does not apply, unless the language of the statute embraces all of the essential elements of the offense. *Church's Case*, 4 W. Va. 745; *State v. Boggess*, 36 W. Va. 713, 15 S. E. 423.

"Though generally sufficient to charge in an indictment an offense in the words of a statute, yet if this does not sufficiently define the particular wrongful act, and give notice to the defendant of the offense he is required to meet—the particular criminal act in its essentials—the statute words must be expanded by such specification of the essentials as will define the offense with particularity." *State v. Mitchell*, 47 W. Va. 789, 35 S. E. 845.

To the same effect see *Boyd v. Commonwealth*, 77 Va. 55; 21 Ency. Pl. & Pr. 672; 22 Cyc. 339-341.

In respect of pleading, there seems to be a well-defined distinction between offenses charged as having been accomplished and those charged as having been attempted. In *State v. Schnelle*, 24 W. Va. 767, it was held that an indictment alleging the accused did slay, kill, and murder a named person was sufficient to inform him fully and plainly of the character and cause of the accusation; but it would not be sufficient to charge merely that the accused had attempted to slay, kill, and murder a named person. In such case, an overt act constituting the attempt must be averred, and an averment of such an act must necessarily include specification of the means employed in the attempt. *Com. v. Clark*, 6 Grat. (Va.) 675; *State v. Baller*, 26 W. Va. 90, 53 Am. Rep. 66. If the indictment had charged intimidation, instead of an attempt to intimidate, the averment might possibly have been held to be one of fact, and to have been sufficiently certain. *Com. v. Feely*, 2 Va. Cas. 1. As to this, how-

ever, we express no opinion. *State v. Schnelle*, cited, might not sustain it, because the form of indictment used in that case had been prescribed by statute, and the real question was whether the statute was constitutional and valid. Here an indictment for intimidation would be tested by common-law rules and principles.

[2, 3] This indictment purports to charge an overt act, but the charge is made by the use of a generic and indefinite term, viz, "threats." The thing done or words used by the accused, by way of threat are not disclosed. Nor is the person against whom the threat was made indicated. The words used might or might not, if disclosed, amount to a threat, and, if so, the relation of the threatened person or property to the parties concerned might be so remote as to make it apparent that the threat could have had no tendency to intimidate or influence the party alleged to have been affected by it. Without specification of these particulars, an indictment purporting to charge an attempt to intimidate does not disclose essential elements of the offense. In other words, it does not show, otherwise than by way of conclusion, that any offense has been committed. It does not fully and plainly inform the accused of the character and cause of the accusation against him, agreeably to common law and constitutional guaranties, nor afford him adequate protection under the law of former adjudication. This conclusion is well sustained by authority. *People v. Jones*, 62 Mich. 304, 28 N. W. 839; *Robinson v. Com.*, 101 Mass. 27; *People v. Frey*, 112 Mich. 251, 70 N. W. 548; 21 Ency. Pl. & Pr. 672.

If it can be said that the indictment purports to charge two offenses, an attempt to intimidate a witness and an attempt to obstruct and impede the administration of justice, and that as to the latter, the rule of pleading should be less strict, in some respects, the requirement of specification of an overt act constituting an attempt could not be dispensed with. No attempt to obstruct or impede, otherwise than by the threat made to the witness, is charged or suggested; and it is just as essential, therefore, that the nature of the threat be disclosed in the one case as in the other.

[4] The omission of an averment of scienter, or knowledge of the status of the parties and intent to intimidate the witness or obstruct and impede the administration of justice, is equally fatal. Though the case of *Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419, differs from this in respect of the status of the parties, the character of the offense and other particulars, it applies a general principle of criminal law. It holds that, to be criminal, an obstruction of the course of justice must be intentional

and that the indictment must aver that the act of obstruction was done with knowledge and intent to obstruct. The indictment in that case was founded upon a statute similar to the one involved here. For the proposition that, under the federal statute, knowledge and intent are material and essential elements and must be established by proof. *United States v. Kee et al.* (D. C.) 39 Fed. 603, is direct authority. When these elements are essential, they must be averred as well as proved.

But the threats need not be set out in the exact words in which they were made. 21 Ency. Pl. & Pr. 673. And a general averment of scienter will no doubt suffice.

As the indictment is defective in both respects, however, it should have been quashed in the court below. The demurrer and motion to quash will be sustained, and the decision certified to that court.

(84 W. Va. 468)

STATE ex rel. DODD et al. v. HILL, Banking Com'r.

(Supreme Court of Appeals of West Virginia. Sept. 16, 1919.)

(Syllabus by the Court.)

1. BANKS AND BANKING §6 — CHARTER — DISCRETION OF COMMISSIONER OF BANKING.

That part of section 78, c. 54 (sec. 3031), Code 1913, as amended in 1919, which provides that "hereafter no charter shall be issued to any bank to do business in this state until the application therefor has been approved in writing by the commissioner of banking," vests in such commissioner discretionary power to approve or reject such application.

2. BANKS AND BANKING §6 — APPLICATION FOR CHARTER — DISCRETION OF COMMISSIONER OF BANKING.

The refusal of the commissioner of banking to approve an application for a charter in a proper exercise of such discretionary power is not subject to judicial review on the ground that a different decision should have been made, unless it clearly appears that he has willfully and arbitrarily disregarded his duty, or that his decision was due to caprice, passion, partiality or corruption.

Mandamus by the State, on the relation of C. I. Dodd and others, against J. S. Hill, Banking Commissioner, etc. Writ denied.

Henry S. Cato and Linn & Byrne, all of Charleston, for relators.

McClintic, Mathews & Campbell, of Charleston, for respondent.

LYNCH, J. Guided by his own construction of section 78, c. 54, Code (sec. 3031), as amended by chapter 21, Acts 1913, prescribing

ing his authority as commissioner of banking, J. S. Hill declined to issue a certificate of approval of the application of C. I. Dodd and others for authority to establish a state bank at Elk View, in Elk district, Kanawha county, to be called and known as Elk View Banking Company. To compel the issuance of such certificate, petitioners applied to this court for and obtained an alternative writ requiring him either to comply with the writ forthwith or appear and show cause for not doing so. To the petition respondent appeared and demurred, moved to quash the writ, and filed his return, to which petitioners demurred.

Speaking as of the date at which the amendment of 1913 became effective, the Legislature declared that "hereafter no charter shall be issued to any bank to do business in this state until the application therefor has been approved in writing by the commissioner of banking." It is by virtue of this power that respondent seeks to justify his action in withholding the certificate without which no new state banking institution lawfully may open its doors for the transaction of business in this state.

As to the power of the Legislature to enact a provision of this character there is no question raised, but the existence of the power is conceded, and nothing need be said upon that subject except to remark that while judicial decisions are not entirely in accord, the greater number uphold such or similar enactments as within the scope of the regulatory authority of the Congress and of the Legislatures of the several states.

Respondent's return, petitioners say, is not sufficient to justify the withholding of the commissioner's approval of their preliminary application for the privilege of engaging in the banking business, and that upon such application the only duty he then was required to perform was to determine the formal sufficiency of the papers presented for examination and approval. The language of the statute does not so limit or circumscribe the powers it purports to confer upon the office thus created. Besides, there was no need to regrant such a right to test the legal sufficiency of such preliminary documents, as that right then belonged and still belongs to the office of the secretary of state, and it is there that such a test is made.

Respondent in the return defends his action in part by showing like action by former occupants of the office in similar circumstances, and a virtual ratification or indorsement of the construction given by him and them of the provisions of section 78 in this: That the Legislature of 1919, presumably knowing and consenting to such construction, amended and re-enacted the section in other particulars, but left intact the provision so construed.

[1, 2] But, granting the scope of the power to be as broad as the respondent says it is,

petitioners claim that his action, nevertheless, was wholly unjustifiable and arbitrary, and that none of the reasons relied on to justify the rejection of their application were sufficient for that purpose. Before condemning as arbitrary and unreasonable the action of an officer charged with the performance of an important public duty, a court should carefully scrutinize the grounds assigned for so doing. Looking to these we find the only charge to be that the banking commissioner acted adversely upon the application on the day it was presented to him for approval. Promptness in the discharge of a public duty ordinarily is worthy of commendation rather than adverse criticism of the officer. It does not necessarily signify failure to give thoughtful consideration to the matters involved before determining what action a proper discharge of his duty required him to take. Besides, according to his return, he "seriously considered all questions connected with the location of said bank and reached the conclusion that from a banking standpoint a bank was not needed at such place, and would not be able to be of any value to the stockholders, or any real value to the people of that community; that respondent was of opinion that the territory in a commercial sense tributary to said Elk View would be very small and was not sufficient to properly support a bank and enable that bank to pay the heavy expenses connected with the operation thereof and make any returns to the stockholders, and respondent's experience has been that unless a bank can make sufficient money for such purposes it is of no value to the public, and in many instances has been really menaces to the interests of the community.

"Respondent further says that in view of late events in one section of West Virginia it can be better appreciated that there is a grave responsibility resting upon respondent in connection with his duties under the law, and that respondent is advised under the law that one of the methods given to him for the protection of the public is to carefully scrutinize every application made for a charter for a new bank, and to take into consideration everything connected therewith in each individual case, and that this especially includes the location of the bank, the territory contributory thereto, its possibilities and probabilities from a banking standpoint, and that in this case he has given much attention to all these and other questions connected therewith, and in the exercise of his best judgment as a sworn officer of the state of West Virginia he has arrived at the conclusion that this application should not be approved."

If, as we believe and hold, the matters stated are fairly considered within the scope of the authority conferred by the Legislature, and the officer upon whom such authority devolved duly considered them, as he solemnly swears he did before deciding to

withhold approval, the writ ought not to issue; for, while this court may by mandamus compel action in good faith by an officer clothed with discretionary power, we will not award the writ for such purpose unless it appears that he has clearly and willfully disregarded his duty, or that his action was flagrantly wrong working unjust results, or that his decision was due to caprice, passion, partiality or corruption. *Dillon v. Bare & Carter*, 60 W. Va. 483, 56 S. E. 390.

Two recent decisions, one by the Supreme Court of Illinois, in *People ex rel. Schweder v. Brady*, 268 Ill. 182, 108 N. E. 1009, the other by the Supreme Court of New York, Appellate Division, in *In re Lughino & Sons*, 176 App. Div. 285, 163 N. Y. Supp. 9, construing provisions regulating banking institutions and conferring authority on specified public officers similar to that dealt with here, support the principle stated in *Dillon v. Bare*, supra. Speaking of the provision of the New York Banking Law (Consol. Laws, c. 2) which "makes the approval of the superintendent a condition precedent to the doing of any act," the court held that it lay within his sound discretion to grant or refuse his approval, and, though a later section conferred upon the court the right to review the action of such official, the exercise of that right was held to be restricted to instances where he acted arbitrarily and without good cause, or where there had been an abuse of discretion, and that "acts properly within such discretion are not subject to judicial review at the instance of some one claiming that a different decision should have been made."

Likewise, *First Nat. Bank of Capitol Hill v. Murray*, 212 Fed. 140, 128 C. C. A. 652, held not reviewable acts of the Comptroller of the Currency done within the scope of the powers conferred on him by the National Banking Act (Act June 20, 1874, c. 343, 18 Stat. 123) as to control and visita-

Some of the matters alleged by respondent for his refusal to approve the initial steps taken for the establishment of the proposed bank may not, as petitioners say, be sufficient. But when the return is considered in its entirety in the light of the objects of the state banking act taken as a whole, and in view of the authorities, it presents facts, circumstances and conditions such as we think do not warrant us in awarding the peremptory writ. Apparently the chief purpose of the Legislature in enacting the state banking law was to regulate the banking business and render it more efficient and more safe for those who intrust money to them. These considerations and numerous others of similar and like character have operated to induce such legislation by many if not all of the states, following congressional action as the safest and best criterion. Depositors have suffered severe losses by the failure of banks, due sometimes only to the lack of business enterprise in the community to create a demand for capital, but generally because of the dishonesty or incapacity of bank officers or agents, and when insolvency occurs, as it often does from one or both causes, it is usually the depositor least capable of sustaining the loss who suffers most seriously.

What motive prompted the creation of the office and the enactment of the provision granting such authority if the Legislature did not intend the public to derive some substantial benefit and protection from the power granted? Certainly there was no public demand for protection against injury from informality in the application for the privilege of engaging in the business. No serious results have flowed from that source. It was to reduce the probability of mishaps and losses of the nature mentioned above that the banking commissioner was intrusted with such power, and to achieve that end a certain discretion must be allowed him in the exercise of his duties.

Writ denied.

(24 Ga. App. 189)

## SOUTHERN EXPRESS CO. v. CHERO-COLA BOTTLING CO.

CHERO-COLA BOTTLING CO. v. SOUTHERN EXPRESS CO.  
(Nos. 10201, 10202.)(Court of Appeals of Georgia, Division No. 2.  
Sept. 19, 1919. Rehearing Denied Oct. 1,  
1919.)*(Syllabus by the Court.)*1. COURTS ⇐189(15)—JUDGMENT ⇐120, 470  
—DOCKET ENTRIES IN PENDING CAUSES NOT  
OPEN TO COLLATERAL ATTACK—"IN DE-  
FAULT."

Upon the call of the appearance docket an entry was made thereon by the trial judge, "In default April 27, 1918." Later in the day a plea was filed, the attorney for the plaintiff notified thereof, and the entry of "In default" erased by the trial judge, and an entry made by him, "Plea filed April 27, 1918." Entries made by the judge on the docket are a part of the proceedings in the case. *Brady v. Little*, 21 Ga. 132 (4), 135 (4). At the trial term a motion was made to strike the plea, because at the time it was filed the case was in default, and the judge had erred in striking the entry "In default," and marking "Plea filed." While sections 5654 and 5656 of the Civil Code of 1910 provide a way in which defaults may be opened, yet where the method provided by these sections is not followed, and the default is set aside and a new entry made, what is the remedy of the plaintiff? He must either except to the erroneous striking of the first entry, or he must file a direct proceeding to "vacate or reform" the second entry. To the judgment erasing "In default" there was no exception. The motion to strike the plea was not a "direct proceeding to vacate or reform" the entry of "Plea filed." "Entries appropriately made upon the dockets of the superior courts during the pendency of causes, by judges presiding therein, are presumed to represent truthfully the incidents occurring in the course of litigation; and so long as such entries stand unchallenged by direct proceedings to vacate or reform them, they are not open to collateral explanation or attack." *Thornton v. Perry*, 101 Ga. 608, 29 S. E. 24 (1); *Albany Pine Products Co. v. Hercules Mfg. Co.*, 123 Ga. 270, 51 S. E. 297; *Saffold v. Banks*, 69 Ga. 290 (5-a); *Smith v. Merchants' & Farmers' Bank*, 22 Ga. App. 505, 96 S. E. 342. The practice in the city court of Carrollton is the same as in the superior courts of this state. *Laws Ga.* 1897, p. 438, §§ 13, 17. The only entry on the docket at the trial term being that of "Plea filed," and there being no direct proceedings to vacate or reform this entry, the judge properly refused to strike the plea. In addition it will be noticed that both entries above discussed were made on the same day, and our Supreme Court has said: "At all events, a case is not 'in default' unless so entered on the docket by the judge; and where the entry is marked off or defaced by the judge on the day the appearance docket is called, such marred entry should not have the effect of an 'in default' judgment. The presump-

tion is that the case was not in default, but that the entry was heedlessly made by the judge through mistake, and that he disfigured the entry with his pen in order to correct his mistake." *Albany Pine Products Co. v. Hercules Mfg. Co.*, 123 Ga. 271, 272, 51 S. E. 297.

## 2. ADMISSION OF EVIDENCE.

The court erred in admitting, over the defendant's objections, the two letters set forth in the bill of exceptions.

## 3. DIRECTED VERDICT.

The evidence, with the letters above eliminated, did not demand a finding for the plaintiff, and the court erred in directing a verdict for that party.

Broyles, P. J., dissenting.

Error from City Court of Carrollton; James Beall, Judge.

Action by the Chero-Cola Bottling Company against the Southern Express Company. Motion by plaintiff to strike plea, on ground that entry of "Plea filed," in lieu of former entry of "In default," was error, denied, and judgment for plaintiff on a directed verdict, and defendant brings error, and plaintiff takes a cross-bill of exceptions. Judgment on main bill of exceptions reversed, and on the cross-bill affirmed.

Robt. C. & Philip H. Alston, of Atlanta, and S. Holderness, of Carrollton, for plaintiff in error.

Boykin & Boykin, of Carrollton, for defendant in error.

STEPHENS, J. Judgment on the main bill of exceptions reversed; on the cross-bill affirmed.

BLOODWORTH, J., concurs.

BROYLES, P. J. (dissenting). At the trial term, upon the hearing of the motion to strike the defendant's plea from the files of the court, the undisputed evidence, which was admitted without objection, showed the following facts: The case was returnable to the March term, 1918, of the city court of Carrollton. When the case was called, on the day which had been previously fixed for the call of the appearance docket for that term, no plea had been filed by the defendant, and the clerk of the court so announced to the presiding judge. The judge thereupon made the following entry on the docket of the court, to wit: "In default April 27, 1918." On the same day, but subsequently to the entering of the default judgment and the closing of the docket, the defendant was allowed by the court to file a plea, and the court thereupon scratched out the words "In default," upon the docket, and marked thereon, "Plea filed April 27, 1918." While it was not shown in so many words, the undisputed evidence clearly demanded the in-



ference that in opening the default there was no attempt to comply with the provisions of sections 5654 and 5656 of the Civil Code of 1910. In my opinion the court erred in overruling the motion to strike the plea. See, in this connection, *Albany Pine Products Co. v. Hercules Mfg. Co.*, 123 Ga. 270, 51 S. E. 297; *Coker & Son v. Lapscomb*, 17 Ga. App. 506, 87 S. E. 704; *Longlife Paint Co. v. Williams*, 20 Ga. App. 524, 93 S. E. 154; *Park's Ann. Code*, §§ 5653, 5654, 5655, 5656, 5661.

Under the facts stated above I do not think that this view of the case is contrary to the rule laid down in *Saffold v. Banks*, 69 Ga. 289, *Thornton v. Perry*, 101 Ga. 608, 29 S. E. 24, and *Smith v. Merchants' & Farmers' Bank*, 22 Ga. App. 505, 96 S. E. 342, to the effect that entries made by the trial judge upon the docket cannot be challenged, except by a direct proceeding to vacate or reform them. While the motion in the instant case, to strike the defendant's plea from the files of the court, may not have constituted, in a narrow and technical sense, a direct proceeding to vacate or reform the entry upon the court's docket, it amounted in substance and effect to the same thing. In *Albany Pine Products Co. v. Hercules Mfg. Co.*, supra, as in the instant case, the motion was to strike the defendant's plea, and the facts there were almost identical with those here, *except that the evidence in that case did not affirmatively show that the plea was not filed before the entry of default was entered upon the docket*, while in this case that controlling fact was affirmatively shown by the undisputed evidence. In that case the headnote is as follows:

"Where it appears that an entry was made by the judge on the docket of 'In default,' and it also appears that on the same day the judge defaced the entry by passing his pen through it, *in the absence of proof to the contrary*, such mutilated entry will be treated as the correction of an inadvertence, and not as an 'in default' judgment." (Italics mine.)

It clearly appears from this headnote, and the opinion in that case, that, if the evidence had affirmatively shown that the plea was not filed until after the judgment of default had been entered on the docket, the "mutilated entry" of "In default" would have been held to be an "in default judgment," and would not have been "treated as the correction of an inadvertence."

The refusal of the court to grant the motion to strike the defendant's plea deprived the plaintiff of a substantial right, and rendered the further proceedings in the case nugatory. In my opinion the judgment on the cross-bill of exceptions should be reversed, and the main bill of exceptions dismissed.

(84 W. Va. 489)

**GAULEY & E. RY. CO. v. CONLEY et al.**  
(Supreme Court of Appeals of West Virginia.  
Sept. 16, 1919.)

(Syllabus by the Court.)

**1. EMINENT DOMAIN §202(1) — MARKET VALUE OF PROPERTY—EVIDENCE.**

In a proceeding to condemn private property for public use, evidence of past annual profits derived from a business conducted on the property, in the form of net income arising from such business, offered as an index to the market value of the property, is ordinarily inadmissible, because the extent to which such income arises out of the property used is uncertain; it being dependent upon the capital invested, business conditions obtaining, and the trading skill and business capacity of the owner, as well as adaptability of the property to the business.

**2. EMINENT DOMAIN §202(1)—REMOVAL OF BUSINESS FROM CONDEMNED PROPERTY—DISADVANTAGES OF NEW LOCATION—ADMISSIBILITY IN EVIDENCE.**

If, in such case, the business is to be continued at another location and on property different from that involved in the proceeding, evidence of the relative inconvenience and disadvantages of the new location is inadmissible, because the constitutional guaranty of indemnity does not extend to the business conducted upon the property taken.

**3. EMINENT DOMAIN §202(1) — REMOVAL OF BUSINESS — CONSTRUCTION OF NEW BUILDING—DAMAGES.**

Nor, in the event of the erection of a new building on a different piece of land, in which such business is to be continued, can the cost thereof be included in the compensation or damages awarded, or proved as tending to show the value of the old building, in the absence of disclosure of like or closely similar construction and conditions in all respects.

**4. EMINENT DOMAIN §202(1) — DAMAGES — EVIDENCE—CONTIGUOUS LOT.**

In such case, the admission of evidence of damages to a lot not involved in the proceeding, nor used in connection with the property proceeded against, though contiguous to it, is erroneous.

**5. EMINENT DOMAIN §202(1)—DAMAGES—EVIDENCE—OFFER TO OWNER.**

It is also erroneous, in such case, to permit the landowner to prove an inquiry to him by an agent and attorney of the condemnor, as to whether he would accept a named sum of money, in payment of compensation for the property to be taken and damages to the residue, without proof of the agent's authority to fix and determine the amount of such compensation and damages. Evidence of such an inquiry is also inadmissible, because it does not fairly tend to prove an admission as to the value of the property.

**6. EMINENT DOMAIN §202(1)—TAKING OF PART OF LOT—PROOF OF VALUE.**

Ordinarily, when only a part of a lot or parcel of land is taken under the power of emi-

ment domain, the proof of value should be limited to the part actually taken, and, as to the residue, the evidence should be limited to damages; but, when virtually all of the property is taken and the remnants are relatively worthless, the value of the entire tract or lot may be established, and an allowance made for the value of the remnants.

**7. EMINENT DOMAIN** ⇨202(1)—DAMAGES—EVIDENCE—OTHER SUITABLE PROPERTY.

After the right to take the property has been adjudicated and acquiesced in, it is inadmissible to prove, upon the inquiry as to compensation and damages, that the condemnor could have obtained other property equally as well suited to its purposes.

**8. EVIDENCE** ⇨501(7)—OPINION—VALUE OF PROPERTY.

Upon such a trial, a witness cannot base his opinion as to the value of the property upon "the possibility or impossibility of securing other locations" for the business conducted upon it.

**9. EMINENT DOMAIN** ⇨202(6) — VALUE OF PROPERTY—EVIDENCE—ASSESSMENT.

To be admissible, by virtue of section 115, c. 29 (sec. 1000), of the Code, as evidence of the value of property proceeded against under the power of eminent domain, the assessment thereof for purposes of taxation, last certified before the beginning of the proceeding, must be limited to the property so proceeded against, and must not include it and other property as a single or combined piece, unless the property is of uniform value and appears to have been assessed by the acre or by the lot.

**Error from Circuit Court, Fayette County.**

Condemnation proceeding by the Gauley & Eastern Railway Company against C. A. Conley and others. Verdict and judgment for defendants, and plaintiff brings error. Reversed, verdict set aside, and cause remanded for a new trial.

W. N. King, of Columbus, Ohio, Leroy Allebach, of Charleston, and Dillon & Nuckolls, of Fayetteville, for plaintiff in error.

Magee McClung and C. R. Summerfield, both of Fayetteville, for defendants in error.

**POFFENBARGER, J.** The verdict and judgment in this condemnation proceeding by a railway company to take, for its purposes, a portion of each of two small lots, on one of which there was a horse and mule barn, and on the other a department store building, both in use at the time, are for \$14,000, and the applicant complains of them.

The dimensions of the barn lot were, substantially, 40 by 80 feet, and of the other lot 40 by 54 feet. The railroad right of way line cut into both lots to a depth of about 30 feet and ran through the building on each. Each of the structures was a two-story frame building; the former about 54 by 37 feet, and the latter about 36 by 50 feet. On account

of the unfavorable topography of the ground, the building sites had to be prepared at considerable expense, by the blasting out and hauling away of rock and the construction of retaining walls. The barn seems to have been built in 1911, and the storehouse in 1914. Up to a date prior to August, 1917, the time of the institution of this proceeding, the two defendants, C. A. Conley and E. D. Kincaid, were partners trading in horses and mules, and conducted their business in the barn just described. At the latter date, Conley, having bought out Kincaid, was conducting the horse and mule business alone. They, however, were owners in common of the two lots, and Conley was paying Kincaid \$25 per month as rental for his interest in the lot on which the barn stood, and the store building paid a rental of \$60 per month.

The commissioners appointed in the usual way ascertained the compensation and damages respecting the lot on which the barn was at \$4,800, and the lot on which the store building was at \$5,500, making a total of \$10,300. The railway company paid this amount into court and obtained an order authorizing it to take possession of the property. The owners excepted to the report of the commissioners and demanded a trial by jury, solely on the question of the amount of compensation and damages; they having acquiesced in the court's decision affirming the right of the applicant to take the property for its railroad purposes, on payment of proper compensation and damages.

All of the numerous assignments of error, except two, are based upon rulings admitting evidence over objections of the plaintiff in error. One of the others denies the propriety of an instruction, because it is based upon evidence alleged to be inadmissible; and the overruling of a motion to set aside the verdict, for insufficiency of the evidence, and as being contrary to the clear and decided preponderance of the evidence, is the subject-matter of the last one.

[1, 2] In the beginning of the trial, the court refused to permit the owners of the property to prove the net income and profits of the horse and mule business conducted in the barn on one of the lots, for the year immediately preceding the month of August, 1917, the date of the institution of this proceeding; but, later, such evidence was admitted over an objection interposed by the applicant. In the argument submitted here in support of the court's final ruling upon the question, it is frankly admitted that such profits cannot be included in the verdict as an element or item of compensation or damages; but it is earnestly insisted that profits actually derived from business conducted on the property may be proved as one of the circumstances tending to show its market value. The distinction between the two offices of proof is

obvious, but it does not overcome the objection to the evidence in question. There is a clear distinction, but it is not coextensive with the difference. The rental value is always admissible, because it is almost as fixed and certain as the market value of the property. The profits derived from a business conducted upon the property are uncertain and speculative in character, because the question of profit and loss, or the amount of profit, in the event of any, depends more upon the capital invested, general business conditions, and the trading skill and business capacity of the person conducting it, than it does upon the location of the place of business. Profits already derived from a business may not be speculative, in the true sense of the term; but they would, nevertheless, constitute an uncertain measure of the value of the property upon which the business was carried on.

The argument submitted in support of the admissibility of this evidence is plausible; but it is not in harmony with our decisions, nor with the weight of authority throughout the country. *B. & N. Railway Co. v. Great Scott Coal & Coke Co.*, 75 W. Va. 423, 83 S. E. 1031; *Shenandoah Valley Ry. Co. v. Shepherd et al.*, 26 W. Va. 672; *Richmond, etc., Railroad Co. v. Chamblin*, 100 Va. 401, 41 S. E. 750; *Braun v. Met. West Side Elevated Railroad Co.*, 166 Ill. 434, 46 N. E. 974; *Dupuis v. C. & N. W. Railway Co.*, 115 Ill. 97, 3 N. E. 720; *Sauer v. Mayor*, 44 App. Div. 305, 60 N. Y. Supp. 648; *Matter of Gilroy*, 26 App. Div. 314, 49 N. Y. Supp. 798; *Newton v. Armstrong*, 19 N. Y. Supp. 573; *Edmonds v. Boston*, 108 Mass. 535; *Cobb v. Boston*, 109 Mass. 438; *Becker v. P. & R. T. R. Co.*, 177 Pa. 252, 35 Atl. 617, 35 L. R. A. 583; *Kossler v. Railway Co.*, 208 Pa. 50, 57 Atl. 66. Several of these cases specifically deny the admissibility of evidence of past profits derived from the land taken. Others rule out proof of future profits. No authority explicitly holding that, under ordinary circumstances, such evidence can be received to prove market value, has been cited or found.

In some jurisdictions, the peculiar character of the property to be condemned or the circumstances of the owner are permitted to vary the rule and to constitute an exception thereto. Thus, in *Montgomery County v. Schuylkill Bridge Co.*, 110 Pa. 54, 20 Atl. 407, in which the subject of condemnation was a toll bridge, the court recognized the exception and permitted the introduction of proof of past annual net profits as tending to show the market value of the bridge. Mr. Justice Paxson, delivering the opinion of the court, said:

"The principle is well enough, but it has no application to the facts of this case. The property taken was of a peculiar character, and can hardly be said to have a market value."

<sup>1</sup> Reported in full in New York Supplement; reported as a memorandum decision without opinion in 63 Hun, 628.

In *Railroad Co. v. Patterson*, 107 Pa. 461, the same court denied the right of a jury to take in consideration, in its estimate of compensation and damages, any supposed loss of profits, saying:

"Such an assessment would be purely speculative, and a rule which justified it would lead to most ruinous results."

In *West Side E. R. Co. v. Siegel*, 161 Ill. 638, 44 N. E. 276, the owners were allowed the cost of removal of their personal property from the real estate taken and damages for interruption of their business; but it was carefully noted that the allowances were made under an exception to the general rule. These cases are referred to merely to show that such exceptions are recognized in some jurisdictions. They are not applicable here, for there is nothing of an anomalous character in this case, justifying an inquiry as to the existence of such exceptions here.

All of the evidence tending to prove that the new barn is not as conveniently or advantageously located as the old one was improperly admitted. As in the case of profits, it pertains, not to the value of the property taken or damage to the residue, but to the business of one of the defendants. For injury or detriment to that the law does not require the condemnor to compensate. *B. & N. Railroad Co. v. Great Scott C. & C. Co.*, 75 W. Va. 423, 83 S. E. 1031; *Shenandoah Valley R. Co. v. Shepherd*, 26 W. Va. 672. Such damages are said to be common to the owners of other like business enterprises of the community. The true reason may be that presumptively the world affords the trader just as good opportunities in other places, and the inconvenience and expense of finding another location are incidents of the business, and not elements of damage to the property condemned; the constitutional guaranty being limited by its terms to compensation for property taken and indemnity for injury to property not taken. If an established business is to be continued on the residue of property only partially taken, an allowance for interruption to the business may possibly be justifiable, on the theory of temporary loss of use of the residue of the property; but as to this we decide nothing, since the question does not arise, the business having been removed to another piece of land.

[3] Evidence of the cost of construction of a new barn on another site was improperly admitted also. The applicant pays the value of the old barn, and, out of that compensation or otherwise, the defendant should provide himself with a new one, if he needs or desires it. As the applicant takes a good portion of each building, and the lots are too small to afford room for them on what remains of each lot, they are in legal contemplation wholly taken. In other words, they are to be treated, upon the inquiry as to compensation, as if they were wholly taken.

Ohio River R. Co. v. Gibbens, 35 W. Va. 57, 12 S. E. 1093; Pumpelly v. Green Bay & M. Canal Co., 13 Wall. 180, 20 L. Ed. 557; Eaton v. Railroad Co., 51 N. H. 504, 12 Am. Rep. 147. They are parts of the property taken, and are therefore to be paid for. The condemnor is not required, in addition to such payment, to provide new buildings. The case is entirely different from one in which a building can be moved over onto the untaken residue of a tract of land and its uses continued. In the latter case, cost of removal might be evidence bearing on the question of damages to the residue; but we do not have this question. The evidence of the cost of erection of the new barn is too uncertain as an element of proof of the value of the old one. It was put up on different ground, and the cost of preparation of the new site may have been considerably more or less than that incident to the construction of the old one, which included expensive excavation and retaining walls. If identity or close similarity of conditions in all respects would make this evidence admissible, as tending to prove the value of the old barn, it is not disclosed, and the record does not indicate that it can be.

[4] Between the two lots in question there was another small one owned by Conley alone, and a part of which was taken. Kincald alone owned another lot adjoining all three of those involved in the proceeding, and on it he resided in a house worth probably \$3,000; but no part of that lot was taken. Defendants were allowed, over objections, to prove damages to his residence lot, resulting from the construction of the railroad in front of it. No direct effort is made in the brief for defendant in error to sustain this ruling, but it is treated as part of the evidence relating to an assessment for taxation, in an effort to apportion the assessment between the residence lot and the store lot; they having been assessed together. This effort at apportionment, however, did not necessarily involve proof of damage to the residence lot, which was not involved in the proceeding. Admission of such proof was a palpable error. On this subject, the rule is strict. *Lewis, Em. Dom.* 697, citing numerous cases sustaining the text.

[5] Evidence of an inquiry made by an agent and attorney of the condemnor as to whether one of the defendants would accept a certain amount of money by way of compensation and damages, if he were sole owner of the property, was admitted over objection. As there was no proof of any authority in the agent and attorney to bind his principal by an agreement as to the compensation and damages, this evidence was improperly admitted. One dealing with an agent must know the extent of his authority. *Uniontown Grocery Co. v. Dawson*, 68 W. Va. 332, 69 S. E. 845, Ann. Cas. 1912B, 148. The inquiry, if made, was no evidence of the value of the property and rights sought. It was an

effort to ascertain the attitude of the defendants, and did not import purpose or willingness to pay the amount suggested. Besides, there is no proof of intent on the part of the principal to make the agent a witness either for or against it in the condemnation proceeding. It was bad for want of proof of authority in the agent, and also for lack of tendency to prove value.

[6] Ordinarily it would be highly improper to permit the owner to prove the value of the entire property, when only a portion of it is taken. But in this case the remnants are so small and unfavorably located, lying between the railroad track and a rock cliff, that their relative values practically amount to almost nothing, and render the ordinary rule difficult of application. It is much more convenient and intelligible to state the entire values and then make allowances for the remnants. In point of utility, though not of law or fact, the entire lots, according to the evidence, were substantially taken, for the portions not taken were rendered almost useless. The buildings were, in a legal sense, wholly taken, because they had to be moved or destroyed. The assignment of error respecting proof of entire values is, for these reasons, held to be untenable.

[7] As the right of the railroad company to take the land had been previously adjudicated and acquiesced in by the defendants, it was too late for them to set up the defense of lack of necessity for condemnation of these lots on the ground of existence of another way occasioning less damage. Introduction of evidence at this stage of the case to prove such a way could subserve no useful or legitimate purpose. It pertains neither to the value of the land taken nor damages to the residue. It might become a fallacious basis of an inference of wantonness on the part of the railway company, in seeking unnecessarily to take improved or actually used property, when vacant property would answer its purposes equally well. If effective at all, such an inference could result only in prejudice against the railway company in the trial. The witness did say the ground on the other side of the road was very steep and rocky; but he had previously stated the condemnor could have gone that way and obtained cheaper property. The court should have sustained the motion to strike that evidence out.

[8] A witness was improperly allowed to give his opinion as to the value of the property, "taking into consideration . . . the possibility or impossibility of securing other locations." It was competent for the defendants to prove the location, the adaptation of the property to any use of which it was susceptible, and the use to which it had been devoted, as bearing on the question of market value; but, for reasons already stated, they could not have the jury take into consideration facts tending to prove detriment to their trading business conducted on the property.

This involves no mere interruption to business to be continued on the residue of a tract of land, which may fall within an exception to the general rule. The taking of the land terminates the business on that tract, and the constitutional guaranty does not require reimbursement for loss of business.

[9] The argument submitted in support of the admission of the tax assessment of the Kincaid residence lot and the store building lot, treated as a single piece of property, at the sum of \$17,280, fallaciously assumes that the assessor put the same values on the two pieces of property as the witnesses accorded to them—\$5,000 on the residence lot and \$12,280 on the other. The unreliability of assessments as indices to the market values of property is shown by the fact that the assessment of these two pieces of property for the preceding year was only \$2,000. Assessments are so fearfully and wonderfully made that it would be unsafe to hazard a guess as to the method adopted in any particular case. The statute (Code 1913, c. 29, § 115 [sec. 1000]) makes them admissible on questions of value; but, ordinarily, the assessment offered should be limited to the particular property involved in the proceeding, for, when two or more pieces are combined, there is no certain means of knowledge affording ground for a just and fair apportionment, unless the land is all of the same quality and appears to have been valued by the acre or the lot. The court should have excluded the assessment and refused the instruction based upon it.

As the evidence on the new trial will be different in material respects from what it was on this trial, it is deemed unnecessary, and might be improper, to enter upon any inquiry as to whether, as it stands now, it is sufficient to sustain the verdict.

For the errors noted, the judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

(84 W. Va. 485)

STATE, for Use of MASON COUNTY COURT, v. TURNER et al.

(Supreme Court of Appeals of West Virginia. Sept. 16, 1919.)

(Syllabus by the Court.)

1. SHERIFFS AND CONSTABLES ⇨157(2), 168 (2)—BOND—DEFALCATION — LIABILITY OF SURETIES—DEFAULT.

In an action brought against the sureties on a new official bond, executed by a sheriff pursuant to an order of the county court, to recover balances found to be due the various public funds on final settlement made after his term of office has ended, the sureties on such new official bond, not being liable for defalcations occurring prior to the taking effect of the new

bond, are entitled to show that the embezzlement of the public moneys occurred before that event, if that is the fact, and they are entitled to set up this defense by a special plea, if they so desire.

(Additional Syllabus by Editorial Staff.)

2. SHERIFFS AND CONSTABLES ⇨162, 168(1)—BOND—DEFAULTS—SUIT ON BOND—ALLEGATIONS.

Under Barnes' Code 1918, c. 39, § 38 (Code 1913, c. 39, § 38 [sec. 1588]), order of county court and failure of sheriff to comply therewith shows a default and is a condition precedent to the right to sue sheriff on his bond; and an averment to that effect, or that a judgment or decree has been rendered against county court for a certain sum, is essential to maintenance of action on the bond.

3. PLEADING ⇨87—MODE OF PLEADING DEFENSE—SPECIAL PLEA.

Notwithstanding the facts alleged in a special plea may be proven under the general issue, a defendant has the right to plead them specially, if he so desires.

Case Certified from Circuit Court, Mason County.

Action of debt by the State of West Virginia, suing for the use of the County Court of Mason County, against H. C. Turner and others. Plaintiff's objection to the filing of defendant's pleas overruled, and the pleas allowed to be filed, and the question of the right to file such pleas certified. Ruling of lower court sustained, with direction.

Rankin Wiley and Musgrave & Blessing, all of Point Pleasant, for plaintiff.

B. H. Blagg and Somerville & Somerville, all of Point Pleasant, and John L. Whitten, of Huntington, for defendants.

WILLIAMS, J. This is an action of debt brought by the state of West Virginia for the use and benefit of the county court of Mason county against the surviving sureties on one of the official bonds given by John P. Austin, now deceased, as sheriff of said county.

The term of office for which said sheriff was elected began January 1, 1909, and ended December 31, 1912. Prior to entering upon the duties of said office he gave the bond required by law, with the Citizens' Trust & Guaranty Company as his surety. On the 17th day of July, 1911, he was required by an order of the county court, entered of record, to give a new bond, and gave the bond now sued on.

Defendants tendered and asked leave to file three special pleas, Nos. 4, 5, and 6, averring, in effect, that the fund for which the sureties are now sought to be held liable was misapplied or embezzled by their principal prior to the time they became his sureties. Plaintiff objected to the filing of these pleas,

but the court overruled the objection and permitted them to be filed, and, at the request of the attorneys for the respective parties, certified the question of the right to file these pleas to this court for its determination.

It is averred in the declaration that the defendant sheriff made annual settlements with the county court during his term of office, and that each settlement showed the balances then due the several funds of which the county court had control for each successive year; that such balances were carried over and charged against the sheriff in his settlement for the succeeding year, and so on, until the final settlement made the 12th day of August, 1913, when it was ascertained that there were certain balances in his hands due the various funds, aggregating \$24,825.05, which he was directed by order of the court entered of record, and of which he had notice, to turn over to F. E. Bletner, his successor in office. It is also alleged that he failed and refused to comply with this order.

[2] It is contended by counsel for plaintiff that, in view of the statute—section 38, chapter 39, Barnes' Code 1918 (Code 1913, c. 39, § 38 [sec. 1555])—forbidding the sheriff to pay any money out of the county treasury "except upon an order signed by the president and clerk of the county court, and properly indorsed as aforesaid, or upon judgment or decree, as provided by the forty-second section of this chapter," the alleged default did not occur until the 12th day of August, 1913, when he was ordered to pay the money over to his successor and failed to do so, and that, therefore, the liability of the sureties on his official bond then in force is determined as of that time, and that consequently the pleas set up no defense. *State v. Wade*, 15 W. Va. 524, *State v. Parsons*, 22 W. Va. 580, *State v. Hays*, 30 W. Va. 107, 3 S. E. 177, and *State v. Keadle*, 63 W. Va. 645, 60 S. E. 798, are cited to sustain this contention. It is true that such an order of the county court and the failure of the sheriff to comply therewith shows a default, and constitutes a condition precedent to the right to sue the sheriff on his official bond. Hence an averment to that effect, or that a judgment or decree has been rendered against the county court for a certain sum of money, is essential to the maintenance of an action on a sheriff's official bond. A breach of his official duty is unquestionably shown by his failure to comply with the order of the county court. But when the conflicting rights and liabilities of different sets of sureties are involved, such order is not conclusive evidence of the time when the embezzlement actually occurred, and the sureties are permitted to show that it occurred at a time before the bond on which they are liable became operative. We in effect, so held in *Raleigh County Court v. Cottle*, 79 W. Va. 661, 92 S. E. 110, Ann. Cas. 1918D, 510.

[1] Being the sureties on the new bond given by their principal, defendants are, by section 20, chapter 10, Barnes' Code 1918 (Code 1913, c. 10, § 20 [sec. 270]), made liable only for the default of their principal occurring after the approval of that bond, and, if the default contemplated by the statute could occur only when the sheriff is ordered to pay the fund over to his successor in office and fails to do so, the provision limiting liability of the sureties to such default only as occurs after the approval of the new bond would be useless, because the sheriff is the treasurer of the county funds and is entitled to the custody thereof until his term of office ends, and he would never be ordered by the county court to pay over any balance in his hands for any fiscal year until the end of his term, and hence it would follow that the sureties on the new bond last given by a sheriff would always be liable for the balance found on last settlement. Clearly it was the purpose of the Legislature, in case a sheriff gives a new bond to make the sureties thereon liable for such malfeasance only as occurs within the time such bond is in force. It is not alleged here that the new bond was retrospective, and unless made so by its terms the law does not give it that effect. The term "default," occurring in section 20, chapter 10, Code, in the phrase "for any default of their principal occurring after the approval of such additional bond," relates to and includes the time when the malfeasance was actually committed, as well as the default that may be shown by the officer's failure to comply with the order of the county court made after final settlement after the ending of his term, and the sureties on the new bond have a right to prove, if they can, that the malfeasance occurred before they became liable. As we interpret the decision in *State v. Wade*, supra, it supports rather than conflicts with our present holding. There the sheriff had given two new official bonds, one July 24, 1869, and the other the 15th of March, 1870, with different sureties. On January 24, 1870, he paid into the treasury nearly three-fourths of the taxes for the year 1869 and directed the auditor to apply the funds to the taxes of 1869. But the sheriff being then delinquent for the taxes of 1867 and 1868, the auditor disregarded his instructions and caused the fund to be applied on the delinquent taxes of 1867 and 1868, claiming the right to do so under the statute. The Legislature then passed a special act, at the instance of the sheriff and his sureties, directing the auditor to apply the payment to the taxes of 1869, or so much thereof as the auditor was satisfied was collected out of the taxes due the state for 1869. The court held that the auditor had no right to disregard the sheriff's instructions, and furthermore, that inasmuch as only three-fourths of the taxes of 1869 were required to be paid into

the treasury prior to May 1, 1870, the sureties in the first bond were liable for three-fourths of the taxes of 1869, and the sureties in the second bond, for the remaining one-fourth. That a sheriff may, by directing the application of public funds under his control to the payment of a particular indebtedness thereto, affect the liability of his sureties is well settled. *Taylor v. La Follette*, 49 W. Va. 478, 39 S. E. 276, and cases cited in the opinion. But that question is not raised by the pleading here.

[3] It may be that defendants are entitled to prove the facts averred in their special pleas, under the issue raised by the plea of conditions performed, but this question we do not decide, as we lately held in case of *First National Bank v. Freeman*, 83 W. Va. —, 98 S. E. 558, that notwithstanding the facts alleged in a special plea may be proven under the general issue, nevertheless a defendant has the right to plead them specially if he so desires. We therefore sustain the ruling of the lower court and direct our decision to be certified back to it.

POFFENBARGER, J., absent.

(84 W. Va. 449)

PITTSBURGH & WEST VIRGINIA GAS CO. et al. v. PENTRESS GAS CO. et al.  
Appeal of CHARTIERS OIL CO.

(Supreme Court of Appeals of West Virginia.  
Sept. 16, 1919.)

(Syllabus by the Court.)

1. IMPROVEMENTS ¶4(2) — WILLFUL TRESPASSER.

One who, with full knowledge of the facts which make his claim of title to land invalid, enters thereon and commits acts of trespass, is a willful trespasser within the meaning of the law, even though he may honestly believe that under such known facts the law confers upon him good title.

2. MINES AND MINERALS ¶80—INVALID OIL AND GAS LEASE—SUIT FOR VALUE OF OIL—DEDUCTION OF EXPENSES.

One who enters upon a tract of land under an oil and gas lease, with full knowledge of the facts which render the same invalid, and produces the oil therefrom, is not entitled, when sued for the value of the oil so produced and sold from the lands by the party having the superior right, to any deduction from such value because of expenditures made by him in producing and marketing such oil.

3. DAMAGES ¶69—INTEREST AS DAMAGES—CONVERSION.

Where, in an action for damages, it appears that the complaining party was entitled to receive the fixed money value of property converted at a certain time, in ascertaining

his damages at the time of recovery, it is proper to add interest on such fixed value from the time of such conversion to the date of recovery.

Appeal from Circuit Court, Monongalia County.

Separate suits for injunction by the Pittsburgh & West Virginia Gas Company and others against the Pentress Gas Company, the Chartiers Oil Company, and others. Decrees for plaintiffs, and defendant Chartiers Oil Company appeals. Reversed, and causes remanded.

Edward S. Craig, Cox & Baker, of Morgantown, for appellant.

Charles A. Goodwin and Glasscock & Glasscock, all of Morgantown, for appellees.

RITZ, J. Plaintiffs are the successors in title to the lessee in two oil and gas leases, executed by the owners of separate tracts of land lying in Monongalia county. These leases are indefinite in their term, and are what is commonly called "no term leases." They provide for the drilling of a well within a certain time, or for the payment of a certain sum of money quarterly in lieu of drilling. For a number of years the plaintiffs and their predecessors paid the commutation money in lieu of drilling and kept the leases alive in that way. At the end of one of the quarterly periods for which this commutation money had been paid, the landowners notified the holders of the leases that the same were canceled, and refused to receive the rental moneys for the next quarter. This contention of the landowners was disputed by the holders of the leases. Shortly thereafter the owners of the land made other leases to the defendants, or their predecessors, covering the same tracts of land, and both plaintiffs and defendants thereupon made locations upon each of the tracts of land with a view to drilling for oil or gas thereon. In the one instance the landowner, and in the other the defendant Pentress Gas Company, filed their bills in the circuit court of Monongalia county, setting up the facts as aforesaid, and asking that the plaintiffs here be enjoined from drilling upon said land under the old leases, contending that the same were canceled, and also be enjoined from interfering with the holders of the junior leases in their operations upon said lands. This injunction was granted, and while it was in force the defendants, claiming under the junior leases, drilled a well on each of the tracts of land, and produced oil therefrom. Upon a final hearing the circuit court perpetuated the injunctions and canceled the senior leases. An appeal was prosecuted from those decrees, and this court reversed the same, holding the senior leases valid and binding, and the junior lessors without right, and dismissed the bills. *Johnson v. Armstrong*, 81 W. Va. 399, 94 S. E. 753, and *Pen-*

tress Gas Co. v. Monongahela Natural Gas Co., 81 W. Va. 399, 94 S. E. 753.

Thereafter the plaintiffs brought these suits and invoked the jurisdiction of equity to enjoin the defendants, the holders of the junior leases, from further operations upon said lands, and to have an accounting and recovery of the money received by said defendants for the oil taken from the premises. The cases were submitted upon a statement of agreed facts, from which it appears that the defendants expended in the drilling of each of the wells more than the sum of \$5,000, and that they also expended in what is termed caring for, storing, and transporting the oil from the wells on the premises the sum of more than \$1,500 in each case, which sums so expended by them in drilling the wells and in marketing the oil it is asked may be set off against the amounts received for the oil produced. The court below declined to allow defendants credit for the cost of drilling the wells, but did allow them credit for the other expenses in connection with said oil, and in the one case this was sufficient to entirely offset the amount received for oil, and in the other to reduce such amount to an inconsiderable sum. The plaintiffs contend that the defendants in their operations upon these lands were willful trespassers, and are not entitled to any credit for money expended by them in producing or marketing the oil which they sold from the lands; while, on the other hand, it is contended by the defendants that they were acting in good faith, believing their rights superior to the rights of plaintiffs, for which reason they are entitled to credit for the expenses incurred in the production of the oil, and further that, even if this is not the case, under decisions of this court cited by counsel, which will be hereafter referred to, they are entitled to be credited in an accounting with such cost of production.

[1] The first question which naturally presents itself is: What was the status of the defendants in relation to these lands at the time they drilled the wells thereon? That they were trespassers there is no doubt, but as will be hereafter seen a willful trespasser is upon a different footing from one who can be said to be acting in good faith. The defendants contend that they were not willful trespassers, because they honestly believed that their title was superior to that of the plaintiffs. They were cognizant of every fact affecting their rights or interests in the lands, as well as the rights and interests of the plaintiffs, and their contention of good faith rests upon the sole ground that they honestly misjudged the law. They believed that under the law the existing facts, of which they were fully informed, gave them the superior right. The plaintiffs did not acquiesce in this view, but, on the contrary, vigorously contested it, and contended from the very beginning that they alone had right

to drill for oil and gas on these lands. Can the fact that one acts under a misconception of the law characterize his acts as innocent? The presumption is that every man knows the law, and when he is fully informed as to the facts, and makes a wrong application of the law thereto, ordinarily he will be bound by his acts to the same extent as if he had no misconception in regard to the law which controls. He is presumed to be as fully informed as to the law controlling under a given state of facts at one time as at another, and if he acts upon his own interpretation of the law he does so at his peril. In this case, as before observed, the defendants were fully informed as to the facts, and committed the acts which resulted in the extraction of the oil with this full knowledge, and with the further knowledge that their interpretation of the law was vigorously contested by the plaintiffs. It may be said that the defendants had such confidence in their judgment as to be willing to take the risk of an unfavorable decision. Entire good faith, it occurs to us, would have dictated to them that the proper course would be to wait until the controversy had been finally determined before expending large sums of money in drilling upon the land.

This doctrine is fully discussed in the case of Chesapeake & Ohio Ry. Co. v. Deepwater Ry. Co., 57 W. Va. 641-695, 50 S. E. 890. In that case the Chesapeake & Ohio Railway Company entered upon the lands under an order of the circuit court and spent large sums of money in constructing a tunnel. It was afterwards determined that the Deepwater Railway Company had the better right to the right of way in dispute, and, notwithstanding the tunnel constructed by the Chesapeake & Ohio Railway Company was beneficial to the Deepwater Railway Company in its operations, this court denied any right to compensation for the money expended and the improvements made. It was there held that the Chesapeake & Ohio Railway Company could not be a bona fide occupant of the land, although it had entered thereon under an order of the court, believing its title to be good, because it had notice of all of the facts, being ignorant only of matter of law. The same doctrine was announced in Snider v. Snider, 3 W. Va. 200. And in Dawson v. Grow, 29 W. Va. 333, 1 S. E. 564, it was held that, to entitle an evicted claimant to compensation for improvements put upon lands, he must have acted bona fide, and that one having knowledge of all the facts in regard to the title to the land, or means of knowledge, is not such bona fide claimant. In that case it was held that the recordation of the deed gave notice of the adverse claim, and that the one making improvements was charged with knowledge of such deed from the fact of its recordation alone. And in the case of Hall v. Hall, 30 W. Va. 779, 5 S. E. 260, it was likewise held



that one evicted from land, claiming for improvements placed thereon, will not be entitled thereto unless he was a bona fide occupant, and that to be such bona fide occupant it must appear that he not only believed he had good title, and made the improvements in good faith under that belief, but it must be further shown that he at the time had reasonable grounds to believe his title good. If the title under which he claimed appeared upon its face to be defective upon a proper application of legal principles thereto, he could not be held to be acting in good faith.

This doctrine is announced in other cases decided by this court, and is well sustained both upon reason and authority. Why should one be treated as acting in good faith when dealing with property as his own, when he knows all of the facts which constitute his claim, as well as the claim of his adversary, which facts, when properly construed, give him no title to the land? Such a holding would make every man a judge of the law in his own case, instead of being bound by the law as interpreted by those charged with that duty. We must therefore conclude that the defendants, when they drilled the wells on these lands, were willful trespassers, just as much so as though there had been no question but that the plaintiffs had the superior right. They could not decide the disputed question in their own favor, and then proceed with the hope that their acts would be characterized by this court as in good faith, even though their judgment upon the law of the case should not be approved.

[2] Having reached this conclusion, what, then, are the plaintiffs entitled to recover in these cases? In case of a trespass to real property by removing timber or mineral therefrom, it seems that the injured party may sue for damages done to the estate, or he may bring his suit in the nature of trover and conversion for the thing severed from the estate, and recover it, or its value. In case he sues for the injury to the estate, the measure of his damages is the depreciation in the value thereof by reason of the trespass; but in case he elects to waive any consequential injury by reason of the trespass, and sue only for the material severed, or its value, then the measure of his damages is arrived at in another way. By severing a part of the freehold and converting it into personalty, the trespasser does not thereby become vested with title. The title still remains in him to whom the real estate belonged at the time the trespass was committed, and he can follow the article so long as he can find it, and recover it for his own benefit without any deduction for the cost of making the severance. *Gaskins v. Davis*, 115 N. C. 85, 20 S. E. 188, 25 L. R. A. 813, 44 Am. St. Rep. 439, and note.

In this case the plaintiffs do not seek to recover damages for the injury inflicted upon

their estate. They seek to recover the value of the oil taken from the property by the defendants as a result of the trespass committed upon their rights. They do not attempt to recover the oil itself, for the very good reason that it has gone beyond the control of either of the parties. It might seem that, if the owner of real estate is entitled to recover the property severed therefrom by a trespasser, without deduction for the cost of such severance where the same increases the value of the property, whether the trespass is willful or otherwise, he would be entitled to recover the value of the article after its severance, where the trespasser has put it beyond his control to recover the article itself; and indeed many of the cases so hold. It seems to us, however, that the better rule is that laid down by the Supreme Court of the United States in *Woodenware Co. v. United States*, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230, and that is that, where the trespass is willful, the measure of damages is the value of the property at the time and place of demand, without deduction for labor and expense; but where such trespass is not willful, but is the result of a mistake of fact, the measure of plaintiff's damages is the value of the article after its severance, less the proper expense of such severance. *Sutherland on Damages*, § 1020; *J. F. Ball & Bro. Lumber Co. v. Simms Lumber Co.*, 121 La. 627, 46 South. 674, 18 L. R. A. (N. S.) 244, and note; *Bailey v. Railroad Co.*, 3 S. D. 531, 54 N. W. 596, 19 L. R. A. 653, and note; *Gaskins v. Davis*, 115 N. C. 85, 20 S. E. 188, 25 L. R. A. 813, 44 Am. St. Rep. 439; *Winchester v. Craig*, 33 Mich. 205.

Many more authorities to the same effect might be cited, but they are thoroughly considered in the cases above noted. In the case of *Guffey v. Smith*, 237 U. S. 101, 35 Sup. Ct. 526, 59 L. Ed. 856, the United States Supreme Court considered a question similar to the one we have here. That was a controversy between junior and senior lessees, in which the one not entitled to the property had produced oil therefrom, and that court held that the proper measure of recovery was the value of the oil sold from the land by the trespasser, without any credit for such sums as he had expended in producing the same after he became a willful trespasser, but with credit for such sums as had been expended by him while he was in ignorance of one of the facts making his lease invalid.

Counsel for the defendants here attempt to distinguish that case upon the ground that in Illinois one holding an oil and gas lease is held to have an interest in the land, while in this jurisdiction the holder of such a lease before production thereunder is held not to have an interest in the land as such, but only an exclusive right to drill the land for the purpose of producing these minerals,

and to produce the same after they are discovered. This can make no difference in the application of the principle, for the reason that the trespass committed here was to the plaintiffs' rights, regardless of what they were. Admittedly plaintiffs had the exclusive right to drill this land for oil and gas, and the defendants wrongfully took this right from them. Plaintiffs likewise had the right, upon discovery of the oil and gas, to produce and sell the same, and of this right they were deprived by the defendants; so that it makes no difference as to the extent of the plaintiffs' interests, the result is that they have been deprived of them, and that by the defendants' unwarranted acts. This would lead to the conclusion that the plaintiffs were entitled to decrees at least for the amounts received by the defendants for the oil produced from these premises, without deduction for the amount spent in the production thereof.

But the defendants claim that these cases are controlled by the decisions of this court in the cases of *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891, *McNeely v. South Penn Oil Co.*, 58 W. Va. 438, 52 S. E. 480, and *South Penn Oil Co. v. Haight*, 71 W. Va. 720, 78 S. E. 759, in each of which cases it was held that a joint tenant, who had committed waste upon the common property, by producing and selling the oil therefrom, should be given credit in an accounting for the amount expended by him in such production. In all of those cases the party committing the waste did so with knowledge or means of knowledge of the facts affecting his title. In the *Williamson-Jones Case*, Jones claimed to be the owner of the whole of the land, and believed himself to be such owner, having bought the same at a judicial sale; but the court held that he was chargeable with the knowledge that an inspection of the record would disclose. To this extent this decision is stronger against the trespasser than that of *Guffey v. Smith*, above cited, for in that case the Supreme Court held that, even though the senior lease was recorded, the junior lessee would not be charged with notice of it from that fact alone. Believing himself to be the owner of the whole tract of land, he developed the same for oil and gas, and thereafter the owners of the other seven-tenths sued him for an accounting. Judge Brannon in that case says that by dry law Jones would not be entitled to any credit for the money expended by him in doing the drilling, but because of the equities existing he was allowed such credit.

How did these equities arise? In the case of joint tenants each is to an extent the agent of the other in the matter of caring for the joint property, and a joint tenant who commits waste because of this relationship is to some extent, at least, in the same situation as an agent who acts in excess of

his authority. If one of the joint owners is in possession of the real estate, he has the right to use it, but not to commit waste thereon, subject to an accounting with his cotenant for the rents and profits derivable from such estate. If he exceeds his authority and commits waste, there is an equitable relation between him and his cotenant similar to that existing between a principal and an agent who exceeds his authority. It is well settled that if an agent exceeds his authority in making a contract for his principal, and the principal subsequently accepts the benefits of the contract, he must likewise submit to its obligations. There is a similar relation, perhaps not, however, so well defined, or existing in the same degree, between joint tenants, where one exceeds his authority by committing waste upon the joint estate, and this is the relation because of which the equities spoken of by Judge Brannon arose.

The same may be said of the decision in the other two cases referred to. The matters decided involved waste committed by joint tenants. In the *McNeely Case* Judge Poffenbarger, speaking for this court, says that the court seems to have gone to the utmost limit of equity jurisdiction to relieve from the rigors of the common and statutory law in allowing the expense incurred by the drilling in that case, and we quite agree with this conclusion. We are not willing to extend those limits, so as to include a trespass committed by one who is a stranger to the title. In the *Haight Case*, above referred to, it is intimated in the opinion that the decision would have been different, were it not for the fact that the notice given by the joint tenant out of possession to his cotenant was more of an invitation to go on with the drilling than it was a prohibition thereof. It cannot be doubted that there is a relation between joint tenants, from which equities may arise in favor of the one or the other, which does not exist between strangers, and for this reason equity may relieve against the harshness of the rule of law otherwise applicable.

The plaintiffs claim that they are entitled, not only to the oil received by the defendants and sold by them, but also to the one-eighth thereof delivered to the owners of the land. They argue that, while it is true the landowners are entitled to receive one-eighth of the oil produced, yet this delivery of the one-eighth to the landowners by the defendants did not fulfill their contract with the landowners. This may be quite true; but it must be borne in mind that the plaintiffs are only under obligation to deliver to the landowners one-eighth of the oil produced by them. They are under no obligation to deliver one-eighth of the oil produced by a trespasser, especially when such trespasser is put upon the land by the landowners themselves. We do not think, therefore, that the plaintiffs' contention in this regard has merit.

[3] Plaintiffs also contend that they are entitled to receive, not only the price at which the oil was sold, but to have interest thereon as a part of the damages, from the time the defendants received the money until it is paid to them; and they further contend that they are entitled to receive the highest market price of the oil between the time that it was produced and the institution of these suits. Both of these contentions cannot stand. Their bills in these cases pray that they be decreed the amount received by the defendants for the oil produced and sold from the premises. This is inconsistent with the demand for the highest market price of such oil between the date of its production and the bringing of the suits. Plaintiffs were, however, entitled to have this money at the time the oil was converted into money. The oil was theirs, and they elected by their suits to take what defendants actually received for it, but contend that as part of their damages interest should be added to this amount until the same is paid. In this contention we think they are correct. While ordinarily interest is not recoverable as a part of unliquidated damages, still, in ascertaining the amount of damages to which one is entitled, where it appears that such damages are determined by a fixed sum, to which the plaintiff was entitled at a particular time, interest may be added to it as one of the elements constituting the amount to which the plaintiff is entitled at the time of the recovery. 8 R. C. L. 537. This was our holding in *Cresap v. Brown*, 82 W. Va. 467, 96 S. E. 66.

In these cases we are of opinion that the plaintiffs are entitled to decrees in their favor for the amounts actually received by the defendants for the oil sold by them from the premises, with interest on each of these amounts from the time the same was so received until the entry of such decrees, without any deduction therefrom for money expended by the defendants for producing and marketing such oil.

The decrees appealed from will be reversed, and the cases remanded for the entry of such decrees.

(84 W. Va. 460)

#### WILKIN v. H. KOPPERS CO.

(Supreme Court of Appeals of West Virginia.  
Sept. 16, 1919.)

(Syllabus by the Court.)

#### 1. MASTER AND SERVANT §356 — MASTER NOT LIABLE WHEN HIS NEGLIGENCE NOT PROXIMATE CAUSE.

Though an employer within the terms of the Workmen's Compensation Act fails to avail himself of the benefit of the statute, he is not liable for an injury sustained by an employé

in the course of his employment, in the absence of negligence on the part of the former which is the proximate cause of the injury.

#### 2. MASTER AND SERVANT §114 — MASTER MUST FURNISH SAFE ACCESS TO PLACE OF WORK.

It is the duty of the employer to provide for his employé a reasonably safe place in which to work, and reasonably safe and convenient means of access to the premises and to the places thereon assigned for work.

#### 3. MASTER AND SERVANT §114—ACCESS TO PLACE OF WORK—MASTER NOT LIABLE FOR DANGEROUS ACCESS BEYOND HIS CONTROL.

But the scope of this duty generally is limited to the premises owned or controlled by the employer, and does not extend to a place beyond them, unless brought within the scope of employment by an express or implied provision in the contract of employment for its use by the employé in going to and returning from his work.

#### 4. MASTER AND SERVANT §114—WHEN DUTY AS TO SAFE ACCESS REASONABLY COMPLIED WITH.

Where the only means of ingress to and egress from the place of employment is across a series of railroad tracks adjoining it, but under separate ownership and control, and there is provided for the use of the employé a public crossing, properly guarded, leading to the premises of the employer and reasonably convenient thereto, the duty of the employer to provide reasonably suitable means of access has been sufficiently complied with, so far as concerns points beyond the boundaries of his premises.

#### 5. MASTER AND SERVANT §233(2)—WHEN SERVANT SELECTS DANGEROUS ROUTE, MASTER NOT LIABLE.

An employé, who for his own personal convenience willfully disregards such public crossing, and elects to take a shorter route over the railroad tracks, more direct, but fraught with more danger, than the public crossing, does so at his peril, and, if killed while thereon, no liability therefor attaches to the employer, though other employés daily follow the same way with the knowledge and consent of the employer.

Error to Circuit Court, Brooke County.

Action by William S. Wilkin, administrator, against the H. Koppers Company. Verdict and judgment for plaintiff, and defendant brings error. Reversed, verdict set aside, and case remanded.

Jno. J. P. O'Brien and Leo A. Coleman, both of Wheeling, for plaintiff in error.

R. L. Ramsay, of Wellsburg, and W. S. Wilkin, of New Cumberland, for defendant in error.

LYNCH, J. John Tsouvalakis, plaintiff's intestate and an employé of the defendant, was killed accidentally while on his way to and about to enter upon the premises on which he was engaged to work, then only

in the temporary control of the defendant, who had and exercised no right to control the operation of the railroad. The railroad right of way and tracks and the premises so controlled by defendant were not subject to joint ownership or control, but were held under different titles, though the properties lay immediately adjacent to each other. To the place of employment but two ways of approach, about half a block apart, were used by defendant's employes, and in using either of the two they were obliged to cross three tracks of the railroad company. One was a public crossing; the other a short cut used by many of its employes, with its knowledge and acquiescence, who for their own convenience preferred to cross the tracks at that point. It was this second route that the deceased took as he was approaching the plant for work on the night shift. Each of the two outside tracks was occupied by idle freight cars on the evening of the accident, and decedent either undertook to crawl under or pass between the cars on the bumpers, and then onto the middle track, where he was struck by the train and killed.

[1] Liability for decedent's death, as averred in the declaration and argued by counsel, rests solely upon the breach of the common-law duty requiring the master to provide for his servants a reasonably safe place in which to work and reasonably safe means of access thereto, without the benefit of the usual common-law defenses. They are not available because defendant, though clearly within the terms of the act, failed to elect to pay into the workmen's compensation fund the premiums provided by law to entitle him to its benefits. But even under those circumstances plaintiff's intestate cannot lawfully be entitled to the benefit of a recovery, unless death resulted from some negligent act or omission to act which at common law required the master to respond in damages. For no such liability can arise except from the wrongful act, neglect, or default of the employer or any of his officers, agents, or employes. Section 26, c. 15P (sec. 682), Code 1913; *Watts v. Ohio Valley Electric Ry. Co.*, 78 W. Va. 144, 88 S. E. 659; *Louis v. Smith-McCormick Construction Co.*, 80 W. Va. 159, 92 S. E. 249.

[2] The duties of a master towards his servants while upon his own premises, or premises under his control, are established by abundant authority. According to them he is bound to exercise due diligence in furnishing them with a reasonably safe place and safe appliances in and with which to work, and reasonably safe means of access to the place assigned them to work, and exits therefrom while in his employ on his premises, including, according to *Jones v. Railroad Co.*, 74 W. Va. 666, 83 S. E. 54, L. R. A. 1915C, 428, a reasonable time and opportunity to depart therefrom. Violation of none of these duties is charged or proved against defendant. De-

cisions dealing with breaches of duties committed elsewhere than on the premises owned or controlled by the master include only those secured to the employe by virtue of some provision of his contract of employment, so far as we have been able to discover.

[3] Outside of decisions under Compensation Acts, the cases are few which discuss the extent of the duty of the employer to provide, beyond the limits of his own possession or control, safe means of ingress and egress to and from his premises for the convenience and safety of his employes. This lack of authority may be accounted for to some extent by the fact that Workmen's Compensation Acts have largely supplanted the common law dealing with employers' liability. The test under these acts now is: Did the injury arise out of and in the course of the employment? It would seem, however, that decisions under such statutes treating of situations analogous to the one now considered, where the plaintiff was injured while off the premises and on his way either to or from work, would properly serve as authority illustrative of the scope of the duty owed in this case. It is safe to say that, wherever at common law the duty existed to provide proper means of access to the property for the employes, an employe injured in such a situation would be held under the Compensation Acts to be within the scope of his employment. The converse, however, is not true, for these acts have been given a broader scope and meaning, permitting an employe to recover compensation he could not have recovered under common-law principles. Hence, whenever an authority is found denying a right to compensation on the ground that the injury sustained by the employe while on his way to or from work was beyond the course of his employment, it is safe to say that the same court would under similar circumstances hold that there had been no violation of the general duty to provide a reasonably safe and convenient means of access to the premises. And there is this further reason for considering decisions under compensation acts as authority in this case. Section 26, c. 15P (sec. 682), Code, provides that employers subject to the act, who have not paid into the compensation fund the premiums provided by the act, shall be liable to their employes for damages suffered by reason of personal injuries "sustained in the course of employment." Under this section, therefore, the right to recover for personal injuries caused by the wrongful act, neglect, or default of the employer is subject to the same test as the right to compensation where the employer had complied with the provisions of the act.

In *De Constantijn v. Public Service Commission*, 75 W. Va. 32, 83 S. E. 88, a case arising under our Compensation Act, a rule

is laid down which we think is applicable to the case before us. The second point of the syllabus is:

"An injury incurred by a workman, in the course of his travel to his place of work and not on the premises of the employer, does not give right to participation in such fund, unless the place of injury was brought within the scope of employment by an express or implied requirement in the contract of employment, of its use by the servant in going to or returning from his work."

As said in the body of the opinion, the scope of the employment does not terminate at the instant the employé lays down his tools, but continues for a reasonable time thereafter, while he is preparing to leave and leaving the premises. But if, says the opinion, "the employé, at the time of the injury, has gone beyond the premises of the employer, or has not reached them, and chosen his own place or mode of travel, the injury does not arise out of his employment, nor is it within the scope thereof."

[4, 5] Likewise the duty to provide a reasonably safe and convenient means of access to the premises and plant of the employer generally is coextensive with, but not outside of, the limits of the premises under his control. There is no charge that defendant has failed in any duty so far as his own premises are concerned. But plaintiff by his declaration, proof, and argument rests his right of recovery upon the breach of an alleged duty to use adequate means to safeguard such of defendant's employes as voluntarily elected not to avail themselves of a crossing duly guarded, less dangerous, and readily accessible to them, though slightly more circuitous, but chose rather the shorter route, with the knowledge and acquiescence of the defendant, as being a more convenient way of approach to and departure from the place appointed for them to convene mornings and evenings for the purpose of registration.

An examination of some analogous cases arising under Compensation Acts proves instructive upon the issues involved. In *Fumicello's Case*, 219 Mass. 488, 107 N. E. 349, the material facts tended to show that an employé, while returning home at the close of the day's work, entered upon a railroad track which he had to cross after leaving his employer's premises, and there was struck by a train and killed. The court, in affirming the denial of compensation, said:

"It is plain that, if \* \* \* it was necessary for him to pass over the railroad location, it formed no part of the employer's plant. \* \* \* The contract of employment did not provide for transportation, or that the employé should be paid for the time taken in going and returning to his place of employment, and when the day's work had ended the employé was free to do as he pleased. If he had chosen to use the public ways, and had been injured by a defect or passing vehicle, the administrator could not

recover against the employer, because there would be no causal connection between the conditions of employment and the injuries suffered. \* \* \* The principle is the same and equally applicable where the employé uses a private way or crosses the land of another, either as a licensee or a trespasser."

By way of contrast, and as showing the difference in the rule where the route taken in going home, and on which the injury occurred, was on the employer's premises, see *Stacy's Case*, 225 Mass. 174, 114 N. E. 206. There the court expressly distinguished the case from *Fumicello's Case* on the ground that in the latter the employé was killed upon a railroad track which was not a part of the premises of the employer, while in *Stacy's Case* the route taken was on the premises.

Likewise, where an employé after work ceased, left the plant, walked about two blocks from the premises, and was killed at a street intersection by a car, he was held not to be entitled to compensation. *N. K. Fairbank Co. v. Industrial Commission*, 285 Ill. 11, 120 N. E. 457. The court said:

"When work for the day has ended, and the employé has left the premises of the employer to go to his home, the liability of the employer ceases, unless after leaving the plant of the employer the employé is incidentally performing some act for the employer under his contract of employment."

Again in *Guastelo v. Mich. Cent. R. R.*, 194 Mich. 382, 160 N. W. 484, L. R. A. 1917D, 69, plaintiff, after quitting work for the day, left the place where he had been working to go to his bunk car a mile away. There were two routes that he could take; the shorter one being a railroad track, the other a public highway. Plaintiff elected to follow the railroad, and at a point about 600 feet down the track was injured by a passing train. The court, in denying compensation, said that it was a well-settled rule "that injuries sustained by an employé while going to or returning from the day's work, where there is no contract of transportation, are not to be regarded as arising out of or received in the course of his employment." See, to the same effect, *Hills v. Blair*, 182 Mich. 20, 148 N. W. 243.

Nor can a repairer of musical instruments, who slips on the ice and is injured while going to his work, be held to be injured in the course of his employment. *Industrial Commission v. Anderson (Colo.)* 169 Pac. 135, L. R. A. 1918F, 885. And a janitor in an office building, who was killed by coming in contact with an electric wire, just as he was leaving his home to go to work, was not in the course of his employment. *Murphy v. Ludlum Steel Co.*, 182 App. Div. 139, 169 N. Y. Supp. 781.

In a case very similar to this—*Leite v. Paraffine Paint Co.*, 2 Cal. Ind. Acc. Com.

948—compensation was denied where it appeared that applicant's husband, while going to work, was killed by a train on the tracks of a railroad which ran in front of the employer's premises; he having taken a short cut across the tracks, instead of walking several blocks to the one street which crossed the railroad and led to the plant.

While these cases are not directly in point, they do have a bearing upon the extent of the employer's liability to his employes, and show that even under Compensation Acts, where an employer may be held for compensation even in the absence of negligence, his responsibility is limited generally to accidents occurring on the premises. Conceding the duty of a master to provide a reasonably safe means of access to the place of employment, one that was reasonably convenient for his men to use, has defendant not fully performed the obligation? Here was a public road, crossing the railroad within reasonable distance of the plant, and adequately guarded. If the place of employment had been isolated completely from any highway, or located so as to be inaccessible, or accessible only by incurring serious risks, the law doubtless would require defendant, in the exercise of a reasonable degree of care, to provide some reasonably safe and convenient means of access for the protection of his employes in going to and from their work, as held in *Patrick v. Atlas Knitting Co.*, 164 App. Div. 753, 149 N. Y. Supp. 845. The case last cited is the only one out of many examined that extended the master's liability beyond the premises owned or controlled by him, for the failure to provide a safe exit therefrom to a public road, and in that case there was no public crossing over the railroad tracks—no means provided for crossing to the public highway, except by trespassing on railroad property. It is interesting to note the history of that case. Upon no trial did plaintiff obtain a judgment. He was thrice plaintiff in error, and was successful only in the volume of the report cited above awarding him a new trial. See 170 App. Div. 943, 154 N. Y. Supp. 1136; *Patrick v. N. Y. Cent. & H. R. R. Co.*, 220 N. Y. 728, 116 N. E. 1063.

No such situation existed here as was present in *Patrick v. Knitting Co.* There, according to the opinion, not even one safe means of ingress and egress was provided. Here there was one comparatively safe means of access, but which for his personal convenience deceased did not choose to follow, but instead elected to take another, which was slightly shorter. He made the election with full notice and knowledge of the dangerous character of the course adopted; for he saw, and seeing he must have known, the imminence of the danger, because of the presence

of the freight cars on the tracks in front of him. Defendant had fulfilled its duty by providing one reasonably safe and convenient means of access for its employes. Owning no other, it therefore has breached no duty toward deceased, and is subject to no liability.

We are therefore of opinion to reverse the judgment, set aside the verdict, and remand the case.

(178 N. C. 200)

BARFOOT et al. v. WILLIS. (No. 176.)

(Supreme Court of North Carolina. Oct. 1, 1919.)

PUBLIC LANDS ~~§~~164 — LANDS NAVIGABLE WHEN COVERED BY TIDE SUBJECT TO ENTRY ONLY BY RIPARIAN OWNER.

Under Revisal 1905, § 1693, lands covered by water at average tide, which is navigable, are not subject to entry except by the riparian owner for wharf purposes under section 1696; hence an entry by one not a riparian owner cannot be sustained.

Appeal from Superior Court, Carteret County; Daniels, Judge.

Protest by G. A. Barfoot and others to an entry by M. L. Willis. The court dismissed the entry, and the enterer excepted and appealed. Affirmed.

This is a protest to an entry. The enterer went in front of protestant's lots, and attempted to fill in navigable water by building sand fences, and then laid his entry. On the trial the following judgment was rendered:

"This cause coming on to be heard before his honor, F. A. Daniels, judge, and a jury, at the conclusion of the plaintiff's evidence the protestant asked the court to rule that upon his testimony the land was, at the time of filing his entry, covered by water at average tide, both before he built the sand fences and since they have been removed. The enterer admitted that he was not the riparian owner, that the land entered was covered by water at average tide, and that the sand fences that had been built prior to the entry had been removed, and that it was now navigable water. The court so held and dismissed the entry. It is therefore considered and adjudged by the court that the enterer is not entitled to maintain the entry, is not entitled to a grant, that the entry is invalid, and void, and that enterer pay the costs, to be taxed by the clerk.

"F. A. Daniels, Judge Presiding."

The enterer excepted and appealed.

Julius F. Duncan, of Beaufort, for appellant.

E. H. Gorham, of Morehead City, and D. L. Ward, of Newbern, for appellees.

**ALLEN, J.** The admissions contained in the judgment clearly show that the attempted entry is unauthorized and of no legal effect. The water, being navigable, was not the subject of entry (Rev. § 1693), except by the riparian owner for wharfage purposes (Rev. § 1696), and the enterer is not a riparian owner.

Affirmed.

(178 N. C. 184)

**WOODWARD v. SAVINGS & TRUST CO.**  
(No. 80.)

(Supreme Court of North Carolina. Oct. 1, 1919.)

**1. BANKS AND BANKING** ¶126—WHERE BANK ON WHICH CHECK DRAWN DEPOSITS IT TO CREDIT OF HOLDER, IT IS PAYMENT.

Where the holder of a check demands that the bank on which it is drawn deposit the same to his credit, and the bank credits him with the amount of the check, and the holder is not guilty of any want of good faith, the act of crediting is equivalent to a payment in money, and the bank cannot recall or repudiate the payment because, on an examination of the accounts of the drawer, it is ascertained that he was without funds to meet the check.

**2. BANKS AND BANKING** ¶125—RIGHT OF HOLDER OF FORGED CHECK DEPOSITING IT TO HIS CREDIT IN BANK ON WHICH DRAWN DETERMINED.

A bank, as between itself and the bona fide holder of a check, is bound to know the signature of its customers, and cannot recover from such holder money paid to him on the subsequent discovery that the drawer's name was forged; hence if a depositor presents a check which he holds in good faith, drawn on the bank by another depositor, and the check is credited to him in his account, and charged to the drawer, that is in effect a payment which the bank cannot repudiate; but in such case the depositor, if both payee and indorser of the check, is held to have knowledge of all facts except the signature of the drawer.

**3. BANKS AND BANKING** ¶125—HOLDER OF CHECK KNOWING NAME OF DRAWER WAS SIGNED BY ANOTHER LIABLE TO BANK PAYING IT.

Where the payee and indorser of a check knew that the one who signed the drawer's name was not the drawer herself, held that, though the bank accepted the check and credited the same to the payee's account, the bank might repudiate the check for that reason.

**4. BANKS AND BANKING** ¶124—RIGHTS OF BANK AND INDORSER OF CHECK PAYABLE TO HIM NOT GOVERNED BY NEGOTIABLE INSTRUMENTS LAW.

Where one indorses a check payable to him so as to receive credit from the bank on which it is drawn, the bank simply honors an order drawn on funds in its hands, and the rights of the parties are not affected by the provisions of the Negotiable Instruments Law relating to indorsers.

**5. BANKS AND BANKING** ¶126—RIGHTS OF HOLDER OF FORGED CHECK DEPOSITED TO HIS CREDIT BY DRAWER BANK DETERMINED.

Where the seller of an automobile received in payment a sum in cash and a check, which the buyer signed with his mother's name, held that the seller, having recovered possession of the machine and retained the cash payment, could not recover from the drawee bank with whom it deposited the check to its account, the bank having recalled the credit on discovery that the check was not signed by the drawer, there being no showing of damage.

Appeal from Superior Court, Beaufort County; Devin, Judge.

Action by J. S. Woodward against the Savings & Trust Company. From a judgment for defendant, plaintiff appeals. No error.

This is an action to recover damages against the defendant bank for charging back against the account of the plaintiff a check of \$380. The jury returned the following verdict:

"(1) Did the defendant represent to the plaintiff that the check for \$380, signed in the name of Winnie E. Jackson, was good and would be paid? Answer. No.

"(2) Was the plaintiff induced by said representation to sell and deliver the car to Simon Jackson? Answer. No.

"(3) Did the defendant accept the check for \$380, and credit plaintiff's account therewith? Answer. Yes.

"(4) Was the name of Winnie E. Jackson signed to said check without the authority, knowledge, or consent of said Winnie E. Jackson? Answer. Yes.

"(5) What damage, if any, is plaintiff entitled to recover therefor? Answer. None."

The verdict, considered in connection with the evidence and the charge, discloses the following facts: In January, 1919, the plaintiff was engaged in the business of selling automobiles in Washington under the name of the Overland Washington Company. On the morning of January 24th one Simon Jackson went to the place of business of the plaintiff about 8 o'clock in the morning, and entered into a contract for the purchase of a Ford car from one Hollowell, agent of the plaintiff, by the terms of which Jackson was to pay \$20 in cash, give a paper for \$100 with solvent indorsers, a check for \$280, and a note for \$25, secured by mortgage on the automobile. Simon Jackson had no account with the defendant bank, but he gave a check for the \$280, signing the name of his mother, Winnie Jackson, as drawer, who did have an account in the bank. Hollowell took the check to the defendant bank, and asked if the check of Winnie Jackson for \$280 was good, which was answered in the affirmative, Winnie Jackson having at that time \$340 to her credit in the bank. Hollowell returned to

the place of business of the plaintiff when the plaintiff was present, and it was then found that Simon Jackson could not secure the papers for \$100, properly indorsed, and the check for \$280 was then torn up, and he gave to the plaintiff as payee another check upon the defendant bank for \$380, signing the name of Winnie Jackson as drawer in the presence of the plaintiff, who took this check to the bank, indorsed it, passed it across the counter, and was given credit for the same on his account as a depositor. Later in the day the defendant bank charged back the check to the account of the plaintiff, finding that Winnie Jackson did not have \$380 to her credit, and that she had not authorized Simon Jackson to sign her name to the check, which the jury finds to be a fact.

The automobile was delivered to Simon Jackson on Friday, and was used by him, and, being injured, was returned to the plaintiff on Saturday for repairs.

The plaintiff, then claiming the right to hold the automobile under his mortgage to secure the \$25, after advertisement sold it, and had it bought in for himself.

The plaintiff now has the automobile, \$20 in cash paid by Simon Jackson, and his note for \$25.

The plaintiff moved for judgment on the third issue, which was refused, and he excepted.

Judgment was rendered for the defendant, and the plaintiff appealed.

E. A. Daniel, Jr., of Washington, N. C., for appellant.

Stewart & Bryan and Ward & Grimes, all of Washington, N. C., for appellee.

ALLEN, J. [1] The weight of authority is in favor of the proposition for which the plaintiff contends, that a bank, the drawee of a check, accepting it unconditionally and passing it to the credit of the depositor, in the absence of special custom known to the depositor, cannot charge it back against the account of the depositor on the ground that it is an overdraft.

The court says in *Bank v. Burkhardt*, 100 U. S. 689, 25 L. Ed. 766:

"In *Morse's* well-considered work on Banking, p. 321, it is said: 'But if at the time the holder hands in the check he demands to have it placed to his credit, and is informed that it shall be done, or if he holds any other species of conversation which practically amounts to demanding and receiving a promise of a transfer of credit, as equivalent to an actual payment, the effect will be the same as if he had received his money in cash, and the bank's indebtedness to him for the amount will be equally fixed and irrevocable.'

"We regard this as a sound and accurate exposition of the law upon the subject, and it rests upon a solid basis of reason. The authority referred to sustains the text.

100 S.E.—20

"When a check on itself is offered to a bank as a deposit, the bank has the option to accept or reject it, or to receive it upon such conditions as may be agreed upon. If it be rejected, there is no room for any doubt or question between the parties. If, on the other hand, the check is offered as a deposit and received as a deposit, there being no fraud and the check genuine, the parties are no less bound and concluded than in the former case. Neither can disavow or repudiate what has been done. The case is simply one of an executed contract. There are the requisite parties, the requisite consideration, and the requisite concurrence and assent of the minds of those concerned. It was well said by an eminent chief justice, 'If there has ever been a doubt on this point, there should be none hereafter.' *Oddie v. National City Bank of New York*, 45 N. Y. 735 [6 Am. Rep. 160]."

"When a bank credits a depositor with the amount of a check drawn upon it by another customer, and there is no want of good faith on the part of the depositor, the act of crediting is equivalent to a payment in money, and the bank cannot recall or repudiate the payment because, upon an examination of the accounts of the drawer, it is ascertained that he was without funds to meet the check, though, when the payment was made, the officers labored under the mistake that there were funds sufficient. In such a case the bank could have received the check conditionally, and have come under obligations to account to the holder for it, only in the event that on an examination of the accounts of the drawer it was found he had funds to meet it, or in the event that he provided funds for its payment. Or it could have asked for time to examine the accounts, that it might determine whether it would accept and pay or dishonor the check. It would have been within the option of the holder to have accepted or rejected either of these propositions. But when the holder presented the check with his passbook, that the check might be entered as a deposit to his credit, it was a request for the payment of the check; and there can be no distinction between a request for payment in money, and a request for payment by a transfer to the credit of the holder." 3 R. C. L. 526.

To the same effect see 7 C. J. 681; *Levy v. Bank*, 4 Dall. 234, 1 L. Ed. 814; *Bank v. Burns*, 68 Ala. 267, 44 Am. Rep. 142; *Bank v. Gregg*, 138 Ill. 596, 28 N. E. 839, 32 Am. St. Rep. 173; *Wasson v. Lamb*, 120 Ind. 514, 22 N. E. 729, 6 L. R. A. 191, 16 Am. St. Rep. 345.

[2, 3] And the authorities also sustain the position that the same rule applies when the check is a forgery:

"A bank is bound to know the signatures of its customers; and if it pays a forged check it must be considered as making the payment out of its own funds, and cannot ordinarily charge the amount so paid to the account of the depositor whose name was forged." 7 C. J. 683.

"In pursuance of the rule that a bank, as between itself and the bona fide holder of a check, is bound to know the signature of its depositors, and cannot recover from such a holder money paid to him upon the subsequent discovery that the drawer's name was forged,



if a depositor presents a check, which he holds in good faith, drawn on the bank by another depositor, and the check is credited to him in his account and charged to the drawer, this is in effect a payment of the check, and the bank cannot strike off the credit." 3 R. C. L. 527.

This principle was first declared by Lord Mansfield in 1762 in *Price v. Neal*, 3 Burrows, 1355, and has been adopted in *United States v. Bank*, 10 Wheat. 333, 6 L. Ed. 334; *Neal v. Coburn*, 92 Me. 145, 42 Atl. 348, 69 Am. St. Rep. 495; *Bank v. Bank*, 107 Iowa, 337, 77 N. W. 1045, 44 L. R. A. 131; *Bank v. Bank*, 90 Ky. 15, 13 S. W. 339, 7 L. R. A. 849; *Bank v. Bank*, 30 Md. 21, 96 Am. Dec. 554; *Bernheimer v. Marshal*, 2 Minn. 82 (Gil. 61) 72 Am. Dec. 89; *Bank v. Bank*, 46 N. Y. 77, 7 Am. Rep. 314; *Bank v. Boutell*, 60 Minn. 189, 62 N. W. 327, 27 L. R. A. 635, 51 Am. St. Rep. 519; *Bank v. Bank*, 10 Vt. 145, 33 Am. Dec. 188; *Yarborough v. Trust Co.*, 142 N. C. 381, 55 S. E. 296; and, indeed, in all the states except Pennsylvania, where it has been changed by statute. *Bank v. Bank*, 66 Pa. 438.

These principles rest upon the presumption that the drawer knows the signature of its customer, and upon the necessity of fixing some time when there shall be no further inquiry by the one upon whom it is drawn into the integrity of commercial paper with which so much of the business of the world is done today; but the courts recognize that they are establishing a rule at variance with the principle that money paid under a mistake of fact may be recovered, and the one depositing the check, if both the payee and indorser of the check, is held to knowledge of all other facts except the signature of the drawer, and he can take no benefit from the transaction if he actively participated in the forgery, although without fraudulent intent.

This is true because the payee in the check is necessarily brought in close touch with the drawer, and has every opportunity to inquire into the regularity and genuineness of the paper.

"It would be an exceedingly harsh rule to permit one who negotiates with the forger, and obtains his check payable to the use of the party advancing the money, who then indorses it to a bank, to hold onto the money when the payee has himself contracted with the forger, and given credit to the paper by his indorsement that led the bank to believe the paper was genuine." *Bank v. Bank*, 90 Ky. 10, 13 S. W. 339, 7 L. R. A. 849.

"The drawee bank is held to a knowledge of the signature of the drawer, but the payee indorser is held to a knowledge of all other facts.

"The discounting bank and the drawee bank, in such a case, have the right to rely upon the indorsement of the payee, and as to him are not required to exercise any diligence to discover the fact that the check had been raised. These facts are conclusively presumed to be within the knowledge of the payee. Under such

circumstances the money paid can be recovered back in assumpsit, unless, possibly, from some subsequent arrangement or cause, the right is lost. Certainly, the fact that the payee, who received the money as payee and ostensible owner, has disposed of it according to his own will, cannot in any way affect this right. The authorities cited by appellee to the proposition that if a bank pays a forged check to a holder without fault, who, in ignorance of the fraud, pays value for it, the money cannot be recovered back, are not applicable to the case at bar. Bradley was the payee, and, by his indorsement, obtained the money. He parted with nothing to get possession of the check. Its genuineness is conclusive as to him, and as indorser he guaranteed it to be genuine for the amount expressed in the check. *Carpenter v. Nat. Bank*, 123 Mass. 66; *Nat. Park Bank v. Seaboard Bank*, 114 N. Y. 28, 20 N. E. 632, 11 Am. St. Rep. 612; *White v. Bank*, 64 N. Y. 316 [21 Am. Rep. 612]; *Susquehanna Bank v. Loomis*, 85 N. Y. 207 [39 Am. Rep. 652]." *Bank v. Bradley*, 103 Ala. at page 119, 15 South. at page 443, 49 Am. St. Rep. 17.

"In the usual course of business, if a check purporting to be signed by one of its depositors is paid by a bank to one who, finding it in circulation or receiving it from the payee by indorsement, took it in good faith for value, the money cannot be recovered back on the discovery that the check is a forgery. It is presumed that the bank knows the signature of its own customers, and therefore is not entitled to the benefit of the rule which in cases of forgery permits a party to recover back money paid under a mistake of fact as to the character of the instrument by which the fraud has been effected. This presumption is conclusive only when the party receiving the money has in no way contributed to the success of the fraud or the mistake of fact under which the payment has been made. \* \* \* To entitle the holder to retain money obtained by a forgery, he should be able to maintain that the whole responsibility of determining the validity of the signature was placed upon the drawee, and that the vigilance of the drawee was not lessened, and that he was not lulled into a false security by any disregard of duty on his own part, or by the failure of any precautions which from his implied assertion in presenting the check as a sufficient voucher the drawee had a right to believe he had taken. *Ellis v. Ohio Ins. & Trust Co.*, 4 Ohio St. 628 [64 Am. Dec. 610]; *Rouvant v. San Antonio National Bank*, 63 Tex. 610; *First National Bank of Quincy v. Ricker*, 71 Ill. 439 [22 Am. Rep. 104]." *Bank v. Bank*, 151 Mass. 280, 24 N. E. 44, 21 Am. St. Rep. 450.

In this case the plaintiff was present and saw Simon Jackson sign the name of Winnie Jackson to the check, and he made no inquiry, except of Simon, of his authority to do so. He carried the check to the bank during business hours, and according to the evidence of the defendant, which the jury has accepted, indorsed it, and had it passed to his credit, without giving any information to the bank of the circumstances attending the drawing of the check.

The plaintiff offered evidence to the con-

trary, but his theory of the case has been repudiated.

Under these conditions the plaintiff cannot be permitted to recover.

[4] We have made no reference to the liability of an indorser under the Negotiable Instruments Law (Laws 1899, c. 733) because his guaranties under that law are only in favor of a holder in due course, and the drawee bank does not occupy that position. Bank v. Bank, 115 Tenn. 71, 88 S. W. 939, 112 Am. St. Rep. 817.

It pays nothing, and simply honors an order on funds in its hands.

[5] It also appears, and the jury has so found, that the plaintiff has suffered no damage, and that if he recovered \$380 of the defendant it would be a recovery for which he has paid nothing.

He sold a Ford car to Simon Jackson on Friday for \$425, of which \$20 was paid in cash, and the balance by the check of Winnie Jackson on the defendant for \$380, and the note of Simon Jackson for \$25 secured by mortgage on the car.

Simon Jackson kept the car one day, and returned it to the plaintiff for repairs, there being evidence that the car was damaged, but the extent not shown.

The plaintiff then advertised the car for sale under the chattel mortgage of Simon Jackson, and at the sale had it bought for himself, and he now has the car, and \$20 to indemnify him for the repairs, the amount of which he did not state, and the use of the car one day.

No error.

(178 N. C. 235)

MITCHELL BROS. v. SOUTHERN EXPRESS CO. et al. (No. 233.)

(Supreme Court of North Carolina. Oct. 8, 1919.)

JUDGMENT  $\S$  111—OF DEFAULT AND INQUIRY ESTABLISHES CAUSE OF ACTION ALLEGED.

Judgment of default and inquiry against a defendant who failed to plead establishes against him the cause of action alleged; so that he cannot rely on the provision in the bill of lading under which plaintiff shipped, and which was only admitted on the issue of damages, that action must be brought within six months from the injury to shipment.

Appeal from Superior Court, Lenoir County; Gulon, Judge.

Action by W. A. Mitchell and another, partners as Mitchell Brothers, against the Southern Express Company and another. From a judgment for plaintiffs, defendant Adams Express Company appeals. No error.

This action was instituted by the plaintiffs against the Southern Express Company on

March 13, 1914, to recover damages to a carload of horses and mules alleged to have been delivered to Adams Express Company at Cincinnati, Ohio, on October 3, 1912, and by the Adams Express Company delivered, in the city of Richmond, Va., to the Southern Express Company for transportation to Kinston, N. C., and by the Southern Express Company delivered to the plaintiffs at Kinston on October 5, 1912; the damages claimed being for alleged injury to a mule and two horses, due, among other causes as alleged, to the improper arrangement of timbers in said car. Summons was not originally issued against the Adams Express Company, but at the June term, 1915, an order was made adjudging that the Adams Express Company be made a party defendant to the action, and that summons issue against the said express company. Service was not obtained, and at the April term, 1916, another order was rendered by the court, adjudging that the said express company be made a party defendant to the action and that summons issue against it, and on May 15, 1916, which was before the convening of any court subsequent to the said April term, 1916, summons was issued against the Adams Express Company and duly served on May 19, 1916, returnable to the June term, 1916, which convened on June 12th. A duly verified complaint was filed against both of the defendants on January 26, 1916, which was before service was made upon the Adams Express Company, but was after an order adjudging that it be made a party had been rendered.

The plaintiffs seek to recover against both of the defendants the sum of \$372.50 for causes as appear in the complaint. At the April term, 1918, a judgment by default and inquiry was rendered against the Adams Express Company, which company had then filed no pleading and had made no appearance in court of any nature. During the April term, 1918, of said court, and after the rendition of the judgment entitled "Judgment by Default and Inquiry," the defendant Adams Express Company for the first time made an appearance in court, and moved the court to strike out said judgment for surprise and excusable neglect, alleging that it had, soon after being summoned, instructed its district counsel to retain counsel, and that the defendant Adams Express Company was not aware that appearance had not been entered for it and that a defense had not been asserted until after the rendition of said judgment by default and inquiry. The motion to strike out the judgment was continued and was refused and disallowed by his honor, Judge Gulon, at the June term, 1919, and the action directed to proceed to trial upon the inquiry as to the amount of damages sustained by the plaintiffs.

The answer of the Southern Express Com-

pany was filed as appears of record on April 8, 1918, and the plaintiffs filed replication as set out in the record on April 8, 1918.

At the June term, 1919, when the cause came on for trial upon the whole cause of action as alleged against the Southern Express Company and upon the judgment by default and inquiry as to the Adams Express Company, the court held, upon the pleadings as to the Southern Express Company and upon the admission of the plaintiffs in open court, that the action had not been instituted within six months from the time of the injury complained of; that the plaintiffs could not recover for any amount against the defendant Southern Express Company.

The cause then proceeded to trial against the defendant Adams Express Company upon the judgment by default and inquiry.

The express company offered the bill of lading in evidence for all purposes, and the court admitted it on the issue of damages, but held that the defendant Adams Express Company would not have the benefit of the provision requiring the action to be brought within six months, because of the judgment by default and inquiry, and defendant excepted. Judgment in favor of plaintiff, and defendant appealed.

Rouse & Rouse, of Kinston, for appellant Adams Express Co.

Dawson, Manning & Wallace, of Kinston, for appellees.

ALLEN, J. There is no exception to the refusal to set aside the judgment by default and inquiry, nor is the legal effect of the provision requiring the action to be brought within six months before us, as the bill of lading was only admitted in evidence on the issue of damages.

The sole question presented is whether the judgment by default and inquiry prevents the defendant from relying upon the provision in the contract.

The effect of a judgment by default and inquiry is to establish the cause of action alleged in the complaint, and, if the recovery sought is damages, to give to the plaintiff the right to recover at least nominal damages, and no evidence is admissible tending to prove that no right of action exists.

In *Hollifield v. Telephone Co.*, 172 N. C. 714, 90 S. E. 996, where there were two parties defendant, one of whom answered and the other of whom failed to answer, judgment by default and inquiry was rendered against the defendant who failed to answer. In discussing the question involved, the court says:

"He failed to plead, and judgment by default was entered against him, which established as against him, under our procedure, and procedure generally, the cause of action alleged in the complaint. *Blow v. Joyner*, 156 N. C. 140, 72 S. E. 319; *Graves v. Cameron*, 161 N. C.

549, 77 S. E. 841; *Patrick v. Dunn*, 162 N. C. 19, 77 S. E. 995; *Plumbing Co. v. Hotel Co.*, 168 N. C. 577, 84 S. E. 1008. It was not necessary to submit an issue as to this negligence, when he admitted it by failing to answer. Justice Brown well says in *Plumbing Co. v. Hotel Co.*, supra: "The default is an admission of every material and traversable allegation of the declaration or complaint necessary to the plaintiff's cause of action. 23 Cyc. 752. It admits all the material averments properly set forth in the complaint, and, of course, everything essential to establish the right of the plaintiff to recover. Any testimony, therefore, tending to prove that no right of action existed, or denying the cause of action, is irrelevant and inadmissible," citing *Garrard v. Dollar*, 49 N. C. 176, 67 Am. Dec. 271; *Lee v. Knapp*, 90 N. C. 171; *Blow v. Joyner*, supra; *Graves v. Cameron*, supra. This being so, the only thing left to do in regard to the resident defendant was the assessment of damages, after ascertaining the negligence of the other defendant."

This authority covers fully the exception presented, and sustains the ruling that the provision of the bill of lading was inadmissible to destroy the plaintiff's action.

No error.

(178 N. C. 143)

#### BREWINGTON v. HARGROVE et al. (No. 228.)

(Supreme Court of North Carolina. Oct. 1, 1919.)

#### 1. VENDOR AND PURCHASER ⇄231(4)—PURCHASER FROM GRANTEE OF PURCHASER AT FORECLOSURE BONA FIDE PURCHASER.

Where there was no vitiating fact appearing on the face of the deeds in the chain of title, a purchaser from the grantee of a purchaser at mortgage foreclosure sale must be deemed to have purchased without notice of any equities, and to have acquired the land.

#### 2. EVIDENCE ⇄383(7)—RECITALS IN DEED ON FORECLOSURE PRIMA FACIE EVIDENCE OF ADVERTISEMENT.

Where deeds signed by the mortgagees and assignee of the mortgage recited that due advertisement, as required, had been made, those recitals were prima facie evidence of that fact.

#### 3. MORTGAGES ⇄369(6)—ACQUIESCENCE OF MORTGAGOR IN CONDUCT OF SALE CURES DEFECT IN ADVERTISEMENT.

The acquiescence of the mortgagor in the conduct of a foreclosure sale will cure any defect as to advertisement.

#### 4. MORTGAGES ⇄369(7)—WAIVER BY MORTGAGOR OF POSTPONEMENT OF SALE.

Though deed made on foreclosure of a mortgage recited that sale took place on January 18th, while the notice showed that advertisement was for January 16th, it will be presumed that the sale was postponed until the 18th, and the mortgagor waived any objection on that ground by making no protest and taking no action to set aside the sale.

**5. MORTGAGES ⇨340—SALE BY HOLDERS OF LEGAL AND EQUITABLE TITLES VALID.**

Where both the holders of the naked legal title of a mortgage and the holder of the equitable title concurred and united in giving notice and making the foreclosure sale, there can be no defect in execution of the power of sale on the theory that neither alone had the right to make the sale.

**6. MORTGAGES ⇨372(5)—IRREGULARITIES IN FORECLOSURE DO NOT AFFECT SUBSEQUENT BONA FIDE PURCHASER.**

A subsequent grantee without notice and in good faith from the grantee of a purchaser at mortgage foreclosure sale takes a good title against irregularities in the sale, if any, of which he had no notice.

Appeal from Superior Court, Sampson County; Gulon, Judge.

Action by James Brewington against Clarissa Hargrove and another. Judgment for plaintiff, and defendants appeal. Affirmed.

On December 27, 1910, J. N. Bennett and Clarissa Hargrove, his mother, executed a mortgage to C. S. and T. A. Hines to secure certain indebtedness. The property conveyed was one tract of land the property of Bennett, consisting of 141 acres, and the other 21½ acres the property of Clarissa Hargrove. C. S. and T. A. Hines assigned the notes and mortgage to D. A. Edwards, who died in February, 1914, and his administrator is defendant in this action.

On December 13, 1915, a notice and advertisement of sale under the power contained in the said mortgage deed, which had been assigned to D. A. Edwards, were given, signed by C. S. and T. A. Hines, mortgagees, and Wilbur T. Edwards, administrator of D. A. Edwards, assignee of the mortgage. The notice specified that the sale would take place on January 16th describing the land conveyed in the mortgage. A deed executed on January 19, 1916, by C. S. Hines and T. A. Hines, mortgagees, and Wilbur T. Edwards, administrator of D. A. Edwards, assignee, recites that the property was exposed by them for sale on January 18, 1916, at 12 o'clock noon, at which sale Thomas Perrett became the last and highest bidder in the sum of \$1,000, and the deed was executed to him accordingly. Perrett testified that he bought the land for J. N. Bennett, but paid no money for it; that on January 8, 1916, he conveyed these two tracts of land to Wilbur T. Edwards for \$1,100 as an individual and not as an administrator. By deed December 1, 1916, Edwards conveyed the two tracts of land to Brewington the plaintiff. There was evidence to show that the 141-acre tract of land at the time of the sale was worth \$3,000, to \$4,000.

The jury found upon the issues submitted that Brewington, the plaintiff, purchased the

21½ acres of land formerly the property of Clarissa Hargrove without notice of any equities in her favor, and that the land was duly advertised according to the terms of the mortgage. Judgment for plaintiff for recovery of the tract of land.

The jury further found that W. T. Edwards, administrator of the assignee of the mortgage, procured Perrett as his agent to bid and purchase said land at the sale under the mortgage, and that its value at that time was \$29 per acre, whereupon it was adjudged that the plaintiff is entitled to the 21½ acres of land and rents and costs, and that Clarissa Hargrove recover of Wilbur T. Edwards the sum of \$406.11 with interest from December, 1916.

Stevens & Beasley, of Warsaw, and H. E. Faison, of Clinton, for appellants.

J. Faison Thomson, of Goldsboro, Fowler & Crumpler, of Clinton, and Murray Allen, of Raleigh, for appellee.

CLARK, C. J. [1] There was no evidence to go to the jury to show that James Brewington purchased the 21½ acres formerly the property of Clarissa Hargrove with notice of any infirmity, and the judge properly instructed the jury to answer the first and second issue accordingly. There was no violating fact appearing on the face of the deeds in the chain of title. *Smith v. Fuller*, 152 N. C. 7, 67 S. E. 48. Brewington was not purchaser at the sale, but bought from Wilbur T. Edwards.

[2-4] The court properly refused to instruct the jury that the burden was upon the plaintiff to show that the land was advertised by notice published at the courthouse door and in three other public places. The deeds signed by the mortgagee and the assignee of the mortgage recited that due advertisement as required by the mortgage and by law had been made. These recitals are prima facie evidence of the fact. The acquiescence of the mortgagor in the conduct of the sale will cure any defect in this respect. *Lunsford v. Speaks*, 112 N. C. 608, 17 S. E. 430, cited and approved in *Norwood v. Lassiter*, 132 N. C. 58, 43 S. E. 509. It is true the recital is that the sale took place on January 18th, while the notice shows that the advertisement was for January 16th, but the presumption, which was not rebutted by any evidence, is that it was postponed till the 18th, and the mortgagor waived any objection on that ground by making no protest and taking no action to set aside the sale. *Norwood v. Lassiter*, supra.

[5] The defendants requested the court to charge the jury that, the mortgage notes having been assigned by C. S. Hines and T. A. Hines to D. A. Edwards, Edwards became only the equitable owner, the naked legal title still remaining in C. S. Hines and T.

A. Hines, and, this being so, the equitable title would only have authorized D. A. Edwards to compel a foreclosure and sale by order of court, and that C. S. Hines and T. A. Hines after the assignment of the notes simply held the legal title and having no debt against the land could not execute the power, and, the assignee of D. A. Edwards being the owner of the debt and having no power of sale transferred to him, his administrator could not sell because he was merely the equitable owner, and the attempted sale by notice from C. S. and T. A. Hines and the administrator of Edwards, assignee, was void. The court properly refused the prayer.

As both the holder of the naked legal title and the holder of the equitable title concurred and united in giving the notice and making the sale, there can be no defect in the execution of the power conferred by the mortgage. *Well v. Davis*, 168 N. C. 298, 84 S. E. 395.

[6] The plaintiff did not buy at the mortgage sale, but was a subsequent grantee without notice and in good faith, and takes a good title against irregularities in the sale, if any, of which he had no notice. *Hinton v. Hall*, 166 N. C. 480, 82 S. E. 847; 27 Cyc. 1494.

Rev. § 1031, authorizes the personal representative of a mortgagee or trustee who is vested with power of sale in the mortgage or trust deed to advertise and sell under said power. Whether this would confer the like power upon the executor or administrator of the assignee of the mortgage is a question not presented on this record.

Affirmed.

(178 N. C. 194)

L. J. UPTON & CO. v. FEREBEE et al.  
(No. 169.)

(Supreme Court of North Carolina. Oct. 1, 1919.)

1. APPEAL AND ERROR ⇨933(4)—GRANT OF NEW TRIAL UPHELD ON ANY GOOD GROUND JUSTIFYING IT.

A grant of a new trial generally will be upheld if there is any ground which would justify it.

2. ESTOPPEL ⇨110, 112—EQUITABLE ESTOPPEL MUST BE PLEADED.

An estoppel must be pleaded with certainty and particularity, unless the cause is one falling within an exception, as where the pleadings are general and a party has no opportunity to enter his plea.

3. ESTOPPEL ⇨110—ESTOPPEL IN PAIS MUST BE PLEADED.

Where plaintiff contracted with a tenant to furnish the seed for a potato crop and the contract was signed by the landlord for the il-

literate tenant, the landlord's estoppel from asserting his lien on part of the crop must be pleaded in order to be available in an action by plaintiff to recover crop taken by the landlord.

4. ESTOPPEL ⇨120—INSTRUCTION AS TO DEFENDANT'S AIDING IN EXECUTION OF PAPER INSUFFICIENT, NOT EXPLAINING TERM.

In an action by one who furnished seed potatoes to a tenant whose landlord executed the contract on behalf of the tenant, an instruction setting up the claim of estoppel against the landlord which referred to the landlord's aiding in the execution of the paper *held* insufficient; there being no explanation of that term.

5. ESTOPPEL ⇨52—REQUISITES OF "ESTOPPEL IN PAIS."

To constitute an "estoppel in pais" or equitable estoppel, there must be conduct amounting to a representation or a concealment of material facts, such facts must be known to the party estopped or knowledge thereof imputable to him and unknown to the opposite party, and such conduct must be done with intent that it will be acted on by the other party, and furthermore such conduct must in fact be acted upon.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Estoppel in Pais.]

6. ESTOPPEL ⇨120 — INSTRUCTION NOT REQUIRING RELIANCE ON DEFENDANT'S ACT TO INJURY OF PLAINTIFF ERROR.

Where one who furnished seed potatoes to a tenant asserted that the landlord was estopped because he executed contract on behalf of the tenant who could not write from claiming any part of the crop, an instruction which merely set out the fact of the landlord's execution, etc., *held* insufficient, not requiring the finding that there was a concealment or otherwise by the landlord upon which plaintiff relied to his damage.

Appeal from Superior Court, Pamlico County; Daniels, Judge.

Action by L. J. Upton & Company against S. W. Ferebee and another. Verdict for plaintiff was set aside and plaintiff allowed to amend, whereupon plaintiff excepted and appealed. No error.

This is an action to recover 14 barrels of Irish potatoes, which the defendant Ferebee took possession of. On the 13th day of November, 1916, L. J. Upton & Co. entered into a contract with one Anthony Avery, a tenant of Ferebee, which contract was signed for Anthony Avery, who could not write, by S. W. Ferebee, who was his landlord. Under this contract the plaintiff and the defendant agreed to plant and grow on equal shares during the spring and summer season of 1917 a crop of Irish Cobbler potatoes. Upton furnished the seed potatoes, 14 bags, furnished the fertilizer, on the basis of 2½ bags to each bag of seed potatoes, and the defendant Anthony Avery was to cultivate and harvest said

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

crop. One-half of the crop was to be the property of Upton and the other one-half the defendant's. And under the seventh paragraph of the contract Upton & Co. agreed to purchase the one-half of the crop, the property of the defendant at the price of \$2.50 per barrel delivered on cars at Stonewall. It is admitted that all of the potatoes raised by Avery were grown from the seed potatoes furnished by Upton; that all the barrels were furnished by Upton and all the fertilizer used to grow the potatoes was furnished by Upton.

The defendant Ferebee, after the potatoes were harvested and delivered to Upton at the railroad station, took 14 barrels of the same, claiming them to be due him for rent.

The defendant set up his title as landlord in his answer, and there was no plea of an estoppel by the plaintiff.

His honor charged the jury, in part, as follows:

"Now, I charge you, gentlemen, that if the evidence satisfies you by its greater weight that Ferebee knew that it was the intention of Upton to take and Avery to give a paper disposing of the whole of the potato crop to be grown on Ferebee's lands by Avery, and aided in the execution of the paper with this knowledge and permitted Upton to furnish seed potatoes, fertilizer, and barrels under the terms of said paper to Avery, then Ferebee would be estopped to claim any of the potatoes, and you should answer the first issue yes."

The jury returned the following verdict:

"(1) Are the plaintiffs owners of the property described in the complaint? Answer: 'Yes.'"

"(2) What was the value of the potatoes at the time of the seizure? Answer: '\$9 per barrel.'"

His honor then set aside the verdict as matter of law and allowed the plaintiff to amend by pleading an estoppel, and the plaintiff excepted and appealed.

Moore & Dunn, of Newbern, for appellant.  
D. L. Ward, of Newbern, and Z. V. Rawls, of Bayboro, for appellees.

ALLEN, J. [1-3] The judge presiding at the trial set aside the verdict as matter of law, without assigning any reason, and his ruling may be sustained upon the ground that the case was submitted to the jury upon the question of estoppel when no such issue was raised by the pleadings.

"An estoppel which 'shutteth a man's mouth to speak the truth' should be pleaded with certainty and particularity. 8 Enc. Pl. & Pr. 11. The court should be able to see from the pleadings what facts are relied upon to work the estoppel." Porter v. Armstrong, 134 N. C. 455, 46 S. E. 1000. And this case does not come within the exceptions to the rule, holding that it is not necessary to plead an estoppel when it is apparent on the face of the record, or when the pleadings are gen-

eral, as in ejectment or trespass and the party has had no opportunity to enter the plea (Wilkins v. Suttles, 114 N. C. 558, 19 S. E. 806; Weeks v. McPhail, 129 N. C. 73, 39 S. E. 732), because in his answer the defendant alleges the tenancy and his claim as landlord, thus affording the opportunity to meet these allegations by pleading the facts relied on to create the estoppel.

This seems to have been the opinion of his honor, as he made the order a part of his judgment that the plaintiff be "allowed to amend his complaint as he may be advised setting up an estoppel against the defendant Ferebee."

[4] We are also of opinion the charge was not sufficiently specific, and that it omitted an important and material element of an estoppel in pais, or by conduct.

In view of the conflict in the evidence as to the circumstances attending the execution of the contract between the plaintiff and the defendant Avery, the plaintiff offering evidence that Ferebee read the contract and the defendant denying this, there ought to have been some explanation of what was meant by aiding in the execution of the paper, and of the difference in legal effect between signing the name of Avery because he could not write, and doing so after reading.

[5, 6] There is, however, a more serious objection to the charge, in that it collects the evidentiary facts relied on by the plaintiff, and instructs the jury, if found to exist, they constitute an estoppel, leaving out of consideration that the conduct of the defendant must be the equivalent of a representation that he would make no claim as landlord, and was so understood by the plaintiff, and relying thereon the plaintiff entered into the contract, and furnished fertilizer, etc.

In other words, the agent of the plaintiff who negotiated the contract and the defendant both testifying that nothing was said about rents or of the rights of the landlord, it was for the jury to say whether the conduct of the defendant amounted to a representation, which was relied on by the plaintiff, while his honor decided these questions as matter of law.

Mr. Pomeroy, in Equity Jurisprudence (volume 2, § 805 [2d Ed.]), states the following as the requisites of an "estoppel in pais," or equitable estoppel:

"(1) There must be conduct—acts, language, or silence—amounting to a representation or a concealment of material facts. (2) These facts must be known to the party estopped at the time of his said conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him. (3) The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when such conduct was done, and at the time when it was acted upon by him. (4) The conduct must be done with the intention, or at least with the expectation, that it

will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon. There are several familiar species in which it is simply impossible to ascribe any intention or even expectation to the party estopped that his conduct will be acted upon by the one who afterwards claims the benefit of the estoppel. (5) The conduct must be relied upon by the other party, and, thus relying, he must be held to act upon it. (6) He must in fact act upon it in such a manner as to change his position for the worse."

The same principles are declared in *Lumber Co. v. Price*, 144 N. C. 57, 56 S. E. 684, and *Hardware Co. v. Lewis*, 173 N. C. 295, 92 S. E. 13, and in *Boddie v. Bond*, 154 N. C. 365, 70 S. E. 826, where the court says:

"In order to constitute an equitable estoppel, there must exist a false representation or concealment of material fact, with a knowledge, actual or constructive, of the truth; the other party must have been without such knowledge, or, having the means of knowledge of the real facts, must not have been culpably negligent in informing himself; it must have been intended or expected that the representation or concealment should be acted upon, and the party asserting the estoppel must have reasonably relied on it or acted upon it to his prejudice. 16 Cyc. 722; *Eaton's Equity*, p. 169. It is a species of fraud which forms the basis of the doctrine, and to prevent its consummation is its object."

In this case there was no concealment of any fact, as the agent of the plaintiff knew he was contracting with a tenant and that Ferebee was the landlord, and if it was the intention to release rents, and was so understood, it is strange that Ferebee was not asked to make himself a party to the contract.

There is no error in setting aside the verdict.

No error.

(178 N. C. 168)

**STEPHENSON v. CITY OF RALEIGH.**  
(No. 256.)

(Supreme Court of North Carolina. Oct. 8, 1919.)

**1. TRIAL ¶29(3)—REMARK OF COURT ON CROSS-EXAMINATION NOT PREJUDICIAL.**

In an action against a city for injuries, remark of the trial judge in the presence of the jury during plaintiff's cross-examination of defendant's mayor, a witness, as to the answer, which the mayor had sworn to, "You are just quibbling over that," held not erroneous as reflecting on plaintiff's counsel so as to prejudice his standing or case before the jury.

**2. TRIAL ¶29(3)—PREJUDICIAL REMARK OF COURT CURED BY INSTRUCTION TO DISREGARD.**

Remark of the trial judge during plaintiff's cross-examination of defendant's witness, if objectionable and prejudicial as reflecting on plain-

tiff's counsel, held cured by the court's direction to the jury in his charge to disregard it.

Appeal from Superior Court, Wake County; Allen, Judge.

Action by Mrs. W. D. Stephenson against the City of Raleigh. From judgment for defendant, plaintiff appeals. No error.

This was an action for the recovery of damages for personal injuries alleged to have been caused by the negligence of the defendant in failing to keep a walkway habitually used for the public in a reasonably safe condition. Verdict and judgment for defendant. Appeal by plaintiff.

Douglass & Douglass, of Raleigh, for appellant.

John W. Hinsdale, Jr., of Raleigh, for appellee.

CLARK, C. J. James I. Johnson, mayor of Raleigh, testified to the ordinance, which was put in evidence forbidding any person to use the grass plats in any of the city parks for walkways and prohibiting any new carriage or walkways to be made in any city park except by the approval of the board of aldermen. The plaintiff's counsel asked the witness the following questions:

"You swore to the answer in this case? A. Yes. Q. Do you swear positively that she did not get hurt? A. No. Q. Do you admit that she did get hurt? A. No, I swore to that on information and belief. Q. Who informed you that she was not hurt? A. I assumed it as a whole. I deny that the hole was left there negligently by the city. Q. How came you to admit that she walked and denied she fell? A. Because I had been notified that she had walked there, and I deny that there was a dangerous hole there and that she was hurt. Q. Why didn't you admit that she fell there?"

At this stage of the cross-examination, his honor stated, in the presence of the jury, "You are just quibbling over that." The plaintiff excepted to this statement of the court.

[1] We cannot see that the remark was any such reflection on counsel as to prejudice his standing, or his case before the jury. The judge was simply calling to his attention that he was taking up the public time in asking irrelevant and unnecessary questions. There have been rare occasions in which the trial judge has made remarks which seemed to be a serious reflection upon the counsel, and on appeal to this court we have in such cases granted a new trial, as in *Perry v. Perry*, 144 N. C. 329, 57 S. E. 1, which was cited and approved, *Bank v. McArthur*, 168 N. C. 53, 84 S. E. 39, and other cases there cited. These cases hold:

"Any remarks of 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."

The presiding judges should be, and usually are, very careful to use no expression that will be disparagement to counsel, or any intimation of opinion upon the merits of the case then on trial. On the other hand, counsel should not unnecessarily consume the time of the court on irrelevant matters, and, when this is being done, the judge should restrict counsel to the matter in hand. We see in the words excepted to no reflection upon counsel or prejudice to the cause he was representing, and nothing more than an effort to restrict the investigation to matters really pertinent to the trial.

[2] Besides the courteous gentleman, who was the presiding judge on this occasion, used the following language in his charge:

"I want to retract one word or remark which I used when the counsel was examining Mr. Johnson and I interrupted and I said it was 'quibbling.' I should not have used that word. I only meant that they were contending about a matter of pleadings, and that it was, to my mind, not throwing any light on the question that we were trying, and I therefore made the remark, and I only meant that it was a contention between counsel about pleadings, and I did not intend to intimate anything about the merits of the case, and I will ask you to dismiss that from your mind."

Even if the remark had been objectionable and capable of the construction that it was prejudicial, it would have been cured, except possibly where there has been a serious abuse of the powers of the court.

The court has held in numerous cases that error in the admission of improper evidence is cured where it is afterwards withdrawn and the jury instructed to disregard it. *Ellison v. Tel. Co.*, 163 N. C. 5, 79 S. E. 277; *Harrison v. Tel. Co.*, 163 N. C. 18, 79 S. E. 281; *Toole v. Toole*, 112 N. C. 152, 16 S. E. 912, 34 Am. St. Rep. 479; *Gilbert v. James*, 86 N. C. 245; *McAllister v. McAllister*, 34 N. C. 184.

For a stronger reason, when a remark of a judge has been made which might seem improper, the error can be cured, if erroneous, by the same instruction to the jury and its express retraction as in this case.

Justice John H. Clarke, now of the United States Supreme Court, then United States District Judge in Ohio, in the course of a written opinion said:

"This court cannot refrain from observing in this connection that the old notion that a suit at law or in equity is chiefly a game, affording an opportunity for the matching of wits of counsel and for the exercise of the ingenuity of courts, is fast giving place to the conception that suits, both at law and in equity, should be sincere and candid attempts to reach the real

point of difference between the parties to them, and to secure a just settlement of such difference." *Coulston v. Steel Range Co.* (D. C.) 221 Fed. 669, 672.

As was said by this court some years ago, a trial is a solemn, serious investigation of the matters in controversy with the sole object of ascertaining the truth of the facts at issue and the application of the law in the interests of justice, "it is not a game in which the object is to catch the judge out on first base." *Wilson v. Mfg. Co.*, 120 N. C. 96, 26 S. E. 629. Trivial matters should be excluded by the trial judge, and in so doing there is no ground for reversal on appeal.

The other exceptions raised do not require any discussion.

No error.

(178 N. C. 201)

# SINGLETON v. ROEBUCK. (No. 178.)

(Supreme Court of North Carolina. Oct. 1, 1919.)

## 1. APPEAL AND ERROR ¶231(3) — GENERAL OBJECTION TO EVIDENCE PARTIALLY COMPETENT INSUFFICIENT.

In view of rule 27 of the Supreme Court (81 S. E. xi), plaintiff's general objection fails to evidence which was at least competent as corroborative; plaintiff not having asked that the evidence be restricted to that purpose.

## 2. APPEAL AND ERROR ¶925(1) — IT WILL BE ASSUMED THAT WITNESSES UNDERSTOOD COURT'S CAUTION.

The Supreme Court must assume that witnesses understood and observed the court's caution not to speak of anything said by persons living, or interested at the time in the controversy.

## 3. EVIDENCE ¶158(27) — DEFENDANT COULD TESTIFY HIS DEED COVERED LAND IN DISPUTE AND AS TO POSSESSION.

In an action to recover land, it was competent for defendant to state that his deed covered the land in dispute, and that he was let into possession of the same, for he was stating facts within his knowledge.

## 4. APPEAL AND ERROR ¶231(3) — GENERAL OBJECTION TO EVIDENCE CORROBORATIVE OF WITNESS INSUFFICIENT.

In view of rule 27 of the Supreme Court (81 S. E. xi), in an action to recover land, question as to a certain corner, in form competent, and the answer that a certain person showed such corner to the witness, being corroborative of such other person as a witness, held competent under general objection only.

## 5. EVIDENCE ¶109 — WITNESS COULD TESTIFY HE KNEW LOCATION OF CORNER OF LAND IN CONTROVERSY.

In an action to recover land, it is competent for a witness, when asked about a corner at a pine, to state that he knew where the stump was.



**6. BOUNDARIES**  $\Leftrightarrow$ 35(2)—**HEARSAY AND REPUTATION AS TO PRIVATE BOUNDARY ARE ADMISSIBLE.**

Under certain restrictions, both hearsay evidence and common reputation are admissible on questions of private boundary.

**7. APPEAL AND ERROR**  $\Leftrightarrow$ 1050(2)—**ADMISSION OF IMMATERIAL EVIDENCE HARMLESS.**

In an action to recover land, testimony of two witnesses, which, if erroneously admitted, was immaterial, held harmless.

**8. EJECTMENT**  $\Leftrightarrow$ 9(3), 86(1) — **BURDEN OF PROOF OF TITLE RESTS ON PLAINTIFF.**

In an action to recover land, the burden rests wholly on plaintiff, who must recover, if at all, on the strength of his own title, and not on the weakness of defendant's.

**9. APPEAL AND ERROR**  $\Leftrightarrow$ 231(9) — **GENERAL EXCEPTION TO CHARGE PARTIALLY CORRECT IS INSUFFICIENT.**

Where some parts of the charge to which plaintiff took exception are clearly correct, plaintiff not having singled out the erroneous part, his exception must fail.

Appeal from Superior Court, Pitt County; Gulon, Judge.

Action by R. P. Singleton against W. B. Roebuck. From a judgment for defendant, plaintiff appeals. No error.

This action was brought to recover the land described in the complaint. Defendant denied plaintiff's title and alleged ownership in himself. There was a controversy as to the location of lines and boundaries, which presented the question in dispute as to the true ownership. Verdict and judgment for defendant, and plaintiff appealed.

Albion Dunn and S. J. Everett, both of Greenville, for appellant.

Julius Brown, F. O. Harding, and D. M. Clark, all of Greenville, for appellee.

**WALKER, J.** The record in this case has been amended under a writ of certiorari. As the record was originally, it appeared that the court had ruled out certain testimony of a witness, Noah Moore, to the effect that Roebuck had bought wood which had been cut from the land. This was competent, and if no amendment had been made, there would have been error. But the amendment has removed it from the case.

[1, 2] First. There was general objection to evidence, which was, at least, competent as corroborative, and plaintiff did not ask that the evidence be restricted to that purpose. The objection fails. Rule of this Court, No. 27 (81 S. E. xi) Dunn v. Lumber Co., 172 N. C. 129, 90 S. E. 18; Ricks v. Woodard, 159 N. C. 647, 75 S. E. 735. This applies to testimony of Mr. Roebuck as to declarations of Mr. Gray and Mr. Perkins. Besides, the court warned witnesses not to

speak of anything said by persons who are living or who were interested, at the time, in the controversy. We must assume that the witnesses understood the caution and observed it.

[3] Second. It was competent for defendant to state that his deed covered the land in dispute and that he was let into possession of the same. Why not? He was stating facts within his knowledge.

[4] Third. The question as to the Crandall corner, and the answer thereto, were properly admitted, in the absence of proper objection. The question was, in form, competent, and the answer that Perkins showed the corner to the witness was corroborative of Perkins, who had before been examined as a witness, about it. Under a general objection, it was competent. Rule 27, and cases supra. His honor, too, again repeated the warning as to statements of living or interested declarants.

[5-7] Fourth. It was competent for the witness, when asked about the corner at the pine, to state that he knew where the stump was, and, besides, it appears to have been harmless and not prejudicial. Buckner v. Railroad Co., 164 N. C. 201, 80 S. E. 225, and is not of sufficient importance, if erroneous, to cause a reversal. There are several of the many exceptions to evidence which are covered by the court's caution and instruction to the witnesses not to state anything told to them by living or interested persons. We will not consider them serialim. It is sufficient to say that the judge required the witnesses to comply with the rule, as to declarations concerning boundaries, established by this court, and thus stated:

"It is the law in this state that under certain restrictions both hearsay evidence and common reputation are admissible on questions of private boundary. Sasser v. Herring, 14 N. C. 340; Shaffer v. Gaynor, 117 N. C. 15 [23 S. E. 154]; Yow v. Hamilton, 136 N. C. 357 [48 S. E. 782]. The restrictions on hearsay evidence of this character—declarations of an individual as to the location of certain lines and corners—established by repeated decisions, are: That the declarations be made ante litem motam; that the declarant be dead when they are offered; and that he was disinterested when they were made. Bethea v. Byrd, 95 N. C. 309 [59 Am. Rep. 240]; Caldwell v. Neely, 81 N. C. 114." Hemphill v. Hemphill, 138 N. C. 504. 51 S. E. 42.

Most, if not nearly all, of the objections may be thus fully met, without further discussion. The surveyor's testimony, as to the Jesse Griffin land division, if erroneously admitted, was harmless. It was immaterial, having no connection with the controversy, and the same may be said of the testimony of J. J. Gray. He might show where his corner was, if he knew its location. If mate-

rial, it was competent, and if immaterial, as claimed, it worked no harm, and certainly no substantial harm.

Fifth. Plaintiff complains that the court did not sufficiently caution witnesses and the jury as to declarations of living or interested witnesses; but we think that he did do so, and in language that could not be misunderstood.

[8] Sixth. As to the charge, we do not think that plaintiff's criticism of it is warranted. The court placed the burden, at the outset, distinctly upon the plaintiff. He stated that the latter must recover, if at all, upon the strength of his own title, and not upon the weakness of the defendant's, and that no burden rests upon the latter. It is all upon the plaintiff. He could not have been more explicit, or correct, on this part of the case. The defendant was not required, by the law, to introduce any evidence. He might rely on that of the plaintiff, and on his ability to show that plaintiff's contention on his own showing was erroneous, and that he had not located his land, or proved his right to recover. The court was arraying the contentions of the parties, and its meaning was that, if plaintiff had offered evidence which satisfied them by its preponderance that his claim was correct, he was entitled to their verdict, and that if the defendant had not introduced evidence tending to show, and sufficient to show, that plaintiff was mistaken in his contention, he would be taking a chance to lose the verdict. He was balancing the contentions of the parties as against each other. The language, if prejudicial to either side, was more against the defendant than against the plaintiff, for there was no burden on the former at all. It was the duty of plaintiff to make out his case, and not rely on the inability of the defendant to sustain his contention, or to show any title.

Speaking of the burden of proof in ejectment, the court says in *Moore v. McClain*, 141 N. C. 473, 478, 54 S. E. 382, 385:

"The plaintiff having shown a prima facie title, it behooves the defendants to show a superior title. The burden of proof upon the issue was upon the plaintiff. She alleged title, and the defendants denied it. Showing a prima facie title did not shift the burden of proof upon the issue, but imposed upon the defendants the duty of 'going forward' with their evidence. The distinction is clear and well illustrated in *Meredith v. Railroad*, 137 N. C. 478 [50 S. E. 1], and *Board of Education v. Makely*, 139 N. C. 31 [51 S. E. 784]."

That is what the judge evidently meant in this case, not that the defendant was required to offer any evidence at all, but that, if he did not do so, while it was still his right to attack and overcome his adversary's case, he might take the risk of an adverse verdict, if he failed to go forward with evi-

dence. He could not well have intended anything else, as he had already told the jury that the burden of proving his case rested upon the plaintiff throughout the trial. The meaning of the court, as we have stated it, is made perfectly plain by the following instruction:

"I charge you further that, in connection with the defendant's chain of title, he has offered in evidence his grant and chain of title for the purpose of showing that his grant and deed cover the same land as is contended to be covered by plaintiff in his grant and deed, not for the purpose of establishing title in himself, because there is no burden upon defendant to establish title in him, because plaintiff himself must establish his own title, but the defendant has offered such evidence which he contends ought to be sufficient to satisfy you that the weight of plaintiff's evidence is not sufficient to locate the land, contended for by him."

[9] It may be further stated that, as there are some parts of the charge to which this exception is taken which are clearly correct, and as plaintiff has not singled out the erroneous part, his exception must fail. *Nance v. Telegraph Co.*, 177 N. C. 313, 98 S. E. 838; *State v. Evans*, 177 N. C. 564, 570, 98 S. E. 788, and cases cited; *State v. Ledford*, 133 N. C. 722, 45 S. E. 944. We said in the *Nance Case*, supra:

"Defendant should have separated the 'good from the bad,' and objected only to the latter, as the objection must be valid as to the whole of the testimony. We will not set off the bad for him, and consider only that much of it, upon the supposition that his objection was aimed solely at the incompetent part. He must do that for himself. This is the firmly established rule."

The thirteenth assignment of error, the last one being merely formal, is subject to the same objection. The particular error is not pointed out and excepted to; there being several different propositions in the instructions, some of which are plainly correct. *Nance v. Telegraph Co.*, supra. But, when the entire charge is considered, especially the statement of defendant's contention, it is apparent that the court did not mean that it required more than seven years' adverse possession to ripen the title, but seven years or more would be sufficient, and the jury so understood it. He indicated seven years as the minimum period, and the expression was doubtless used because the evidence showed such a possession for more than seven years, and the judge had stated the plaintiff's contention to be that he had occupied the land adversely for more than seven years, or "for seven years and upward," without any correction from the plaintiff. The court sufficiently instructed the jury that they should decide with the plaintiff, if they found that he had been in adverse possession, as had been contended by him.

There was no substantial error in the rulings or charge of the Court, if error at all, and, even if there was slight error, it is not of sufficient importance to warrant a reversal (*Griffin v. Railroad Co.*, 138 N. C. 55, 50 S. E. 516), and the instruction as to adverse possession was responsive to plaintiff's contention, as stated by the court, and not questioned at the time by him (*Griffin v. Railroad Co.*, *supra*).

The case has been correctly tried, as we think, without prejudice to any just right of the plaintiff.

No error.

(178 N. C. 175)

**PRODUCE TRADING CO. v. NORFOLK SOUTHERN R. CO.** (No. 14.)

(Supreme Court of North Carolina. Oct. 1, 1919.)

**1. CARRIERS ⇐187 — WHICH WAS INITIAL CARRIER QUESTION FOR JURY.**

In an action for damage to or loss of a shipment of potatoes, whether defendant railroad or a steamboat company was the first carrier in the line of continuous transportation to final destination *held* a question for the jury.

**2. CARRIERS ⇐177(3)—IMMATERIAL WHETHER INITIAL CARRIER OF INTERSTATE SHIPMENT WAS NEGLIGENT.**

It was immaterial under the Carmack Amendment to the Interstate Commerce Act (U. S. Comp. St. §§ 8604a, 8604aa), as to a shipment of potatoes by several carriers, whether the initial carrier was negligent, for initial carrier was answerable for the negligence of succeeding carriers.

**3. CARRIERS ⇐185(1) — CONNECTING CARRIER MUST SHOW DELIVERY TO SUCCEEDING CARRIER IN GOOD CONDITION.**

Where there was evidence of the good condition of a shipment when loaded on the car of an intermediate carrier, the burden was on such carrier to prove the shipment continued in the same good condition as when received until it had been delivered to the next carrier.

**4. INDEMNITY ⇐13(1) — REMEDY OVER OF INITIAL CARRIER AGAINST NEGLIGENT CONNECTING CARRIER.**

An initial carrier, liable under the Carmack Amendment to the federal Interstate Commerce Act (U. S. Comp. St. §§ 8604a, 8604aa) for damage to the goods in the hands of any succeeding carrier, has a remedy over against the carrier in default, if it was not itself negligent.

**5. CARRIERS ⇐76—ADJUSTMENT OF LOSS EQUITABLE ASSIGNMENT TO CONSIGNOR OF CONSIGNEE'S CLAIM FOR DAMAGES.**

Where goods are shipped on open bills of lading, so that title passes, but the price of the goods to the consignee is docked the amount of any loss or damage, the adjustment amounts to an equitable assignment to the consignor of the consignee's right to recover of the carrier.

**6. CARRIERS ⇐177(3)—ON RECONSIGNMENT, NEW DESTINATION REGARDED AS ORIGINAL ONE IN DETERMINING LIABILITY.**

When the consignor controls the bill of lading, or has the right to change the destination or divert the goods to a new one, a reconsignment does not break the connection; but the new destination is regarded as the original one, to determine the liability of the initial carrier under the Carmack Amendment to the Interstate Commerce Act (U. S. Comp. St. §§ 8604a, 8604aa).

**7. CARRIERS ⇐132—WHERE SHIPPER LOADS AND COUNTS, BURDEN OF PROOF OF DAMAGE ON HIM.**

Where a shipper undertakes to load and count the goods, the carrier's burden of proof is shifted, and the shipper must affirmatively show his damage.

**8. CARRIERS ⇐186 — NUMBER OF CARS IN SHIPMENT QUESTION FOR JURY.**

In the shipper's action for injuries to several shipments of potatoes, the question as to the number of the cars, being one of identity, *held* for the jury under the evidence.

Appeal from Superior Court, Pasquotank County; Devin, Judge.

Action by the Produce Trading Company against the Norfolk Southern Railroad Company. From a judgment for plaintiff, defendant appeals. No error.

*First Shipment—Second Issue.*—Plaintiff sued for damages sustained in the shipment of potatoes, and he especially relied on negligence in the transportation of four lots, some of which were either injured or lost. The inquiry in regard to those damages is covered by the second, fifth, sixth, and tenth issues. The first shipment of 200 barrels was to Elizabeth City, N. C., at which place, on the wharf of defendant, the potatoes were deposited by the North River Steamboat Company; it having been brought by that line from one of its landings on the river at Jarvisburg, N. C., June 14, 1917, under a bill of lading in which they were consigned by the plaintiff to itself—destination not mentioned, but left blank. These potatoes were loaded in defendant's cars, and they were carried to Berkley, Va., and by telegraph ordered to be reconsigned there to John A. Eck, at Chicago, Ill. When they were loaded in cars at Elizabeth City, N. C., a through way bill, or shipping instructions, reading from Jarvisburg, N. C., to Berkley, Va., was handed by the agent of the steamboat line to the agent of defendant at Elizabeth City. Ten barrels of these potatoes were lost in transit, and the market price of the others had fallen 50 cents per barrel, by reason of the delay in shipment, causing the consignor to lose that much from the contract price, as the consignee exacted that much in reduction of the amount due by them.

*Second Shipment—Fifth Issue.*—This shipment contained 200 barrels of potatoes, consigned by plaintiff to Lally Bros., at Chicago, Ill. Four barrels were lost in transit, and the rest were delayed in shipment and damaged by delay. The car was in bad condition, and was marked, "Car in bad order, shop when empty." These potatoes were brought by the North River Line to Elizabeth City, N. C., from Morris' Wharf, N. C., a landing on the river, on June 18, 1917. The goods moved from Elizabeth City by defendant's line and connecting carriers to Chicago, Ill. Plaintiff claims as damages \$330.

*Third Shipment—Sixth Issue.*—The bill of lading in this case was issued by the defendant at Pasquotank, N. C., on June 19, 1917, in the name of the Produce Trading Company, as consignor and consignee, destination Berkley, Va., for 175 barrels of potatoes, and the bill was indorsed "S. L. & C.," meaning "shipper's load and count." The car left Pasquotank on June 19, arrived at Berkley, Va., at 4:10 p. m. the same day, and the next day, June 20, 1917, plaintiff by telegraph reconsigned it at that place to Zivi & Co., Chicago, Ill., route Star Union. Plaintiff alleged damage to 7 barrels of the potatoes and delay in transporting the remainder of them, whereby, as to the latter part of the shipment, plaintiff lost \$1.50 per barrel by the decline in the price. The claim is for \$28, on account of the lost barrels of potatoes, and \$256.50 for the loss in price of the others.

*Fourth Shipment—Seventh Issue.*—This was 207 barrels of potatoes received by defendant at Bishop's Cross, and consigned to Watson & Sons, Chicago, Ill., on June 17, 1917. When the car of potatoes arrived at its destination, it was found to be short 9 barrels, for which plaintiff claimed damages in the sum of \$90.

Upon the verdict, the court gave judgment for the total amounts assessed by the jury under the foregoing issues, and defendant appealed.

Thompson & Wilson, of Elizabeth City, and W. B. Rodman, of Norfolk, Va., for appellant.

Aydlett, Simpson & Sawyer, of Elizabeth City, for appellee.

WALKER, J. (after stating the facts as above). We have only given an outline of the several causes of action upon which the four sets of issues above set out were framed, preferring to mention the other pertinent facts in this opinion, when dealing with each shipment separately.

[1, 2] The first set of issues related to the shipment of potatoes by the plaintiff via the North River Line to Elizabeth City, N. C., from a landing on the river. The evidence tends to show that various shipments were made to that place, and there assembled for

transportation, after being assorted, to distant points in other states. It did not appear clearly at the trial whether the defendant, or the North River Line, was the first carrier in the line of continuous transportation to the final destination, and the court, therefore, very properly submitted the question to the jury to say how this was. There was testimony which would authorize a decision either way, and the evidence was not conclusive of the question for either side. The proper course was therefore taken, for the decision of the question depended upon how the jury should find the facts to be. There was no destination stated in the original bill of lading, and defendant contends that the shipment was intended for Berkley, Va., from which place it was reconsigned to John A. Eck Company, at Chicago, Ill. It would be impossible to hold, as a matter of law, that defendant was not the first carrier, as to do so we would have to ignore all the evidence as to the position held by the North River Line. In the first place, it was for the jury to say whether Berkley was originally intended as the destination, when its destination was left blank in the bill of lading. We cannot assume in law that it was so intended to be. The jury had the right to consider the bills of lading in connection with the other relevant testimony, and they would have to do so, in order to give the true effect to the transaction. Having decided that defendant was the initial carrier, it made no difference, under the Carmack Amendment (Act June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 595) to the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 [U. S. Comp. St. §§ 8604a, 8604aa]), as to this shipment, whether defendant was chargeable with negligence, either in respect to the loss of the potatoes or any part thereof, or of the damage to them. This, we take it, is conceded by the defendant; but, if not, it is correct as a principle of the law applicable to this case.

But the defendant argues that the steamboat company was engaged in interstate commerce, and therefore it must have been the first carrier, and not the defendant. But the conclusion does not follow from the premise. Counsel rely on the following authorities to sustain their position: Texas, etc., Railroad Co. v. Sabine Tram Co., 227 U. S. 111, 33 Sup. Ct. 229, 57 L. Ed. 442; S. P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 31 Sup. Ct. 279, 55 L. Ed. 310; Railroad Commission v. Worthington, 225 U. S. 101, 32 Sup. Ct. 653, 56 L. Ed. 1004. But the question there was not as to who was the initial carrier within the meaning of the Carmack Amendment, but whether the defendant carriers were engaged in interstate commerce, and therefore subject to the rates prescribed by the Interstate Commerce Commission, and not to those of the state Railroad Commission. We will refer further to only one of

those cases, which is typical of all of them; the others being practically like it.

In *Railroad Co. v. Sabine Tram Co.*, supra, we understand the case and decision to be this: A shipment of lumber, destined by the purchaser for export, was made by the seller under a local bill of lading from an interior point in Texas to a Texas Gulf port, at which the lumber was unloaded without delay by the purchaser's order into slips or docks, in reach of ship's tackle, and was then loaded into chartered ships, by which it was carried to foreign ports. Such shipment, not being an isolated one, but typical of many others, constitutes foreign commerce, as the court held, and as such is governed by the tariffs on file with the Interstate Commerce Commission, to the exclusion of the rates established by the state Railroad Commission, although the seller had no connection with the lumber after it reached the railway terminus, and had no concern with its destination after it came into the hands of the purchaser, and no knowledge thereof, and although the lumber had no definite foreign destination at the time of the initial shipment. But this, according to our conception, is far from holding that the first railroad which handled the lumber at Rutliff, in Texas, and destined for Sabine, was an "initial carrier." The court held that the connecting carriers, all in Texas, from the first to the last, were subject to the federal tariffs as to switching charges, as they were engaged in interstate commerce.

[3] The second shipment was from plaintiff, at Morris' Wharf, N. C., on the North River Line, to Lally Bros., Chicago, Ill., and the court held that the steamboat company was the initial carrier, and called upon the jury to inquire and find whether the defendant, who was an intermediate carrier, was actually negligent in respect to the loss of four barrels of potatoes and damage to the others, and liable therefor, as a question of fact. We do not see why the case is not fully covered by *Meredith v. Railroad Co.*, 137 N. C. 478, 50 S. E. 1, assuming the contract of carriage to have been that defendant, as an intermediate carrier, agreed to transport the goods over his own line and to deliver them to the next carrier on the route in the same condition that he received them. The consignor or consignee does not know the facts, and it must be difficult, if not impossible, to prove them. The carriers do know them, or should know them. It is easy for any of the carriers to prove that he delivered them in good order to the next carrier, but not so for the consignor or consignee. In such a case, Justice Connor says, citing 3 *Wood on Railroads*, 1926, *Railroad Co. v. Tupelo Co.*, 67 Miss. 35, 7 South. 279, 19 Am. St. Rep. 262, and *Railroad Co. v. Emrich*, 24 Ill. App. 249, that—

"On proof that any carrier on the route received the goods in good condition, the burden of proof rests upon such carrier to show delivery

in the same condition to the next carrier or to the consignee; it being peculiarly and almost solely within its power to make such proof."

He supports the proposition by many authorities, and among them 1 Elliott on Ev. 141; *U. S. v. Railroad Co.*, 191 U. S. 84, 24 Sup. Ct. 33, 48 L. Ed. 106; *Brintnall v. Railroad Co.*, 32 Vt. 665 (opinion by Poland, J.); *Ellis v. Railroad Co.*, 24 N. C. 138; *Aycock v. Railroad Co.*, 89 N. C. 321; *Lindley v. Railroad Co.*, 88 N. C. 547; *Phillips v. Railroad Co.*, 78 N. C. 294. In the *Meredith Case*, supra, reference is made to *Mitchell v. Railroad Co.*, 124 N. C. 238, 32 S. E. 671, 44 L. R. A. 515, as follows:

"The principle is applied in an able and exhaustive opinion by Mr. Justice Douglas. It is true that he was discussing the question in respect to the burden of proof as applied to the last carrier, but we can see no reason why the same rule does not apply when the first or contracting carrier is sued. In both cases the plaintiff's cause of action is based upon the assumption of a duty and the breach thereof. The same reason which requires the last carrier to show performance of the duty applies with equal force to the first—that the sources or means of proving the exculpatory facts are peculiarly within its knowledge, and not otherwise open to the plaintiff. It would be a difficult, if not a vain, undertaking on the part of the plaintiff to locate the time and place at which his goods were injured, or where the delay of 14 days occurred. Every reason which justifies the rule as to the first carrier applies with equal force to the other. It assumed the duty of safely, and within a reasonable time, conveying the goods to Wilmington and delivering them to the Coast Line"

—that railroad company, the Coast Line, being the next carrier, and also the last one in the route.

Chief Justice Smith said, in the *Lindley Case*, supra:

"The obligation resting on each attaches as the goods pass into its custody, and ceases only when safely carried and delivered to the successor."

The court also says in the *Meredith Case* that the license cases (*State v. Morrison*, 14 N. C. 299; *State v. Emery*, 98 N. C. 668, 3 S. E. 636; *State v. Glenn*, 118 N. C. 1194, 23 S. E. 1004) also support the doctrine as to the prima facie case and the burden resting upon the carrier of going forward with its proof of facts peculiarly within its knowledge, or of taking the risk of defeat as the prima facie case carries the case to the jury; the principle of all such decisions being really the same. 1 Elliott on Ev. 141, says:

"The fact that the party having peculiar knowledge of the matter fails to bring it forward may raise a presumption or justify an inference in favor of his adversary's claim, and thus shift the burden of proceeding in order to win; but the burden of establishing the issue is not shifted, nor is it ordinarily determined in the

first instance, by the mere fact that a negative is involved, or that some fact is peculiarly within the knowledge of the adverse party."

We cannot see why, under this reasonable and firmly established principle, there is not enough shown in this case to bring it within the operation of the same. There was sufficient evidence of the good condition of the potatoes when loaded on the defendant's car, and when they reached their destination the car was in a bad plight. The defendant should have offered evidence that it continued in the same condition it was when started by it on its journey until it had been delivered to the next carrier in the line of transportation; the *prima facie* case being enough to carry the case to the jury. We therefore hold that the charge with reference to this shipment was correct.

[4] The third shipment contained 175 barrels of potatoes, originated at Pasquotank, or Elizabeth City, N. C., and was consigned by plaintiff to itself at Berkley, Va., and by its direction reconsigned, at that station, to Zivi & Co., Chicago, Ill. The defendant was the initial carrier, and consequently was liable, under the Carmack Amendment, for any loss or damage occurring during the carriage, whether caused by its negligence or not. Its remedy is one against the defaulting carrier, if it was not itself negligent. This shipment is governed by the principle already discussed.

The fourth shipment contained 207 barrels of potatoes, consigned by plaintiff at Bishop's Cross, N. C., to C. A. Watson & Sons, at Chicago, Ill. This consignment is governed by the same rules heretofore discussed and applied, where defendant was the first carrier, and no further comment is necessary.

We will now consider some general questions raised by the defendant, together with the assessment of damages on each of the shipments.

[5] It is urged that the bills of lading were open, which means that the consignor neither retained the title nor any interest in the goods, and the defendant insists that, this being so, the property in the goods passed from consignor to consignee at the time of delivery to the carrier, and the plaintiff, therefore, not being injured by any loss or damage sustained, is not the proper party to sue for the same. But, while that is perhaps true, nothing else appearing but the straight consignment and delivery to the carrier, there may be such an arrangement between the two parties, consignor and consignee, as to change the ordinary rule arising out of that simple relation and to entitle the consignor to sue for the loss or damage. Has such a change been wrought in this case? We are of the opinion that there has been. If the goods were either lost or damaged by the wrong or negligence of the carrier, and

on demand of the consignee, and afterwards, by mutual consent of the parties, the price of the goods was docked by as much as the loss or damage, and the settlement made on that basis, we cannot see why this does not amount to an equitable assignment to the consignor of the consignee's right to recover of the carrier, and to the extent that the consignor has been required to reduce the price he has suffered a loss by the negligence of the carrier. Whether you consider it as an assignment to the consignor of the consignee's right to so much against the carrier, or as a loss of so much indirectly to the consignor by the negligence, or as ultimately a sale on the account of the consignor, it seems to us that the latter should have the right to sue. We have said that by the consignment under such a bill of lading the title *prima facie* passes to the consignee, which does not, however, exclude the idea that the consignor has not lost all and every right in the shipment. The consignee gets the title, so that he may sue for the specific recovery of the goods, and damages for any loss or injury to them by the carrier, if he elects so to do; but he may settle with the consignor, or so agree with him, that the latter may acquire the right to recover for any loss or damage he may have suffered. The case falls within the principle of *Aydlett v. Railroad Co.*, 172 N. C. 47, 89 S. E. 1000; *Buggy Co. v. Railroad Co.*, 152 N. C. 122, 67 S. E. 251; *Summers v. Railroad Co.*, 138 N. C. 295, 50 S. E. 714; *Railroad Co. v. Guano Co.*, 103 Ga. 590, 30 S. E. 555; *Cardwell v. Railroad Co.*, 146 N. C. 218, 59 S. E. 673.

But, if this is not so, the consignee would not have received the goods, but for this arrangement, and he had the right of reasonable inspection for the purpose of ascertaining their condition and rejecting them, if damaged. 6 Cyc. 465. If the consignee could refuse to receive the goods, on account of injury to them caused by the negligence of the carrier, a reduction in price allowed to induce a receipt of them would be the loss of the consignor, for which he should recover of the carrier, as he is the party aggrieved, and to the extent of this loss has an interest in the shipment. The court charged that the loss must have been charged back to the consignor. We can see, in the record, testimony sufficient to show that there was damage or loss in respect to each shipment.

[6] We have assumed as correct, in our discussion of the case, the position of defendant that the reconsignment at Berkley, or elsewhere, would not make a new shipment, or change the initial point in the line of transportation, and thus break its continuity, so as to bring the defendant's liability within the operation of the Carmack Amendment as to the first carrier. *Atchison, T. & S. F. Railroad Co. v. Harold*, 241 U. S. 371, 36 Sup. Ct. 665, 60 L. Ed. 1050; *Missou-*

ri, etc., *Railroad Co. v. Ward*, 244 U. S. 383-388, 37 Sup. Ct. 617, 61 L. Ed. 1213; *Myers v. Railroad Co.*, 171 N. C. 194, 88 S. E. 149. When the consignor controls the bill of lading, or has the right to change the destination or divert the goods to a new one, this does not break the connection; but the new destination is regarded as if it were the original one. *Myers v. Railroad Co.*, 171 N. C. 190, 88 S. E. 149.

[7] The letters on the bills, "S. L. & C.," meaning "shipper's load and count," merely changed the burden of proof. If they have not been there the carrier had loaded and counted the goods, the burden would have been upon it, if there had been any loss or damage; but, where the shipper undertakes to load and count the goods, this burden is shifted, and the latter must affirmatively show his damage. This burden was properly placed on him by the judge, and, there being some evidence of the loss and damage, there was no error on this score.

The judge could not have nonsuited the case upon the ground that there was no evidence. In the case of S. L. & C. shipments, these letters required explanation, and besides there was some evidence upon all phases of the case, so far as defendant's negligence is concerned, when we consider and apply the rule stated in *Meredith v. Railroad Co.*, supra, and the other authorities cited in connection therewith. There was also evidence as to the damages and plaintiff's right to recover them, and in respect to those instances where the defendant company has been acquitted of negligence, it is liable, whether or no the loss or damage occurred on its line, under the Carmack amendment.

The jury found that, while the defendant was not the initial carrier, it was guilty of individual negligence, or that the loss or damage by negligence took place on its line, and that in the other instances it was liable under the Carmack Amendment, and assessed the damage, for which the judgment was entered. There was no error in the rulings which vitiated the verdict.

Before closing, we will say, in answer to the position taken by defendant in its supple-

mental brief, that the cases of *Ch. & W. C. R. Co. v. Varnville F. Co.*, 237 U. S. 597, 35 Sup. Ct. 715, 59 L. Ed. 1137, *Ann. Cas.*, 1916D, 333, and *Atchison, etc., R. Co. v. Harold*, 241 U. S. 371, 38 Sup. Ct. 665, 60 L. Ed. 1050, have not been overlooked. We have not held, in this case, that an intermediate or delivering carrier is liable for a loss or damage not shown to have happened while the goods were in its possession. We have, on the other hand, held defendant liable as the initial carrier, or when it was not such, but an intermediate one, we have so held it liable, because there was some evidence, under the principle of *Meredith's Case*, that the loss did actually occur on its line. Nor have we failed to give the defendant the benefit of the position that a reconsignment, at an intermediate point, under an exchange bill of lading, did not constitute two separate and distinct shipments. *Atchison, etc., R. R. Co. v. Harold*, supra. Nor do we think that this case, owing to its peculiar facts, falls within the principle of *Galveston, etc., R. R. Co. v. Wallace*, 223 U. S. 481, 32 Sup. Ct. 205, 56 L. Ed. 516. There is testimony here which, in at least one view of it, tends to show that the North River Line took no part in a continuous shipment from Jarvisburg to the final destination in the West, but merely delivered the potatoes at Elizabeth City, where all the lots of potatoes were assembled, and there weighed and reassorted, and then started on their interstate journey to Chicago, Ill., or elsewhere in some other state. The bill of lading was not, in this case, of such a decisive character as to preclude inquiry as to whether it was really that of defendant as the initial carrier, and the matter was properly left to the jury.

We have not found it necessary to consider the case of *Paper Box Co. v. Railroad Co.*, 177 N. C. 351, 99 S. E. 23, but have decided the case on other grounds.

[8] The question as to the number of the cars was one of identity, and was for the jury to decide upon the evidence.

We have endeavored to review all of defendant's material points, and, after doing so, no error is found.

No error.

(178 N. C. 231)

(100 S.E.)

**BEFARRAH et al. v. SPELL et ux.**  
(No. 229.)

(Supreme Court of North Carolina. Oct. 8, 1919.)

**1. SALES  $\S$ 800 — VENDOR'S LIEN DOES NOT ATTACH TO PERSONALTY.**

A vendor's lien for purchase money does not attach to personalty.

**2. VENDOR AND PURCHASER  $\S$ 254(2)—VENDOR WHO HAS GIVEN DEED HAS NO LIEN.**

A vendor who has conveyed by deed has no lien on land for purchase money.

**3. EXEMPTIONS  $\S$ 119(1)—TIME FOR MAKING CLAIMS.**

Where a stock of goods which defendant had purchased, giving notes for part of the purchase price, were attached by the holders of the notes and sold, *held*, that after sale defendant was under Const. art. 10,  $\S$  1, and Revisal 1905,  $\S$  695, entitled to claim a personal property exemption of \$500 out of proceeds where the claim was made before final disposition of the fund.

**4. APPEAL AND ERROR  $\S$ 856(1)—DECISION NOT SUSTAINED ON GROUNDS NOT URGED IN LOWER COURT.**

Where defendants' claim to personal property exemption was denied on other grounds, *held*, that on appeal the denial was not sustained on the claim that finding of defendants' residence was insufficient.

Appeal from Superior Court, Sampson County; Gulon, Judge.

Action by J. E. Befarraah and another against T. F. Spell and wife. From a judgment for plaintiff which denied the request of defendants to have set apart to them personal property exemption, defendants appeal. Reversed.

See, also, 176 N. C. 193, 96 S. E. 949.

This is an action to collect certain notes given for the purchase price of a stock of goods. The facts are as follows:

On March 28, 1917, N. J. Aboud, a merchant at Roseboro, N. C., sold to the defendant T. F. Spell his entire stock of merchandise for the sum of \$4,000, \$500 of which was paid in cash, and the balance represented by notes as set out in article 2 of the complaint, said notes being secured by a mortgage deed upon the dwelling house and premises of the defendant I. V. Spell, situate in the town of Roseboro. There was no mortgage or other lien given upon the stock of merchandise. On the same date, to wit, March 28, 1917, said notes and mortgage were duly transferred and assigned to the plaintiffs, J. E. Befarraah and F. Nassif, trading as the Raleigh Bargain House.

Default having been made in the payment of the second note, the plaintiffs sued out an attachment in the superior court of Sampson and seized said stock of goods. Upon motion

of the defendant, said warrant of attachment was vacated and set aside; and thereupon, at the request of the plaintiffs, a receiver was appointed to take charge of said stock of goods, wares, and merchandise, sell the same, and hold the proceeds pending the final judgment in this action. Said goods were sold and the net proceeds from said sale were deposited with W. F. Sessoms, clerk of superior court.

This case was first tried by his honor Judge Calvert at February term, 1918, and the plaintiffs were nonsuited. An appeal was taken to the Supreme Court, and at the fall term thereof said judgment of nonsuit was set aside and a new trial ordered. See *Befarraah v. Spell*, 176 N. C. 193, 96 S. E. 949. In the meantime, upon the petition of J. E. Befarraah, a member of the firm constituting the Raleigh Bargain House, he was made a party plaintiff and allowed to file a complaint, which he did at August term, 1918.

The certificate of the Supreme Court having been certified down, this cause again came on for hearing before Judge O. H. Gulon, at February term, 1919. The defendants, Spell and wife, requested his honor to set apart to them their personal property exemption in the funds deposited with the clerk of the superior court. His honor denied the request, and upon motion of the plaintiff Befarraah, and upon the complaint and answer, his honor held that the claim of the plaintiffs constituted a purchase-money lien upon the stock of goods, wares, and merchandise sold to the defendant, and that they were not entitled to any personal property exemption in said goods or the moneys derived from the sale thereof. Judgment was entered in accordance with the foregoing ruling, from which the defendants, Spell and wife, appealed to the Supreme Court.

Grady & Graham, of Clinton, for appellants.

Butler & Herring, of Clinton, for appellees.

ALLEN, J. [1, 2] A vendor's lien for the purchase money "does not attach to personalty" (39 Cyc. 1804), and in this state we have gone further, and have refused to follow the English doctrine giving such a lien in sales of land.

"Ever since the leading case of *Womble v. Battle*, 38 N. C. 182, decided in 1844, it has been settled in this state that a vendor of real estate who has conveyed it by deed has no lien upon the land for the purchase money, and that the English doctrine of the purchase-money lien does not obtain here." *Lumber Co. v. Lumber Co.*, 150 N. C. 288, 63 S. E. 1048, 21 L. R. A. (N. S.) 843.

It follows that his honor was in error in holding that the plaintiff was entitled to a lien upon the proceeds of the sale of the



stock of goods to secure the purchase-money notes, and, there being no lien, the defendant is entitled to his exemption, unless he has waited too long, or his application cannot be made because no execution or process has issued to enforce payment of the plaintiff's judgment.

[3] The statute (Revisal, § 695), following the language of the Constitution (article 10, § 1), gives to each resident of the state a personal property exemption of \$500 out of his own property as against an execution or other final process, which is to be set apart on his demand, and, unlike the homestead exemption, which must be allotted before levying upon the land, the right to the exemption may be insisted on at any time before the sale, or the appropriation of the property by the court, "at the last moment" (*Gardner v. McConnaughey*, 157 N. C. 482, 73 S. E. 125), and the order of the court directing the payment of the money is final process within the meaning of the Constitution.

The case of *Chemical Co. v. Sloan*, 136 N. J. 122, 48 S. E. 577, is decisive of both points. In that case the action was brought to recover money, the proceeds of the sale of certain fertilizers, alleged to have been unlawfully converted by the defendant, a resident of this state, as agent of the plaintiff. The latter sued out an attachment upon the allegation in its affidavit that he had attempted to dispose of his property and was about to dispose of and secrete the same with the intent to defraud the plaintiff and his other creditors. The attachment was levied on personal property of the defendant, the value of which was less than \$500. The property so attached, being perishable, was sold by the sheriff under an order of the court, and the sheriff held in his hands the proceeds of the sale subject to the further order and direction of the court. The defendant claimed his exemption out of the money so held by the sheriff. The plaintiff resisted the claim upon the ground that the demand for the allotment of the exemption was not made until after the sale. The court ordered the allotment to be made by the sheriff. The defendant moved to vacate the attachment, but the court denied the motion. There had been no judgment in the case, and consequently no order directing the application of the money to the payment of the plaintiff's claim. The court said, in discussing the question presented:

"We do not see why the defendant is not entitled to his exemption upon the foregoing facts. The Constitution exempts the personal property of any resident of this state to the value of \$500 from sale under execution or other final process. This language is too plain and explicit for any possible misunderstanding of its meaning. It is only when the property is about to be subjected to the payment of a debt by final process that the last opportunity is

left to the defendant to claim his exemption. At any time before this stage of the proceeding is reached he may make his demand and become entitled to an allotment of the exemption. This is perfectly clear without light upon the subject from any of the authorities. A warrant of attachment is mesne process, and is nothing more than a provisional remedy. It is ancillary to the relief sought in the principal action, and is intended to preserve the property, or its proceeds if it has been sold as perishable, in the hands of the sheriff or in the custody of the law to abide the event of the suit. The defendant may demand his exemption when the warrant is levied on his property and it is taken out of his possession, or he may wait until the final process is issued and the property is about to be appropriated by sale to the satisfaction of the same."

The facts in the *Sloan Case* were more favorable to the plaintiff than in this, because in the *Sloan Case* the motion to dissolve the attachment was denied, while in this it was allowed.

[4] The plaintiff also objects to the allotment of the exemption because it does not appear that the defendant is a resident of this state, but, as this objection was not made in the superior court, and the ruling of his honor was on a different ground, and the defendant was engaged in business in Sampson county, we would not be justified in denying the right to the exemption because of lack of more definite and specific finding as to residence.

Upon the record as it now stands the male defendant is entitled to his exemption.

Reversed.

(178 N. C. 163)

MORTON et al. v. PINE LUMBER CO.  
(No. 219.)

(Supreme Court of North Carolina. Oct. 8, 1919.)

1. LOGS AND LOGGING §3(14)—CHILDREN OF DECEASED OWNER MAY ENJOIN CUTTING TIMBER ON DEFAULT IN PAYMENTS.

Where the owner of timber lands died, the lands descending to his infant children, and the lumber company, to which he had granted the right to cut timber within 10 years, with the privilege of renewal for 10 years on payment of \$10 annually, and its assignee, had not tendered the extension money to the children within the time required for the first payment, nor to any one with right to create a permanent interest in their property, the children are entitled to enjoin the cutting of timber and to recover damages for that cut after the 10 years.

2. DOWER §56(1, 2)—UNTIL DOWER ALLOTTED POSSESSION AND RIGHT OF HEIRS IN TIMBER LANDS SUPERIOR TO WIDOW.

Until dower was allotted in a decedent's timber lands, the possession and right thereto was in his infant children as his heirs, and his widow had no power to bind the children con-

cerning the land in any way, as by accepting from a lumber company money required by its contract to give it the right to cut timber for 10 additional years.

**3. LOGS AND LOGGING — 3(14)—FAILURE TO TENDER YEARLY EXTENSION MONEY CAUSING FORFEITURE OF TIMBER CONTRACT.**

Failure of grantee of right to cut timber from a decedent's land, and also of its assignee, to pay the \$10 per year extension money for the first year after the original 10 years for which the contract was made, held to work a forfeiture of the entire contract, which permitted a 10-year extension on the payment of \$10 annually; such contracts being strictly construed, and the particular one requiring the extension money to be paid or properly tendered year by year.

**4. GUARDIAN AND WARD — 42 — EXTENSION OF TIMBER CONTRACT OF DECEASED FATHER BY GUARDIAN REQUIRES COURT'S APPROVAL.**

Under Revisal 1905, §§ 1788, 1789, 1798, 1800, a sale of his ward's realty by a guardian is allowed only on petition filed, and the order must in all cases have the supervision and approval of the judge, and tender to the guardian of infant children, heirs of a deceased owner of timber lands, by the grantee of the right to cut timber, of money necessary by the contract to extend the right to cut for 10 years, could not be sanctioned or made effective by the mere receipt of the money by the guardian, but required a court proceeding.

**5. LOGS AND LOGGING — 3(7)—EFFECT ON HUSBAND'S DEATH OF JOINDER BY WIFE IN HUSBAND'S SALE OF TIMBER.**

Where a husband and wife granted the right to cut timber from his lands, and the husband died, the land descending to his children as his heirs, the widow was not entitled to receive from the grantee of the right to cut timber or its assignee money necessary to be paid to extend the term of the contract for another 10 years merely because she was one of the grantors of the original deed.

Allen, J., dissenting.

Appeal from Superior Court, Onslow County; Gulon, Judge.

Action by Dena Morton, guardian of Ernest Loyd and Junie Loyd, against the Pine Lumber Company. From judgment for defendant, plaintiffs appeal. Reversed.

Civil action to restrain cutting of timber and for damages determined on final hearing before his honor, O. H. Gulon, Judge, at April Term, 1919, of the superior court of Onslow county. The court was of the opinion that, on the pleadings and exhibits made in the cause, plaintiffs had shown no right to relief, and thereupon adjudged that defendants go without day. Plaintiffs excepted and appealed.

Duffy & Day and E. M. Koonce, all of Jacksonville, and Cowper, Whitaker & Allen, of Kinston, for appellants.

Frank Thompson, of Jacksonville, and L. R. Varser, of Lumberton, for appellee.

HOKE, J. On the hearing it appeared: That on April 8, 1905, John Loyd, owner, with his wife, in consideration of \$30, conveyed to the Swansboro Lumber Company the timber of every description of 12 inches and upward standing and growing upon three tracts of land aggregating 103 acres, with right to cut same at any time within 10 years from date of the deed with the privilege of renewal for 10 years on request of grantee, etc., and on payment of \$10 annually for said period. For the same consideration for like period, the right to build all necessary tracks and tramways, etc., was also conveyed, with privilege of cutting any timber under said size to be used in construction. In same deed there was also conveyed a permanent right of way for a railroad 60 feet wide over said land and, with the stipulation that the owner should not cut during these periods any timber from said land, under the size 12 inches, except what was necessarily required for fencing and further that the parties of the first part should pay all taxes and assessments upon said land and timber so long as the contract should remain in force, etc. That soon after the execution of this deed and contract, John Loyd, the owner, died, leaving him surviving, his widow Dena (now intermarried with Gardock Morton), and two children, plaintiffs in this suit, Ernest Loyd and Junie Loyd, who were then and are now infants. That nothing further was done under the contract until April 6, 1915, when the Swansboro Lumber Company, grantee in the deed, paid to Dena Morton \$10 and took a written receipt therefor signed by said Dena and her then husband, Gardock Morton, specifying that the same was in payment for one year's extension on the timber deed of Mr. Loyd and wife. And thereafter, to wit, on 25th of March, 1916, the Swansboro Lumber Company having conveyed their interest to the Pine Lumber Company, and Dena Morton having meantime qualified as guardian of plaintiffs, the said Pine Lumber Company paid to said guardian \$50 and took a written receipt therefor specifying that same was a payment in full for five years' extension for the right and privilege of cutting said timber.

It appeared further that the said Pine Lumber Company were preparing and intended to cut the timber from said land, claiming that they had the legal right to do so under their deed from the Swansboro Lumber Company and by virtue of the payments referred to.

In a recent case before the court (Lumber Co. v. Wells, 171 N. C. 262, 88 S. E. 327), it was said to be the correct deduction from many of our decisions on the subject, "that standing lumber is realty," subject to the laws of devolution and transfer applicable to that kind of property, and that lumber deeds,

such as this, convey an estate of absolute ownership defeasible as to all timber not cut and removed within the specified period, citing *Williams v. Parsons*, 167 N. C. 529, 83 S. E. 914; *Midyette v. Grubbs*, 145 N. C. 85, 58 S. E. 795, 13 L. R. A. (N. S.) 278; *Lumber Co. v. Corey*, 140 N. C. 477, 53 S. E. 300.

And further that stipulations for an extension of time are in the nature of options, and that they do not in themselves create any interest in the property, but amount only to an offer to create such interest when the conditions are performed and working a forfeiture when not strictly complied with. Citing *Waterman v. Banks*, 144 U. S. 394, 12 Sup. Ct. 646, 36 L. Ed. 479; *Thacher v. Weston*, 197 Mass. 143, 83 N. E. 360; and other cases. And again that "where \* \* \* the time first provided for" in a deed of this character "has passed, and it becomes necessary for the grantee to hold by reason of the performance of the stipulation for an extension, the estate or interest arises at the time the conditions are complied with, and, in the absence of any provision in his deed to the contrary, the price paid belongs to him who then has the title and from whose ownership the interest is then created. The option or privilege obtained, to the extent of the right conferred, is a contract attendant on the title, and, as stated, unless otherwise provided in the deed conveying the title, the price for the interest arising on proper performance of the conditions will inure to the owner. It is from his estate that the interest passes, and he must receive the purchase price."

In further illustration of the principle, it was held in another case in the same volume, *Carolina Lumber Co. v. Bryan*, 171 N. C. 265, 88 S. E. 329, that when the owner has died—during the first period—nothing else appearing, the title descended to the heirs, and that they, and not the executor, are entitled to receive the purchase money.

[1] On the facts presented and a proper application of these principles approved in *Mizell v. Lumber Co.*, 174 N. C. 68, 93 S. E. 436, and many other cases, we are of opinion that the restraining orders heretofore issued in the cause should be made permanent and defendants perpetually enjoined from any further cutting of timber. On the death of John Loyd, the owner, the land descended to the infant plaintiffs, his children and heirs at law, and on the record there is no valid claim or suggestion that any tender of the extension money was ever made to them within the time required for the first payment nor to any one having lawful right to create or convey a permanent interest in their property.

[2-5] Until dower is allotted, the possession and the right thereto was in the heirs, and the widow as such had no power to bind them in any way concerning it. *Fishel v. Browning*, 145 N. C. 71, 58 S.

E. 759. The payment of the money to the widow, therefore, for the first year's extension, just two days before the time limit had expired, could not affect their interest, and there being no other payment within that time for the first year's extension, this of itself would work a forfeiture, for these contracts, as stated, are to be strictly construed, and the agreement requires that the extension money should be paid or properly tendered year by year. *Eureka Lbr. Co. v. Whitley*, 163 N. C. 47, 79 S. E. 268; *Rountree v. Cohn-Bock Co.*, 158 N. C. 153, 73 S. E. 796; *Bateman v. Lbr. Co.*, 154 N. C. 248, 70 S. E. 474, 34 L. R. A. (N. S.) 615; *Product Co. v. Dunn*, 142 N. C. 471, 55 S. E. 299. And if it were open to consideration, the attempted payment to the guardian is equally without effect; this being for the 5 years following the first year. A perusal of our statutes on the subject will show that the power of a guardian to make disposition of his ward's real estate is very carefully regulated, and a sale is not allowed except on petition filed, and the order must in all cases have the supervision and approval of the judge. Rev. §§ 1800, 1798, 1788, 1789. And this tender, which, as we have seen, when rightly made, serves frequently to create or convey an interest in the real estate of the infant ward, could not be sanctioned or made effective by the mere receipt of the guardian, but would require a court proceeding where the ward's interest could be supervised and cared for, as the law contemplates and directs. *Le Roy v. Jacobski*, 136 N. C. 443, 48 S. E. 796, 67 L. R. A. 977. On examination the present contract affords us apt instance and illustration of the wisdom of the provisions of our law on the subject. The suggestion that by the terms of the deed the wife could receive the extension money as one of the grantors of the deed is without merit. It being made to appear that the land belonged to her deceased husband if her name is included in the "granting clauses of the deed as one of the parties of the first part," this prima facie should only serve to pass the rights appertaining to her as wife of the owner, her inchoate right of dower, etc., and beyond that would be regarded as a mere formality. And even since the Martin Act, empowering the wife to contract and deal as if she were a feme sole (Laws 1911, c. 109), the covenants and stipulations in such a deed should not be allowed to affect her except to the extent of her interest and would give her no power to bind the owners of the inheritance unless otherwise clearly and plainly expressed in the instrument. *Coble v. Barringer*, 171 N. C. 445, 88 S. E. 518, L. R. A. 1916E, 901, Ann. Cas. 1918E, 281; 13 R. O. L. pp. 1325, 1326; 2 Devlin on Deeds, § 955.

There is error, and this will be certified that a judgment for permanent injunction be entered.

Reversed.

ALLEN, J. (dissenting). I do not agree to the disposition of this case, because there was no one in being at the time of the expiration of the time for cutting the timber to whom the money for the extension could be paid; as the title had descended to infants without guardian and the money was paid to the guardian as soon as one was appointed and before one year of the extension period had expired.

I also think, in any event, provision ought to be made for the return of the amount paid to the guardian.

(178 N. C. 323)

KING GROCERY CO. v. SOUTHERN EXPRESS CO. et al. (No. 298.)

(Supreme Court of North Carolina. Oct. 15, 1919.)

CARRIERS  $\Leftarrow$  137½, New, vol. 3 Key-No. Series—INCONSISTENT FINDINGS AS TO LIABILITY INSUFFICIENT TO SUSTAIN JUDGMENT.

In action against express companies for negligence, a finding by the jury that the S. company, which transported the butter, is not liable for the loss, is inconsistent with a finding that the A. company, which was organized subsequently to the loss and succeeded to the business of the S. company, is liable, and cannot support a judgment against the A. company.

Appeal from Superior Court, Robison County; Calvert, Judge.

Action by the King Grocery Company against the Southern Express Company and another. Judgment for plaintiff against the defendant American Railway Express Company, which excepted and appeals. Reversed.

The defendant the American Railway Express Company appealed. The following is the charge of the court and the issues, to all of which the defendant specifically excepted:

"Gentlemen of the Jury: There are some issues to be submitted to you. The first is: 'In what sum, if any, is the defendant American Railway Express Company indebted to the plaintiff on account of the loss of merchandise, as alleged in the complaint?'

"If you find the facts to be as testified to, you will answer that issue: '\$2.68.'

"The second issue is: 'In what sum, if any, is the defendant Southern Express Company indebted to the plaintiff on account of the loss of merchandise, as alleged in the complaint?' If you find the facts to be as testified to, then you will answer this issue: 'Nothing.'

"Third. 'Did the plaintiff file claim with the defendant Southern Express Company within the time provided by statute?' If you find the facts to be as testified to, you will answer that issue: 'Yes.'

"Fourth. 'Did the defendant fail and refuse

to pay said claim within three months after the filing of same?' If you find the facts to be as testified to, you will answer that 'Yes,' also."

"Upon the jury's answer to the foregoing issues, the court as a matter of law answered the fifth issue: 'In what sum is the defendant American Railway Express Company indebted to the plaintiff on account of penalty for failure to pay said claim within the time provided by statute?' '\$50.00,' to which the defendant American Railway Express Company excepted."

McLean, Varser, McLean & Stacy, of Lumberton, for appellant.

Johnson & Johnson, of Lumberton, for appellee.

BROWN, J. The uncontradicted evidence is, and it is admitted, that the merchandise was shipped prior to the incorporation and organization of the American Railway Express Company. The claim of \$2.68 was filed with the Southern Express Company on May 3, 1918. The American Railway Express Company was organized during the recent war as a war measure, for the better operation and control of the express business of the country. At the time this butter was damaged, this company was not in existence; but whether it is liable for the acts and negligence of the Southern Express Company we will not determine on this appeal. It is manifest that there is an inconsistency in the findings of the jury. Under the instructions of the learned judge the jury have found that the Southern Express Company is not liable to the plaintiff on account of the loss of merchandise as alleged in the complaint. It necessarily follows that if the Southern Express Company, which transported the butter and is alleged to have caused the damage by its negligence, is not liable, then the American Railway Express Company, although it succeeded to the business of the Southern Express Company, cannot be liable.

The case of Friedenwald v. Tobacco Works, 117 N. C. 545, 23 S. E. 490, is not in conflict with this proposition. In that case there was a transfer of all the property rights and franchises of one corporation to a new company organized by the same stockholders and the same directors for the purpose of carrying on the same business. It was held that the new corporation was liable for the debts of the old; it being practically the same business conducted by the same persons under a new name.

In the case at bar no liability has been established against the Southern Express Company; consequently, as the negligence was not the fault of the American Express Company, it cannot be liable if the Southern Express Company is not.

Reversed.

(178 N. C. 159)

**McCOTTER v. NORFOLK SOUTHERN R. CO. (No. 170.)**

(Supreme Court of North Carolina. Oct. 8, 1919.)

**1. TRIAL ⇨165—ON MOTION FOR NONSUIT, PLAINTIFF'S TESTIMONY TAKEN AS TRUE.**

On a motion for nonsuit, the testimony in support of plaintiff's claim must be taken as true and construed in the light most favorable to him.

**2. CARRIERS ⇨175 — REFUSAL TO DELIVER A BREACH FOR WHICH INITIAL CARRIER LIABLE.**

Refusal to deliver without bill of lading by terminal carrier on receipt of message from initial carrier directing such delivery held a breach of duty on the part of the terminal carrier for which the initial carrier might be held liable under the Carmack (U. S. Comp. St. §§ 8604a, 8604aa) and subsequent amendments to the Interstate Commerce Act.

**3. CARRIERS ⇨70—ON SHIPMENT "TO ORDER OF CONSIGNOR NOTIFY," TITLE REMAINS IN CONSIGNOR.**

In a shipment "to order of consignor notify," title remains in the shipper, who has control of the shipment as to route, destination, and delivery unless by assignment of the bill of lading or other contract for value creating an interest in the goods he has deprived himself of his rights.

**4. CARRIERS ⇨159(2)—TIMELY PRESENTATION OF CLAIM FOR DAMAGE.**

Where the damaged shipment had been made September 12th, the action of the shipper's broker, on December 29th, in filing with the terminal carrier full notice of claim, etc., held a full compliance with the requirement of the contract that claim be presented at the point of delivery or origin within four months.

Appeal from Superior Court, Pamlico County; Daniels, Judge.

Action by D. C. McCotter against the Norfolk Southern Railroad Company. From judgment for plaintiff, defendant appeals. No error.

Civil action to recover damages for loss caused by negligent delay in shipment and delivery of a lot of potatoes from Bayboro, N. C., to Roanoke, Va. The goods were shipped by plaintiff to his own order, notify Roanoke Fruit Company, etc., on December 12, 1914. The shipment was routed over Norfolk & Western in state of Virginia; the defendant being the initial carrier, receiving the shipment at Bayboro as stated. On denial of liability, the jury rendered the following verdict:

"(1) Did plaintiff on or about the 12th day of December, 1914, deliver to defendant at Bayboro, N. C., 105 barrels of sweet potatoes in good condition to be safely transported and delivered within a reasonable time over said

railroad and its connecting carriers to consignee or agent, Roanoke, Va.? Answer: 'Yes.'

"(2) If so, did defendant negligently fail to transport and deliver said potatoes within a reasonable time and thereby damage plaintiff, as alleged? Answer: 'Yes.'

"(3) If so, what damage, if any, is plaintiff entitled to recover? Answer: '\$189.90 at 6 per cent. from December 30, 1914, to date.'

"(4). Did plaintiff file notice of claim as required by the bill of lading? Answer: 'Yes.'"

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

Moore & Dunn, of Newbern, for appellant.  
D. L. Ward, of Newbern, and Z. V. Rawls, of Bayboro, for appellee.

HOKE, J. There was evidence on part of plaintiff tending to show that the potatoes delivered for shipment to the defendant road at Bayboro, N. C., on December 12, 1914, and routed via Norfolk and thence over Norfolk & Western to Roanoke, Va., arrived at this point on December 17th following; that owing to the fact that the bill of lading was lost or delayed in the mails, the delivering carrier refused to turn over the goods without presentation of a bill of lading, or a bond of indemnity, and did not do so until December 23d; that the weather was mild at the time the potatoes were shipped, and continued so until December 17th, when it turned very cold and continued to be freezing weather for several days thereafter, and, owing to the delay in delivery of potatoes, the same were frozen and became worthless; that on arrival of potatoes at Roanoke they were applied for by the American Brokerage Company acting at Roanoke for the shipper, and, delivery being refused for want of bill of lading, the brokerage company wired that no bill of lading had been received, etc., and had a message in reply that the defendant road had been requested to notify the Norfolk & Western to deliver without bill of lading. There was further evidence tending to show that, on receipt of message from his brokers, plaintiff saw agent of defendant road and requested it to notify the Norfolk & Western by telegram to deliver without bill of lading and that shipper had offered bond of indemnity; that said shipper offered a bond to defendant's agent, and was told that his standing was well known and that he need not give a bond. There were also facts in evidence to the effect that this message was received by the Norfolk & Western on December 17th, and further that the brokerage company in renewing its demand for the potatoes informed the agent of the delivering carrier that the message directing delivery without bill of lading had been forwarded by the defendant road at request of the owner.

The testimony on the part of defendant

tended to show that the message from the initial carrier directing delivery without presentation of bill of lading was not received till December 23d, at which time potatoes were forthwith surrendered to shipper's agent and without bond.

[1, 2] On these, the facts more directly pertinent to the issue, it was urged for error that the court refused to allow defendant's motion for a nonsuit, and this for the reason, chiefly, that the delivering carrier was not required to surrender potatoes without presentation and surrender of the bill of lading; but on the record we are of opinion that the position cannot be maintained. Not only is it the accepted rule on a motion of this kind that the testimony in support of plaintiff's claim must be taken as true and construed in the light most favorable to him, but it appears, from a perusal of his honor's charge on the third issue, that, in this aspect of the case, the jury have necessarily determined that the message from defendant directing delivery without the bill of lading was received in Norfolk on December 17th, and in such case, in refusing delivery, we concur in the opinion of the lower court that a breach of duty has been properly established on the part of the Norfolk & Western and for which defendant may be held liable under the Carmack (Act Cong. Feb. 4, 1887, c. 104, § 20, 24 Stat. 386, as amended by Act Cong. June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 595 [U. S. Comp. St. §§ 8604a, 8604aa]) and subsequent amendments to the Interstate Commerce Act. *Paper Box Co. v. Ry.*, 177 N. C. 351, 99 S. E. 23, and cases cited; *Mann v. Navigation Co.*, 176 N. C. 104, 96 S. E. 731.

[3] In a shipment of the kind presented here, "to order of consignor notify," the title to the goods remains in the shipper, and, ordinarily, he has the control of same as to route, destination, and delivery, unless he has, by assignment of the bill of lading or other contract for value creating an interest in the goods, deprived himself of his rights over them. In *Hutchinson on Carriers*, § 193, the position is stated as follows:

"When there has been no agreement to ship the goods which will make the delivery of them to the carrier a delivery to the consignee and vest the property in him, the shipper may, even after the delivery to the carrier and after the bill of lading has been signed and delivered or after the goods have passed from the possession of the initial carrier into that of a succeeding one, alter their destination and direct their delivery to another consignee, unless the bill of lading has been forwarded to the consignee first named or to some one for his use."

A principle very generally recognized and approved, and applied with us in *Richardson & Produce Co. v. Woodruff & Son*, 100 S. E. 173, at present term, *Myers v. R. R. Co.*, 171 N. C. 190, 88 S. E. 149; *Development Co. v. R. R.*, 147 N. C. 506, 61 S. E. 881; and other cases.

On the facts presented, therefore, a failure to deliver the potatoes to the owner or his agent on a telegraphic message from the initial carrier directing that this be done without presentation of the bill of lading, made at the request of the owner and consignor in the bill of lading, would be sufficient to sustain the verdict on the issue, and in this connection it may be well to note that, when such consignor requested that the message be sent, he offered to give a bond of indemnity and was told that no such bond would be required.

In no event would an order of nonsuit be justified, there being additional evidence on the part of plaintiff tending to show that the time actually taken for the shipment from December 12th to 17th was too long, and, in itself, might reasonably have caused the injury complained of.

[4] It was further contended that no recovery should be allowed because no claim was filed within the time required by the terms of the contract. Stipulations of this kind, when reasonable, have been approved by us in cases coming under the laws of this jurisdiction (*Culbreth v. R. R.*, 169 N. C. 725, 86 S. E. 624), and in interstate shipments are expressly recognized by the statute, when not for a shorter period than 90 days. It appears, however, that on December 29, 1914, the same month when the loss occurred, the plaintiff's broker in Roanoke, acting for plaintiff, filed with the delivering carrier a full notice of claim, showing the amount, nature, and value of the shipment, the date and address, the car in which the goods were sent, the time it arrived at Roanoke, and the condition of the goods. It would seem to be a full compliance with the requirement of the contract "that the claim be presented at the point of delivery or point of origin within four months." Apart from this, the verdict having established that the loss was caused by negligence in shipment and delivery of goods, the statute applicable (*Mann v. Transportation Co.*, *supra*) provides that no notice of claim shall be required as a condition precedent to recovery.

On careful consideration of the record, we have found no error to defendant's prejudice and the judgment of the superior court is affirmed.

No error.

(178 N. C. 228)

**GUY v. BULLARD et al. (No. 221.)**

(Supreme Court of North Carolina. Oct. 8, 1919.)

**1. SALES  $\S$ 456 — CONTRACT CONDITIONAL SALE OF SAWMILL AND NOT LEASE.**

Contract, reciting that whereas plaintiff owned a sawmill outfit and desired to sell it to defendant, while defendant desired to purchase, plaintiff leased to defendant subject to purchase, with provisions as to the terms of payment of \$1 a thousand feet of lumber cut until \$750 had been paid, which should be treated as the price, *held* a contract of conditional sale.

**2. SALES  $\S$ 456—PARTIES CANNOT CHANGE EFFECT OF CONTRACT BY GIVING IT NAME.**

A construction put by the parties on a contract of sale or lease of personalty is entitled to consideration in determining its true meaning, but the parties cannot change the legal effect of the contract merely by giving a name to it.

**3. ASSIGNMENTS  $\S$ 19 — CONDITIONAL SALE CONTRACT ASSIGNABLE BY BUYER.**

Conditional sale contract covering sawmill outfit *held* assignable, not importing reliance on the character, skill, or personal qualities of the buyer for its performance.

**4. ASSIGNMENTS  $\S$ 68—ESTOPPEL OF SELLER TO DENY LEGALITY OF ASSIGNMENT OF CONDITIONAL SALE CONTRACT.**

The conditional seller of a sawmill outfit, who has consented to the assignment by the buyer by accepting part of the purchase money from the assignee, and by cashing one of the checks after judgment in favor of the assignee in the seller's suit to recover the outfit has been rendered, is not in a position to say the contract was not legally assigned by the buyer.

**5. SALES  $\S$ 477(1)—PRIVILEGE TO REPOSSESS PROPERTY CONDITIONALLY SOLD WAIVED BY FAILURE TO EXERCISE.**

A conditional seller of a sawmill outfit, suing to recover it from the buyer and his assignee, cannot avail himself of the contract provision giving him the right to repossess for failure to operate for 30 days, where, instead of exercising the privilege, he permitted the buyer to continue in the use of the mill and accepted the balance of the purchase money.

Appeal from Superior Court, Sampson County; Gulon, Judge.

Action by I. J. Guy against Badger Bullard and Thomas E. Owen. From judgment for defendants, plaintiff appeals. Affirmed.

This is an action to recover a sawmill outfit.

On April 28, 1917, the plaintiff entered into a contract with the defendant Bullard in reference to said property, which contract was afterwards assigned to the defendant Owen.

The contract recites:

"That whereas the said I. J. Guy is the owner of a certain sawmill outfit located in the county of Cumberland on the Kelly Melvin land which he is desirous of selling to the said Badger Bullard and which the said Badger Bullard is desirous of purchasing."

It then provides that—

"I. J. Guy has by these presents leased to the said Badger Bullard subject to purchase."

It further provides that—

"Said I. J. Guy agrees to lease to said Badger Bullard all of the above-described property."

The terms of payment set out in the contract were \$1 per thousand feet for each and every thousand feet of lumber cut and manufactured by said sawmill outfit, and the contract concluded with the following provision:

"It is further agreed by and between the parties hereto that the said Badger Bullard shall comply with the terms and conditions above enumerated, then and in that event when the sum of \$750 has been paid, the same shall be treated as the purchase price of said property, and he shall be the absolute and legal owner of the same, and the same shall be treated as a complete and full settlement by and between the parties hereto and the property above described and enumerated shall all belong to the said Badger Bullard."

The judgment rendered in the superior court sets out the contract in full, and concludes as follows:

"And it further appearing to the court that on the 12th day of February, 1918, the said Badger Bullard sold and conveyed and duly transferred in writing said contract for said mill and all his right and title thereto under the aforesaid contract to the defendant, Thomas E. Owen, and

"It further appearing to the court that prior to the sale of said property by Badger Bullard to Thomas E. Owen the said Badger Bullard paid, under the contract, the sum of \$151.18, being the \$1 per thousand feet mentioned in the contract on 151,179 feet of lumber sawed by him with said sawmill, and that after the sale and assignment of his contract the defendant has paid to the plaintiff, I. J. Guy, a sum which, together with the money paid by Badger Bullard, makes the total sum paid to I. J. Guy, the plaintiff, under the contract for said sawmill outfit, \$750, of which \$306.71 is evidenced by uncollected checks drawn by the defendant to the order of the plaintiff and now held by plaintiff uncollected, but which are collectible from funds in the bank on which they are drawn.

"Upon the foregoing facts found by his honor and admitted by the parties, his honor being of the opinion that said contract was a sale and not a lease, and that the purchaser of Badger Bullard, being the defendant Thomas E. Owen, had a right to pay the said sum of \$750 and take the property, and the defendants having paid said sum to the plaintiff herein:

"It is considered, ordered, and adjudged that the plaintiff has been fully paid for his mill

under said contract, and that plaintiff take nothing by his suit, and that the defendants recover of the plaintiff and John D. Kerr, Sr., surety on his prosecution bond, the costs of this action to be taxed by the clerk of this court."

The plaintiff excepted and appealed.

Kerr & Herring and Fowler & Crumpler, all of Clinton, for appellant.

Butler & Herring, of Clinton, for appellees.

ALLEN, J. [1] A contract very much like the one before us was considered and construed in *Puffer v. Lucas*, 112 N. C. 377, 17 S. E. 174, 19 L. R. A. 682; and it was then held that contracts of this character are contracts of conditional sale, and that upon the payment of the purchase price the title to the property rests in the vendee.

This case has been affirmed several times, and notably in the case of *Hamilton v. Highlands*, 144 N. C. 280, 56 S. E. 930, 12 Ann. Cas. 876.

In this last case the plaintiff entered into a written contract with the defendant, which was called a "lease," to hire to the use of the plaintiff for nineteen months a piano, etc., and to pay \$50 cash, and as rent \$15 monthly, with further provision that, if the defendant paid the installments of rent as they fell due, he should have the right to purchase the piano for the total amount of the installments, in which case all sums paid as rent should be deducted from the purchase price, and the court, after discussing the general effect of the contract, says:

"It follows that the courts, in determining whether or not a contract is one of bailment or one of sale, with an attempt to retain a lien for the price, in effect a mortgage, do not consider what description the parties have given to it, but what is its essential character. It was a mere subterfuge to call this transaction a lease, and the application of that term to it in the written agreement of the parties does not in law change its real meaning. A contract like the one upon which this suit was brought has been held by a very large majority of the courts of this country to be, in substance, a conditional sale, although in the form of a lease (and so called) or of a bailment for use, with an option to purchase."

Numerous authorities are cited and discussed in support of the conclusion that the contract was one of conditional sale, and that upon failure to pay the entire debt the

defendant was entitled to have the property sold and, after applying enough of the proceeds to pay the balance of the debt, to have any surplus paid to him.

[2] The construction put upon the contract by the parties is entitled to consideration in determining its true meaning, but they cannot, by giving a name to it, change its legal effect.

[3,4] These authorities are conclusive against the plaintiff's contention that the contract is one of lease and not of sale, nor can we sustain the position that the contract was not assignable.

The general rule is that any claim or demand can be transferred, and this contract does not come within any of the exceptions in *Petty v. Rousseau*, 94 N. C. 363, nor does it in express terms or by fair intendment import reliance on the character, skill, or personal qualities of the vendee for its performance, a class of contracts which cannot be assigned (*Railroad v. Railroad*, 147 N. C. 376, 61 S. E. 185, 23 L. R. A. [N. S.] 223, 125 Am. St. Rep. 550, 15 Ann. Cas. 363); but, if nonassignable, it appears here from the findings in the judgment that the plaintiff has consented to the assignment by accepting a part of the purchase money from the assignee and by cashing one of the checks after the judgment was rendered and depositing it as security for the costs on the appeal.

It is found as a fact in the judgment that Bullard paid to the plaintiff \$151.18 before the contract was assigned to Owen; that the plaintiff had, when the judgment was rendered, checks given to him by Owen amounting to \$306.71, the two amounts aggregating \$457.89, which, deducted from \$750, the full amount of the purchase money which has been paid to the plaintiff, leaves \$292.11 paid by the defendant Owen after the assignment of the contract and accepted by the plaintiff.

He is not therefore in a position to say that the contract has not been legally assigned to the defendant.

[5] Nor can the plaintiff avail himself of the provision in the contract giving him the right to repossess the property upon failure to operate the mill for a period of 30 days because, instead of exercising this privilege, he permitted the defendant to continue in the use and operation of the mill and accepted the balance of the purchase money.

We find no error in the judgment.

Affirmed.



(178 N. C. 154)

RICKS et al. v. FUTRELL et al. (No. 106.)

(Supreme Court of North Carolina. Oct 8, 1919.)

**1. LOGS AND LOGGING §3(7)—CONSTRUCTION OF TIMBER DEEDS.**

In ascertaining timber rights, the deeds conveying the timber interests and those affecting the general title will be considered together, and the true intent of the parties ascertained from the entire agreements.

**2. LOGS AND LOGGING §3(11)—CONSTRUCTION OF TIMBER DEED.**

Timber deeds held to pass to grantees the title to the timber for five years, with the privilege of cutting and removing the timber any time within the first three years, free of further charge, but requiring grantee to make additional payment for privilege of removing timber during the last two years.

**3. LOGS AND LOGGING §3(11)—ON SALE OF TIMBER RIGHTS ADDITIONAL PAYMENT REQUIRED FOR EXTENDED TIME FOR REMOVAL.**

Where deed conveying timber for five-year period provided that for privilege of removing timber after expiration of first three years grantee should make additional payment to grantor "or the then owner of the aforesaid tract of land," owner of general title during the last two years of such five-year period was not entitled to such additional payment, where his grantor had reserved the timber rights during such period; his grantor being the then owner of that part of the land constituting the timber rights.

**4. ESTOPPEL §54—RECORD OF DEED AS NOTICE PRECLUDING ESTOPPEL IN PAIS.**

Where timber deed conveying timber for five-year period required additional payment for right of removal during last two years, to be made to "the then owner of land," lumber company claiming under such deed, who made such payment to owner of general title, instead of such owner's grantor, who had reserved timber rights, could not, in grantor's action against it, avail itself of defense of estoppel in pais, where latter deed, reserving such timber rights, was of record.

Appeal from Superior Court, Northampton County; Connor, Judge.

Action by E. H. Ricks and another against Jackson Futrell and another. Judgment for defendants, and plaintiffs except and appeal. Reversed.

George O. Green, of Weldon, and W. L. Long, of Roanoke Rapids, for appellants.

Walter E. Daniel, of Weldon, and G. E. Midyette, of Jackson, for appellees.

HOKE, J. On the hearing it was properly made to appear:

That on the 10th day of March, 1916, E. T. Zollicoffer, owning a large body of land in said county, sold and conveyed to J. W. Crew the standing timber growing thereon; the

provision in reference to the timber contained in the deed being as follows:

"That the said party of the second part, his heirs and assigns, shall have five years from the date hereof in which to remove the timber hereby conveyed from the aforesaid tract of land: Provided, however, that he, or his assigns, shall after the expiration of three years from the date hereof pay to the said party of the first part, or the then owner of the aforesaid tract of land, six per centum annually, in advance, upon the amount of the purchase price aforesaid—that is, nineteen thousand dollars—for the privilege of the remaining two years in which to remove the said timber."

That on March 28, 1916, said grantee J. W. Crew and wife conveyed said timber to A. C. and H. C. House, and on December 6, 1916, said A. C. and H. C. House conveyed the same to defendant the Greenville Manufacturing Company; the stipulations in these conveyances as to the timber rights and interests being the same as in the first deed, etc. That on December 27, 1916, said E. T. Zollicoffer conveyed this land, on which the timber was situate, to W. L. Long; and, the lands having been in the meantime divided into several lots, on January 18, 1918, W. L. Long and wife conveyed to plaintiffs in the action two of said lots, Nos. 12 and 14, on which the timber in controversy is situated, both of these deeds containing a stipulation that the same were made "subject to the terms and conditions of a certain timber deed executed by E. T. Zollicoffer to J. N. Crew in 1916," etc. That on September 21, 1918, plaintiffs conveyed one of these lots, No. 14, to Jackson Futrell; the deed containing stipulation concerning the timber thereon as follows:

"It is distinctly understood and agreed by and between the parties to these presents that this deed does not convey and pass title to three (3) acres sold to the said G. Moody, above mentioned, by Messrs. C. A. Wyche and W. L. Long, and for which they have not yet given him a deed; also all timber rights on the land herein conveyed reserved by the said parties of the first part until March 10, 1921."

And in December following lot No. 12 was conveyed to said Jackson Futrell by plaintiff, with habendum:

"To have and to hold the above-described piece, parcel, or tract of land, together with all privileges and appurtenances thereunto belonging, save and except all standing timber and rights thereto, which are herein reserved by the said parties of the first part for a period of two (2) years, from the 10th day of March, 1919, to the 10th day of March, 1921, to the said party of the second part, his heirs and assigns, to their only use and behoof in fee simple forever."

That prior to expiration of the time limit for cutting, to wit, March 10, 1919, defendant lumber company made an adjustment for

privilege of further cutting, by paying to the codefendant Futrell the price for one year's extension, and was proceeding to cut the timber on these portions of the land, when it was stopped by restraining order in this cause.

[1-3] Considering these two series of deeds together, the deeds conveying the timber interests and those affecting the general title, and seeking the true intent of the parties as expressed in their entire agreements, the approved method of construction in such cases (*Hornthal v. Howcott*, 154 N. C. 228, 70 S. E. 171; *Davis v. Frazier*, 150 N. C. 447, 64 S. E. 200), we are of opinion that the force and effect of the provisions in the timber deeds, is to pass to the grantees the title to the timber for five years, with the privilege of cutting and removing the timber any time within the first three years, free of further charge. and for the last two years the privilege is to be paid for annually, in advance, 6 per cent. on the purchase price of \$19,000. The stipulation amounts to a positive obligation to pay for the privilege the agreed price, while the timber remains on the ground and uncut, whether the same is exercised or not; i. e., 6 per cent. on \$19,000 in advance for the first of these two later years, and, if not cut then, the same amount to be due for the privilege during the last year, and the sum or sums to be paid to plaintiffs, who are the owners of the timber during the period covered by the agreement and to whom the money is due by the clear intent of the parties as expressed in their conveyances covering the property—the stipulation of the deed on September 21st being as stated:

"It is distinctly understood and agreed by and between the parties to these presents that this deed does not convey and pass title to three (3) acres sold to the said G. Moody, above mentioned, by Messrs. C. A. Wyche and W. L. Long, and for which they have not yet given him a deed; also all timber rights on the land herein conveyed reserved by the said parties of the first part until March 10, 1921."

And that of 31st of December being:

"To have and to hold the above-described piece, parcel, or tract of land, together with all privileges and appurtenances thereunto belonging, save and except all standing timber and rights thereto which are herein reserved by the said parties of the first part for a period of two (2) years, from the 10th day of March, 1919, to the 10th day of March, 1921, to the said party of the second part, his heirs and assigns, to their only use and behoof in fee simple forever."

These important provisions of the contract would to our minds be entirely without significance unless they except the title to the timber until March 10, 1921, and reserve to the grantors during that period the payment of the purchase price. The question is, we think, virtually decided in *Powell v. Lumber Co.*, 163 N. C. 36, 79 S. E. 272. In that case Mary E. Sumner, owner of the land, in

July, 1901, sold the timber thereon to one W. W. Cummer, with right to remove same for ten years, and with an extension privilege of five years. In November following she sold the land to other parties, "excepting the timber sold by Mary E. Sumner on said land and by her conveyed to W. W. Cummer by deed," etc. Subject to these exceptions and under mesne conveyances the land was acquired and held by plaintiff Powell. Prior to expiration of ten years Mary E. Sumner sold and conveyed to assignee of Cummer the timber for the extension period, and it held that she had the right to dispose of the timber for the renewal period and to recover the amount which had been agreed upon as the consideration for same. As shown in the opinion referred to, the decision of *Hornthal v. Howcott*, 154 N. C. 228, 70 S. E. 171, to which reference has been made by defendants' counsel involved only the right of the parties after the period specified for cutting had terminated, and the question as to who could rightfully collect the purchase price under the terms of the contract was in no way presented.

It was earnestly insisted for the defendant that in the contract creating the timber interest it is specified that the payment for the last two years is to be made to the *then* owner of the land, and that the lumber company, having made satisfactory arrangements with its codefendant Futrell, who then held the title, thereby acquired the legal right to proceed under the contract. The term "land" is one of very comprehensive significance. As said by my Lord Coke:

"It includes not only the ground or soil, but everything which is attached to the earth, whether by the course of nature, such as trees, herbage, and water, or by the hand of man, as houses or other buildings, and it has an indefinite extent, upwards as well as downwards, so as to include everything terrestrial under or on it."

And we have uniformly held in this jurisdiction that standing timber is realty and subject to the laws of devolution and transfer appertaining to that kind of property. In September and December, 1918, *McPherson and Ricks*, the grantors in the deeds to Futrell, were the owners of the lands and the standing timber thereon which constituted part of it. As such owners they had the perfect right to control it, and to grant a part of the property to one and reserve a portion to themselves. Having therefore excepted that part of the land consisting of this standing timber, and in terms which clearly imputed a right to receive the purchase money for the same during the period covered by the contract, we see no reason why this exemption should not be given effect and the grantee, Futrell, be conclusively bound by it. *Herring v. Lumber Co.*, 163 N. C. 481, 79 S. E. 876.

[4] On the record there can be no claim that the lumber company has been imposed upon, or that the facts present a case for an estoppel in pais. The terms of the instruments upon which plaintiffs rely appear upon the face of the conveyances, and ordinary care would have sufficed to fully inform and protect the company, and in such case they could acquire no more than their grantor, Futrell, himself owned; that is, the land, except the standing timber during the life of the contract. True, in *Timber Co. v. Wells*, 171 N. C. 262, 88 S. E. 327, the court held that, in case of an option for an extension period, the purchase money would be due and owing to him who held the title at the time the same was due and payable; but it appeared also as the approved limitation on the principle, "unless there was a contrary provision in the deed itself." Here there is a contrary provision in the deed, to wit, a clause excepting the standing timber till March 10, 1921, and in terms as stated reserving to the grantor the right to collect the purchase money for the extension period—I. e. the interest on \$19,000.

It will be noted that only a portion of the land was acquired by plaintiffs and conveyed by them to Futrell, and therefore they could only recover their due proportion of the purchase money. Ordinarily the defendants would have the right to require that all the owners of the land be made parties; but inasmuch as it appears that the timber on all the other parts of the land has been cut, and the rights concerning the same satisfactorily adjusted, there is no reason why the present suit should not proceed as now constituted and the rights of the parties thereon determined.

This will be certified, that the proportionate amount of the purchase money—I. e., the interest as stated—presently due plaintiffs be ascertained; that defendants meantime be restrained until the same is paid, and on sufficient bond given to assure payment of plaintiffs' reasonable recovery and costs, and such further proceedings had as the legal rights of the parties may require.

Reversed.

(178 N. C. 221)

NEW HANOVER SHINGLE MILLS CO.,  
Inc., et al. v. JOHN L. ROPER LUM-  
BER CO. et al. (No. 220.)

(Supreme Court of North Carolina. Oct. 8,  
1919.)

**1. TAXATION §788(3) — PLAINTIFFS, GRAN-  
TEES IN DEED FROM STATE, MUST SHOW TAX  
DEED TO STATE VALID.**

Plaintiffs claiming swamp land by deed from the state board of education, successor to the literary fund, on which Rev. St. c. 67, § 3,

conferred title to certain lands, excepting swamp lands theretofore granted to individuals, and defendants showing such a grant, and the presumption under Revisal 1905, § 4047, in favor of deed of said board lasting only till the other party has shown good and valid title, plaintiffs have the burden of establishing validity of a tax deed to the Governor, claimed to have again placed the title in the state, prior to their deed.

**2. TAXATION §766—TAX DEED NOT ACKNOWLEDGED AND RECORDED AS REQUIRED BY STATUTE INVALID.**

Sheriff's tax deed to the Governor for land sold for taxes to him for the state under Acts 1798, c. 492 (Rev. St. c. 102, § 60 et seq.), is ineffectual; it not appearing it was acknowledged in open court, much less at the next term, or that it was registered in the clerk's office, or that it was filed with the secretary of state before settlement of sheriff's account, as required by the statute.

**3. TAXATION §766—RECITAL OF ACKNOWLEDGMENT OF TAX DEED FROM SHERIFF TO STATE INSUFFICIENT.**

Recital in attestation clause of sheriff's tax deed to Governor, under Acts 1798, c. 492 (Rev. St. c. 102, § 60 et seq.), that it was acknowledged in open court, appearing before sheriff's signature, not being made by an officer authorized to take the acknowledgment, amounts to nothing more than the sheriff's unsworn declaration of what he intended to do.

**4. TAXATION §788(3)—THERE IS NO PRESUMPTION OF PROPER PROBATE OF TAX DEED.**

In the absence of evidence of any probate of a tax deed, there can be no presumption of proper probate, as where the proper officer certifies an instrument has been duly proven, without setting out his acts.

**5. TAXATION §788(3) — PRESUMPTION OF  
PROBATE OF TAX DEED ARISES FROM REGIS-  
TRATION.**

No presumption of proper probate of a tax deed arises from its registration, where it appears the register acted on the certified copy, and its indorsements bearing no evidence of probate.

Appeal from Superior Court, Onslow County; Gulon, Judge.

Action by the New Hanover Shingle Mills Company, Incorporated, and others, against the John L. Roper Lumber Company and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

This is an action to recover damages for trespass upon land, in which the title was put in issue, and was the real question involved in the trial. Plaintiffs claim title to the land in question under a deed from the state board of education to one Carrier, dated July 3, 1896. The plaintiffs offered evidence tending to show that the description in the above deed covered the three tracts of land described in the complaint,

and evidence to locate said land. Plaintiffs then offered in evidence mesne conveyances, connecting themselves with the aforesaid deed from the state board of education. It was shown that all of these deeds connecting plaintiffs with said deed from the state board of education described the lands set out in the complaint, and that all grantees through whom plaintiffs held appear to be purchasers for value. The deed from the state board of education was, however, objected to, on account of alleged defect in its probate, and for that, it was asserted by defendants, it could carry no title to the grantees in any view.

The defendants offered in evidence grant No. 732, to David Allison, dated May 29, 1795, and it was admitted that this grant covered the land in question. Defendants then offered mesne conveyances connecting themselves with said David Allison grant, one of which was executed and registered in the year 1859, showing that the grantee therein was a purchaser for value. The defendants further introduced evidence tending to show possession of such lands covered by the Allison grant, and their mesne conveyances from the year 1906 to the present time. The plaintiffs thereupon offered in evidence a deed from William Doty, sheriff of Onslow county, to William R. Davie, Governor of North Carolina, dated October 10, 1799. It purports to convey the lands set forth in the David Allison grant and lying in Onslow county to the state under a tax sale made by the sheriff of Onslow county. This deed was also objected to by the defendants, both on the ground of its competency and its effect.

The attestation clause, the form of execution, and the attempted probate of these deeds were as follows:

**Deed of state board of education:**

"In witness whereof the said state board of education has caused its corporate seal to be hereunto affixed and these presents to be subscribed by its president, secretary, and treasurer, and this the date above written. Elias Carr, Governor and Ex Officio President State B. Education. John C. Scarborough, Supt. Public Ex Officio Secretary of State B. Education. [Seal of the State of North Carolina Board of Education.]

"State of North Carolina, Pender County:

"The foregoing signature of John C. Scarborough, superintendent of public instruction and ex officio secretary state board of education, W. H. Worth, state treasurer and ex officio treasurer of the state board of education, and Elias Carr, Governor and ex officio president of state board of education, with seal of the board of education, is adjudged to be correct. Let said deed and certificate be registered.

"July 20, 1896. W. W. Larkin, C. S. C.

"North Carolina, Onslow County:

"The foregoing deed of conveyance from the state board of education of North Carolina to Cassius M. Carrier, of the county of Jefferson, state of Pennsylvania, with the official seal of

the state board of education thereto attached, having been exhibited before me, it is adjudged to be in due form and according to law. Therefore let the same, with this certificate, be registered. This July 30, 1896.

"Chas. Gerock,

"Clerk Superior Court, Onslow County.

"Filed for registration July 30, 1896. Registered in due form, October 7, 1896.

"C. C. Morton, Register."

**Deed of sheriff:**

"In witness whereof I have hereunto set my hand and seal, signed, sealed, and acknowledged in open court, October term, 1799.

"Lemuel Doty, Sheriff. [Seal.]

"Test: J. O. Scottraff.

"North Carolina, Onslow County:

"I hereby certify that the deed is recorded in Book A, page 1, agreeable to law.

"J. O. Scottraff.

"The foregoing is a true copy of the original on file in this office. Given under my hand this 14th day of February, 1867.

"R. W. Best, Sec. of State.

"[State of N. C. Seal.]

"Recorded with official seal,

"D. Caswell, P. Secretary.

"Deed—Gor 155-442 acres Onslow County—Lemuel Doty to the Governor.

"State of North Carolina, Onslow County:

"Received for registration August 13, 1867, and immediately enrolled in due form of law.

"Z. M. Coston, Reg."

His honor held that these deeds were incompetent and invalid to pass title, and plaintiffs excepted. Judgment in favor of defendants, and plaintiffs appealed.

Winston & Matthews, of Windsor, J. O. Carr, of Wilmington, E. M. Koonce, of Jacksonville, and Cowper, Whitaker & Allen, of Kinston, for appellants.

Frank Thompson, of Jacksonville, L. R. Varser, of Lumberton, and L. I. Moore, of Newbern, for appellees.

ALLEN, J. [1] The statute, conferring title to certain lands on the president and directors of the literary fund, to which the state board of education is the successor, excepts from its operation swamp lands "heretofore entered and granted to individuals" (Rev. Stat. c. 67, § 3), and it follows that when the defendants introduced a grant from the state to David Allison, issued in 1795, and mesne conveyances to the defendants, covering the land described in the complaint, they rebutted any presumption raised by statute in favor of the deed of the state board of education of date July 3, 1896.

The effect of the introduction of the grant and the other conveyances was not only to show that the land had been granted to an individual before the statute in favor of the literary fund was enacted, and therefore the title did not pass by the terms and language of the statute, but also to establish title in

the defendants, nothing else appearing, and the statute in favor of the deeds of the state board of education provides that the presumption shall last only "until the other party shall show that he hath a good and valid title to such lands in himself." Revisal, § 4047.

In this condition of the record, with nothing in evidence except the deed of the state board of education and mesne conveyances to the plaintiffs, and the Allison grant and mesne conveyances to the defendants, all covering the same land, the court would unhesitatingly declare the title to be in the defendants, and it therefore became vital for the plaintiffs to establish the validity of the tax deed of Lemuel Doty, sheriff, to the Governor, in 1799, for the purpose of showing that the title of Allison had been divested and did not pass to the defendants, and to again place the title in the state as vacant land subject to entry, which would belong to the literary fund under the statute, and then to the state board of education.

[2] The sale for taxes was made under Acts 1798, c. 492 (Rev. Stat. c. 102, § 60 et seq.) of which Chief Justice Ruffin makes the following summary in *Avery v. Rose*, 15 N. C. 552:

"It recites that the mode of selling lands for taxes, as then established by law, was insufficient to secure the collection of the revenue, and then provides, amongst other things, that, when no person will pay the taxes for a less quantity than the whole tract, it shall be deemed a purchase of the whole by the Governor, and the sheriff shall execute a conveyance to him, and his successors, for the use of the state; that it shall be the duty of the sheriff to perfect the deed, by signing it, acknowledging, and delivery thereof in the presence of the next county court; that the clerk shall register it in a book, to be kept for that purpose, and after doing so shall certify the same, and deliver it to the sheriff (who shall call on him for the same), within 20 days after the court; that the sheriff shall, before he settles his account with the comptroller, deposit the deed with the secretary of state, who shall record and keep it for the benefit of the state; and that the lands so conveyed shall be deemed vacant and subject again to entry. It then further provides that the secretary of state shall give to the sheriff a certificate setting forth the quantity of land thus conveyed (the tax being then *ad numerum*, not *ad valorem*), and that upon the deposit thereof with the comptroller, and the oath of the sheriff that he had conveyed, in conformity to the requisitions of the act, all the lands by him sold for taxes, and thus purchased for the use of the state, the comptroller (the requisites of the act being complied with) shall allow the sheriff in his settlement a credit for the tax on those lands and all charges on the sale, and his commissions thereon, as if the sum had been collected in money; and, lastly, that the sheriff shall be credited in like manner in his settlement at home, for the county and poor taxes."

The learned Chief Justice then proceeds to discuss the statute in connection with the other revenue laws then existing, and reaches the conclusion that the state is not a purchaser as usually understood; that the purpose of the statute was not to enable the state to acquire title to land, but to collect her revenue; that, as the state was in no danger of losing the taxes, which were charged against the sheriff, for which he and his sureties were liable, that the provisions of the statute were for the benefit of the sheriff, to provide the means for obtaining credit with the comptroller and being discharged from liability for the taxes, and that the duty was enjoined upon the sheriff to follow the terms of the statute, and to see that others did so, and it was held that the statute must receive a strict construction, and that a failure on the part of the sheriff to acknowledge the deed at the next ensuing term of the county court was fatal to the deed to the Governor.

We quote at length from the opinion because of its learning and reasoning, and it is the only authoritative construction of the statute in our Reports.

"But to us it seems that the state cannot be deemed a purchaser, whose title is to be protected, notwithstanding irregularities, within any of the principles on which they are disregarded in sales on executions. The scope of the act is not to enable the state to reacquire her territory from her own citizens. She does not wish it. As soon as she gets it under this act, it is by the same act offered for private appropriation again, upon the same terms on which it was before granted. The policy of the state, in this statute and throughout our legislation, is to part on the most favorable terms with all her public domain, with a few exceptions, and not to become again the proprietor of any that has been granted, unless in a case of necessity. This is clear from the act of 1793, which forbids the surrender of land to avoid the taxes. It is apparent on the act of 1798 itself, for she does not purchase, as a chapman does, for the least price, but only takes the land instead of the tax, when the tax can be got in no other way, and, if she does not take the title, the sheriff is responsible for that tax, and the owner for the accruing ones. The great object of this provision, therefore, is not to acquire the land for the state, but to secure the collection of the taxes, to raise revenue, and have it duly accounted for and paid by the proper officers, and in justice to those officers, to make them account for, and pay only such portions as they have collected, or might have collected. \* \* \*

"The act assures to him (the sheriff) such credit, upon certain conditions which it puts in his power to perform, and the performance of which it requires to be established by certain evidence. The case, then, is not one in which the interest of the creditor or the debtor requires the law to be indulgent in overlooking omissions in the mode of proceeding. It is one in which the creditor is secure at all events, because she can look to the sheriff and his sure-

ties for the tax, but in which she will not, provided he makes it appear in the manner prescribed, which is plain and easily attainable, that she ought not. This part of the act is therefore substantially and really for the benefit of the sheriff himself, the person charged with the duty of selling, and with the performance of all the subsequent measures of importance required for its completion. Upon established principles he ought to be held to strict performance. He is so held in this statute. \* \* \*

"The question has thus far been considered in reference to the words of this part of the statute, and to the circumstance that the interest of the sheriff himself, was principally concerned, and therefore that he should act in due time. Whatever interest the state has demands likewise his diligence throughout. It is important to her to know her actual net revenue, and what prior claims there are against her at the time it is paid in. She wishes to resell the land, that she has reluctantly taken back, and with as little delay as possible. An early and public notice of it, in the county where it is situated, is therefore deemed important. She wishes to avoid and detect frauds attempted on her, and therefore, while the whole matter is of recent occurrence, she requires that a sale made shall be acknowledged of record and in open court of that county, that no pretended sale may at a distant day be imposed on her, and she brought in conflict with one of her own citizens. Every act of omission which tends to defeat these views is inconsistent with the real intention of the Legislature, and cannot be tolerated. The state does not take the land, but as a credit to the sheriff for the tax, and no conveyance to the state is to be taken as valid within the statute, but such an one on the production of which the sheriff would be entitled to credit for the tax. From this it would result that the sheriff must procure the other officers to do their duty, because otherwise the state is not bound to accept the deed, and the title does not vest in her, under this law, in any other case. \* \* \*

"The authority to make the state a bidder is a special one, and for the sheriff's benefit, to bid for her only where there is no other bidder, for a tax due to her, and to make a deed within a certain time, upon which the sheriff shall have credit. It must therefore be strictly construed with respect to those acts, and the periods prescribed. \* \* \* Upon these grounds, it is the opinion of the court, that the deed to the Governor is void, because it was not made or acknowledged at the court next succeeding the sale."

This authority was cited and approved in *Stewart v. Pergusson*, 133 N. C. 281, 45 S. E. 585. Applying these principles we must hold that the sheriff's deed is not valid, and did not have the effect of passing title to the state, as it does not appear that it was acknowledged in open court at all, much less at the next succeeding term, or that it has been registered in the clerk's office as required by the statute.

[3] The recital in the attestation clause of the deed that it was acknowledged in open court, appearing before the signature, not being made by an officer authorized to take the acknowledgment, amounts to nothing more than the unsworn declaration of the sheriff of what he intended to do, and not of what he had done.

[4, 5] There is no evidence of any probate of the deed in any form, and consequently no room for the application of the doctrine of *Starke v. Etheridge*, 71 N. C. 240, and of other cases, holding that, when the proper officer certifies that an instrument has been duly proven, without setting out his acts, it will be presumed that the probate was taken according to law, and no presumption can arise from registration, as it appears that the register acted upon the certified copy and the indorsements thereon sent to him in 1867, and not upon any other probate or evidence of acknowledgment.

Again, the tax deed bears date October 16, 1799, and purports to have been made pursuant to a sale to collect the taxes of 1798, and of this phase of the case the court says in the *Avery Case*:

"It [the statute] requires him [the sheriff] to produce and file the deed in the office of the secretary of state before he settles for the taxes, and to make oath that he has conveyed all the lands struck off to the state, in conformity to the requisitions of the act. The deed must therefore have been made, recorded, and filed, before the 1st day of October of the year in which the tax is payable (the succeeding year; in this case, 1799). This would, of itself, be fatal to the plaintiff's title."

This view of the case renders it unnecessary to consider the doctrine of ancient documents, or to pass on the objections to the deed of the state board of education; but we would not be understood to approve the form of the execution of the deed, or of its attempted probate.

Affirmed.

(178 N. C. 238)

**DEBNAM v. WATKINS et ux. (No. 258.)**

(Supreme Court of North Carolina. Oct. 8, 1919.)

**1. MORTGAGES  $\S$  300 — UNACCEPTED TENDER DOES NOT DISCHARGE LIEN.**

An unaccepted tender of amount due on a debt secured by a mortgage does not discharge the lien of the mortgage, unless the tender be kept good and the money be paid into court.

**2. MORTGAGES  $\S$  302 — TENDER AFTER MATURITY DOES NOT DISCHARGE LIEN.**

After maturity of a mortgage a tender does not, in North Carolina, which follows the common-law doctrine, discharge the lien of the mortgage.

**3. MORTGAGES  $\S$  372(1) — PURCHASER AT FORECLOSURE NOT DEFEATED BY TENDER.**

The rights of purchaser at mortgage foreclosure sale cannot be defeated by proof of tender of the amount of the indebtedness prior to sale, where the owner, who had acquired the property subject to the mortgage, appeared at the sale and participated in the bidding without making known the fact of tender, for such conduct works an estoppel.

Appeal from Superior Court, Wake County; Allen, Judge.

Action by J. B. Debnam against J. A. Watkins and wife. From a judgment for plaintiff, defendants appeal. No error.

William Mitchell died in the year 1890, and left a will, in which he devised the tract of land in question to C. R. Debnam for life, remainder to his five children, Joseph B., Mattie, Bettie, Hattie, and Thomas Debnam. C. R. Debnam, the life tenant, is still living, and about 30 years ago he leased the land to the defendant J. A. Watkins, who has held it from year to year, under the lease, ever since. On the 26th of October, 1909, C. R. Debnam and Hattie Debnam, one of his children, conveyed all their interest in the land, by deed of trust, to W. N. Jones, to secure an indebtedness of \$80, which deed was duly recorded in October, 1909. On the 16th of December, 1910, C. R. Debnam, and Thomas Debnam, one of his children, conveyed all their interest in the land, by mortgage, to B. F. Montague, to secure an indebtedness of \$122.33, which mortgage was duly recorded on the 26th day of January, 1911. Thomas Debnam and C. R. Debnam having failed to pay the indebtedness secured in the mortgage to B. F. Montague, the latter, under the power of sale in said mortgage, sold the land, and the defendant J. A. Watkins purchased the same at the sale on April 13, 1912, for \$225, and a deed was duly made to him by B. F. Montague and registered in April, 1912. Hattie Debnam and C. R. Debnam having failed to pay the indebtedness secured in the deed of trust to W. N. Jones, the latter

sold the land, under the power of sale in the deed of trust, and conveyed the same to plaintiff J. B. Debnam for \$260 by deed recorded on the 13th of July, 1913. The defendant having failed to pay rent or to give possession to the plaintiff, he commenced this action for possession and damages, as shown in his complaint.

The jury returned the following verdict:

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

"(2) What is the yearly rental value of said land? Answer: \$100."

Judgment on the verdict, and defendant appealed.

J. G. Mills, of Wake Forest, for appellants. Jones & Bailey, of Raleigh, for appellee.

WALKER, J. (after stating the facts as above). The questions of fraud and improvements may be eliminated from the case, as the first is not properly pleaded, nor is the second referred to at all. It was agreed that the issues be settled after hearing the evidence. There was no evidence of fraud. It may be, as suggested by plaintiff on the argument, that defendants may proceed, under the statute, to have an allowance made for improvements; but we give no opinion as to this matter, it not being before us.

[1] Under the tender alleged to have been made to Mr. Jones, the senior mortgagee, the money has not been deposited in court, although the defendants seek in this action to redeem from the Jones deed of trust. It was said by Justice Allen in *Lee v. Manly*, 154 N. C. 244, 70 S. E. 385:

"In *Dixon v. Clark*, 57 E. C. L. R. 376, Wilde, C. J., announces the rule as follows: 'The principle of the plea of tender, in our apprehension, is that the defendant has been always ready (toujours prêt) to perform entirely the contract on which the action is founded; and that he did perform it, as far as he was able, by tendering the requisite money, the plaintiff himself precluding a complete performance by refusing to receive it. And as in ordinary cases, the debt is not discharged by such tender and refusal, the plea must not only go on to allege that the defendant is still ready (uncore prêt), but must be accompanied by a profert in curiam of the money tendered.' And this is cited with approval in *Bank v. Davidson*, 70 N. C. 122. In *Bilzell v. Haywood*, 96 U. S. 580 [24 L. Ed. 678], it is said that, 'to have the effect of stopping interest or costs, a tender must be kept good,' and in *Soper v. Jones*, 56 Md. 503, 'A plea of tender, not accompanied by profert in curiam, is bad.' In the case of *Parker v. Beasley*, 116 N. C. 1 [21 S. E. 955, 33 L. R. A. 231], it is held that an unaccepted tender of the amount due on a debt secured by a mortgage does not discharge the lien of the mortgage, unless the tender be kept good and the money be paid into court, and the same doctrine is affirmed in *Dickerson v. Simmons*, 141 N. C. 330 [53 S. E. 850, 8 Ann. Cas. 361]."

The alleged tender of defendants was made after the note was due. It is not necessary that our conclusion be based upon this ground alone, and that case is specially mentioned as appearing to be analogous in its facts, and it seems to be sufficiently so to control our decision.

[2, 3] There is another reason for affirming the judgment. If the tender of the amount due on the note secured by the deed of trust to Mr. Jones was properly made, or was a good tender, it appears that thereafter Mr. Jones, as trustee, offered the land for sale, after advertisement; that defendants attended the sale and bid for the land, without giving any notice to the other bidders that the sale was unauthorized because of a previous tender by him of the amount due upon the note secured by the deed of trust. He made no such claim at that time, and the plaintiff purchased at the sale, for full value and without any notice of any such claim on the part of the defendant. This, plaintiff contends, was a waiver of the tender defendants made, so far as he is concerned, and an estoppel upon the defendants to set it up, as a defense in this action, even if, under other circumstances, it would be a valid one. This subject was considered to some extent in *Dickerson v. Simmons*, 141 N. C. 325, 329, 53 S. E. 850, 851 (8 Ann. Cas. 361), where it is said:

"It is well settled and universally held that an unconditional tender on the day when the mortgage debt falls due, called the law day, discharges the lien of the mortgage, although the debt survives as a personal liability. 20 Am. and Eng. Enc. (2d Ed.) 1062, and cases cited; *Shields v. Lazear*, 34 N. J. Law, 496 [3 Am. St. Rep. 256]. As to the effect of a tender made, as in this case, after maturity, there is much conflict of authority. In those jurisdictions where the mortgage is treated simply as a security to a debt, the rule is that a mortgage is discharged by a proper tender made at any time before foreclosure, and that a sale under the power is void. In those more numerous jurisdictions where the common-law doctrines prevail, the lien of the mortgage is not discharged by the tender; the only effect being to arrest the accruing of interest and to free the debtor from future costs. If the mortgagor desires by his tender to discharge the lien, when it is not accepted, he must bring his suit by redemption and pay the money into court. North Carolina, Massachusetts, New Jersey, and other states are classified as jurisdictions which adhere to the common law. 20 Am. & Eng. Enc. (2d Ed.) 1063. In the first-named jurisdictions it is held that, where tender is made after the law day, a sale under the power is void even as to a bona fide purchaser for value. *Cameron v. Irwin*, 5 Hill (N. Y.) 272-276; *Pingree on Mortgages*, § 1342. The contrary is held in Massachusetts and some other courts, which adhere to the common law. *Jones on Mortgages*, 1798, and cases cited. Those courts regard the power as one coupled with an interest which cannot be revoked, and hold that a sale under the pow-

er, after an unaccepted tender, transfers the legal title to the purchaser, and that the tender is merely a foundation for a suit in equity for redemption. It seems, therefore, that in those states a bona fide purchaser for value and without notice of tender gets a good title. It is also held that a mortgagor who has notice of an intended sale and allows it to proceed without objection cannot afterwards show a tender or even a payment in full of the mortgage debt and thereby defeat the title of a bona fide purchaser for value without notice. *Cranston v. Crane*, 97 Mass. 459 [93 Am. Dec. 106]; *Jones on Mortgages*, § 1788. It has been determined expressly by this court that 'the unaccepted tender of the amount due on a debt secured by mortgage does not discharge the lien of the mortgage unless the tender be kept good and the money paid into court. Its only effect is to stop interest and costs accruing after tender'—citing *Parker v. Beasley*, 116 N. C. 1, 21 S. E. 955, 33 L. R. A. 231.

But our case is stronger for this plaintiff. The defendant knew of the sale and attended it with a view of becoming a purchaser, and was a competitor of the plaintiff in the bidding. He said nothing about his tender, did not rely upon it, and offered no objection to the sale. If he had any objection to it, based on the tender, common fairness required of him to then and there make it known, and not to impress the plaintiff with the belief that no such objection existed, and thereby induce him to buy the land after being lulled into security by the defendant's silence and inaction, or by his conduct at the sale. In this connection, it is further said in *Dickerson v. Simmons*, 141 N. C. at page 330, 53 S. E. at page 852, 8 Ann. Cas. 361:

"Notwithstanding the conflict between the courts as to the effect of a tender made after the law day, it seems to be agreed by all that a mortgagor may preserve his right to redeem against any purchaser by giving him notice of the tender before or at the sale"—citing *Cranston v. Crane*, 97 Mass. 459, 93 Am. Dec. 106, supra; *Jones on Mortgages*, supra.

This the defendants did not do, but the opposite, as they not only assented to the sale, but actually participated in the bidding. It would be very inequitable that they now should be allowed to set up their alleged tender, after they had held out to the plaintiff by their conduct that there was no such objection, or, if it ever existed, that they waived it. Having been silent when they should have spoken, we will not hear them speak when they should be silent. They had undoubtedly a right to buy at the sale to protect their own title, but the obligation rested upon them not to put another to a disadvantage by their conduct, and cause him to do what otherwise he would not have done, if the defendant's claim had been disclosed. Even in the assertion or protection of his own rights, a party should not by his acts or conduct mislead others, who will be



prejudiced thereby, because of their ignorance of facts which were known to him and also because of his conduct, which induced them to act. The doctrine is well stated by the learned reporter in the fourth head-note to *Mason v. Williams*, 66 N. C. 564:

"Not only the uberrima fides, but that simple bona fides which the law exacts from every man, required the true owner to make known his claim at said sale or never; he should have given all bidders the advantages he possessed from his exclusive knowledge; his omission to do so amounted to a negligence which imperiled the interests of others, and gave him an unfair advantage over them, enabling him, if he could, to buy low, and thereby secure an indisputable title, or, if another outbid him, to fall back on his reserved claim."

There Mr. Mason attended the sale to protect his interest in the property, but he assented to the sale without making known his claim, or his object in bidding, and he bid for the property, and by his silence induced another to buy. He was held to be estopped afterwards to assert his title against the purchaser. That case has been approved many times by this court.

In *Morris v. Herndon*, 113 N. C. 236, at page 239, 18 S. E. 203, at page 205, *Shepherd, C. J.*, thus refers to the case:

"The rule is that if a man so conducts himself, whether intentionally or not, that a reasonable person would infer that a certain state of things exists, and acts on that inference, he shall be afterwards estopped from denying it"—citing *Mason v. Williams*, *supra*.

The passage was quoted from the opinion of *Bramwell, B.*, in *Cornish v. Abingdon*, 4 Hurl. & Nor. (Exch. Rep.) 549. He also quotes from 2 *Herman on Estoppel*, 9627, as follows:

"But this is applicable only in the case where the foundation of the estoppel is in silence or acquiescence, for, when the owner concurs in a sale by participating in it at the time, it becomes his own act."

And in *Biggs v. Brickell*, 68 N. C. 239, *Justice Boyden* refers to the case in these words:

"Can any one maintain that the debtor who assented to this sale could have successfully defended an action of ejectment brought against him by the defendant? We think the case of *Lentz v. Chambers*, 27 N. C. 587 [44 Am. Dec. 63], and the case of *Mason v. Williams*, 66 N. C. 564, and the cases therein cited, are decisive of the question."

In this case it appears, from the defendants' own testimony, that they attended the sale, assented to it, and the male defendant was one of the bidders; that they gave no notice of their tender to the plaintiff or any other bidder. There seems to be no controversy about the facts, and the case falls

within the principles of tender, payment of money into court, and estoppel, which we have stated as being settled by the authorities cited.

We have assumed in the discussion that the tender itself, as alleged by the defendants, was sufficiently made, that is, was in due form, though there is reason to doubt it. No error.

(178 N. C. 322)

**SASSER et al. v. HARRISS et al.** (No. 281.)

(Supreme Court of North Carolina. Oct. 15, 1919.)

APPEAL AND ERROR  $\S$  781(4)—DISMISSAL OF APPEAL INVOLVING MOOT OR USELESS QUESTIONS.

An order restraining holding a primary election on a date fixed by the city board of elections, and requiring it to be held on the date fixed by law, will not be reviewed long after the primary election has been held.

Appeal from Superior Court, New Hanover County; Calvert, Judge.

Action by L. B. Sasser and others against W. N. Harriss and others. From a judgment for plaintiffs, defendants appeal. Appeal dismissed.

E. K. Bryan and A. G. Ricaud, both of Wilmington, for appellants.

Iredell Meares, of Wilmington, for appellees.

**BROWN, J.** This is an action by the plaintiffs against the defendants, constituting the members of the city board of elections of the city of Wilmington, for the purpose of having declared void the call made by the board for the primary election under the act of the General Assembly of 1919, authorizing the board of elections to call the primary and fix the date for the holding thereof, which act is recited in the record.

The cause was heard before his honor, Thomas H. Calvert, judge, at the March term, A. D. 1919, of the superior court of New Hanover county, and upon said hearing his honor restrained the holding of the said primary election on the date fixed by the board, and ordered the election to be held on the date as provided by the law in force relative thereto, prior to the passage of the act of 1919, and from the judgment of the court, defendants appealed.

It appears that the primary election has long since been held, and doubtless the candidates now have been duly elected. Nothing can now be accomplished by setting aside the order of Judge Calvert. If his judgment was reversed, this court could not now order another primary. The question has thus become merely a moot question, and there is

nothing for the judgment of the court to operate upon.

The appeal is dismissed.

Appeal dismissed.

(178 N. C. 698)

STATE v. MINCHER. (No. 209.)

(Supreme Court of North Carolina. Oct. 8, 1919.)

1. INDICTMENT AND INFORMATION  $\S$ 129(2)—JOINDER OF COUNTS FOR LARCENY AND FOR RECEIVING STOLEN GOODS VALID.

A count for larceny may be joined with one for receiving stolen goods in the same indictment.

2. CRIMINAL LAW  $\S$ 370—RECEIVING STOLEN GOODS  $\S$ 8(4)—POSSESSION OF OTHER STOLEN PROPERTY EVIDENCE OF GUILTY KNOWLEDGE.

In a prosecution for receiving stolen goods, evidence as to defendant's possession of a watch stolen at another time and an article in the daily paper which defendant took, relating to the theft, were competent evidence on the question of guilty knowledge.

3. CRIMINAL LAW  $\S$ 370—EVIDENCE OF RECEIPT OF OTHER STOLEN GOODS ADMISSIBLE TO SHOW GUILTY KNOWLEDGE.

Where defendant admitted he had received the stolen property from a convict, who was in his charge with no opportunity to make money, but who secured it while allowed to be away from camp, evidence of the receipt of other stolen property by defendant was admissible upon the question of guilty knowledge.

Appeal from Superior Court, Lenoir County; Daniels, Judge.

E. W. Mincher was convicted under an indictment charging larceny and receiving of stolen goods, and he appeals. No error.

The defendant appeals from a judgment pronounced upon an indictment, charging in one count larceny and in the other receiving one gold watch, three pieces of English gold coin, and one \$2½ gold piece of United States coin, the property of E. A. Adrey.

The state's evidence tended to show that the defendant had been for six years an overseer of the convict road force of Lenoir county. Among the other prisoners, under the control of and worked by the defendant at the convict camp of the county, was Will Gorham, who had been a trusty for some time. About the 18th or 20th of December, 1918, a watch and chain were stolen from J. T. Hearne, a witness for the state. On the night of Tuesday, January 28, 1919, several stores in the city of Kinston were broken open and goods and other articles were taken from them. On the same night the home of E. A. Adrey, a Syrian merchant of the town, was entered and about \$300 in

bills, gold, and checks were stolen. Among this money were three English gold pounds, one \$2½ gold piece of American money, a \$5 gold piece, a half pound of African money, some Greek money, about the size of a quarter, a Chinese dime, and some Philippine Island money. On the next morning (Wednesday morning) the officers found a track of a man in his stocking feet and tracked him from about the edge of town to the iron bridge and to the stockade. There they arrested Will Gorham. In consequence of what they learned from him the latter part of March, 1919, they took out a search warrant and searched the house and premises of the defendant, Mincher. This was about 40 or 50 yards from the stockade. Put away in a trunk, which was locked, were three gold pieces, the property of Adrey, and later they obtained from him, in addition to these three gold pieces, a \$2½ gold piece, also the property of Adrey. The defendant at the time was wearing the watch of Hearne attached to another chain. The hands had been changed and the number inside had been scratched out. Will Gorham was convicted at the August term, 1918, of Lenoir county of housebreaking and was serving the sentence of five years on the roads for such offense. Adrey did not succeed in finding or recovering any of the rest of his money. It appeared further from the testimony of Rhem, superintendent of roads, that Gorham was made a trusty in the fall of 1918, and that he (Rhem) left the stockade on Saturday night and other nights. During his absence the convicts were left in charge of Mincher one Saturday and Sunday, and of John Ipock on the next. He further testified that the defendant, Mincher, had entire charge of the camp when he (Rhem) was absent. The defendant was a subscriber to the Kinston Daily News during the period when these robberies were going on, and had been for several years before. It was taken to him by a rural carrier. In the issue of that paper of January 30, 1919, there was a full account of the robberies the preceding Tuesday night, including those of the Adrey home and also a list of the coins stolen therefrom. There was evidence also on the part of the state that Will Gorham was permitted to leave camp nearly every Saturday night and would not be back until after 11 o'clock Sunday night; that Will Gorham brought money back with him on some of these trips \$10 and \$20 bills, which he gave to the cook, another trusty, to keep for him; that he gave the \$2½ piece, the English pounds, and some paper money to the defendant on the road; that the defendant knew of Will's bringing to the camp a large quantity of Reyno cigarettes, as the witness overheard Mincher tell Will, "You had better get them cigarettes, out of the cage, old Thad Tyndall is talking," and the defendant and Will were

having secret talks together mostly every night after supper.

The defendant in his testimony admitted getting the \$2½ and English pound pieces from Will some time in February, 1919. He admitted also getting the watch from Will, but claimed that he did not know that they were stolen. It appears in the testimony that defendant was in Kinston the night in which Hearne's house was robbed; this, also, he admits.

The defendant moved to quash the indictment upon the ground that the two counts could not be joined. Overruled, and the defendant excepted.

The defendant also excepted to the admission of evidence as to the watch found in his possession because it was shown to be the property of Hearne, and if stolen it was not at the same time when the property described in the indictment was stolen.

Also, to the introduction of the Daily News containing an account of the robberies.

Fred I. Sutton and T. C. Wooten, both of Kinston, for appellant.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

ALLEN, J. [1] It has been the uniform practice in this state to join a count for larceny with one for receiving in one indictment, and this has been repeatedly approved. *State v. Baker*, 70 N. C. 685; *State v. Stancill*, 100 S. E. 241, at this term.

[2] The evidence as to the watch and the article from the Daily News belong to the same class of testimony, and both were competent on the question of guilty knowledge.

[3] The defendant admitted he received the watch as well as the property charged in the indictment from Gorham, a convict in his charge, who had no opportunity to make money, and who was in the habit of leaving camp at night; but he denied that he knew that any of the property was stolen, and this was the real question in controversy before the jury.

The number of the watch had been scratched out, the hands changed, and the defendant testified he was to pay Gorham \$8 for it, while Hearne said it was worth \$40.

It was also shown that the Daily News was delivered to him as a subscriber regularly, and that it contained an account of the stealing from the house of Adrey before the defendant received the property from Gorham, and the defendant, testifying in his own behalf, did not deny that he knew of the newspaper article.

This evidence comes clearly within the principle of *State v. Simons*, 100 S. E. 239, and *State v. Stancill*, 100 S. E. 241, at this term, in which the authorities are collected and discussed.

The court says in the first of these cases:

"There are offenses which are committed in sudden temper, or under violent provocation, or by the impulse of passion. As to these the only competent evidence is what took place at the time. *State v. Norton*, 82 N. C. 630. But the crime of illicit dealing in intoxicating liquor is in the same class with larceny, counterfeiting, forgery, obtaining money under false pretenses, and burglary; which are all committed with deliberation, in defiance of law, and for the ignoble motive of making profit thereby. In all such cases it is competent to prove intent by showing matters of like nature before or after the offense."

And in the second, in which the defendant was charged with the larceny and receiving of tobacco, the property of J. H. Little, and evidence that other tobacco in his possession was stolen from one Wilkinson was admitted:

"The testimony as to the theft of the Wilkinson tobacco was offered merely to show the intent with which the defendants stole this tobacco, and not to prove the accusation substantively. 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 is said in *State v. Murphy*, 84 N. C. 742: 'Evidence of a "collateral offense" of the same character and connected with that charged in an indictment, and tending to prove the guilty knowledge of the defendant, when that is an essential element of the crime, is admissible; therefore on the trial of an indictment for the larceny of a hog, where the prosecutor testified that he identified the property as his in an inclosure of the defendant, and demanded its delivery to him, it was held competent for the state to prove by the testimony of another witness that at the same time and place, and in the presence of the prosecutor and defendant, such witness said that the other hog therein was his, and he then and there claimed and demanded it of defendant.' In that case the court says, in an opinion by Justice Ashe, who always wrote clearly, accurately, and vigorously, and reviews the law at length: 'Where the question of identity or intent is involved, or where it is necessary to show a guilty knowledge on the part of the prisoner, evidence may be received of other criminal acts than those charged in the indictment'—citing and approving *Yarborough v. State*, 41 Ala. 405; *Thorp v. State*, 15 Ala. 749. The whole question is considered and fully reviewed in *Gray v. Cartwright*, 174 N. C. 49, 93 S. E. 432, where the authorities are collected. This question is fully discussed by the Chief Justice in *State v. Simons*, 100 S. E. 239, at this term, and evidence of the kind admitted in this case is held there to be competent to show knowledge, intent, and motive."

The other exceptions to evidence are untenable and require no discussion, and an examination of the charge shows that it is clear, accurate, full, and fair.

No error.

(178 N. C. 212)

**EDENTON COTTON MILLS v. NORFOLK SOUTHERN R. CO. (No. 29.)**

(Supreme Court of North Carolina. Oct. 8, 1919.)

**1. CARRIERS ⇐35—AGREEMENT TO SUBMIT CLAIM OF SHIPPER FOR REPARATION INVALID.**

Shipper in interstate commerce, who, having paid a rate less than that established under authority of Interstate Commerce Commission, because of railroad's ignorance of increase thereof, paid difference between old and new rate upon railroad's promise to submit shipper's claim for reparation to Corporation Commission, cannot recover for railroad's breach of such promise; the promise being void under U. S. Comp. St. 1916, §§ 8569, 8574, prohibiting rebating, and the damages being speculative, because of impossibility of determining how Corporation Commission would have decided case.

**2. CARRIERS ⇐35—AGREEMENT FOR INTERSTATE SHIPMENT AT LESS THAN PRESCRIBED RATE ILLEGAL.**

Agreement for interstate shipment at a rate less than that prescribed is illegal, under U. S. Comp. St. 1916, §§ 8569, 8574, though rate has been misquoted to shipper and received by the agent of the carrier by the mere mistake or the negligence of such agent.

**3. CONTRACTS ⇐103—TO ACCOMPLISH ILLEGAL OBJECT INVALID.**

There can be no recovery on a contract for services made with an illegal design in view, or for the purpose of enabling the beneficiary to accomplish an unlawful object.

Appeal from Superior Court, Chowan County; Devin, Judge.

Action by the Edenton Cotton Mills against the Norfolk Southern Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

The action, as it appears from the pleadings, was brought to recover certain alleged freight overcharges for goods shipped by the plaintiff over the lines of defendant and connecting carriers. It turns out that certain freight rates had been established with the sanction of the Interstate Commerce Commission, which afterwards were duly changed and increased in amount, but the parties to this action were not aware of the change at the time that the charges were made against the plaintiff. When the change of rates was discovered, the defendant demanded the difference between the rates charged and the amount received under the old tariff and those due under the tariff of rates as amended and increased by the commission. This amount, or difference, was paid by the plaintiff, and it now alleges that the defendant entered into a special agreement with it as follows:

"(1) The defendant undertook, promised, and agreed, for and on behalf of plaintiff, that it would take charge of, present, and submit the same [that is, its claim for reparation] to the said Corporation Commission in proper form and manner and in due time for adjustment and allowance, and time and again, when this plaintiff would call upon it for settlement, stated to this plaintiff that it was then attending to the matter and would have the same presented in reasonable time, which undertaking, agreement, and promise this plaintiff reasonably relied upon.

"(2) Notwithstanding the defendant's undertaking, promise, and agreement aforesaid, and notwithstanding it had assumed the duty aforesaid to this plaintiff, the defendant neglected and wrongfully failed and refused to do its duty as it had agreed to do, and in justice and right was required to do, until more than two years after the plaintiff had paid the overcharges as demanded by the defendant and had suffered the damage aforesaid, and after all right and power to consider and allow the same were by lapse of time denied the Interstate Commerce Commission under the law.

"(3) The claims and demands of the plaintiff aforesaid were, after a lapse of two years from the time the right of demand accrued, presented to the said Interstate Commerce Commission, and that commission disallowed the same solely upon the ground that, because of the delay aforesaid, it was not permitted by law to consider the same.

"(4) That but for the promise, undertaking, and assurance of the defendant, as hereinbefore set out, and but for the reliance of the plaintiff on the same, and its belief that the defendant was performing its duty as it had undertaken to do, this plaintiff would have presented and prosecuted before the Corporation Commission the claim aforesaid, to which there was no defense, and about which there was no dispute, and would have recovered the money justly due it.

"(5) That by reason of the wrongful and unlawful conduct of the defendant aforesaid, and its failure to perform its duty as hereinbefore set forth, the plaintiff has been damaged in a large sum."

There is a prayer for judgment; the amount claimed being \$1,000.

The defendant answered, and denied the material allegations as to the contract. It denied that it had overcharged the plaintiff, and averred that the plaintiff had been charged at the established and promulgated rates, and further that the defendant could not, under the Interstate Commerce Act, have charged any less; that the defendant could not refund any of the sums paid, without the same being authorized under the said law.

The jury found against the defendant as to the contract and its breach, and allowed the amount of the excess over the rates promulgated July 20, 1911 (the old rates), as damages. Judgment was entered upon the verdict, and defendant appealed.

Small, MacLean, Bragaw & Rodman, of Washington, N. C., for appellant.  
J. N. Pruden, of Edenton, and Ehringhaus & Small, of Elizabeth City, for appellee.

WALKER, J. [1, 2] If we concede that the evidence tends to show a contract as alleged, and not a mere gratuitous offer to lend its aid and assistance in obtaining a refund of the difference between the two rates, as paid by the plaintiff, and also that the contract, if made as alleged by the plaintiff, was founded upon a sufficient consideration, our opinion is that the plaintiff cannot recover, as the contract is illegal; it being contrary to the provisions of the law against rebating or giving undue preferences, privileges, or concessions, which is made a misdemeanor by the Interstate Commerce Act, both as to persons and corporations participating in the unlawful act. U. S. Compiled Statutes (1916) Annotated, vol. 8, title "Interstate and Foreign Commerce," §§ 8569 and 8574, and notes, where many authorities are collected. The language of the act of Congress is very stringent in regard to the duty of the shipper to pay and of the carrier to collect the schedule rates on all shipments of freight. The cases cited in notes to the sections of the Compiled Statutes show conclusively that the agreement for a shipment at a rate less than that prescribed cannot be recognized by the courts, and it makes no difference whether the rate has been misquoted to the shipper and received by the agent of the carrier by the mere mistake or the negligence of the latter. The only rate is the true rate, as authorized by the commission. It was held in *T. & R. Ry. Co. v. Mugg*, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. p. 1011, that where a carrier has negligently made and quoted to a shipper rates on interstate shipments of coal, upon which he has relied in contracting for the coal, selling at prices based on such rates, which were lower than the rates which had been duly published, printed, and posted as required by the Interstate Commerce Act, and the carrier, as required by the act, collects the prescribed rates, the shipper cannot recover against the carrier for damages occasioned by its misrepresentation of the rates. To the same effect are *Alabama Lumber & Exp. Co. v. Philadelphia, B. & W. R. Co.*, 19 Interst. Com. R. 295, and *Texas & P. R. Co. v. Leslie*, 62 Tex. Civ. App. 380, 131 S. W. 824, motion for rehearing overruled 62 Tex. Civ. App. 380, 131 S. W. 827. See, also, Ill., etc., *R. Co. v. Henderson Elevator Co.*, 226 U. S. 441, 33 Sup. Ct. 176, 57 L. Ed. 290; *Va.-Caro. Peanut Co. v. Railroad Co.*, 166 N. C. 62, 82 S. E. 1. The following cases are to the same effect, as will appear by statement of the substance of each decision:

"Acceptance by railroad of charge less than rate filed by mistake, not discovered till after consignee's settlement with his principal, held

not to create waiver or estoppel, precluding recovery of balance from consignee." Penn. R. Co. v. Titus, 216 N. Y. 17, 109 N. E. 857, L. R. A. 1916E, 1127, Ann. Cas. 1917C, 862.

"A person dealing with a carrier is as effectually bound by the law and the orders of the Commerce Commission, as to both freight and passenger tariffs, as is carrier itself, and neither is estopped to assert the illegality of contract made in violation of the act and orders of the commission." *Melody v. Great Northern Ry. Co.*, 25 S. D. 606, 127 N. W. 543, 30 L. R. A. (N. S.) 568, Ann. Cas. 1912C, 727.

The same was held in *B. & O., etc., Rwy. Co. v. N. A. Box & Basket Co.*, 48 Ind. App. 647, 94 N. E. 906, 96 N. E. 28; *La. Rwy. & Nav. Co. v. Holly*, 127 La. 615, 53 South. 882; *N. Y., etc., R. Co. v. York & W. Co.*, 215 Mass. 36, 102 N. E. 366.

An agreement of a carrier to refund a part of the rates lawfully charged and collected is in violation of the Act and unenforceable. *L. & R. Co. v. Coquillard Wagon Works*, 147 Ky. 530, 144 S. W. 1080. Carrier cannot, directly or indirectly, contract for a rate different from that specified in its schedules. *St. Louis, etc., R. Co. v. S. R. Stone Co.*, 169 Mo. App. 109, 154 S. W. 465. A suit by a shipper for a loss of goods on a policy of insurance issued to the carrier, after receipt of the limited value fixed on such goods by the carrier's schedules and bills of lading, was held to be in violation of the act of Congress, amended by Act June 29, 1906, c. 3591, 34 Stat. 586, as seeking or soliciting a rebate or concession, and not maintainable. *Duplan Silk Co. v. Am. & For. Marine Ins. Co.*, 205 Fed. 724, 124 C. C. A. 18. A carrier may recover from a shipper, who has paid the legal rate, a refund made to the shipper by carrier's agent, either by mistake of carrier or through agent's illegal act. *Cent. of Ga. R. Co. v. Curtis*, 14 Ga. App. 716, 82 S. E. 318; *L. & N. R. Co. v. Allen*, 152 Ky. 145, 153 S. W. 198 (s. c. reaffirmed, 152 Ky. 837, 154 S. W. 371); *Ga. R. Co. v. Creety*, 5 Ga. App. 424, 63 S. E. 528; *Schenberger v. Union Pac. R. Co.*, 84 Kan. 79, 113 Pac. 433, 33 L. R. A. (N. S.) 391.

It all comes to this: That the carrier is bound to collect and the shipper to pay the published rates, even though the agent of the carrier has by his conduct caused the shipper to pay a lower rate to his prejudice in fixing the price of his goods, or in any other way. *La. R. & N. Co. v. Holly*, 127 La. 615, 53 South. 882; *Baldwin S. & L. Co. v. Columbia S. R. Co.*, 58 Or. 285, 114 Pac. 469; *So. Pac. Co. v. Frye & Bruhn*, 82 Wash. 9, 143 Pac. 163; *Hamlen v. Ill. Cent. R. Co.* (D. C.) 212 Fed. 324. Ignorance of shipper as to the correct rates will not excuse him, and he should not rely on representations of carrier or his agent as to them. *St. L., etc., R. Co. v. Faulkner*, 111 Ark. 430, 164 S. W. 763; *Wyrick v. Mo., etc., R. Co.*, 74 Mo. App. 406; *Baldwin S. & L. Co. v. Columbia*

S. R. Co., supra. Those cases show how strictly the courts have required carriers and shippers to live up to the letter of the law enacted by Congress for the purpose of exacting rigid compliance with the main intention, that there should be no favoritism or discrimination, and no unfair competition, in the form of rebates, or by other methods of business.

The Interstate Commerce Commission considered a question similar to the one now before us, and through Commissioner Clements it said in *Forster Bros. Co. v. Duluth etc., R. Co.*, 14 Interst. Com. R. at page 236:

"It is unfortunate that shippers should be misled to their injury by erroneous information furnished by representatives of carriers as to the rate in effect. It is, of course, the duty of carriers' agents to furnish correct information as to the proper application of the lawful established rates. However, the law requires that tariffs shall be open to public inspection, and therefore shippers are themselves charged with notice of the rate lawfully applicable. The commission cannot consider an erroneous rate quotation made by an agent of a carrier as the basis for an award of reparation to a shipper who thereby suffers damage. Collusion between the carrier and a shipper, which it desired to favor, for protection of other than the tariff rates, would be rendered too easy of accomplishment. In such case the carrier could protect any rate which it might desire to apply, by simply quoting it to the favored shipper, and thus the integrity of the published tariffs (a strict observance of which is required by law in order to prevent unjust discrimination) would be constantly violated."

This matter has been recently considered by this court in *Southern R. Co. v. Latham*, 176 N. C. 417, at page 419, 97 S. E. 234, 235, where Justice Hoke, for the court, says:

"It is clear that defendants are responsible for the amount properly due for these shipments, both as consignors under the bill of lading presented and under the express agreement that they were to prepay the freight in protection of the designated consignee, and, further, that this amount must be determined by the rates of the schedules and tariff established, pursuant to law"—citing *Tex. Pac. Ry. v. Mugg & Dryden*, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011; *Central of Ga. Ry. v. Birmingham Sand & Brick Co.*, 9 Ala. App. 419, 64 South. 202; *Baltimore, etc., Ry. v. New Albany, etc., Basket Co.*, 48 Ind. App. 647, 94 N. E. 906, 96 N. E. 28; *Holt v. Westcott*, 43 Me. 445, 69 Am. Dec. 74; *Asheboro Wheelbarrow Co. v. Ry.*, 149 N. C. 261, 62 S. E. 1091.

*Railway Co. v. Mugg*, supra, is quoted with approval, where it is said:

"A common carrier may exact the regular rate for an interstate shipment, as shown by its printed and published schedules on file with the Interstate Commerce Commission and posted, . . . as required by the Interstate Commerce Act, although a lower rate was quoted by the carrier to the shipper, who shipped under the lower rate so quoted."

And then the case of *Balto. & Ohio Railway Co. v. New Albany, etc., Basket Co.*, supra, where the court held:

(1) "One who engages a railroad company to transport freight in interstate commerce is liable for the established rate on such freight, regardless of any contract such shipper might have with the consignee."

(4) "A shipper must take notice of the rates for interstate shipments; and he relies, at his peril, on the statement of the carrier's agent."

(5) "An interstate carrier is not estopped from recovering the balance due for a shipment by the unauthorized act of its agent in quoting an illegal freight rate."

And finally the case of *Cent. of Ga. Ry. v. Birmingham Sand & Brick Co.*, supra, where the same rule was thus stated:

"Under the Interstate Commerce Act, the freight rate of an interstate shipment is not that named in the bill of lading or contract of shipment, but the lawful rate existing at the time, whether or not such rate is known to the consignor or consignee, and regardless of whether the parties were misled by the carrier as to the lawful rate, or whether it had posted the lawful rate as required by the statute; hence the carrier cannot by any act estop itself from demanding the lawful rate."

So that the principle is firmly settled that the only rate is the rate fixed by the Interstate Commerce Commission and published, and no contract, agreement, or understanding between the parties can change it.

In this case, if recovery by the plaintiff were adjudged, he would be given a rate for the transportation of his goods and wares which would be less than that allowed to other shippers. It is no answer to the assertion to say that plaintiff would merely be recovering damages for a breach of contract, and not recovering a favor from the defendant by a reduction of the published rate, contrary to the express provision of the act forbidding any concession, privilege, or discrimination. It is not the manner of showing a favor to the plaintiff, so much as the substance of it, that we must consider in passing upon the question whether there has been either a direct or indirect violation of the law. If the resultant effect is bad, and comes within the prohibition, it matters little what particular form it takes. The clear and ultimate result is that plaintiff will have had his goods hauled at a less rate than that which was published at the time the service was rendered. If defendant can be compelled to pay the difference by an action in court, it can pay it just the same without such an action; that is, voluntarily. All it will have to do, then, in order to circumvent the act and give the plaintiff what is, in effect, a rebate, is what has been done here—contract to render service in obtaining reparation for the amount paid in excess of the mistakenly supposed rate, and

then refuse to perform the contract and instead pay the damages.

Such a course would open the door wide for collusion and corrupt bargaining to violate the law, and would therefore be against public policy as declared by the act, which seeks to compel equal and impartial service to all alike, and to abolish rebates and discrimination in any and every form, as being in violation of the very terms of the act, and opposed to the wise policy inaugurated by it, which was so firmly enforced in *Duplan Silk Co. v. Am. & For. Marine Ins. Co.*, *supra*. There the defendant paid the stipulated value of \$1 per pound for the silk carried by it and lost in a marine disaster to one of the carrier's boats. The plaintiff sued on a marine policy, but the court held, as we have shown, that he could not recover, as, though the suit was a collateral one, and not against the carrier, it was forbidden by the Interstate Commerce Law (Act Feb. 4, 1887, c. 104, § 16a) as added by section 6 of the Act of June 29, 1906 (Hepburn Act), 34 Stat. 584 (U. S. Comp. St. § 8585), prohibiting the carrier to give, or the shipper to receive or solicit, any rebate or concession for schedule rates, and no question as to the right of the shipper to recover otherwise on the policy was considered; the decision being confined to the single point above stated.

[3] Where a contract for services is made with an illegal design in view, or for enabling the beneficiary to accomplish an unlawful object, no recovery will be allowed upon it. 9 Cyc. 573; *Clark on Contracts* (2d Ed.) p. 254 et seq. The court said in the *Duplan Silk Case*, *supra*:

"The libellant argues that the giving of marine insurance by the railroad company is not a rebate, facility, or concession connected with transportation within the meaning of the act. We think this altogether too technical. No one could contend that a carrier which charged its published rate of freight could lawfully agree in addition to pay the shipper's life insurance or office rent or wages of any of his employes. It is next urged that this insurance was not a discrimination, because it was given to all shippers equally. Nevertheless it was a violation of the act by the carrier, because not stated in its tariff schedules. Indeed, the express contrary was stated, viz. that the carrier would not assume marine insurance unless it was specifically provided for; and the libellant, even though not aware of the insurance at the time the goods were shipped, is by this suit violating the act, inasmuch as it is knowingly soliciting a concession by which its shipment was being transported at a less rate than that named in the tariffs published and filed by such carrier." *American Exp. Co. v. United States*, 212 U. S. 522, 29 Sup. Ct. 315, 53 L. Ed. 635; *Chicago, St. P., M. & O. Ry. Co. v. United States*, 162 Fed. 835, 90 C. C. A. 211. If the libellant recover in this suit, it will get at the expense of the railroad company the full value of its shipment as if it had paid three times first-class

freight, when it is only entitled to the agreed value on the freight paid."

It was therefore held there that it was a clear case of soliciting for an advantage or favor beyond that allowed to other shippers, and in our case the plaintiff asks to recover on a special contract for the rendering of a service which is not specified in the carrier's schedule of rates, and a service, too, not granted or promised to the other shippers over its line. By thus seeking to gain an advantage over others, the plaintiff, by this suit, is, according to the authorities, itself guilty of violating the Interstate Commerce Act. A similar view was taken by the Circuit Court of Appeals in Washington, etc., *R. R. Co. v. Mobile & O. R. Co.*, 253 Fed. 12, at page 14, 166 C. C. A. 342, as follows:

"Defendants make the proposition that, after having received money in payment of a freight charge, the Mobile & Ohio had the right to do with it as it pleased, and the right to give it to the Washington & Choctaw, if it so desired. This proposition cannot receive the sanction of the courts. It is a mistake to assume that the railroad companies may do as they please with that which they receive. They are public corporations, charged with public duties, and those duties cannot be performed without a proper conservation and administration of their revenues. The rate-making bodies of the country must see to it that reasonable rates are fixed, with the view of enabling the companies to perform their public duties. The proper fixing of rates is inconsistent with an unrestrained right upon the part of the railroad companies to donate or otherwise dispose of their funds, except for the purposes and in the manner contemplated by the laws. Even if this general proposition could be controverted, there could be no question about the duty of railroad companies to conform their interstate transactions to the terms of the Interstate Commerce Act. Tariffs and divisions would be rendered nugatory, if the interested companies could, by repayments and readjustments of accounts, bring about any result they might desire as between themselves and connecting lines, or between themselves and shippers. It is the right and the duty of railroad companies which have improperly paid out money to connecting lines under a mistake of fact, or with knowledge of the unlawful character of payment, to recover such payments. The conclusions reached, and so well stated, by the trial judge, are concurred in entirely."

But there is another ground upon which plaintiff's recovery may be defeated. If defendant can be sued upon the alleged contract, there is no way of determining with any certainty in law how the Interstate Commerce Commission would have decided the case, if it had been properly constituted before it and diligently prosecuted by the defendant carrier, in behalf of the plaintiff, if such a proceeding would have been permitted by the commission at all. It is a judicial question, and there is no way of foreseeing or foretelling what the decision would have

been, or of knowing, in advance, what would be its conclusion, whether in favor of the shipper or the carrier. It may have ordered reparation to be made, or it may have refused to do so, in the exercise of its own judgment as to the law and merits of the case. There is no possible way, therefore, of telling beforehand whether there would be any order for reparation or for the return of a part of the money paid on the freight charges. It would be highly unseemly for a court to foretell its own opinion of a case, and what the decision would be if it were brought before it, and no respectable court would do such a thing, nor should any such wrong be imputed to it. Even if it should do so, its opinion could be changed, when the facts are developed, at any time before the decision, and it would be its duty to change it. So we are unable to say, in advance of a decision, whether the plaintiff would sustain any damages. They are, therefore, too uncertain and speculative to be safely estimated. *Machine Co. v. Tobacco Co.*, 141 N. C. 284, 53 S. E. 885; *Wilkinson v. Dunbar*, 149 N. C. 20, 62 S. E. 748; *Hardware Co. v. Buggy Co.*, 167 N. C. 423, 83 S. E. 557; *Coles v. Lumber Co.*, 150 N. C. 183, 63 S. E. 736.

We need not discuss the question, which has been raised, whether there is any consideration for the contract, apart from its illegal nature, and the uncertainty as to any loss from a breach of it. But the principal ground of decision is that the tendency of such a contract, and its probable, if not inevitable, effect, would be to violate one of the important provisions of the Interstate Commerce Act, the one against rebates and discrimination among shippers, which was enacted to protect them and the public against such unfair and collusive agreements.

The motion for a nonsuit should have been sustained, and for this error we reverse the judgment and order the action to be dismissed.

Reversed.

(178 N. C. 693)

# STATE v. BALDWIN. (No. 241.)

(Supreme Court of North Carolina. Oct. 8, 1919.)

## 1. INTOXICATING LIQUORS ⇨236(7) — EVIDENCE SUSTAINING CONVICTION ON ILLEGAL POSSESSION.

In a prosecution for having in his possession intoxicating liquor for the purpose of sale, evidence held sufficient to sustain conviction.

## 2. INTOXICATING LIQUORS ⇨233(2)—ILLEGAL POSSESSION SHOWN BY CONDITION OF PREMISES.

In a prosecution for having in his possession intoxicating liquors for the purpose of

sale, evidence of the condition of defendant's premises and the liquor corks, etc., stored therein, is competent to show purpose of defendant in having the liquor.

## 3. CRIMINAL LAW ⇨829(1), 834(2) — LANGUAGE OF REQUESTS NEED NOT BE FOLLOWED.

A trial judge need not adopt the language of the requests, and it is sufficient if they be covered by the charge given.

## 4. CRIMINAL LAW ⇨818—ERROR IN INSTRUCTION AS TO INTENT CORRECTED BY RETRACTION.

In a prosecution for having possession of intoxicating liquor with intent to sell, where the trial court promptly corrected his erroneous statement that the law presumed an intent or purpose to sell from the bare fact of possession of more than a quart and stated the correct rule, the error was sufficiently retracted.

## 5. CRIMINAL LAW ⇨825(1)—SOLICITOR MAY RESTATE CONTENTIONS WHILE COURT RECAPITULATING THEM.

In a prosecution for having possession of intoxicating liquor with intent to sell, it was not error to permit the solicitor to restate his contentions while the court was recapitulating them on both sides, and, if the contentions were misstated, the court's attention should have been called to it so that the proper correction could have been made.

Appeal from Superior Court, Wake County; Allen, Judge.

Joe Baldwin was convicted of having in his possession intoxicating liquors for the purpose of sale, and he appeals. Affirmed.

Defendant was tried under an indictment containing four counts for:

(1) Having sold whisky to parties unknown.

(2) Having whisky in his possession for the purpose of sale.

(3) Having received more than one quart in one package at one time.

(4) Having received more than a quart within 15 days.

There was a verdict of guilty, and, from the judgment upon such conviction, the defendant appealed to this court. The judge, however, confined the jury's consideration to whether defendant had intoxicating liquors in his possession for the purpose of sale.

There was testimony which tended to show that three officers of Wake county, Raines, Honeycutt, and Broadwell, in consequence of information which they had received, went to Apex on the evening of December 18, 1918, and about 8 o'clock that evening stationed themselves in a plum thicket near defendant's house, which was situated just outside of the limits of that town by the Seaboard Air Line Railroad. While they were there, an automobile came up. The driver, putting out the lights when he was approaching the house, ran up in front of defendant's drive-



way, which led into his back lot, and stopped. When the officers had arrived within about 50 yards of the car, they could see a man going to and coming from it, the moon at the time shining brightly. They arrested this man as he put down the last jug inside the gate of defendant. The man himself was Hayes Baldwin, a brother of defendant, and there were four jugs, two of two gallons, one of three gallons, and one of one gallon, each jug in a guano sack. One of the officers stated that they contained monkey rum, and the other corn whisky. Officer Raines, sending Broadwell to the front door of defendant's house, went himself to the back door. The house was lighted, and he, going inside, found two white boys and two white women, as well as the wife of Hayes Baldwin, but did not find Joe Baldwin or his wife therein. He found one quart of whisky outside of the back door on a little shelf. Officer Honeycutt, while Raines was in the house, went to the back door with Hayes Baldwin in charge, and while there a little negro boy ran out. This attracted his attention, and, while watching the boy, Hayes made his escape. He found in the yard a broken-down automobile and a box that had a half gallon of cork stoppers in it. By the garage was a small chicken house, and Honeycutt, throwing his searchlight in it, found seven five-gallon kegs of corn whisky. This they deposited with the four jugs at the gate. After the search, the officers, intending to use the automobile in which Hayes Baldwin had driven up to carry the liquor which they had found, were engaged in putting the liquor in the machine, when Hayes Baldwin, suddenly appearing, locked the machine so that they could not use it and again made his escape. It seems that the white people in Joe Baldwin's house were residents of the town of Wilson, and were on their way home when they stopped there. The white man claimed that his machine had broken down and that they stopped for the purpose of having it repaired. The officers, however, used his machine in carrying the liquor to Apex. The defendant was arrested on Friday afternoon, December 20th, about 75 yards from his home. He was left in the custody of the local deputy, Wall, on that occasion, and while the other officers went to search another house he made his escape. On the afternoon of the 20th they found, on defendant's premises, two five-gallon kegs of wine, one of which was set up in a corner of his garage with two glasses near it. This had a faucet which could be used only with a key. In this garage, too, they found a large number of wrappers for bottles, "the kind that are usually seen around them." They were pasteboards in the shape of pint bottles.

The officer Roy Honeycutt testified, as to the search on December 20th, as follows:

"I found a five-gallon jug about half full of Scuppernon wine, and a fifteen-gallon keg of Bullis wine, which was on the shelf in the garage, and a glass the size of that. One of them had a faucet that you could lock, and the lock was in the possession of Joe's wife, and that was put up there from the time we went there Wednesday night until Friday."

Defendant objected to this evidence, but it was admitted. This was defendant's second exception. His first exception was to the refusal of the court to permit an officer, who was a witness, to answer a question asked him on the cross-examination: "Did Mr. Harrison, the white man, tell you why he was at Joe Baldwin's house?" But testimony to this effect was afterwards admitted, without objection, and this is what they said to Officer Honeycutt:

"I had a conversation with the people in the house after I found the whisky. They didn't want to give me their names; I asked them two or three times. The older lady said her name was Mrs. Lambe, and the gentleman said he was Mr. Harrison and the other lady his wife. They told us the automobile was broken down, but it was the same automobile that was in the back yard, and it was the one they took us down to Apex in. They said their car was broken down there, and that they didn't know what kind of a house it was. They said they had not seen any whisky and would not have stopped there if they had known there was whisky there."

Defendant's third exception was taken to the court's refusal to give judgment as of nonsuit upon the evidence.

The remaining exceptions of the defendant were directed to the judge's charge, or to his refusal to charge as specially requested.

Exception 4 is founded upon the following state of facts: The judge had stated fully the contentions of the state upon the evidence and had followed this by a statement of the contentions of the defendant. The court, at this point, permitted the solicitor to make a statement of his contentions, as to the condition of the garage, but refused to embrace them in his charge. The court then stating that it allowed the defendant the same privilege, that is, to state his contentions, as to the condition of the garage.

Armistead Jones & Son, of Raleigh, and Percy J. Olive, of Apex, for appellant.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

WALKER, J. (after stating the facts as above). [1,2] We have not stated all of the evidence tending to show defendant's guilt, but only so much as is necessary to a proper consideration of the exceptions taken at the trial. There was ample testimony to prove that defendant had liquor in his possession for the purpose of sale.

The testimony to which the defendant objected, and which was admitted, was competent to show how the search of the defendant's premises was made and what was discovered. It laid the foundation for further proof that the liquor was on his premises with his knowledge and consent, and that some of it was placed there by him or at his request. The discoveries tended to show preparation for the sale of liquor. The conduct of the defendant, when he returned to his home, was not that of an innocent man.

The first exception taken to the testimony as to what was said to the officer by some of the parties found at defendant's house, about their being there and why they were there, is without merit, because, if the evidence was competent of itself, the defendant got the full benefit of it afterwards. The error, if any, was harmless, at least so far as the defendant was concerned.

The second exception is equally without any merit. It was competent, and relevant, to show what was found on the defendant's premises, in the garage, and the chicken coop, and the condition of those places. It aroused a grave suspicion of retailing liquor, and gave rise to even more than a suspicion, as it tended strongly to prove an actual sale of liquor. Seven five-gallon kegs of corn whisky or "monkey rum" in the chicken coop, a half gallon of cork stoppers, a fifteen-gallon keg of Bullis wine, a five-gallon jug of Scuppernong wine, a glass about the proper size, the bottle wrappers, the locked faucet, with the key in the possession of defendant's wife, and the defendant's behavior when he came back to his home, form an array of circumstances which cannot be denied any potency as evidence of guilt. The condition of the premises as described by the witnesses, was competent to show the intent and purpose of the defendant in having the liquor.

The refusal to nonsuit was correct. This follows from what we have already, and circumstantially, said about the evidence and its sufficiency. *State v. Atwood*, 166 N. C. 438, 81 S. E. 318; *State v. Turner*, 171 N. C. 803, 88 S. E. 523; *State v. Dobbins*, 149 N. C. 465, 62 S. E. 635; *State v. Blauntia*, 170 N. C. 749, 87 S. E. 101; *State v. Boynton*, 155 N. C. 456, 71 S. E. 341; *State v. Bush*, 177 N. C. 551, 98 S. E. 281. The evidence we have here consists of "pregnant circumstances," as said in *State v. Turner*, supra. It is the cumulation of facts that makes it all fit for the consideration of the jury, and not any single fact. The evidence in this case is stronger than was that in *State v. Jones*, 175 N. C. 709, 95 S. E. 576, and *State v.*

*Horner*, 174 N. C. 788, 94 S. E. 291, where we sustained the convictions for distilling liquor.

[3] The charge of the court was all that the defendant could ask for. It covered the points in controversy, and, when read altogether, was a correct statement of the law bearing upon the case, and the defendant had the full benefit of the instructions requested by him so far as he was entitled to them. It was not required that the judge should adopt the language of the requests. *Graves v. Jackson*, 150 N. C. 383, 64 S. E. 128; *Rencher v. Wynne*, 86 N. C. 268.

[4] The judge fell into error when he stated that the law presumed an intent, or a purpose, to sell from the bare fact of possession of more than a quart; but he promptly, and even immediately, corrected the error and gave the proper instruction, in accordance with *State v. Barrett*, 138 N. C. 630, 50 S. E. 506, 1 L. R. A. (N. S.) 626; *State v. Wilkerson*, 164 N. C. 432, 79 S. E. 888; and *State v. Bean*, 175 N. C. 748, 94 S. E. 705. The error was sufficiently retracted, and the correct rule given as to the prima facie case, presumption of innocence, reasonable doubt, and burden of proof. It also appears that defendant himself led the court into the error as to the presumption by one of his own requests for instructions (No. 11).

[5] There was no error in permitting the solicitor to restate his contentions while the court was recapitulating them on both sides. If the contentions were misstated, the judge's attention should have been called to it, so that the proper correction could then be made; otherwise it is too late after verdict to complain. *Bradley v. Mfg. Co.*, 177 N. C. 153, 98 S. E. 818.

The doctrine of actual and constructive possession was properly explained to the jury, in respect to its bearing upon the facts of this case, as it is stated in *State v. Lee*, 164 N. C. 533, 80 S. E. 405, and *State v. Bush*, 177 N. C. 551, 98 S. E. 281. There was evidence from which the jury could rightly infer that *Hayes Baldwin* was acting for defendant in bringing liquor to his premises for the purpose of sale, and also that the defendant was at times actually at his home and engaged in the sale of liquor from a stock, and a large one, which he kept on hand for sale, and at other times was constructively in possession of the premises and liquor for the same illegal purpose.

The trial was free from error, so far as we can see.

No error.

(178 N. C. 687)

**STATE v. BALDWIN. (No. 242.)**

(Supreme Court of North Carolina. Oct. 8, 1919.)

**1. CRIMINAL LAW §732—STATUTES PROHIBITING EXPRESSION OF OPINION IN CHARGE STRICTLY CONSTRUED.**

Revisal 1905, § 535, declaring that no judge in giving a charge to a petit jury in either a civil or criminal action shall give an opinion whether a fact is fully or sufficiently proven, being in derogation of the common law, must be strictly construed.

**2. CRIMINAL LAW §1166½(12)—REMARKS OF JUDGE NOT EXPRESSION OF OPINION AS TO GUILT OF DEFENDANT IN ANOTHER CASE.**

Where both defendant and his brother were separately convicted of having possession of intoxicating liquor for purpose of sale, the fact that the trial judge, in sentencing defendant's brother a week previous, remarked that in his opinion the two were delivering liquor to people of a particular town, is no ground for reversing judgment of conviction against defendant on the theory that such statement before bystanders and jury in first case was an expression of opinion as to defendant's guilt, for Revisal 1905, § 535, prohibiting the judge from expressing an opinion as to the facts, being in derogation of common law, should be strictly construed, and furthermore section 1959 required that the panel for the first week in which the remark was made should be discharged, so there was no probability that any juror trying defendant heard the remark.

**3. CRIMINAL LAW §1144(15)—PRESUMPTION THAT REMARKS OF JUDGE IN ONE CASE WERE DISREGARDED IN ANOTHER CASE.**

It will be presumed, where the judge in sentencing defendant's brother, who was also convicted of having possession of intoxicants for purpose of sale, made a remark as to their unlawful sales, that if any one who sat as a juror in the prosecution against defendant heard the remark it was disregarded.

**4. CRIMINAL LAW §589(4) — CONTINUANCE PROPERLY DENIED THROUGH JUDGE PREVIOUSLY TRIED ACCUSED'S BROTHER.**

Where defendant and his brother were both charged with having possession of intoxicating liquor for the purpose of sale, defendant is not entitled to a continuance because the judge before whom he was tried was the same as the one who tried defendant's brother a week previous.

**5. CRIMINAL LAW §1151—GRANT OF CONTINUANCE ON DISCRETION OF COURT.**

The granting or refusal of a continuance, like the granting or refusing of a severance or separation of witnesses, has been left to the sound discretion of the trial judge, and is not reviewable unless patent abuse appears.

**6. INTOXICATING LIQUORS §233(1) — MATTERS FOR CONSIDERATION ON PROSECUTION FOR KEEPING FOR SALE.**

In a prosecution for having intoxicating liquor in his possession for the purpose of sale,

the jury might consider that, when officers were proceeding to take and carry off the liquor which defendant had brought to his brother's residence, defendant, who had escaped, returned and locked his car which the officers were about to use.

Appeal from Superior Court, Wake County; Allen, Judge.

Hayes Baldwin was convicted of having in his possession spirituous liquor for the purpose of sale, and he appeals. Affirmed.

The defendant was convicted of having in his possession spirituous liquors for the purpose of sale. The evidence showed that on the night of December 18, 1918, he drove up in an automobile to the house of his brother Joe Baldwin, near Apex (who was also convicted at the same term of the same offense). At the yard gate he took out of the machine four jugs nearly full of whisky, one of them being a three-gallon jug. He was arrested by the officers just as he put down inside the yard the last of these jugs. One of the officers went inside the house leaving the defendant in charge of the other. The defendant thereupon made his escape. In the back yard of the house seven five-gallon kegs of corn whisky were found in the chicken house.

The officers, intending to use the defendant's car to transport the liquor to Apex, backed it up to the gate and commenced loading the whisky on it, when the defendant suddenly made his appearance and took the key out of the car, thus preventing it being used, and again made his escape. When the officers arrived at the house of Joe Baldwin, it was lighted up, and when Officer Raines went inside he found the wife of Hayes Baldwin playing the piano, and a little negro boy ran out of the house. There were in the house also two white people, two men, and two women who refused at first to give their names.

Upon this evidence the jury found the defendant guilty, and he appealed.

Armistead Jones & Son, of Raleigh, and Percy J. Olive, of Apex, for appellant.

J. S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

CLARK, C. J. [1-3] The exception chiefly relied on, it seems, was that the week before the judge, in sentencing Joe Baldwin (see State v. Joe Baldwin at this term, 100 S. E. 345), remarked that in his opinion Joe and Hayes Baldwin were not selling liquor to the people of Apex, but were delivering it to people in Wilson. This was in connection with the fact that the Wilson people found in the house who had been subpoenaed as witnesses had failed to attend.

The trial of the defendant Hayes Baldwin did not take place till the next week, and it

does not appear in the record that a single juror on the trial of the present defendant was present when Joe Baldwin was sentenced the previous week. Indeed, Rev. § 1959, required that the panel for the first week (when these remarks were made) should be discharged at the end of that week, and there is no probability that any juror who tried this defendant on Thursday of the following week knew of the judge's expression as to the Wilson people on Friday of the week before. Nor could his remarks be considered as an expression of an opinion in the trial of this defendant the following week any more than the verdict of guilty against Joe Baldwin on whom he was passing sentence.

At common law and in England to this day the judge is not forbidden to express an opinion upon the facts of any case; but it was deemed that the judge who is an integral part of the trial could be of aid to the jury in expressing an opinion upon the reasonable inferences to be drawn from the evidence, though, of course, he could not direct a verdict when there was conflicting evidence. The same rule still obtains in all the federal courts and the courts of nearly every state of the Union. It is therefore not an inherent right of a defendant that the judge should be restricted from expressing any opinion during a trial. The North Carolina statute, being a restriction upon the almost universal rule, cannot be extended beyond its terms, which are as follows:

Rev. 535. "No judge, in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion 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."

This restriction therefore forbids the judge only "in giving a charge to the petit jury" and from "giving an opinion whether a fact is fully or sufficiently proven." Being in derogation of the common law and of the practice and procedure in the English and federal courts and of the procedure generally elsewhere, we cannot extend it beyond its terms.

In *State v. Jacobs*, 106 N. C. 695, 10 S. E. 1031, where the judge remarked, just before the trial began, that the jailer had informed him that the prisoner "would escape if he had the opportunity," this was held not an expression of opinion forbidden by our statute. It was not given "in a charge to the jury," nor was it an expression of "opinion whether a fact is fully or sufficiently proven."

The court said:

"At common law, though the judge, as is still the rule, could not direct a verdict in any criminal case, nor in a civil case, where there was a conflict of evidence, there was no inhibition

upon his expressing an opinion upon the facts. It was thought that such expression of opinion, while not governing the jury, would be of assistance to them, coming from an impartial man of much experience in weighing evidence and in drawing conclusions therefrom. Such is still the practice in England and her colonies, in our federal courts, and indeed in most of the states of the Union. In North Carolina, in 1796, the [following] statute was passed which changed the practice in this respect: \* \* \* 'No judge, in giving a charge to the petit jury, either in a civil or criminal action, shall give an opinion whether a fact is fully or sufficiently proven, such matter being the true office and province of the jury.'"

The court added:

"It is difficult to see how the remark of the judge violated any provision of this statute. No juror had been selected, the remark was not in the presence of the jury, nor did it contain any opinion that 'a fact was fully or sufficiently proven.' No facts had been shown in evidence. Indeed, had the jury been impaneled, the statute prohibited the judge 'from expressing an opinion only upon those "facts" respecting which the parties take issue or dispute, and on which, as having occurred or not occurred, the imputed liability of the defendant depends.' *Ruffin, C. J., in State v. Angel*, 29 N. C. 27. To the same purport is the late case of *De Berry v. Railroad*, 100 N. C. 310 [6 S. E. 723]; also, *State v. Jones*, 67 N. C. 285; *State v. Robertson*, 86 N. C. 628, and *State v. Laxton*, 78 N. C. 564. In the latter case [in which the prisoner was convicted of rape], *Smith, C. J.*, says: 'It is quite obvious from the words of the act that its special object was to prevent the intimation of such opinion in connection with and constituting a part of the instructions by which the jury were to be governed, and when its influence on their minds would be direct and effective.'"

After making the above citations, the court, in *State v. Jacobs*, said further:

"Our juries are usually men of intelligence, competent to understand the evidence and draw their own conclusions as to the facts. To construe every remark incidentally made by the judge, in ruling upon debated questions arising on the trial or otherwise, to have such weight upon the mind of the jury as to bias the freedom of their verdict, is as little complimentary to the intelligence and sturdy independence of those who compose our juries as it is to the impartiality of those who are called upon to preside over our superior and criminal courts."

In *State v. Jacobs*, *supra*, the remark was made just before the trial began, but the jury had not been impaneled; the remark was not in a charge to the jury; nor was it an expression of opinion whether "a fact is fully or sufficiently proven," for no facts had been shown in evidence, and hence it was held that it was not a violation of our statute restricting the judge as to such matters. There the men who were subsequently on the jury were doubtless present in the court-

room at the time when the remark was made. In the present case the remark objected to was made six days previously in passing sentence upon a defendant in another case, and there is no evidence that any one was present who subsequently served on this jury, and the presumption is that there was not, for the previous jury had been discharged by operation of law at the end of the previous week.

In *State v. Angel*, 29 N. C. 27, quoted supra, the prisoner was convicted of murder, and the remark of the judge excepted to was made in the charge to the jury. Ruffin, C. J., said in that case that the act of the assembly restraining the judges from expressing to the jury an opinion as to the facts of the case applied only "to those 'facts,' respecting which the parties take issue or dispute, and on which, as having occurred or not occurred, the imputed liability of the defendant depends." This has been cited often since; among other cases, in *State v. Howard*, 129 N. C. 661, 40 S. E. 71, and in the very recent cases of *State v. Rogers*, 168 N. C. 116, 83 S. E. 161, and *Long v. Byrd*, 169 N. C. 659, 86 S. E. 574.

Among the cases citing *State v. Jacobs*, 106 N. C. 696, 10 S. E. 1031 (besides those already quoted) is *State v. Crane*, 110 N. C. 535, 15 S. E. 232, where the court says:

"The jury is an essential part of the judicial system among every English speaking people, and, while not perfect, the experience of the ages and the observation of the present are that it performs fairly well its part. Certainly no better substitute has ever been found. To underrate the intelligence of twelve honest, impartial men who try the question of fact submitted to them is a mistake. When aided by a just and intelligent judge, their verdicts are generally correct. Jurors are not expected to possess legal training. Their province is not to pass on questions of law, but their grasp of the facts is usually just and accurate, and probably not a court passes that upon the jury there are not men of equal mental capacity with the judge who presides, or the counsel who address them. Jurors are not in their nonage, and it is not just to underrate their intelligence. This court has heretofore said as much in *State v. Jacobs*, 106 N. C. 695 [10 S. E. 1031]."

The court in that case (*State v. Crane*) was remarking upon the exception that though the judge had withdrawn evidence from the jury it would still be affected by it.

In *State v. Jackson*, 112 N. C. 853, 17 S. E. 150, where the exception was that during the argument of a motion for continuance of a case in the presence, but prior to the impaneling of a jury a bystander had remarked in open court that the prisoner's wife had said she would not come to a trial because she would only help get her husband in jail, it was held that it was not ground for excep-

tion because the judge did not grant a continuance thereafter, saying:

"If such remarks were grounds for new trials, all men present who might possibly become jurors would need be sent out of the courthouse on the argument of preliminary motions. Remarks made by the judge on such motions do not come within the prohibition of the statute. *State v. Jacobs*, 106 N. C. 695 [10 S. E. 1031], and cases there cited. \* \* \* There is a presumption of law that jurors are men of sufficient intelligence to understand that their verdicts must be based solely upon the evidence adduced on the trial and the law laid down by the court."

In this present case, the remark of the judge in sentencing another party tried for committing the same offense does not appear to have been heard by any juror who sat in this case, and if it had been the jury would be presumed conclusively to have tried the case, according to their oaths, upon the evidence submitted to them.

[4, 5] The exception to the refusal of a continuance of the case of *Hayes Baldwin* because the same judge had tried *Joe Baldwin* the previous week has no foundation in precedent nor logically, for the facts are found by the jury only. 25 Cyc. 582, 583.

The granting or refusal of a continuance, like the granting or refusing of a severance, or the separation of witnesses, and like matters, has always been wisely and properly left to the sound discretion of the presiding judge, and not reviewable except in cases of patent abuse, which does not appear here. As was said in *State v. Southerland*, 100 S. E. 187, at this term:

"The judge is not a mere moderator, and it would detract very much from the efficiency and economy of the administration of justice if he were unnecessarily hampered with arbitrary rules as to matters which have always been committed to his sound discretion."

[6] The defendant also excepts that the court stated as a contention of the state that the jury had a right to consider as a circumstance that, when the officers were proceeding to take the whisky and carry it off, the defendant, who had escaped, came back on the scene and locked the car and again escaped. This was stated as a contention, but it would not have been error if the court had told the jury that it was a circumstance which they could consider in connection with the other evidence offered by the state in connection with having the liquor in his possession whether it was for an unlawful purpose.

There were numerous other exceptions; but, after a careful and full consideration of them, we are of opinion they require no discussion.

No error.

(178 N. C. 146)

## SPEIGHT v. WESTERN UNION TELEGRAPH CO. (Nos. 100, 101.)

(Supreme Court of North Carolina. Oct. 8, 1919.)

## 1. APPEAL AND ERROR ⇨843(2)—UNNECESSARY MATTERS NOT DETERMINED.

On an appeal in an action for damages for negligent alteration in transmission of a telegram, it is unnecessary to determine whether the message was sent out of the state to evade the state law where the message was intrastate as a matter of law.

## 2. COMMERCE ⇨28 — TELEGRAM BETWEEN POINTS WITHIN THE STATE SENT THROUGH ANOTHER STATE INTRASTATE MESSAGE.

Where the initial and terminal points of a telegram message are within the state, and there was a direct telegraph line of the defendant company between such points over which the message could have been transmitted without passing through another state, the message is intrastate, even though relayed through another state, and the defendant is liable under state law for negligent alteration in transmission, whether the alteration occurred within or without the state, in view of Const. U. S. art. 1, § 8, cl. 2, relating to interstate commerce, and amendment 10, reserving power to the states.

## 3. TELEGRAPHS AND TELEPHONES ⇨66(1) — TELEGRAM BETWEEN POINTS WITHIN A STATE SENT THROUGH ANOTHER STATE EVASION OF JURISDICTION.

In an action against a telegraph company for negligent alteration of a message in transmission between points within the state, in view of Laws 1919, c. 175, making such messages prima facie intrastate, and prohibiting their conversion into interstate messages, the burden was upon the defendant claiming the message was interstate to show that the transmission through another state was not done to evade the jurisdiction of the state, whose laws give damages for such negligence.

Allen, J., dissenting.

Appeal from Superior Court, Halifax County; Kerr, Judge.

Action by Addie Speight against the Western Union Telegraph Company. A verdict for plaintiff for damages was set aside, and a judgment of nonsuit entered, and both plaintiff and defendant appeal. Reversed.

This was an action for damages for the negligent alteration in the transmission of a telegram from Greenville, N. C., to Rosemary, N. C., both in this state. The message was as follows:

"Greenville N. C., 9:45 A. M.

"1—24—18.

"Mrs. Addie Speight, Rosemary, N. C.

"Father died this morning. Funeral to-morrow, 10:10 A. M. Appie O. Smith."

This message was delivered to the plaintiff at Rosemary, N. C., on the same day with the date changed from January 24 to January 23, 1918, thus making the telegram read: "Father died this morning (l. e., January 23d). Funeral to-morrow (l. e., January 24th)."

Upon receiving this message in the changed form, the plaintiff believed that her brother, who was the father of the sender of the message, died on January 23d and would be buried on the 24th, the date of its delivery, and it was impossible for plaintiff therefore to reach Greenville in time to attend the funeral. If the message had been correctly dated, it would have been apparent that the funeral was to take place on January 25th, and the plaintiff was thus misled and prevented from attending the funeral. The jury responded to the issues that the message sued on was sent out of North Carolina into Virginia and thence back into North Carolina "for the purpose of fraudulently evading liability under the laws of North Carolina," that it was "negligently changed in transmission in the manner alleged by plaintiff," and that she was entitled "to recover \$100 damages."

The court set aside the verdict, being of opinion that as a matter of law in no view of the testimony was the plaintiff entitled to recover, and entered a judgment of nonsuit. The plaintiff appealed.

The defendant's appeal is upon the ground that there was no evidence to submit to the jury upon the first issue whether the message was sent out of the state, through Weldon to Richmond, thence to Norfolk, and thence back through Weldon to Rosemary, to evade the state law.

The plaintiff's appeal is upon the ground that the court set aside the verdict as a matter of law because the message upon the evidence was interstate and therefore damages could not be recovered.

George C. Green, of Weldon, J. P. Pippen, of Littleton, and Murray Allen, of Raleigh, for plaintiff.

W. E. Daniel, of Weldon, for defendant.

CLARK, C. J. [1] We do not think it necessary to pass upon the question presented by the defendant's appeal, for we deem that as a matter of law this was an intrastate message, and hence governed by our decisions, and it is immaterial whether the message was sent through Weldon, N. C., to Richmond, Va., and thence to Norfolk, Va., and thence back through Weldon, N. C., to Rosemary, N. C., in order to evade the North Carolina laws applicable to the transmission of messages of this nature in intrastate commerce, or whether this remarkable circumlocutory method of transmission was due solely to the method which the defendant corporation had adopted for its own conven-

lence in transmitting messages from Greenville to Rosemary. Both these points are in this state, and the defendant has a continuous line entirely in this state and in operation from Greenville to Rosemary. It transmits messages from Greenville to Weldon (67 miles) without going through Richmond, and it transmits messages from Weldon to Rosemary without sending them through Norfolk. It could have transferred this message at Weldon, N. C., and it did not make this an interstate message because the corporation chose to forward it to Richmond, Va., thence to be sent back through Norfolk, Va., to Rosemary, N. C.

[2] It could as well have sent the message to Raleigh to which it has a direct line, and there to be transferred to Rosemary, to which point there is also a direct line from Raleigh all in this state.

It was the defendant's own method, adopted for its own convenience, or according to the notions of some superintendent, that there were two transfers made at Richmond and at Norfolk, both in another state, instead of by the natural method of one transfer point either at Raleigh or Weldon, both in this state.

If the defendant saw fit to adopt business methods requiring this remarkable system of making three transmissions each of greater length than the entire distance from Greenville to Rosemary, i. e. Weldon to Richmond, Richmond to Norfolk, and Norfolk to Rosemary, it does not concern the plaintiff, provided the message was delivered with promptness, and without this error in transmission, which was doubtless caused by the additional relays required by this system of transmission.

If a package were sent by mail route or by stage, or by wagon, from Greenville to consignee in Rosemary, there being a continuous route between the two points in such condition that it did not require the wagon or stagecoach to go through Virginia to get from Greenville, N. C., to Rosemary, N. C., this would be an intrastate transaction, and the fact that the carrier chose that roundabout method of making the transportation through another state would not make this interstate commerce.

Frequently cars are put into "through trains" which rarely stop to cut out cars. If a carload of tobacco were shipped from Greenville to Rosemary, there being, as there is, continuous rail connection between the two points, this would not become interstate commerce because the railroad company, being reluctant to cut out the car at Weldon, should for its own convenience carry it on to Richmond, thence send it to Norfolk, and then again tranship it from Norfolk through Weldon to Rosemary. The convenience or the whim of the carrier does not repeal the jurisdiction of the state over matters retain-

ed by it in its grant of interstate commerce to the federal government.

If the jurisdiction of the state depends upon the method which the telegraph company shall see fit to adopt in the transmission of messages from one point to another in the state, the state laws could be repealed entirely, and doubtless would be, by the defendant telegraph company simply sending every message between two points in this state to a point outside the state and thence back into North Carolina; for it would be almost impossible to prove that this was done to evade the state jurisdiction, since no one but the defendant and its agents can know its motive. The question is not the motive of the defendant in shifting around its messages in this most extraordinary manner, but whether it has a direct line between the two points, which is in regular use and not out of repair and which can be used without carrying the message to another state and thence back into this state. It is not a question of motive, nor of what method the defendant prefers to do its business, nor of red tape, but simply a question of fact whether the initial and terminal points are in this state and whether there is a direct telegraph line between the two points, in good condition and in use, over which the message can be transmitted without passing through another state. If so, it is an intrastate message whether it is actually sent through another state or not.

If commerce is between two points in the same state, the jurisdiction of the state over it is protected by the federal Constitution by which jurisdiction of interstate commerce is given to the federal government, and which provides that all power and authority not therein conferred is reserved to the several states. Whether commerce between two points in the same state is intrastate depends primarily upon whether both termini are in this state, and the only exception is when it is necessary to cross through the territory of another state in passing from the initial point in this state to the terminal point also in this state. This was held by Shepherd, C. J., in *Comrs. v. Telegraph Co.*, 113 N. C. 222, 18 S. E. 389, 22 L. R. A. 570, affirming the ruling of the Railroad Commission to that effect.

In *Leavell v. Telegraph Co.*, 116 N. C. 220, 21 S. E. 391, 27 L. R. A. 843, 47 Am. St. Rep. 798, this court affirmed the last-cited case, saying:

"In *R. R. Commission v. Telegraph Co.* (Albee's Case), 113 N. C. 213 [18 S. E. 389, 22 L. R. A. 570], the court held that telegraphic messages transmitted by a company from and to points in this state, although traversing another state in the route, do not constitute interstate commerce and are subject to the tariff regulation of the commission. In this it followed the unanimous opinion of the Supreme Court of the United States, delivered by Fuller,

C. J., in *R. R. v. Pennsylvania*, 145 U. S. 192 [12 Sup. Ct. 806, 36 L. Ed. 672]. To the same purport, *Campbell v. R. R.*, 86 Iowa, 587 [53 N. W. 351, 17 L. R. A. 443]."

In *Bateman v. Tel. Co.*, 174 N. C. 97, 93 S. E. 467, L. R. A. 1918A, 803, the message was transmitted from Hertford, N. C., to Plymouth, N. C., and there being no direct telegraph line entirely in North Carolina from Hertford, N. C., to Plymouth, N. C., the message was necessarily sent through Norfolk, Va., and thence to Plymouth, and the court held that if this was done in good faith it was an interstate message; but that is not the case here, where there is a complete line of wire running from Greenville to Rosemary entirely in the state. The *Bateman* Case did not present the anomalous situation which we have here of the message going through Weldon in this state to Richmond, Va., thence to Norfolk, Va., and thence back through Weldon, N. C., to Rosemary, N. C.

In *Lehigh Valley R. R. Co. v. Pennsylvania*, 145 U. S. 192, 12 Sup. Ct. 806, 36 L. Ed. 672, it was held that transportation from one point in a state to another point in the same state, but passing through part of another state, could be taxed by the state, and is not a tax upon interstate commerce. This was a unanimous opinion and written by Chief Justice Fuller. To same effect, *Seawell v. R. R.*, 119 Mo. 222, 24 S. W. 1002; *Campbell v. R. R.*, 86 Iowa, 587, 53 N. W. 351, 17 L. R. A. 443. In *Kansas City S. Ry. Co. v. R. R. Com'rs* (C. C.) 106 Fed. 353, it was held, citing the above cases and *Commissioners v. Tel. Co.*, 113 N. C. 213, 18 S. E. 389, 22 L. R. A. 570, that, "where the course of transportation [between two points in the same state] must be for a considerable part of the distance through another state," it is interstate commerce. This seems to be the modification, or rather interpretation, of the doctrine of the three cases named. Certainly it is the only reasonable limitation.

It has also been held that where a telephone line extends into another state this does not exempt it from state control in respect to persons and service and rates for persons within the state. *Tel. Co. v. Falley*, 118 Ind. 201, 19 N. E. 604, 10 Am. St. Rep. 114; *Tel. Co. v. Bradbury*, 106 Ind. 1, 5 N. E. 721; *Hockett v. State*, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201, 31 L. R. A. 807, note, 60 L. R. A. 646, note.

In *Tel. Co. v. Reynolds*, 100 Va. 459, 41 S. E. 856, 93 Am. St. Rep. 971, it was held:

"Where the initial and terminal points are both in the same state, and the telegram is transmitted over the wires of the same company, and concerns only citizens of that state, the message is a domestic message, and its character, in that respect, is not altered by the circumstance that the line passes in part over territory of another state. Nor is it affected by the fact that the company has established a relay office in such other state. The statute

deals with the company, not its agents. The company in this case undertook to transmit the message from one point to another in Virginia, and it cannot escape the penalty imposed by statute for its dereliction of duty on the theory that the statute has no extraterritorial force."

The same doctrine of this case was reaffirmed in *Tel. Co. v. Hughes*, 104 Va. 240, 51 S. E. 225, though that was subsequent to *Hanley v. R. R. Co.*, 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333, in which it was held that, where the continuous transportation of goods between two points in this state passes over a "route" a large part of which is outside the state, this is interstate commerce.

The case of *Hanley v. R. R. Co.*, 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333, is not in conflict with what is said above. That merely holds that when goods were transported on a through bill of lading from Ft. Smith, Ark., to Grannis, Ark., over respondent's railroad, a direct route running by way of Spiro, Ind. T., a total distance of 116 miles, of which 52 miles are in Arkansas and 64 miles in Indian Territory, this is interstate commerce, and the state of Arkansas cannot interfere in opposition to a regulation of Congress. This case certainly does not justify the extraordinary proposition sought to be built upon it that it puts it in the power of any state or telegraph company to destroy the right of the state to regulate intrastate commerce whenever it can by any device, however unnecessarily, divert transportation or transmission of a telegram, through another state. It is admitted here that this message could have been sent entirely in North Carolina more directly from Greenville to Rosemary, but it is alleged that it was contrary to the defendant's business methods to do so.

In *R. R. v. Leibengood*, 83 Kan. 25, 109 Pac. 988, 28 L. R. A. (N. S.) 985, it was held that where the line passes from one point in a state to another point in the same state, but a part of the route passes over the territory of another state, this is interstate commerce. This case (1910) has there full citation of authorities, an examination of which will show that, when the route necessarily passes over the territory of another state, this is interstate commerce; but none of them hold that in a case like this, where both points are in the same state, and there is a line of railroad or of telegraph between those points which can be used, that it becomes interstate commerce because the corporation sees fit to arrange its method of transportation or of transmission so as to make a wide detour through another state and then back into this state.

Most certainly we cannot concur in the proposition:

"But if the purpose was apparent to avoid the doctrine as to mental anguish as applied in this state and to place itself under the doctrine of



the federal courts, this alone would not be unlawful, and, if such an intent could be declared contrary to law, it would not subject the defendant to liability as motive, intent, or purpose, however reprehensible (if) not connected with some wrongful act, cannot be the subject of a civil action."

It is not a question of making the defendant company indictable, or liable for a civil action in transacting its business by sending it through another state, and then back into this state, but whether it can by so doing oust the jurisdiction of this state over intrastate commerce which was reserved to it when in the compact at Philadelphia in 1787 the states agreed to confer upon the federal government jurisdiction over interstate commerce, but reserved to themselves jurisdiction over intrastate commerce and all other matters not expressly conceded to the federal government.

The tenth amendment reads as follows:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

The power over interstate commerce conferred on the federal government is in article 1, § 8, cl. 3, as follows: "To regulate commerce with foreign nations, and among the several states, and with the Indian Tribes." The line between "state's rights" and federal rights has often been the subject of dispute, and has not yet been clearly marked and run in every particular. There is, unfortunately still, a "twilight zone"; but it is beyond dispute that, while the federal government has control over interstate commerce, the state has never granted it control over intrastate commerce, and when the transaction is between two points in the same state, and there is a continuous road or railroad or telegraph line between those points in good condition capable of being used, transportation and transmission between those points cannot be made interstate commerce by the company's method of doing business "when the purpose is apparent to avoid the doctrine as to mental anguish as applied in this state, and to place itself under the doctrine of the federal court." If this were true, if this were admissible, the line between state's rights and federal rights is not that drawn by the Constitution of the United States, but is nullified by the fraudulent purpose of the corporation to evade the lawful jurisdiction of the state which incorporated the defendant, gave it the right to do business here, and protects it and its officials and its property from violence. This doctrine would make the pecuniary interest of a money-making corporation supreme, and the powers of the people in governing the state under its own laws (within the limits of the federal and state Constitutions) entirely secondary to the evasive and fraudulent conduct

of a private corporation. Surely the state authority cannot be made "null and of no effect" in that manner. The creature that the state has made cannot be more powerful than its creator, like another Frankenstein.

The establishment of relay offices in another state in order to evade the laws of this state, or even if only to facilitate its business, is not a "necessary part" of the transmission of the message, except to the extent that it may avoid the jurisdiction of the state court, or possibly be some economy in the transmission of the message. Certainly, the defendant could not evade the 25-cent limit prescribed by the statute of this state for a message between two points, and charge in lieu thereof the rate for a message from Greenville, N. C., to Richmond, Va., plus the rate from Richmond, Va., to Norfolk, plus the rate from Norfolk, Va., to Rosemary, N. C., thus making three messages out of one. This demonstrates that there is but one message in law, and that is from Greenville, N. C., to Rosemary, N. C., for which the telegraph company can charge only the state limit of 25 cents for 10 words, and subject to the state law for damages for negligence in the transmission of said message.

It may be that the error was made by the operator at Greenville, N. C., or by the operator at Rosemary, N. C. No one knows, but the liability of the company is the same and is not less because it saw fit to send the message by such a remarkable roundabout way. It is therefore possible and probable that in the multitudinous and circumlocutory manner of handling this message the error may have been made, at some point outside the state.

[3] Besides, the order setting aside the verdict as a matter of law was erroneous, for it found necessarily as a matter of fact that this method of sending the message out of the state relaying it at Richmond and again at Norfolk, and then back into the state, was not for evasion; whereas, the defendant having a direct, continuous line between Greenville and Rosemary one-tenth of the distance and requiring only one relay at Weldon, the burden was on the company to show at least that this was not done to evade the jurisdiction of the state whose laws give damages for negligence in a case like this from which the company is exempted if it can make this an interstate message by this device.

The General Assembly, taking notice of this custom, which the defendant has adopted, enacted chapter 175, Laws 1919, "to prohibit telegraph companies from converting intrastate messages into interstate messages," which provides that "proof of the sending of any message from one point in this state to another point in this state shall be prima facie evidence that it is an intrastate message," and it was for the defendant to rebut this prima facie case.

There was error in setting aside the verdict. If the first issue had been material,

there was evidence to sustain the finding of the jury. The ground on which the court set the verdict aside and entered a nonsuit was because it held that upon the face of the evidence this was an interstate message, which we do not think was correct. But even if the finding upon the first issue was set aside, the other two issues left standing (as well as upon the finding of the first issue), the judgment should be entered in favor of the plaintiff, and the case must be remanded for that purpose.

Reversed.

WALKER, J., concurring in result.

ALLEN, J., dissenting.

(112 S. C. 528)

STATE v. COLUMBIA RY., GAS & ELECTRIC CO. (No. 10274.)

(Supreme Court of South Carolina. Aug. 26, 1919.)

1. REMOVAL OF CAUSES §18—ACTION UNDER STATUTE DEFENDED ON GROUND OF REPUGNANCY TO CONSTITUTION OF UNITED STATES NOT REMOVABLE.

State's action to obtain judgment of forfeiture of defendant's rights in a canal because of noncompliance with conditions subsequent of grant conveying rights, defended on ground that the statute authorizing action was in impairment of contract rights, was properly brought in state court, and application for removal to United States District Court was properly refused.

2. REMOVAL OF CAUSES §109—DUTY OF STATE COURT AFTER REMAND TO PROCEED WITH CASE.

Where ineffectual attempt was made to remove action from state to federal court, it was duty of state court, after federal court had remanded case, to proceed as if no removal had been attempted.

3. STATUTES §238—COURTS CAN ONLY GIVE EFFECT TO INTENTION EXPRESSED.

Courts lean against a construction which creates a condition subsequent, because forfeiture often results in unconscionable hardships; but they have no power, by construction, to make or modify contracts or statutes, their power being limited to discovery of and giving effect to intention expressed.

4. STATUTES §238—FORFEITURE WILL BE ENFORCED EXCEPT WHERE COURT HAS POWER TO RELIEVE AGAINST IT.

Where it is clear that forfeiture has been provided for, it is court's duty to enforce it, except where court has power to relieve against it and the circumstances call for the exercise of that power.

5. STATUTES §181(1) — IN CONSTRUCTION THAT WHICH IS CLEARLY IMPLIED IS AS BINDING AS IF EXPRESSED.

The purpose of construction is to find out the intention, however it may be expressed,

whether in apt and technical words or otherwise, and that which is clearly implied is as good as if expressed.

6. STATUTES §238—NO PARTICULAR WORDS NECESSARY TO CREATE CONDITION SUBSEQUENT.

No particular phraseology and no technical words are necessary to create a condition subsequent, and that which is expressed as a condition may be held to be only a limitation or restriction, and vice versa, if it clearly appears that such was the intention.

7. STATUTES §238—PROVISION FOR RE-ENTRY NOT NECESSARY TO CREATION OF CONDITION SUBSEQUENT.

Provision for reverter or re-entry for breach of condition subsequent is not necessary to creation of condition subsequent, since reverter and re-entry are but remedies which follow the breach as legal consequences.

8. STATUTES §205 — LEGISLATIVE INTENT MUST BE GATHERED FROM STATUTE AS A WHOLE.

The legislative intention must be gathered from the language of the statute as a whole, not that found in any particular section or proviso.

9. STATUTES §238—MUST BE CONSTRUED IN LIGHT OF CIRCUMSTANCES.

Statute must be read in the light of all the circumstances, the subject of the grant, and the purpose to be attained.

10. CANALS §20—GRANT BY STATE SUBJECT TO PERFORMANCE OF THE CONDITIONS MAKES PERFORMANCE A CONDITION SUBSEQUENT.

Act Dec. 24, 1887 (19 St. at Large, p. 1090), conveying canal "subject to the performance of the conditions and limitations herein prescribed," held to make performance of the prescribed conditions, relating to completion of canal, conditions subsequent, notwithstanding absence of provision for reverter or re-entry, except in proviso relating to only small part of work, such proviso being consistent with general intention to create conditions subsequent, and the purpose of grant being promotion of navigation, in view of Act Dec. 24, 1890 (20 St. at Large, p. 967).

11. CANALS §20—GRANT SUBJECT TO PERFORMANCE OF CONDITIONS NOT WAIVER OF RIGHT TO COMPLETION OF CANAL.

Act. Feb. 26, 1912 (27 St. at Large, p. 779), relating to completion of Columbia Canal, granted by state under Act Dec. 24, 1887 (19 St. at Large, p. 1090), subject to performance of specified conditions as to completion of canal, does not waive state's right to have canal completed.

12. PLEADING §216(1)—WHETHER REASONABLE TIME FOR PERFORMANCE OF CONDITION SUBSEQUENT HAS ELAPSED MATTER OF DEFENSE.

In action to enforce forfeiture for nonperformance of conditions subsequent, question of whether a reasonable time has elapsed for performance of the conditions is a matter of de-

fense, and not open to consideration on demurrer.

13. CONSTITUTIONAL LAW §121(1)—DECLARING FORFEITURE FOR NONPERFORMANCE OF CONDITIONS SUBSEQUENT NOT IMPAIRMENT OF CONTRACT RIGHTS.

Act March 12, 1917 (80 St. at Large, p. 348), declaring that rights of gas and electric company to canal under grant from state had been forfeited for nonperformance of conditions subsequent, and authorizing action to enforce performance of conditions, *held* not to impair obligations of contract.

Appeal from Common Pleas Circuit Court of Richland County; W. H. Townsend and R. W. Memminger, Judges.

Action by the State of South Carolina against the Columbia Railway, Gas & Electric Company. From an order refusing its motion to approve and accept its petition and bond for the removal of the case into United States District Court, and from an order overruling its demurrer to the complaint, defendant appeals. Affirmed.

Following is the order of Townsend, Circuit Judge, overruling demurrer, referred to in opinion:

"This cause comes on to be heard on demurrer to complaint, on the ground that it fails to state facts sufficient to constitute a cause of action. The first question is whether there is any condition in the grant by the state of the Columbia Canal working a forfeiture, because of noncompliance by the grantee therewith.

"A grant by 'an act of the Legislature \* \* \* differs from a grant of a private person in that it is both a grant and a law, and, as such, the intent of the law is to be kept in view, and its purpose effectuated, whenever the subject-matter of the grant comes in controversy; and that construction must be placed upon it which will preserve and carry out the object of the Legislature, however such construction may conflict with the principles of the common law, or prevent the attachment of equities which would spring from transactions between private parties.' Jackson, etc., R. Co. v. Davison, 65 Mich. 430, 32 N. W. 728; Schulenberg v. Harriman, 21 Wall. 44, 22 L. Ed. 551; Nash v. Sullivan, 29 Minn. 214, 12 N. W. 698; Oregon & Cal. R. R. v. United States, 238 U. S. 416, 35 Sup. Ct. 908, 59 L. Ed. 1360.

"The sense of a law or terms of an instrument may be found in other words than the quoted technical ones, if the intention is made clear.' Oregon & Cal. R. R. Co. v. United States, 238 U. S. 415, 35 Sup. Ct. 917, 59 L. Ed. 1360.

"A history of the Columbia Canal, as shown by our legislative acts, may be found in the opinion in State v. Water Power Co., 82 S. C. 181, 183 to 187, 63 S. E. 884, 22 L. R. A. (N. S.) 435, 129 Am. St. Rep. 876, 17 Ann. Cas. 343. As there suggested, the Broad and Congaree rivers are navigable streams, and, while the grant was obtained by the grantee

for his private advantage, it was made by the state primarily, in pursuance of a policy to benefit the community by the improvement of the navigability of these rivers (82 S. C. 186, 187, 63 S. E. 884, 22 L. R. A. (N. S.) 435, 129 Am. St. Rep. 876, 17 Ann. Cas. 343), and therefore to advantage to that extent the state. The grant contemplated a development of the subject of the grant by the grantee, in a direction that would promote the purposes of commerce. White v. Nassau Trust Co., 168 N. Y. 149, 61 N. E. 169, 64 L. R. A. 275. The property of the state in these rivers was ingrafted with a trust for the benefit of the public, and was inalienable except for certain public purposes. State v. Pacific Guano Co., 22 S. C. 83; Ill. Cent. R. R. Co. v. Ill., 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018; Scott v. Lattig, 227 U. S. 242, 243, 33 Sup. Ct. 242, 57 L. Ed. 490, 44 L. R. A. (N. S.) 107; United States v. Cress, 243 U. S. 316, 37 Sup. Ct. 380, 61 L. Ed. 746.

"As stated in Water Power Co. v. Electric Co., 43 S. C. 163, 20 S. E. 1002, by the present Chief Justice, the grant in question was made 'upon the conditions therein stated.' Prominent among these conditions was the improvement of the navigability of the rivers by the completion of the canal from Bull's sluice, on Broad river, to a point a few yards above Rocky branch on the Congaree. The statute which makes the grant clearly declares the purpose for which it was intended the granted property should be used, i. e., the improvement of the navigability of these rivers by the completion and maintenance of the canal as therein prescribed, which was in furtherance of the trust held by the state. Such use would inure specially to the benefit of the public, for whom the state was trustee. The grant may be declared void if the declared purpose is not fulfilled. Mahoning v. Young, 59 Fed. 96, 8 C. C. A. 27; Slegel v. Lauer, 148 Pa. 236, 23 Atl. 996, 15 L. R. A. 547. The grantee cannot disregard the requirements of the law under which he received the property, and still continue to hold it. In effect, the grant was of a limited fee, made on the implied condition of reverter in the event that the grantee failed or ceased to use the property for the purpose for which it was granted. Northern Pacific Ry. v. Townsend, 190 U. S. 267, 271, 23 Sup. Ct. 671, 47 L. Ed. 1044.

"This disposes of the first and second specifications of demurrer.

"The legislative act of 1917, coupled with the alleged demand for possession and refusal, is equivalent to the exercise of the right of re-entry. White v. Britton, 75 S. C. 428, 56 S. E. 232; Schulenberg v. Harriman, 21 Wall. 44, 22 L. Ed. 551. A judicial proceeding was authorized by the act of 1917. Des Moines v. City Railway Co., 214 U. S. 179, 29 Sup. Ct. 553, 53 L. Ed. 958; Defiance Water Co. v. Defiance, 191 U. S. 184, 24 Sup. Ct. 63, 48 L. Ed. 140; New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 22 Sup. Ct. 691, 46 L. Ed. 936; City of Detroit v. Detroit, etc., Ry. Co., 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592; Taylor v. Anderson, 234 U. S. 74, 34 Sup. Ct. 724, 58 L. Ed. 1218; Hammond v. Railway, 15 S. C. 10.

"The complaint shows no waiver by the state

of any breach of conditions in the grant. The other specifications of demurrer were not pressed in argument. The purpose of this action is to determine whether the alleged conditions existed in the grant, and whether the defendant and those under whom it claims have violated them. Both the conditions and violations are alleged. If the defendant has any defense, it must be shown by answer.

"It is therefore ordered, adjudged, and decreed that the demurrer to the complaint be, and is hereby, overruled; with leave to the defendant to answer, if it be so advised, within 20 days from the date of this order."

William Elliott and J. B. S. Lyles, both of Columbia, for appellant.

T. H. Peeples, Atty. Gen., B. L. Abney and J. Fraser Lyon, both of Columbia, and S. M. Wolfe, Atty. Gen., for the State.

HYDRICK, J. The state brought this action to obtain a judgment of forfeiture of the rights of defendant in and to the Columbia Canal, and to recover possession thereof. The complaint alleges that the state was the owner of the canal, and, in pursuance of an act of the Legislature, in 1887 (19 Stat. 1090), it was conveyed to a board of trustees—

"for the use and benefit of the city of Columbia, for the purposes hereinafter in this act mentioned, subject, nevertheless, to the performance of the conditions and limitations herein prescribed on the part of the said board of trustees and their assigns: Provided, that should the said canal not be completed to Gervais street within seven years from the passage of this act all the rights, powers, and privileges guaranteed by this act shall cease, and the said property shall revert to the state."

That it had been completed nearly to Gervais street, something more than half its proposed length, and the trustees were required to carry it on to the point where it was to empty into the Congaree river, as soon as practicable, and provisions were made therein for that purpose; that in 1892, in pursuance of an act of 1890, amending the act of 1887 (20 Stat. 967), the trustees conveyed it to the Columbia Water Power Company, "subject, nevertheless, to the conditions, limitations, provisos, and exceptions" contained in said acts, and in 1905 the Water Power Company conveyed it in like manner to defendant; that the chief inducement to the conveyance of the property by the state was to open navigation through the canal around the shoals in the Congaree and Broad rivers at and near their confluence, and develop the water power thereof south as well as north of Gervais street, all of which is provided for in minute detail by the terms of the acts referred to; that nothing has been done toward the completion of the canal south of Gervais street, notwithstanding it has long since been practicable to have done so, and defendant has allowed it to be obstructed, so as to prevent

the navigation thereof north of that street, and has abandoned the completion thereof, and the development of the water power contemplated south of that street; that by an act of 1917 (30 Stat. 348) the Legislature declared that the rights of defendant in and to said property had been forfeited, and the same had reverted to the state, on account of the failure to perform the conditions upon which it had been granted, and the Attorney General and other agents of the state therein named were directed to take such steps and institute such action as they might deem proper to recover possession thereof, unless defendant should, within 90 days after the passage thereof, make satisfactory arrangements with said officers and agents with reference thereto, as therein provided; and that defendant declined to make any arrangements whatever with regard thereto, and denied any obligation to perform the conditions of the grant.

Defendant sought to remove the case to the federal court on the ground that the act of 1917 was in effect a denial of due process of law, and an attempt by legislative fiat to impair the obligation of the state's contract. Judge Memminger refused to order removal, on the ground that no federal right was involved, and that defendant could contest the validity of the act of 1917 in the state court as well as in the federal court. Thereafter the federal court remanded the case, on the ground that no right under federal law was necessarily involved.

[1] There was no error in refusing the application for removal. *Taylor v. Anderson*, 234 U. S. 74, 34 Sup. Ct. 724, 58 L. Ed. 1218; *Arkansas v. Kansas & Texas Coal Co.*, 183 U. S. 185, 22 Sup. Ct. 47, 46 L. Ed. 144.

[2] Besides, when the federal court remanded the case it was the duty of the state court to proceed as though no removal had been attempted. *Railroad Co. v. Koontz*, 104 U. S. 5, 26 L. Ed. 643; *St. Paul, etc., R. Co. v. McLean*, 108 U. S. 212, 2 Sup. Ct. 498, 27 L. Ed. 703; *Empire Co. v. Towboat Co.*, 59 S. C. 549, 38 S. E. 156.

Defendant demurred to the complaint for insufficiency, on several grounds, the one chiefly relied upon being that the act of 1887 does not contain apt words to create a condition subsequent the breach of which would work a forfeiture. Judge Townsend overruled the demurrer in an opinion which will be reported. The conclusions therein announced are fully supported by the authorities cited.

[3] While courts lean against a construction which creates a condition subsequent, because that works forfeiture which often results in unconscionable hardship, they have no power by construction to make or modify contracts or statutes.

[4] Their power and duty is limited to the discovery of the intention therein ex-

fense, and not open to consideration on demurrer.

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Following is the order of Townsend, Circuit Judge, overruling demurrer, referred to in opinion:

"This cause comes on to be heard on demurrer to complaint, on the ground that it fails to state facts sufficient to constitute a cause of action. The first question is whether there is any condition in the grant by the state of the Columbia Canal working a forfeiture, because of noncompliance by the grantee therewith.

"A grant by 'an act of the Legislature \* \* \* differs from a grant of a private person in that it is both a grant and a law, and, as such, the intent of the law is to be kept in view, and its purpose effectuated, whenever the subject-matter of the grant comes in controversy; and that construction must be placed upon it which will preserve and carry out the object of the Legislature, however such construction may conflict with the principles of the common law, or prevent the attachment of equities which would spring from transactions between private parties.' Jackson, etc., R. Co. v. Davison, 65 Mich. 430, 32 N. W. 728; Schulenberg v. Harriman, 21 Wall. 44, 22 L. Ed. 551; Nash v. Sullivan, 29 Minn. 214, 12 N. W. 698; Oregon & Cal. R. R. v. United States, 238 U. S. 416, 35 Sup. Ct. 908, 59 L. Ed. 1360.

"The sense of a law or terms of an instrument may be found in other words than the quoted technical ones, if the intention is made clear.' Oregon & Cal. R. R. Co. v. United States, 238 U. S. 415, 35 Sup. Ct. 917, 59 L. Ed. 1360.

"A history of the Columbia Canal, as shown by our legislative acts, may be found in the opinion in State v. Water Power Co., 82 S. C. 181, 183 to 187, 63 S. E. 884, 22 L. R. A. (N. S.) 435, 129 Am. St. Rep. 876, 17 Ann. Cas. 343. As there suggested, the Broad and Congaree rivers are navigable streams, and, while the grant was obtained by the grantee

for his private advantage, it was made by the state primarily, in pursuance of a policy to benefit the community by the improvement of the navigability of these rivers (82 S. C. 186, 187, 63 S. E. 884, 22 L. R. A. [N. S.] 435, 129 Am. St. Rep. 876, 17 Ann. Cas. 343), and therefore to advantage to that extent the state. The grant contemplated a development of the subject of the grant by the grantee, in a direction that would promote the purposes of commerce. White v. Nassau Trust Co., 168 N. Y. 149, 61 N. E. 169, 64 L. R. A. 275. The property of the state in these rivers was ingrafted with a trust for the benefit of the public, and was inalienable except for certain public purposes. State v. Pacific Guano Co., 22 S. C. 83; Ill. Cent. R. R. Co. v. Ill., 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018; Scott v. Lattig, 227 U. S. 242, 243, 33 Sup. Ct. 242, 57 L. Ed. 490, 44 L. R. A. (N. S.) 107; United States v. Cress, 243 U. S. 316, 37 Sup. Ct. 380, 61 L. Ed. 746.

"As stated in Water Power Co. v. Electric Co., 43 S. C. 163, 20 S. E. 1002, by the present Chief Justice, the grant in question was made 'upon the conditions therein stated.' Prominent among these conditions was the improvement of the navigability of the rivers by the completion of the canal from Bull's sluice, on Broad river, to a point a few yards above Rocky branch on the Congaree. The statute which makes the grant clearly declares the purpose for which it was intended the granted property should be used, i. e., the improvement of the navigability of these rivers by the completion and maintenance of the canal as therein prescribed, which was in furtherance of the trust held by the state. Such use would inure specially to the benefit of the public, for whom the state was trustee. The grant may be declared void if the declared purpose is not fulfilled. Mahoning v. Young, 59 Fed. 96, 8 C. C. A. 27; Slegel v. Lauer, 148 Pa. 236, 23 Atl. 996, 15 L. R. A. 547. The grantee cannot disregard the requirements of the law under which he received the property, and still continue to hold it. In effect, the grant was of a limited fee, made on the implied condition of reverter in the event that the grantee failed or ceased to use the property for the purpose for which it was granted. Northern Pacific Ry. v. Townsend, 190 U. S. 267, 271, 23 Sup. Ct. 671, 47 L. Ed. 1044.

"This disposes of the first and second specifications of demurrer.

"The legislative act of 1917, coupled with the alleged demand for possession and refusal, is equivalent to the exercise of the right of re-entry. White v. Britton, 75 S. C. 428, 56 S. E. 232; Schulenberg v. Harriman, 21 Wall. 44, 22 L. Ed. 551. A judicial proceeding was authorized by the act of 1917. Des Moines v. City Railway Co., 214 U. S. 179, 29 Sup. Ct. 553, 53 L. Ed. 958; Defiance Water Co. v. Defiance, 191 U. S. 184, 24 Sup. Ct. 63, 48 L. Ed. 140; New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 22 Sup. Ct. 691, 46 L. Ed. 936; City of Detroit v. Detroit, etc., Ry. Co., 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592; Taylor v. Anderson, 234 U. S. 74, 34 Sup. Ct. 724, 58 L. Ed. 1218; Hammond v. Railway, 15 S. C. 10.

"The complaint shows no waiver by the state

of any breach of conditions in the grant. The other specifications of demurrer were not pressed in argument. The purpose of this action is to determine whether the alleged conditions existed in the grant, and whether the defendant and those under whom it claims have violated them. Both the conditions and violations are alleged. If the defendant has any defense, it must be shown by answer.

"It is therefore ordered, adjudged, and decreed that the demurrer to the complaint be, and is hereby, overruled; with leave to the defendant to answer, if it be so advised, within 20 days from the date of this order."

William Elliott and J. B. S. Lyles, both of Columbia, for appellant.

T. H. Peeples, Atty. Gen., B. L. Abney and J. Fraser Lyon, both of Columbia, and S. M. Wolfe, Atty. Gen., for the State.

HYDRICK, J. The state brought this action to obtain a judgment of forfeiture of the rights of defendant in and to the Columbia Canal, and to recover possession thereof. The complaint alleges that the state was the owner of the canal, and, in pursuance of an act of the Legislature, in 1887 (19 Stat. 1090), it was conveyed to a board of trustees—

"for the use and benefit of the city of Columbia, for the purposes hereinafter in this act mentioned, subject, nevertheless, to the performance of the conditions and limitations herein prescribed on the part of the said board of trustees and their assigns: Provided, that should the said canal not be completed to Gervais street within seven years from the passage of this act all the rights, powers, and privileges guaranteed by this act shall cease, and the said property shall revert to the state."

That it had been completed nearly to Gervais street, something more than half its proposed length, and the trustees were required to carry it on to the point where it was to empty into the Congaree river, as soon as practicable, and provisions were made therein for that purpose; that in 1892, in pursuance of an act of 1890, amending the act of 1887 (20 Stat. 967), the trustees conveyed it to the Columbia Water Power Company, "subject, nevertheless, to the conditions, limitations, provisos, and exceptions" contained in said acts, and in 1905 the Water Power Company conveyed it in like manner to defendant; that the chief inducement to the conveyance of the property by the state was to open navigation through the canal around the shoals in the Congaree and Broad rivers at and near their confluence, and develop the water power thereof south as well as north of Gervais street, all of which is provided for in minute detail by the terms of the acts referred to; that nothing has been done toward the completion of the canal south of Gervais street, notwithstanding it has long since been practicable to have done so, and defendant has allowed it to be obstructed, so as to prevent

the navigation thereof north of that street, and has abandoned the completion thereof, and the development of the water power contemplated south of that street; that by an act of 1917 (30 Stat. 348) the Legislature declared that the rights of defendant in and to said property had been forfeited, and the same had reverted to the state, on account of the failure to perform the conditions upon which it had been granted, and the Attorney General and other agents of the state therein named were directed to take such steps and institute such action as they might deem proper to recover possession thereof, unless defendant should, within 90 days after the passage thereof, make satisfactory arrangements with said officers and agents with reference thereto, as therein provided; and that defendant declined to make any arrangements whatever with regard thereto, and denied any obligation to perform the conditions of the grant.

Defendant sought to remove the case to the federal court on the ground that the act of 1917 was in effect a denial of due process of law, and an attempt by legislative fiat to impair the obligation of the state's contract. Judge Memminger refused to order removal, on the ground that no federal right was involved, and that defendant could contest the validity of the act of 1917 in the state court as well as in the federal court. Thereafter the federal court remanded the case, on the ground that no right under federal law was necessarily involved.

[1] There was no error in refusing the application for removal. *Taylor v. Anderson*, 234 U. S. 74, 34 Sup. Ct. 724, 58 L. Ed. 1218; *Arkansas v. Kansas & Texas Coal Co.*, 183 U. S. 185, 22 Sup. Ct. 47, 46 L. Ed. 144.

[2] Besides, when the federal court remanded the case it was the duty of the state court to proceed as though no removal had been attempted. *Railroad Co. v. Koontz*, 104 U. S. 5, 26 L. Ed. 643; *St. Paul, etc., R. Co. v. McLean*, 108 U. S. 212, 2 Sup. Ct. 498, 27 L. Ed. 703; *Empire Co. v. Towboat Co.*, 59 S. C. 549, 38 S. E. 156.

Defendant demurred to the complaint for insufficiency, on several grounds, the one chiefly relied upon being that the act of 1887 does not contain apt words to create a condition subsequent the breach of which would work a forfeiture. Judge Townsend overruled the demurrer in an opinion which will be reported. The conclusions therein announced are fully supported by the authorities cited.

[3] While courts lean against a construction which creates a condition subsequent, because that works forfeiture which often results in unconscionable hardship, they have no power by construction to make or modify contracts or statutes.

[4] Their power and duty is limited to the discovery of the intention therein ex-

pressed, and to giving it effect; and, if it is clear that forfeiture has been provided for and incurred, it is as much the duty of the court to enforce it as any other lawful provision, except, of course, in cases where the court has power to relieve against it, and the circumstances call for the exercise of that power.

[5] The purpose of construction is to find out the intention, however it may be expressed, whether in apt and technical words or otherwise; and that which is clearly implied is as good as if expressed.

[6] No particular phraseology and no technical words are necessary to create a condition subsequent; and even that which is expressed as a condition may be held to be only a limitation or restriction, and vice versa, if it clearly appears that such was the intention; and, when such condition is created, provision for reverter or re-entry for breach thereof is not indispensable, since these are but remedies which follow the breach as legal consequences.

[7] It makes little difference, therefore, that the statute does not provide for reverter or re-entry.

[8, 9] The legislative intention must be gathered from the language of the statute—not that found in any particular section or proviso, but from the statute as a whole—and it must be read in the light of all the circumstances, the situation and relation of the parties, the subject of the grant, and the purpose to be attained.

It appears from the numerous acts of the Legislature relative to the canal that the dominant purpose in providing for its construction was the improvement of navigation in the Congaree and Broad rivers, and to make it possible to obviate the obstruction caused by the shoals at and near their confluence. That purpose runs as an unbroken thread through the entire legislative history of the project, and nowhere does it appear more clearly than in the act of 1887, wherein it is so clearly expressed that no grantee thereunder can be heard to say that he did not contract with reference to it; and, so far as completed, the canal has become a part of the navigable waters of the state, and, as such, impressed by the Constitution with a trust for the public benefit. *State v. Water Power Co.*, 82 S. C. 181, 63 S. E. 884, 22 L. R. A. (N. S.) 435, 129 Am. St. Rep. 876, 17 Ann. Cas. 343. The other purposes contemplated, such as the development of water power, were incidental and subsidiary, but, nevertheless, important.

[10] Having in mind the purposes and subject-matter of the grant, let us consider the words thereof. It was made, "subject to the performance of the conditions and limitations herein prescribed." These words are apt and sufficient to manifest the intention that the continuance of the estate granted

was to depend upon the doing of the things prescribed; in other words, to make performance of them conditions subsequent, the breach of which would result in forfeiture.

Appellant argues that as the proviso to section 1, above quoted, does create a condition subsequent, and provides for forfeiture and reverter for breach thereof, in apt and technical language, under the rule "*expressio unius*" no other like condition was intended or it would have been expressed in like manner. The argument fails to appreciate the circumstances. The proviso expresses a particular intention relative to a comparatively small part of the work, and is not inconsistent with the general intention previously declared; it was not intended, therefore, to be restrictive of it. The general intention was that the grant should be subject to the performance not of one but of all the things required to be done.

[11] On the issue of waiver, appellant has called attention to the act of 1912 (27 Stat. 779), in which there is a provision which indicates the intention to allow such further time for completion of the work as might be fixed by the court. That shows no intention to waive the right to have the canal completed, but rather the contrary. Besides, the allowance of further time was conditioned upon acceptance of the terms of the act, and it does not appear that that was done. Therefore it cannot avail appellant on demurrer, which admits the allegation that a reasonable time has elapsed, and that appellant has refused to do the work at all.

[12] Whether a reasonable time has in fact elapsed, and whether, under all the circumstances, the drastic remedy of forfeiture should be adjudged, without giving further time, are questions upon which we express no opinion, since they are matters of defense, and will depend upon the facts and circumstances developed at the trial. There is authority for the proposition that where no time is fixed for the performance of a condition a reasonable time is intended, and no default can ordinarily attach until after a demand and refusal to perform. 3 Elliott on Contracts, § 2098. But, as said, all that is a matter of defense, and is not open to consideration on demurrer.

[13] The act of 1917 violates no constitutional right of defendant. The Legislature did not undertake to adjudicate anything, but merely declared that, in its opinion, a forfeiture had been incurred, and directed a judicial investigation and determination of the question in accordance with law. The action is to enforce the obligations of the contract and not to impair them.

Judgment affirmed.

GARY, C. J., and WATTS, FRASER and GAGE, JJ., concur.

(112 S. C. 457)

## COMMERCIAL SECURITY CO. v. DONALD DRUG CO. (No. 10262.)

(Supreme Court of South Carolina. Aug. 25, 1919.)

## 1. ALTERATION OF INSTRUMENTS §6 — CHANGE OF TIME AND PLACE OF PAYMENT MATERIAL.

A printed promissory note was materially altered, under Negotiable Instruments Law, §§ 124, 125, where the word "three," referring to the number of months after date payment was to be made, was erased, and the figure "4" interlined, and the place of payment was erased and changed.

## 2. BILLS AND NOTES §517—PROOF OF SIGNATURE TO NOTE AUTHORIZES ITS INTRODUCTION.

Proof of the signature is enough to allow introduction of a promissory note in evidence.

## 3. ALTERATION OF INSTRUMENTS §27(2) — BURDEN ON DEFENDANT TO SHOW MATERIAL ALTERATION NOT MADE BEFORE EXECUTION.

Where the signature to a materially altered promissory note is proved, the burden rests upon the defendant to show, under Negotiable Instruments Law, §§ 124, 125, that the alteration was not made before execution of the note.

## 4. ALTERATION OF INSTRUMENTS §25—PLEA OF MATERIAL ALTERATION A PLEA OF CONFESSION AND AVOIDANCE.

Where the defense in an action on a note is that a material alteration has been made, the plea is in the nature of confession and avoidance.

Appeal from Common Pleas Circuit Court of Anderson County; George E. Prince, Judge.

Action by the Commercial Security Company against the Donald Drug Company, a partnership, etc. Judgment for defendant, and plaintiff appeals. Reversed.

See, also, 96 S. E. 529.

S. M. Wolfe, of Columbia, for appellant.  
Bonham, Watkins & Allen, of Anderson, for respondent.

FRASER, J. [1] This is an action on four promissory notes. The defense, so far as this appeal is concerned, is material alterations. One note is set out in the case, and is as follows:

"\$225.00 P. O. Honea Path, State Ga. S. C.  
4 "Date Dec. 6th, 1916.

"Three months after date, for value received, we promise to pay to the order of Partin Manufacturing Company, Incorporated, two hundred and twenty-five dollars (\$225.00), at Citizens' Bank, Honea Path, S. C.

"The Donald Drug Co.,  
"Per S. F. Donald."

Instead of "Honea Path, S. C.," the original had "Honea Path, Ga." "Ga." was erased,

and "S. C." substituted; the printed word "three" was erased, and the figure "4" interlined; thus changing the date of payment and the place of payment. Both are material changes under the negotiable instrument statute. Laws 1914, P. 687. The statute reads as follows:

"124. Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers.

"But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.

"125. Any alteration which changes:

"(1) The date;

"(2) The sum payable, either for principal or interest;

"(3) The time or place of payment;

"(4) The number or the relation of the parties;

"(5) The medium or currency in which payment is to be made;

or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect is a material alteration."

I. The record shows that the plaintiff was a holder in due course. It fails to show that it was a party to the alteration, if there was an alteration, and therefore it was entitled to enforce payment of the notes according to the original tenor. There is nothing in the record to show that the plaintiff was not entitled to enforce the payment according to the original tenor. The note was dated December 16, 1916, and assigned to the plaintiff December 27, 1916.

[2,3] II. There is another question that is fairly made and should be settled in this case, and that is: Upon whom rests the burden of proof that a material alteration in an instrument was made before its execution? Upon this subject authorities elsewhere are in hopeless conflict, and the authorities in this state are not specific. It was held in *Wicker v. Pope*, 12 Rich. Law, 387, 75 Am. Dec. 732, and other cases, that it is a question for the jury to determine under all the circumstances when the change was made, and whether authorized by the maker or not. That, however, does not settle the question as to the burden of proof. The note shows an alteration on its face. It does not, as a matter of law, show when the alteration was made. The way to prove the execution of a note is to prove the signature. The proof of the signature is enough to allow the introduction of the note in evidence. If nothing more appears, then the plaintiff is entitled to a directed verdict. In this case the signature is not denied. That the instrument



has been altered is a matter of defense, and the burden is unquestionably on the defendant to prove his defense.

[4] Again, where the defense is that a material alteration has been made, the plea is in the nature of confession and avoidance. "While the note was good when executed, it has become void." He who alleges a change in conditions must show it. We know of no valid principle of law that throws on the holder of a negotiable instrument the burden of showing that it is valid.

A contrary holding would practically destroy many valid negotiable instruments. Banks and concerns doing a large business, dealing in negotiable instruments, must use printed forms. These forms must be printed to suit the majority of their customers. To hold that any change in the printed form to make it conform to the special contract between the parties throws upon the holder the burden of showing that the alteration was made before signing would be to practically destroy its value as a negotiable instrument. It may be said that this trouble can be obviated by a footnote, stating that the instrument was altered before signing. This overlooks the fact that the notation of alteration is a matter of as much suspicion as the alteration in the body of the instrument. It is just as easy to put in the notation of the alteration as it is to alter the instrument.

The judgment is reversed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

**LOVELAND v. M. S. NIMMONS CO.**  
(No. 10263.)

(Supreme Court of South Carolina. Aug. 25, 1919.)

Appeal from Common Pleas Circuit Court of Anderson County; George E. Prince, Judge.

Action by F. M. Loveland against the M. S. Nimmons Company. Judgment for defendant, and plaintiff appeals. Reversed, and new trial ordered.

S. M. Wolfe, of Columbia, for appellant.  
Bonham, Watkins & Allen, of Anderson, for respondent.

**FRASER, J.** The essential facts in this case are the same as those set forth in the case of *Commercial Security Co. v. Donald Drug Co.*, 100 S. E. 359 (heard at this term). There two cases are governed by the same principles, and the judgment is reversed, for the reasons stated in the above-stated case.

A new trial is ordered.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(112 S. C. 403)

**CHAPMAN v. WILLIAMS et al.** (No. 10238.)

(Supreme Court of South Carolina. July 14, 1919.)

**1. CONTRACTS §143—COURTS HAVE NO JURISDICTION TO MAKE CONTRACTS.**

It is not the province of the courts to make contracts for people, but only to enforce their legal contracts.

**2. REFORMATION OF INSTRUMENTS §26 — MORTGAGE CANNOT BE REFORMED BY CHANGING NAME OF PARTY.**

A note and mortgage cannot be reformed by changing the name of the obligee, where there is no evidence that there was any contract between the parties.

**3. REFORMATION OF INSTRUMENTS §25—NOT GRANTED WHEN FUTILE.**

An instrument will not be reformed where it would be futile to do so.

**4. TRUSTS §206(1)—VALIDITY OF MORTGAGE BY TRUSTEE.**

Trustees of a fund cannot give a valid mortgage to one having notice of the trust, unless the necessity for the mortgage is absolute and the trustees have the power to execute mortgages.

**5. REFORMATION OF INSTRUMENTS §7—MORTGAGE BY TRUSTEE TO DIVERT CORPUS OF ESTATE INVALID.**

A mortgage executed by and in the name of an individual trustee will not be reformed because the cestui que trust, a church, had received benefits, the mortgage not being absolutely necessary, being executed by the trustee to divert to current expenses the corpus, or a considerable portion of the corpus, of the trust estate.

**6. RELIGIOUS SOCIETIES §9—CHURCH NOT ESTOPPED BY CONDUCT OF TRUSTEE IN MORTGAGING PROPERTY.**

A church cannot be estopped, even by an unauthorized mortgage by its trustees of land, to deny that the church property was liable therefor, although the proceeds of the mortgage were expended for the benefit of the church.

Gage, J., dissenting.

Appeal from Common Pleas Circuit Court of Abbeville County; S. W. G. Shipp, Judge.

Action by Mrs. Belle Chapman against E. W. Williams, in his own right, and as Chairman of Board of Trustees of the Afro-American Presbyterian Church, and the Afro-American Presbyterian Church. Judgment for plaintiff, and the Afro-American Presbyterian Church appeals. Reversed.

J. M. Nickles, of Abbeville, for appellant.  
Wm. N. Graydon, of Columbia, for respondent.

**FRASER, J.** The record shows that Rev. E. W. Williams was the president in charge

of Ferguson and Williams College, for colored youths, located in the city of Abbeville, S. C. It was deemed for the best interest of all concerned to change the location of the college, and the defendant Williams secured an option on the tract of 40 acres of land then owned by the plaintiff respondent; the purchase price to be \$3,000. The defendant Williams then went North to raise the money to buy the land. In Washington he met a lady who gave him the \$3,000 with which to pay the purchase price of the land to be used for the college. He at once returned to Abbeville and called together the trustees and told them that he had the money to pay for the land; that the college was in need of supplies, but that he had an agreement with Mr. Chapman, the husband of the plaintiff, who was acting as her agent in the sale, by which the deed was to be made upon the payment of \$2,500; and that he would arrange for the other \$500. The trustees deny that they consented to the withholding of the \$500. Be that as it may, the defendant Williams deposited the \$3,000 in a bank in Washington and gave to Mr. Morse, the treasurer of Ferguson and Williams College, a check for \$2,500, and this sum was turned over to the plaintiff, and the plaintiff delivered the deed. The deed as it now appears was to the trustees of the Afro-American Presbyterian Church. The transfer of the property and management from Ferguson and Williams College to the Afro-American Presbyterian Church is not in question. The church popularly known as the "Southern Presbyterian Church" assisted in the management and furnished some trustees who were white men. The defendant Williams gave, not to the grantor, but to her husband, his individual note for \$500, and a mortgage of the land conveyed by the plaintiff to the defendant the Afro-American Presbyterian Church. Mr. Chapman died, and Mrs. Chapman, who was the sole beneficiary, found the note and mortgage among his papers. The note has not been paid. Mrs. Chapman brought this action to reform the note and mortgage, so as to substitute the Afro-American Church as the maker of the note and the mortgage, or in the mortgage in place of E. A. Williams, and to foreclose the same.

The case was tried in the court of common pleas, and a decree was made reforming the note and mortgage and ordering foreclosure. From this decree this appeal is taken, upon several exceptions. The appellant did not treat the exceptions *seriatim*, and we will not.

As this court views the record, only one question need be considered, and that is: Has the plaintiff made out a case for the reformation of the note and mortgage? The answer to that question is: She has not.

[1, 2] The plaintiff has failed to make out her case for two reasons:

(1) It is not the province of the courts to make contracts for people, but only to enforce their legal contracts.

There is no testimony in the record to show that there was any contract between the grantor or her agent on the one hand, and the Afro-American Presbyterian Church or their trustees on its behalf, that the obligation for the unpaid portion of the purchase money should become the obligation of the Afro-American Presbyterian Church. This would be the making of a new contract, and the court has no power to do so.

[3] (2) The second reason why the reformation would not be made is that it would be futile to do so.

[4] The donor made this donation for the purchase of the land. The deed was made to trustees, and the obligee had notice of the trust. This court does not say that under no circumstances will it allow trustees to put a mortgage on trust property, but three things must appear: (a) The necessity for the mortgage must be absolute; (b) the trustees must consent to the mortgage; and (c) the trustees must have the power to make the mortgage.

In this case it was convenient to use a part of the trust fund for other purposes, but it was not necessary. There was no testimony to show that the trustees consented and no testimony to show a power to mortgage.

[5] It is said that the plaintiff is in a court of equity, a court of conscience; and it is unconscionable to allow the defendant church to use the property of the plaintiff without making full payment therefor. The contract that the parties made has proven to have been very unwise, but the consequence of a reformation would be disastrous to all trust estates within the jurisdiction of this court. No trust estate would be safe if trustees were permitted to incumber trust estates with a mortgage, especially, as here, to divert to current expenses the corpus or a considerable portion of the corpus of the trust estate. The effect of a valid mortgage would be to endanger, if not destroy, the entire trust fund of \$3,000. It is the duty of the courts to preserve, and not to destroy, trust estates.

[6] It is said that the defendant is estopped by conduct in the use of the property and by knowledge by the trustees of the existence of the mortgage. The defendant the Afro-American Presbyterian Church could not be estopped, even by an unauthorized mortgage by its trustees.

For these reasons the judgment appealed from is reversed.

GARY, C. J., and HYDRICK and WATTS, JJ., concur.

GAGE, J., dissents.

(149 Ga. 404)

ENGLISH v. ENGLISH et al. (No. 1257.)

(Supreme Court of Georgia. Sept. 27, 1919.)

*(Syllabus by the Court.)*

1. GUARDIAN AND WARD ⇨68—MUNICIPAL CORPORATIONS ⇨519(1), 975—LIENS FOR PAVING IMPROVEMENTS ARISE BY OPERATION OF LAW AND NOT BY CONTRACT.

Liens for municipal taxes and street pavement assessments arise by operation of law, and do not depend for their validity upon contract, express or implied. Hence, where real estate of a ward is impressed by such liens, and his guardian pays them off, the guardian will be allowed, in an equitable accounting, to encroach upon the corpus of the estate for reimbursement, where there are not sufficient funds arising from income. The provisions of Civil Code 1910, §§ 3060, 3074, regulating disbursements by guardians, and limiting the power of guardians to bind their wards by contract and to create liens upon their property, do not militate against this ruling.

2. GUARDIAN AND WARD ⇨151—GUARDIAN CAN CHARGE STATUTORY COMMISSION AGAINST CORPUS OF ESTATE.

Where a guardian receives and disburses the estate of his ward, he is entitled to statutory commissions (Civil Code 1910, §§ 3071, 4062), unless he forfeits them on grounds provided by law (Civil Code 1910, §§ 4069, 4065); and in an accounting between the guardian and his ward, such commissions may be charged against the corpus of the estate, as well as the income.

3. GUARDIAN AND WARD ⇨153—SEPARATE ACCOUNTS SHOULD BE KEPT WITH EACH WARD.

Where a guardian represents more than one ward, he should keep separate accounts with them; and in an accounting with his wards, the guardian's accounts should show his status with each ward separately. If the accounts are mingled, the guardian will not be entitled to charge for such advances as are not shown to have been made for one particular ward. *Hudson v. Hawkins*, 79 Ga. 274, 4 S. E. 682.

4. EVEN DIVISION OF COURT.

The case was an equitable accounting between guardian and his ward, and was heard by the judge by consent without a jury. The case being for decision by six Justices, the court is evenly divided as to whether the trial judge erred in refusing the guardian any reimbursement from the corpus of the estate for permanent improvements on the ward's property constructed with money advanced by the guardian from his personal funds without any order of a court of competent jurisdiction. *Fish, C. J., Beck, P. J., and Atkinson, J.*, are of the opinion that some reimbursement should have been allowed. *Hill, Gilbert, and George, JJ.*, are of the contrary opinion.

5. DENIAL OF NEW TRIAL.

The foregoing rulings dispose of the controlling questions in the case. Under the rulings announced in the first and second headnotes, the judge erred in denying a new trial.

Error from Superior Court, Ware County; *J. I. Summerall, Judge.*

Equitable accounting between guardian and ward between A. P. English and J. E. English and others. Judgment for the latter, motion for new trial denied, and the former brings error. Reversed.

*J. L. Sweat and Wilson & Bennett*, all of Waycross, for plaintiffs in error.

*Parks & Reed*, of Waycross, and *Memory & Memory*, of Blackshear, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(149 Ga. 431)

J. B. McCrary Co. v. City of Glenn-Ville. (No. 1075.)

(Supreme Court of Georgia. Sept. 3, 1919. Rehearing Denied Oct. 1, 1919.)

*(Syllabus by the Court.)*

1. MUNICIPAL CORPORATIONS ⇨864(3)—CONTRACT FOR CONSTRUCTION OF LIGHT AND WATER PLANT—CREATION OF "DEBT" WITHIN CONSTITUTION.

Where a contractor enters into a contract with a municipal corporation for the construction and equipment of a light and water plant under a written agreement whereby some of the contract price is to be paid in installments through a series of years after the contract is completed, the effect of such a contract is to create a "debt" within the meaning of article 7, § 7, par. 1, of the Constitution of this state (Civ. Code 1910, § 6563), which limits the power of municipalities to contract debts, and is prohibited by that provision of the Constitution. *Renfroe v. Atlanta*, 140 Ga. 81, 78 S. E. 449, 45 L. R. A. (N. S.) 1173.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Debt.]

2. SALES ⇨456—CONTRACT FOR CONSTRUCTION OF LIGHT AND WATER PLANT ONE OF "CONDITIONAL SALE."

Where the contract also provides for retention of title in the contractor until the contract price is fully paid, for delivery of the plant after its completion to the municipality as lessee, and for a rental of \$1 per annum until all the deferred payments for the contract price have been made, which, when done, shall cause title to the property to vest immediately in the municipality, the contract is one of "conditional sale," as distinguished from a mere lease. *Hays v. Jordan*, 85 Ga. 741, 11 S. E. 833, 9 L. R. A. 373; *Ross v. McDuffie*, 91 Ga. 120, 16 S. E. 648; *North v. Goebel*, 138 Ga. 739, 76 S. E. 46.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Conditional Sale.]

3. MUNICIPAL CORPORATIONS  $\Leftrightarrow$  864(3)—EXECUTORY CONDITIONAL CONTRACT OF SALE ILLEGAL AND UNENFORCEABLE.

Under former decisions of this court, where a contractor constructed and installed a light and water plant in pursuance of an executory conditional contract of sale as described in the preceding notes, and delivered physical possession to the municipality, his right of action to recover the property or to enforce the payment of the contract price by the city was necessarily dependent upon the agreement by which title was reserved in him, and that agreement, being contrary to the express provisions of the Constitution, was illegal and not enforceable in law or in equity. *Abbott Furniture Co. v. Mobley*, 141 Ga. 456, 81 S. E. 196; *Sewell v. Norris*, 128 Ga. 824, 58 S. E. 637, 13 L. R. A. (N. S.) 1118; *Bugg v. Towner*, 41 Ga. 315; *Thompson v. Cummings*, 68 Ga. 124 (2); *Watkins v. Nugen*, 118 Ga. 373, 45 S. E. 262; *Butts County v. Jackson Bkg. Co.*, 129 Ga. 801, 811, 60 S. E. 149, 15 L. R. A. (N. S.) 567, 121 Am. St. Rep. 244; *Garrison v. Perkins*, 137 Ga. 744, 74 S. E. 541 (3).

(a) A contrary result was reached in the cases of *Chapman v. Douglas County*, 107 U. S. 348, 2 Sup. Ct. 62, 27 L. Ed. 378, *City of Bardwell v. Southern Engine Boiler Works (Ky.)* 113 S. W. 97, 20 L. R. A. (N. S.) 110, and cases in other jurisdictions; but they are not controlling.

4. DISMISSAL OF PETITION ON GENERAL DEMURRER.

Applying the principles above announced, there was no error in dismissing the petition on general demurrer.

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Action by the J. B. McCrary Company against the City of Glennville. Petition dismissed on general demurrer, and plaintiff brings error. Affirmed.

The petition alleges that in 1913 the City of Glennville desired to procure a system of electric lights and waterworks. It contracted with the J. B. McCrary Company to construct the same. The contract provided that title to the system should be retained by the McCrary Company until it was fully paid for. On December 3, 1914, the city found it impracticable, or legally impossible, to make the payments required of it under the original contract. The McCrary Company was unwilling to complete and deliver the system without payment. At this point a second contract was made. It recites the making of the contract of December 23, 1913; that the McCrary Company has furnished material and proceeded with the erection of the system to a point nearing completion; that under the original contract the city agreed that payment should be made in part by the sale of bonds issued for that purpose by the city and the balance as set forth in the contract of December 23, 1913; that it is

impracticable to comply with the terms of said contract by having the banks carry the amounts specified; that the McCrary Company has refused to complete the system, except upon compliance by the city with the terms of payment; that the city is unable to make these payments; that the mayor and council of the city have, by formal resolution passed in conformity with law, authorized the execution and delivery of this contract (December 3, 1914). This contract further recites that of the original contract price the city has paid all but a balance of \$4,851.21. It stipulates that the McCrary Company will complete the system and deliver it to the city, to be used by it, and that the city shall pay an annual rental of \$1; that title is to remain in the McCrary Company; that for the balance remaining unpaid on the original purchase price the city shall give its check for \$247.17, and four notes for stated amounts, due December 10, 1914, January 10, 1915, December 10, 1915, and December 10, 1916; that the rental provided for shall continue until all of said notes are paid, and that when this is done all amounts paid as rental shall be deducted from the notes; that upon failure of the city to pay said notes the McCrary Company shall have the right to enter upon the premises, remove all material, and sell the same, proceeds to be applied to the expense of sale, the debt due by the city to the McCrary Company, and any balance remaining to be turned over to the city. (The contract of December 23, 1913, is not in the record, and it does not appear how the payments were to be made.)

The petition also alleges that all of the notes given under the contract of 1914 have fully matured; that there is a balance of \$3,802.04 due thereon, which the city refuses to pay; that the city refuses to deliver the property to the McCrary Company; that the McCrary Company has the legal title as well as the right of possession; that the question of whether the indebtedness is legally enforceable against the city otherwise than through the right of the McCrary Company to retain title to the property until the money is paid is not material to its case, but that upon payment of said notes in accordance with the terms of the contract it will release to the city of Glennville all its right, title, and interest in the property and otherwise do full and complete equity; that the action is brought for the purpose of recovering possession of the property, and that the court may determine the respective rights of the parties; that the reasonable rental value of the property is \$2,500 per annum, and that the city is earning through its use \$3,000 per annum or other large sum; that these earnings are being appropriated by the city to its uses and purposes, and that the plaintiff is entitled to have the same

appropriated to it; that for the McCrary Company to take possession of the property, or to cause the same to be levied upon, without regard to the use to which the city is devoting the same, and the physical connections of the same to the property of private persons and consumers of the light and water, would greatly detract from its value; that 'it is necessary for the protection of the McCrary Company, as well as the city, that a receiver be appointed to take possession of the system, operate the same, collect and hold the earnings subject to appropriation to payment of plaintiff's claim or otherwise as the court may direct, and to sell the property, or otherwise dispose of it, or turn it over to plaintiff, as the court may direct. The prayers are: (1) For a decree establishing the title of the McCrary Company and its right of possession; (2) that the court adjust the equities between the parties, and by its process and decree compel the city to either pay the balance under the contract or surrender the property on such terms as may be equitable; (3) for the appointment of a receiver to take charge of the property and operate or sell the same as the court may order; (4) for general relief; and (5) for process.

The petition was demurred to upon the grounds: (1) No cause of action is set forth; (2) under the facts stated the plaintiff is not entitled to any relief; (3) so much of the petition as seeks the appointment of a receiver is especially demurred to, because the facts stated do not authorize the same; (4) the petition does not show that the claim or demand was presented to the governing authorities of the city before bringing suit. The demurrer was sustained, and the petition dismissed. The plaintiff excepted.

Little, Powell, Smith & Goldstein, of Atlanta, for plaintiff in error.

Jas. K. Hines, of Atlanta, for defendant in error.

GILBERT, J. Judgment affirmed. All the Justices concur.

(149 Ga. 376)

JASPER COUNTY v. BUTTS COUNTY et al.  
(No. 1179.)

(Supreme Court of Georgia. Sept. 23, 1919.)

(Syllabus by the Court.)

1. PLEADING  $\S$ 259—IN SUIT BETWEEN COUNTIES TO APPORTION TAXES AMENDMENT OF PLEA, AFTER NONSUIT REVERSED, PROPERLY ALLOWED.

In Jasper County v. Butts County, 142 Ga. 576, 83 S. E. 217, it was held, in effect, that the taxable situs of the realty constituting the electrical plant of the Central Georgia Power Company was in Jasper county as to all of

the property located in that county, and in Butts county as to all of the property located in Butts county; the boundary line between the two counties was also defined, so that Butts county should include the whole of the river where it separates the two counties. Afterwards Jasper county instituted another suit against the same defendants. It was alleged in the petition that a certain number of cubic yards of the dam constructed by the power company, as a part of its plant which lay in Jasper county, had been returned by the company and accepted by the comptroller general of the state, as located in Butts county, which would give Butts county the benefit of taxes on such part of the dam; whereas, the benefit should go to Jasper county. Certain figures were alleged, which showed the number of cubic yards returned in the respective counties to be in the ratio of one third to Jasper county and two thirds to Butts county. Other allegations were that there would be repetition of such returns so long as the "dam remains in its present form," and that in order to prevent a multiplicity of suits the court should decree the proportions in which the respective counties should share the taxes, presently as well as in future years. The answer of Butts county denied that there had been any improper return, and alleged that for want of information it was unable to admit or deny that similar returns would be made by the company in the future. At the trial a nonsuit was granted. On review the judgment of the trial court was reversed, the court holding also that certain evidence offered by the plaintiff was erroneously excluded. Jasper County v. Butts County, 147 Ga. 672, 95 S. E. 254. After that decision the plaintiff amended its petition by adding a second count which was in all respects the same as the first, except that the apportionment alleged was on the basis of the number of lineal feet of the dam in the respective counties. After that amendment the defendant Butts county amended its answer, alleging in substance that: (a) In Butts county there is a natural hill or abutment to which "the artificial structure called the dam" is affixed, which is as long as the entire artificial structure, and is used to hold back the water and serve all the uses of the dam and is a part thereof, and it should be taken into consideration as a part of the dam in ascertaining the taxable value; (b) the value of the property located in Butts county should be determined by the use in which it is employed. This amendment was allowed over objections in the nature of a general demurrer. On the trial the jury returned a general verdict for the defendants, upon which the court rendered a decree, which among other things provided "that the ratio of taxes to be returned to each of the counties [naming them], embraced in said return under the head of 'all other property,' be and the same is hereby adjudged to be in the future, so long as the said property remains in its present shape and form, of one third to two thirds, that is, one-third to be returned to Jasper county and two-thirds to Butts county, the same being the ratio observed in the return of the Central Georgia Power Company for the year 1916, which is hereby confirmed and adopted." The plaintiff made a motion for new trial, and excepted to a

judgment overruling the motion. In the bill of exceptions error was also assigned on the exceptions pendente lite duly filed to the judgment allowing the amendment to the answer, and likewise upon the decree, on the ground that it was unauthorized by the pleadings and evidence. *Held*:

The amendment to the plea was properly allowed.

## 2. MOTION FOR NEW TRIAL.

The several special grounds of the motion for new trial complaining of the omission to charge show no cause for reversal.

## 3. EVIDENCE TO AUTHORIZE DECREE.

There was evidence to support the finding for the defendant; and the verdict, considered in connection with the pleadings, was sufficient to authorize the decree.

Error from Superior Court, Henry County; W. E. H. Searcy, Jr., Judge.

Suit by Jasper County against Butts County and others. Verdict and decree for defendants, motion for new trial denied, and plaintiff brings error. Affirmed.

W. H. Key and Greene F. Johnson, both of Monticello, for plaintiff in error.

E. M. Smith and E. J. Reagan, both of McDonough, W. E. Watkins, of Jackson, and Hatcher & Smith, of Macon, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(149 Ga. 383)

CROSS v. CORDELL et al. (No. 1080.)  
(Supreme Court of Georgia. Sept. 27, 1919.)

### (Syllabus by the Court.)

HUSBAND AND WIFE  $\S$ 183—CONVEYANCE BY WIFE IN PAYMENT OF HUSBAND'S DEBTS VOID.

This is an action brought by a wife against two creditors of her husband, for the recovery of a described parcel of land; the contention of the plaintiff being that the defendants hold the land under deeds made by her in payment of her husband's indebtedness, and therefore that the deeds are void. Plaintiff died pending the suit, and her administrator was made party plaintiff in her stead. On the trial there was evidence which required instructions to the jury, without request, to the effect that if creditors of a husband enter into an arrangement or scheme for the purpose of having his wife execute a deed of gift of her property to the husband, and for him, in turn, to convey it to the creditors in satisfaction of his debt, the deed from the husband to the creditors in such circumstances stands just as if the wife, without conveying her property to the husband, had made a deed directly to the creditors for the payment of the husband's debts, and would

likewise be void; and this is true whether the creditors concocted such plan or scheme, or the husband did so, and they knowingly joined with him in its effectuation; and furthermore, if subsequently to the execution of such deeds by the wife to her husband, and by him to his creditors, for the purpose of paying his indebtedness with her property, another deed was executed by the wife conveying the same property to the same creditors, which expressly recited as its consideration a given sum of money paid to the wife, the ratification and confirmation of the prior deed of gift by the wife to the husband, and an agreement by the wife to withdraw a claim filed by her to the land in controversy, on a levy thereon of an execution issued upon a judgment in favor of the creditors against the husband, such transaction being entire, and not divisible, the last-mentioned deed would also be void. See *First National Bank of Cartersville v. Bayless*, 96 Ga. 684, 23 S. E. 851; *Mickleberry v. O'Neal*, 98 Ga. 42, 25 S. E. 933; *Bond v. Sullivan*, 133 Ga. 160, 65 S. E. 376, 134 Am. St. Rep. 199. The court in its instructions to the jury did not give them the legal principles above announced, therefore it was error to refuse the grant of a new trial upon the grounds of the motion assigning error upon the failure of the court so to do.

Error from Superior Court, Decatur County; W. C. Worrill, Judge.

Action by H. L. Cross, administrator, against Forest Cordell and others. Judgment for defendants, motion for new trial denied, and plaintiff brings error. Reversed.

W. I. Geer, of Colquitt, for plaintiff in error.

Hartsfield & Conger, of Bainbridge, for defendants in error.

FISH, C. J. Judgment reversed. All the Justices concur.

(149 Ga. 384)

ESTILL et al. v. ESTILL et al. (two cases).  
(Nos. 1126, 1169.)

(Supreme Court of Georgia. Sept. 27, 1919.)

### (Syllabus by the Court.)

1. TRIAL  $\S$ 235(5)—INSTRUCTION AS TO EFFECT OF POSITIVE AND NEGATIVE EVIDENCE ERRONEOUS.

Where, upon a material issue in a case, the evidence in behalf of one party is positive, and the evidence in behalf of the opposite party is negative, it is error to instruct the jury: "The existence of a fact testified to by one positive witness is to be believed rather than such fact did not exist because many witnesses who had the same opportunity of observation swear that they did not see or know of its having transpired. This rule does not apply when, two parties having equal facilities for seeing or hearing a thing, one swears that it occurred, the other that it did not," without the qualification that the witnesses in other respects are

found to be equally credible. *Humphries v. State*, 100 Ga. 260, 28 S. E. 25; *Atlanta Consolidated Street Ry. Co. v. Bigham*, 105 Ga. 498, 30 S. E. 934; *Southern Ry. Co. v. O'Bryan*, 115 Ga. 659, 42 S. E. 42; *Atlantic Coast Line R. Co. v. O'Neill*, 127 Ga. 685, 56 S. E. 986; *Alabama Great Southern R. Co. v. Brock*, 139 Ga. 248, 77 S. E. 20; *Ware v. House*, 141 Ga. 410, 81 S. E. 118; *Georgia Railroad, etc., Co. v. Radford*, 144 Ga. 22, 85 S. E. 1006. Consequently the trial judge did not err in granting a new trial on the ground assigning error upon the instruction just quoted.

**2. EVIDENCE §§291, 313—DECLARATIONS OF REPUTED FATHER SINCE DECEASED ARE ADMISSIBLE TO PROVE RELATIONSHIP.**

Where the paternity of a child is the issue involved, the declarations of the reputed father, since deceased, are admissible in evidence, under section 5764 of the Civil Code of 1910, which provides: Pedigree, including descent, relationship, birth, marriage, and death, may be proved either by the declarations of deceased persons related by blood or marriage, or by general repute in the family, or by genealogies, inscriptions, 'family trees,' and similar evidence." The weight to be given the declarations is a matter for the jury.

(a) The case of *Mobley v. Pierce*, 144 Ga. 327, 87 S. E. 24, differs on its facts from the present case, and does not require a contrary holding.

Hill, J., dissenting in part.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Suit by E. P. Estill, guardian, against the Citizens' & Southern Bank of Savannah, which interpleaded J. H. Estill and others. Verdict for plaintiff, motion for new trial granted, and plaintiff brings error, and defendants Estill and others take a cross-bill of exceptions. Judgment on both bills of exceptions affirmed.

John Holbrook Estill died on November 9, 1907, leaving a will the eighth item of which was as follows:

"And to the Citizens' & Southern Bank of Savannah one-sixth part, which it shall hold as trustee upon the following uses and trusts, namely, to pay the income therefrom to my son, Marion W. Estill, during the term of his natural life, for the support of himself and the support and education of his children, should he leave any, and after his death said income to be applied to the support and education of his children, the principal to be equally divided between them when the youngest child attains the age of twenty-one years. In the event of the death of either of said children during minority and without leaving issue, the share of the one so dying shall go to the survivor or survivors, children of a deceased child to represent the parent. If, however, my son, Marion W. Estill, should depart this life leaving no child or issue of a child him surviving, then the one-sixth part shall be equally distributed between the distributees of

the other five-sixths in the manner provided in this item."

Marion W. Estill, the son named in the foregoing item of the will, died on December 26, 1915. Marion W. Estill married Elizabeth Pate on October 30, 1902. After the death of Marion W., Mrs. Elizabeth Pate Estill, as guardian of Virginia Estill, alleged to be the child of Marion W. Estill and Elizabeth Pate Estill, called upon the Citizens' & Southern Bank of Savannah to pay to her the income which she claimed was rightfully due to her as guardian and as next friend of Marion Virginia Estill, under the eighth item of the will of John Holbrook Estill. The bank refused to pay over the income to the guardian, and the guardian filed suit against it in Chatham superior court. The bank filed a petition for interpleader, in which it alleged that it had been notified by the other legatees and claimants under the will of John Holbrook Estill that Marion W. Estill died without children or issue or child surviving him, that Marion Virginia Estill was not his child, and that she was not entitled to receive the income under the will. The parties at interest were required to interplead. Marion Virginia Estill, by her mother, Elizabeth Estill, as guardian and as next friend, filed an answer setting up the claim of the minor to the trust fund, and praying that the trustee be directed to pay the income of the trust property to the guardian. The heirs of John Holbrook Estill, entitled under his will to the property in the event Marion W. Estill died without child or the issue of child surviving him, in their answer alleged that Marion Virginia Estill was not the child of Marion W. Estill, but that the said Marion Virginia Estill was taken as an infant by Marion W. Estill and his wife, Mrs. Elizabeth Pate Estill, and claimed as their child for the purpose of securing to Elizabeth Pate Estill control of the income from the property in question and for the purpose of depriving the defendants of the same. The cause came on for trial at the November term, 1916, of Chatham superior court. The jury returned a verdict in favor of the guardian, and the defendants filed a motion for new trial, which was granted by the court. To this grant of a new trial the guardian filed exceptions, and the judgment of the court was affirmed by the Supreme Court at the October term, 1917. *Estill v. Estill*, 147 Ga. 358, 94 S. E. 304. In April, 1918, the case was again submitted to a jury in Chatham superior court. The plaintiff relied upon positive evidence, while some of the evidence for the defendants was negative in character.

The court, over objection of defendants, admitted in evidence the declarations of Marion W. Estill, made after September 9,

1912, tending to show that Marion Virginia Estill was his child. The ground of objection was that the declarations were made post litem motam. For the most part these declarations were contained in letters written by Marion W. Estill, while absent from his home, to his wife and to Marion Virginia. At the time the letters were written neither the paternity of the child nor her right to claim under the will of J. H. Estill, had ever been questioned by any member of the Estill family, so far as the record disclosed. In his charge the court instructed the jury as follows:

"The existence of a fact testified to by one positive witness is to be believed rather than such fact did not exist because many witnesses who had the same opportunity of observation swear that they did not see or know of its having transpired. This rule does not apply when, two parties having equal facilities for seeing or hearing a thing, one swears that it occurred; the other that it did not."

The jury returned a verdict in favor of the plaintiff. The defendants moved for a new trial, which was granted, upon the ground that the court erred in giving the above-quoted instruction (30th ground of the motion). The plaintiff sued out a writ of error, excepting to the judgment granting a new trial. The defendants, by cross-bill, excepted to the refusal of the court to grant them a new trial upon other grounds set out in the motion, and especially upon the grounds assigning error upon the ruling of the court in admitting evidence of the written and oral declarations of Marion W. Estill to the effect that Marion Virginia Estill was his child.

W. B. Stubbs, G. N. Alford, and Oliver & Oliver, all of Savannah, and Jas. K. Hines, of Atlanta, for plaintiffs in error.

Osborne, Lawrence & Abrahams, Robt. L. Colding, and T. P. Ravenel, all of Savannah, for defendants in error.

**PER CURIAM.** Judgment on both bills of exceptions affirmed. All the Justices concur, except ATKINSON, J., disqualified, and HILL, J., dissenting from the ruling in the second headnote.

**HILL, J. (dissenting).** I dissent from the decision of the majority of the court, so far as the second division of the opinion is concerned. Whether the letters and declarations objected to are admissible in evidence depends upon whether they were written or made ante litem motam, before the origin of the controversy, or whether they were written or made post litem motam, after the controversy arose on the question at issue. The weight of authority is to the effect that declarations made by a reputed father or relative are admissible in evidence to prove pedigree, provided they are made without

reference to any controversy which is about to arise as to such disputed fact. One of the earliest, and perhaps the leading case on the subject is that of William Fitzharding Berkeley, claiming as of right to be Earl of Berkeley, etc., reported in 4 Camp. 401. In that case it appeared that Frederick Augustus Berkeley, fifth Earl of Berkeley, died on August 8, 1810. During the same year the claimant presented a petition praying that a writ might be issued to summon him to Parliament by the title of Earl of Berkeley as eldest son of the late Earl, by Mary, Countess of Berkeley. The petition was referred to the House of Lords. The petitioner alleged that his father and mother were married in the parish of Berkeley, in the county of Gloucester, on the 30th of March, 1785. They were likewise married in the parish of St. Mary Lambeth on the 16th of May, 1796, till which time Lady Berkeley did not appear as his lordship's wife. The claimant, William Fitzharding Berkeley, was born before the second marriage, and was not until some time after the second marriage treated as their legitimate son. They had several children after the second marriage. The question to be decided in that case respected the legitimacy of the claimant, and that depended upon the reality of the first marriage alleged to have taken place between his parents. The Earl of Berkeley was one of the witnesses examined by interrogatories for the plaintiff, and in his depositions he swore positively to the reality of the first marriage and the plaintiff's legitimacy. Counsel for the claimant, after other evidence adduced, proposed to read this deposition as a declaration by the Earl of Berkeley as to the matter of pedigree respecting the legitimacy of his son. The admissibility of this evidence was objected to, and upon the question being submitted it was held that the deposition could not be received as evidence of the declarations of the alleged father as to the matter of pedigree. In delivering one of the opinions Bayley, J., said:

"But the father may have views of his own and a personal interest to serve by establishing the legitimacy of his eldest son. His eldest son may be of an age to cut off an entail, which cannot be done by means of the younger. There may be various other considerations in point of interest to influence the father, which, if exhibited by cross-examination, might in a great degree impeach, if not completely destroy, the effect of the evidence he has given. So it might turn out on cross-examination that he had made other contrary declarations, perhaps equally solemn as those to which he has been asked, and that his conduct towards his children and towards other persons had been such as to throw an entire discredit on his present asseverations. The learned judge then made some observations on the case of *Whitelocke v. Baker*, 13 Ves. 511, and *Goodright v. Moss*, Cowp. 591, and concluded by submitting it to their lordships as his opinion that the depositions of J. S. as evidence of declarations in



the matter of pedigree ought not to be received."

Wood, B., in the same case said:

"The admission of hearsay evidence of the declarations of deceased persons in matters of pedigree is an exception to the general law of evidence; and it has ever been received with a degree of jealousy, because the opposite party has had no opportunity of cross-examining the persons by whom the declarations are supposed to have been made. But declarations, to be received in evidence, as I have always understood, and as was said in the case of *White-locke v. Baker*, must have been the natural effusions of the mind of the party making them, and must have been made on an occasion when his mind stood in an even position, without any temptation to exceed or fall short of the truth. Upon this principle it has been the general rule, as far back as my experience and knowledge go, to reject hearsay evidence of the declarations of deceased persons, not only relative to matters in actual suit, but in dispute and controversy prior to the commencement of judicial proceedings. Though such declarations may in some instances be founded in truth, I have always understood it to be a general rule to reject them because of the possibility, nay probability, that they may have been made to serve one or other of the contending parties."

Also in the same case *Mansfield, O. J.*, said:

"In England, where the jury are the sole judges of the fact, hearsay evidence is properly excluded, because no man can tell what effect it might have upon their minds. (a) To the general rule, with us, there are two exceptions: First, on the trial of the rights of common and other rights claimed by prescription; and, secondly, on questions of pedigree. With respect to all these, the declarations of deceased persons, who are supposed to have had a personal knowledge of the facts, and to have stood quite disinterested, are received in evidence. In cases of general rights, which depend upon immemorial usage, living witnesses can only speak of their own knowledge to what has passed in their own time; and to supply the deficiency the law receives the declarations of persons who are dead. There, however, the witness is only allowed to speak to what he has heard the dead man say respecting the reputation of the right of way, or of common, or the like. A declaration with regard to a particular fact, which would support or negative the right, is inadmissible. In matters of pedigree, it being impossible to prove by living witnesses the relationships of past generations, the declarations of deceased members of the family are admitted; but here, as the reputation must proceed on particular facts, such as marriages, births, and the like, from the necessity of the thing, the hearsay of the family as to these particular facts is not excluded. General rights are naturally talked of in the neighborhood, and family transactions among the relations of the parties. Therefore what is thus dropped in conversation upon such subjects may be presumed to be true. But, after a dispute has arisen, the presumption in favor of declarations fails; and to admit them would lead to the

most dangerous consequences. Accordingly I know no rule better established in practice than this, that such declarations shall be excluded. With respect to questions of prescription, I have known many instances in which the rule has been acted upon. I never heard the contrary contended either as counsel or judge. I think the rule is equally applicable to questions of pedigree; and the violation of it here would be still more alarming. There is no difference between the declarations of a father and those of any other relative; and if the declarations of a father after the suit has begun be receivable, so must the declarations of all related to the parties, whatever their station in society, and whatever their private character. I do not feel that much mischief is likely to arise from such declarations being rejected. This question supposes *J. S.* to be the reputed father; and evidence of reputation must previously be given aliunde to render the declaration admissible. If the father is proved to have brought up the party as his legitimate son, this is sufficient evidence of legitimacy till impeached, and indeed it amounts to a daily assertion that the son is legitimate. On principle I think the evidence inadmissible. The weight of authority, I think, inclines to the same side. In the famous *Douglas Cause* hearsay evidence of all sorts was received, but that cause was tried by the law of Scotland, according to which it was receivable. In the *Anglesea Cause* many declarations of deceased persons were given in evidence; but after an attentive examination I cannot find that any of these had been made after the dispute had occurred. I myself took a note at the time of the case before Lord Camden, which states that on a question of the legitimacy of the son the declarations of the mother as to her marriage, made after the commencement of the suit were received after objection taken and debate had; but not a word appears to have been said of the prior decision of Lord Chief Baron Reynolds. Had it been cited I make no doubt that I should have enriched my store of notes with some account of it. In *Goodright v. Moss* the objection to the answer that it was post litem motam does not seem to have been taken; and upon examination it will be found that the new trial was granted on the ground that the general declarations of the father and mother had been rejected. I am not aware of any other authority upon the subject in our law; but the distinction of declarations ante litem motam and post litem motam is clearly taken in a foreign treatise of great learning, entitled *De Probationibus*. I have now only to notice the observation that to exclude declarations you must show that the *lis mota* was known to the person who made them. There is no such rule. The line of distinction is the origin of the controversy, and not the commencement of the suit. After the controversy has originated, all declarations are to be excluded, whether it was or was not known to the witness. If an inquiry were to be instituted in each instance, whether the existence of the controversy was or was not known at the time of the declaration, much time would be wasted, and great confusion would be produced. For these reasons I conceive that the deposition now offered in evidence is not admissible."

In *Greenleaf on Evidence* it is said:

"Declarations made during the course of a legal controversy are to be regarded as lacking in the guarantees of trustworthiness; it is generally conceded that declarations made post litem motam are inadmissible. To have this effect, the dispute must have been upon the very point in controversy, though there is room for much latitude in applying this limitation. On the other hand, it is immaterial whether litigation had actually begun, if the controversy existed." 1 *Greenleaf on Evidence* (16th Ed.) § 114e, pp. 201, 202.

Prof. Wigmore (2 *Wigmore on Ev.* § 1484) says:

"The existence of a controversy is only one circumstance (though the most common one) likely to produce a bias fatal to the trustworthiness of the declaration. Judicial opinion seems to hold, and properly, that other considerations may under certain circumstances operate to exclude the declarations. In general, they would be excluded where there is any specific and adequate reason to suppose the existence of a motive inconsistent with a fair degree of sincerity. In Lord Eldon's words, they must appear to be the natural effusions of a party standing in an even position."

In *Byers v. Wallace*, 87 Tex. 503, 29 S. W. 760, the Supreme Court of Texas held:

"The declarations of the father of the plaintiff W. that he had a nephew who went to Texas, and was killed in 1836, at what was known as the 'Fannin Massacre,' was inadmissible, because it established the declarant to be the sole heir of the deceased, and was contrary to the rule that the statement must be such as is not under the influence of any interest that would be active in inducing the declarant to depart from the truth."

Brown, J., after citing a number of authorities, said:

"In pedigree, matters of public interest, and ancient boundaries the law excludes declarations of all persons made post litem motam, because it presumes that even that interest one may feel in the success of his friend might bias the statement, and deprive it of its value as a statement impartially made."

There can be no rational distinction between a case where a declarant manufactures it for the benefit of a friend who is to profit by it after his death. In either case the evidence, if made post litem motam, must be excluded as being self-serving. In *Monkton v. Attorney General*, 2 Russ. & Mylne, 147, where the question of pedigree was involved, it was said on pages 160, 161, by the Lord Chancellor (Brougham):

"One restriction, however, clearly must be imposed; the declaration must be ante litem motam. If there be litem mota, or anything which has precisely the same effect upon a person's mind with litem contestatio, that person's declaration ceases to be admissible in evidence. It is no longer what Lord Eldon calls a natural effusion of the mind. It is subject to a strong

suspicion that the party was in the act of making evidence for himself. If he be in such circumstances that what he says is said, not because it is true, not because he believes it, but because he feels it to be profitable, or that it may hereafter become evidence for him, or for those in whom he takes an interest after his death, it is excluded, both upon principle and upon the authority of the cases, and among others of *Whitelocke v. Baker*. There is still more distinct authority in the *Berkeley Peerage Case*, where Mr. Justice Lawrence adopts almost the very language of Lord Eldon in *Whitelocke v. Baker*, and where, proceedings in equity having been instituted to perpetuate testimony, evidence of declarations was rejected upon the ground of litem contestatio. \* \* \* It was then asked, as an argument for a further restriction of the rule, 'If a man may sit down to frame a pedigree, how can you receive that pedigree in evidence like an ordinary declaration, when, non constat, he may not have been in the act of making evidence for himself, by preparing a document which would afterwards profit him, or those in whom he is interested?' To that I answer: Shew me that the pedigree in question was prepared with that view; bring it within the rule of either *Whitelocke v. Baker* or of the *Berkeley Peerage Case*; prove that it was made post litem motam, not meaning thereby a suit actually pending, but a controversy existing, and that the person making or concocting the declaration took part in the controversy; shew me even that there was a contemplation of legal proceedings, with a view to which the pedigree was manufactured; and I shall then hold that it comes within the rule which rejects evidence fabricated for a purpose, by a man who has an interest of his own to serve. The question then always will be (and so far I agree with the argument of the Crown): Was the evidence in the particular circumstances manufactured, or was it spontaneous and natural? If I thought that this came within the description of manufactured evidence, manufactured for a purpose connected with the present controversy, I should, of course, at once have rejected it."

Thus it will be seen that the doctrine of post litem motam extends not only to those who have a personal interest in the controversy, but if the declarations are made in the interest of those in whom the declarant takes an interest after his death, such statements are to be excluded. This does not change the general rule as to proving pedigree by hearsay evidence, as provided by our statute nor the rule which prevents living, interested witnesses from testifying, for in that case they can be cross-examined. Section 5764 of the Civil Code is as follows:

"Pedigree, including descent, relationship, birth, marriage, and death, may be proved either by the declarations of deceased persons related by blood or marriage, or by general repute in the family, or by genealogies, inscriptions, 'family trees,' and similar evidence."

But this section is subject to the qualification that the declaration must have been made ante litem motam. *Mobley v. Pierce*,

144 Ga. 327, 87 S. E. 24. Section 5768 of the Civil Code provides:

"The declarations and entries of a person, since deceased, against his interest, and not made with a view to pending litigation, are admissible in evidence in any case."

The converse of this proposition is equally true. Therefore, if such declarations were made with a view to a pending controversy and in the interest of declarant's friend, they should be excluded.

In the case of *Mobley v. Pierce*, supra, this court held:

"Declarations of deceased persons, related by blood or marriage to the family in question, are admissible in matters of pedigree, but before such declarations are receivable in evidence the relationship of the declarant with the family must be established by some proof independent of the declaration itself." "The foregoing rule is further qualified in that the declaration must have been made ante litem motam."

This ruling is in accord with the general weight of authority in outside jurisdiction. In the *Mobley Case*, supra, the Supreme Court of Georgia cites section 5764 of the Civil Code, and puts a construction on our statute with reference to proving pedigree in consonance with the authorities cited in this opinion and numerous others of like import. Such proposed testimony should be free from suspicion. 2 Wigmore on Ev. § 1481, and notes.

In view of the foregoing authorities, how stands this case? At the time of the probate of the will of John H. Estill, Marion W. Estill, the writer of the letters objected to as evidence, had been married 10 years, and had no children by his wife, Elizabeth Pate Estill; and there was evidence tending to show that it was impossible for her to bear children. Under the terms of item 8 of the will of his father, Marion W. had only the income from a one-sixth interest bequeathed to him during his natural life for the support of himself and the support and education of his children, should he leave any, until their majority, when it was to be theirs absolutely. His wife took nothing under the will. The interest of Marion in the estate terminated at his death; and if he left no child or issue of child surviving him, the share bequeathed to him was to be equally divided between the distributees of the other five-sixths interests, as provided in the will. If he left children, the principal was to be equally divided between them when the youngest child attained the age of 21 years. The motive, therefore, was present for adopting a child as his own, so that his widow, who took nothing under the will, and who, so far as the record discloses, had no separate estate of her own, could handle, as natural guardian of the alleged child, her remainder interest in the estate until she arrived at 21 years of age, and then under the will her interest, whatever it

was, could be shared by her mother. But it is argued that Marion had no interest in the estate after his death, and therefore no motive or interest in manufacturing testimony. As already pointed out, his widow was without property, and this he knew; and as Lord Chancellor Brougham well said in the *Monkton Case*, supra, if the declarant made statements, not because they were true, not because he believed them, but because he feels it to be profitable, or that they might become evidence for him, or for those in whom he takes an interest after his death, the evidence is excluded. Besides, Marion had no property of his own that he could leave his wife and thus provide for her. In the instant case the declarant doubtless loved his wife, for he so expressed himself repeatedly in his letters; and after the adoption of the child, if it was adopted, he doubtless loved the child, and he so declared. In one of the letters to his wife he said: "Yes, dear, I love you and baby, and nobody else." He doubtless wanted to see both provided for so far as he could after his death, and therefore the powerful motive of making the declarations as to the child's paternity subsequently to the origin of the controversy; and if so made they should not be received as evidence. Such declarations, in order to be admissible, as before observed, must be above suspicion. A reading of the entire record in this case will result in causing a strong suspicion as to the motive for this evidence; and if it does, under the authorities cited, it must be excluded. The fact that every letter was written and preserved is suspicious in view of the circumstances. Dr. Stothart, who had been the family physician, and who was a witness in the case, and to whom some of the letters objected to were written, and who had been the confidential friend and financial agent of Marion W. Estill, was asked on the trial if he had ever discussed with Mrs. (Elizabeth Pate) Estill and Marion W. Estill the terms of the will of Col. John H. Estill, as to where the income to "Joy Estill [Marion W.] would go after his death in the event he did not have a child." "Whether it would revert to the other heirs." He answered: "Yes; we talked about it. I possibly talked to Mr. Estill and Mrs. Estill—maybe both." This witness also testified that he was "on intimate terms with Mr. and Mrs. Estill," and he declares that the matter of the will and to whether the legacy left to "Joy" (Marion) Estill would revert to the other heirs after his death without his leaving a child or children was discussed. Here, then, is evidence that Marion had discussed the matter, and a powerful motive is shown for the adoption of a child, and making statements with reference to her in the interest of the wife, or widow, of Marion Estill, and the child after his death; and the rule excluding statements as to pedigree made post litem motam, as already shown, extends not only to the persons

making the declarations in their own favor, but to declarations made in the interest of those in whom he takes an interest after his death.

Under the principle ruled in the foregoing authorities it was error to admit in evidence the letters and declarations of Marion Estill, since deceased. See, besides the authorities already cited, 1 Gr. Ev. (16th Ed.) 217, § 131; Walker v. Countess of Beauchamp, 6 C. & P. 552, 561; Elliott v. Peirsol, 1 Pet. 328 (3), 7 L. Ed. 164; Rollins v. Wicker, 154 N. C. 559, 70 S. E. 934; Byers v. Wallace, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760; Monkton v. Attorney General, 2 Russ. & Mylne, 147.

(149 Ga. 463)

NOTTINGHAM et al. v. McKELVEY et al.  
(No. 1129.)

(Supreme Court of Georgia. Oct. 1, 1919.)

(Syllabus by the Court.)

2. WILLS §602(3) — DEVISE TO ONE AND, FAILING ISSUE, REMAINDER TO ANOTHER, CREATES DEFEASIBLE FEE.

A will declared: "I give and bequeath to my nephew, Willie H. Stubbs, the two-thirds interest in all the land that was deeded to me by my father on the 23d day of June, 1873, to have and to hold the same in fee simple. \* \* \* I give and bequeath to my nephew, Alpheus B. Stubbs, the remaining one-third interest in the land deeded to me by my father on the 23d day of June, 1873." By a codicil, executed on the same day the will was executed, it was provided: "I will and desire that if my two nephews, Willie H. Stubbs and Alpheus B. Stubbs, should die without heirs of their body, then that all my property that is willed and given to them go and be the property of [other named persons], to them and their heirs forever, in fee simple." *Held*, the words in the above items of the will and codicil give the land to the above-named nephews of the testatrix in fee simple, defeasible upon their dying without child or children, although such nephews survived the testatrix. Civ. Code 1910, § 3662; Gibson v. Hardaway, 68 Ga. 370; Ewing v. Shropshire, 80 Ga. 374, 7 S. E. 554; Brown v. Lane, 147 Ga. 1, 92 S. E. 517.

(a) The cases of Patterson v. Patterson, 147 Ga. 44, 92 S. E. 882; Heath v. Rhea, 149 Ga. —, 99 S. E. 298, are distinguishable upon their facts.

## 2. ERRONEOUS CONSTRUCTION OF WILL.

The trial court erred in construing the will and rendering judgment in accordance with the erroneous construction given.

Beck, P. J., dissenting.

Error from Superior Court, Bartow County; M. C. Tarver, Judge.

Action between W. D. Nottingham and others and J. N. McKelvey, administrator,

and others. Judgment for the latter and the former bring error. Reversed.

Milner & Farkas, of Albany, Watt H. Milner, of Cartersville, and W. D. Nottingham, R. Curd, and Hardeman, Jones, Park & Johnston, all of Macon, for plaintiffs in error.

G. H. Aubrey, of Cartersville, for defendants in error.

PER CURIAM. Judgment reversed. All the Justices concur, except

BECK, P. J. (dissenting). I dissent from the rulings made by the majority of the court in this case. See the case of Wilcher v. Walker, 144 Ga. 526, 87 S. E. 671, and cases there cited. See, also, the cases collected in the note to the case of Smith v. Smith, 25 L. R. A. (N. S.) 1045. Some of the cases there collected support the ruling of the majority, but a large number of them are in accordance with this dissent, and state clearly and convincingly the doctrine upon which it is based.

(149 Ga. 379)

KNOX v. REESE et al. (No. 1223.)

(Supreme Court of Georgia. Sept. 23, 1919.)

(Syllabus by the Court.)

1. ACTION §46, 50(3)—NUISANCE §32—PETITION TO ENJOIN OPERATION OF PUBLIC GINNERY IN RESIDENTIAL SECTION STATES CAUSE OF ACTION.

Several citizens owning homes in the main residential section of a town joined in a petition to have the defendant enjoined from the erection and operation of a public ginnery and feed-crushing outfit or mill in close proximity to the residences and homes of the respective petitioners, alleging, for various reasons set forth, that the operation of the plant by the means and in the manner stated would be a nuisance, and would result in damages in stated amounts to their respective dwellings; the market value of each being alleged. At a preliminary hearing an interlocutory injunction was refused. At the trial term the petitioners were allowed to amend their original petition by alleging that since the refusal of an interlocutory injunction the defendant had erected the ginnery and feed-crushing mill, and was operating the same as petitioner alleged in the original petition he intended to do, that it constituted a nuisance for the reasons set forth in the original petition, and that each of the petitioners had been damaged in designated amounts by the operation of the nuisance. The amendment included a prayer that each of the petitioners recover the damages which he had sustained by the erection and operation of the nuisance. The defendant demurred to the amendment, on the ground that it contained a misjoinder of parties plaintiff and causes of action. *Held*, that the petition set forth a cause of action, the amendment was

properly allowed, and the special demurrers were without merit.

(Additional Syllabus by Editorial Staff.)

**2. PLEADING**  $\S$ 214(1)—ALLEGATIONS OF PETITION TAKEN AS TRUE AGAINST DEMURRER.

The allegations of a petition, as well as those of an amendment thereto, are to be taken as true as against a general demurrer.

**3. EQUITY**  $\S$ 39(1)—HAVING JURISDICTION, WILL GRANT COMPLETE RELIEF.

A court of equity, having jurisdiction to enforce a common right of all the plaintiffs to enjoin the alleged nuisance, will seek to do complete justice by granting them all appropriate relief, whether legal or equitable.

George, J., dissenting in part.

Error from Superior Court, McDuffie County; H. C. Hammond, Judge.

Suit for injunction by R. W. Reese and others against P. S. Knox. Judgment for plaintiffs, and defendant brings error. Affirmed.

Archibald Blackshear, of Augusta, for plaintiff in error.

P. B. Johnson and J. B. Burnside, both of Thomson, for defendants in error.

**FISH, C. J.** Four citizens, owning homes in the main residential section of the town of Thomson, brought an action against the defendant, alleging in substance as follows: The defendant is preparing to erect on a lot near the respective homes of the plaintiffs a public ginnery, and a feed-crushing outfit or mill, and for the purpose of operating the same to use a steam engine or engines and boilers; that the dust, dirt, and lint necessarily escaping from the gins will be thrown into the air and continuously blown into the residences of the plaintiffs, greatly to their hurt, vexation, and injury, and causing them a great amount of extra work in sweeping and dusting, in order to keep their homes clean and habitable, and will be injurious to the health of the inmates of plaintiff's homes; that the smoke from the engines and boilers used for running the ginnery and mill will be continuously blown into their homes, damaging their furniture and furnishings, and smoking and blacking their residences; that public gins and mills are run throughout the day, and frequently late at night, and the noise made by the machinery and the blowing of whistles will render the homes of the plaintiffs almost uninhabitable; that, if the ginnery and mill should be erected and operated, numbers of wagons and teams will be around the same, and the noise, confusion, and crowding of wagons and teams will greatly disturb and annoy plaintiffs while in their homes; that the respective homes of plaintiffs are of stated values, and

the erection and operation of such ginnery and mill, for the reasons stated, will decrease the market value of their respective homes in designated amounts; and that the operation of the ginnery and mill, for the reasons stated, will be a nuisance, and will result in damage to the health, peace, and property of the plaintiffs. The prayer was for an injunction restraining the erection of such ginnery and mill. After the filing of demurrers, general and special, to the petition, and the answer of the defendant, the judge refused an interlocutory injunction.

The plaintiffs thereafter amended the petition substantially as follows: Since the refusal of an interlocutory injunction, the defendant has erected the ginnery and mill, and is operating the same, greatly to the damage of the plaintiffs in the respects and for the reasons set forth in the original petition. The amount in which each plaintiff has been damaged by the operation of the ginnery and mill since the refusal of the interlocutory injunction is set out, and there are prayers that the further operation of the ginnery and mill be enjoined as a nuisance, and that each of the plaintiffs recover against the defendant the amount of damage which each had suffered by the operation of the ginnery and mill. When the case came on for final trial, the defendant demurred, generally and specially, to the petition as amended—one of the grounds of demurrer being that distinct and separate claims are sought to be asserted by each of the plaintiffs against the defendant in one action; that the damages sought by each plaintiff are for different sums alleged to have been done the several plaintiffs by the defendant, the interest of each of the plaintiffs being several, and not joint; and that therefore there is a misjoinder of causes of action and parties plaintiff. All of the demurrers were overruled, and the defendant excepted.

[1] A nuisance is anything that worketh hurt, such inconvenience as would affect an ordinary reasonable man, or damage to another. Civil Code,  $\S$  4457. The maintenance and operation of a cotton ginning plant, in which machinery is used which separates dust and sand from the cotton and drives them with smoke into the air, and which produces noises by steam whistles and otherwise, and where the plant is so near residences that the comfortable enjoyment thereof is interfered with, and the market value thereof depreciated for the reasons indicated, constitutes a nuisance which will be enjoined. *Ponder v. Qultman Ginnery*, 122 Ga. 29, 49 S. E. 746; *Southern Cotton Oil Co. v. Overby*, 136 Ga. 69, 70 S. E. 664; *Southern Cotton Oil Co. v. Overby*, 139 Ga. 209, 76 S. E. 999; *Tate v. Mull*, 147 Ga. 195, 93 S. E. 212. A public nuisance may be enjoined

at the suit of individuals, when it appears that they will suffer special damage not shared in by the public. Civil Code, § 4455; City of Sylvester v. Tison, 133 Ga. 518, 66 S. E. 246, and citations.

[2] The allegations of the petition, as well as those of the amendment thereto, which are to be taken as true as against a general demurrer, are sufficient to show that the erection and operation of the ginnery and mill constitute a nuisance which may be enjoined at the instance of the plaintiffs. Therefore the general demurrer was properly overruled.

[3] While distinct and separate claims of different persons against another cannot be joined in the same action (Civil Code, § 5515), yet, where there is one common right to be established by several persons against another, they may join in the same suit against him, and equity will determine the whole matter in such action. Civil Code, § 5419. The several plaintiffs need not have an interest in all matters embraced in the suit; it is sufficient if each of them has an interest in some matter common to all; and where there is one common right sought to be established by several against one, equity will determine the whole matter. Civil Code, § 5419. All the plaintiffs in the present case have the common right to have the alleged nuisance complained of enjoined. The petition, as amended, embraces both equitable and legal rights. The equitable right is to have the operation of the alleged nuisance enjoined, and the legal right is to recover damages done each of the plaintiffs by the operation of the nuisance. Since the adoption of the Uniform Procedure Act of 1887 (Acts 1887, p. 64), legal and equitable rights may be enforced in the same suit. De Lacy v. Hurst, 83 Ga. 223, 9 S. E. 1052; Cohen v. Wolff, 92 Ga. 199, 17 S. E. 1029; Vaughn v. Georgia Co-operative Loan Co., 98 Ga. 288, 25 S. E. 441; Booth v. Mohr, 122 Ga. 333, 50 S. E. 173, and citations. A court of equity, having jurisdiction to enforce the common right of all of the plaintiffs to enjoin the alleged nuisance, will seek to do complete justice by granting them all appropriate relief, whether legal or equitable. The demurrer on the ground of misjoinder of parties plaintiff and causes of action was not meritorious.

The special demurrers on the ground that the petition was not sufficiently definite in setting forth wherein the erection and operation of the ginnery and mill would constitute a nuisance were not good.

Judgment affirmed. All the Justices concur.

GEORGE, J. (dissenting in part). All persons whose property is affected by a nuisance, though they own the property in sever-

alty and not jointly, may join in an action to abate the nuisance. The nuisance is a common injury to all of them, though the damages to each resulting from it are separate and distinct. The relief granted must be such as is common to all the plaintiffs. Therefore in such action the plaintiffs cannot have judgments for the damages done to the property of each. The precise question has been ruled in Grant v. Schmidt, 22 Minn. 1; Murray v. Hay, 1 Barb. Ch. (N. Y.) 59, 65, 43 Am. Dec. 773, and City of Paducah v. Allen (Ky.) 49 S. W. 343. The insertion of the prayer for the damages which the plaintiffs have respectively sustained by the alleged nuisance renders the petition multifarious. Neither the general principles of equity nor the Uniform Procedure Act of this state authorize a court of equity to grant such relief. The prayer for the damages which the plaintiffs respectively have sustained by reason of the alleged nuisance should have been stricken.

(149 Ga. 377)

EDENFIELD v. BRINSON. (No. 1227.)

(Supreme Court of Georgia. Sept. 23, 1919.)

(Syllabus by the Court.)

1. DEEDS  $\S$  38(8) — EVIDENCE  $\S$  353(14) — DEED NOT VOID FOR UNCERTAINTY OF DESCRIPTION.

Mrs. N. A. Dickerson brought ejectment against John Edenfield, Jr., executor of the will of John Edenfield, Sr. After the filing of the suit, the plaintiff died, and W. A. Brinson was appointed administrator upon her estate, and was made party plaintiff in the action. The description of the property in the deed alleged to have been executed by the defendant's testator to the plaintiff's intestate, and upon which the plaintiff relied for recovery, was as follows: "A certain tract of land lying in 58th district G. M., of said county [Emanuel], containing one hundred and fifty (150) acres [and not an indefinite number of acres, expressed by the words "more or less"], bounded as follows: East by the Oliver Mill branch; south by lands of John Edenfield, Jr.; west by the Bare Bay; north by lands of the said John Edenfield, Sr. [grantor]. Said lands to be cut from the place whereon I now reside." Held, that the deed was not void on its face for uncertainty or insufficiency of description, and, in view of the extrinsic evidence, which applied the description to the subject-matter, there was no error in admitting the deed in evidence.

2. EVIDENCE  $\S$  375 — PROOF OF GENUINENESS OF SIGNATURE BY MARK AFTER DEATH OF WITNESSES THERETO.

Where the alleged maker of an unrecorded deed, who signed by his mark, and the two subscribing witnesses to the instrument, are dead,

proof that the signatures of the two latter upon the instrument are in their genuine handwriting is evidence of the fact of execution; and the charge of the court, which in effect instructed the jury that such proof was prima facie evidence of the fact of the execution of the deed, was not contrary to law. Civil Code 1910, § 5834; *McVicker v. Conkle*, 96 Ga. 584, 24 S. E. 23 (1).

**3. APPEAL AND ERROR §=981—DISCRETION OF COURT AS TO NEWLY DISCOVERED CONFLICTING EVIDENCE AS GROUND FOR NEW TRIAL NOT REVIEWABLE.**

Where newly discovered evidence is relied upon as a ground for a new trial, and it appears from an examination of the approved brief of evidence that the alleged newly discovered evidence was cumulative and impeaching in character, and, from a counter showing made, that the evidence is conflicting as to the truth of some of the facts claimed to be newly discovered, the reviewing court will not interfere with the discretion of the court below in refusing a new trial upon such ground. Civil Code 1910, §§ 6085, 6086; *Atlanta Consolidated Street Railway Co. v. McIntire*, 103 Ga. 568, 29 S. E. 766 (2).

**4. APPEAL AND ERROR §=302(3)—SUFFICIENCY OF ASSIGNMENT OF ERROR AS TO ADMISSION OF EVIDENCE.**

*Mrs. N. A. Dickerson* died intestate. Her husband, one of her heirs at law, was a subscribing witness to the deed under which the plaintiff administrator claimed. The husband was permitted to testify that he signed the deed as a subscribing witness. The admission of this evidence is assigned as error in one ground of the motion for new trial. *Held*, that the assignment is insufficient. "To make an objection to evidence available in the reviewing court, it must appear that objection was made and upon what grounds it was made in the trial court." *Donaldson v. Chance*, 144 Ga. 469, 87 S. E. 395. It is not sufficient that the evidence was admitted over objection, nor that certain grounds of objection are contained in the amended motion for new trial. *Central of Georgia Railway Co. v. James*, 143 Ga. 753, 85 S. E. 920 (2), and cases cited.

**5. TRIAL §=85—EXCLUSION OF EVIDENCE ADMISSIBLE IN PART.**

A son and an heir at law of the plaintiff's intestate was sworn as a witness for the plaintiff. His evidence was objected to as a whole, upon the ground that, as a party interested in the result of the case, he was incompetent to testify to any transaction had with the defendant's testate. *Held*, that the overruling of the objection to certain testimony of the witness in bulk, some of which was not open to the objection made (conceding, without deciding,

that some of it was subject to the objection urged), is not ground for new trial. *M., D. & S. R. Co. v. Anchors*, 140 Ga. 531 (2), 536, 79 S. E. 153; *Fambrough v. De Vane*, 141 Ga. 794, 82 S. E. 249 (3); *L. & N. R. Co. v. McHan*, 144 Ga. 683, 87 S. E. 889 (2).

**6. SUFFICIENCY OF EVIDENCE—ASSIGNMENTS OF ERROR.**

The evidence authorized the verdict, and the assignments of error sufficient to raise any question for decision in this court do not show cause for reversal.

Error from Superior Court, Emanuel County; *R. N. Hardeman*, Judge.

Ejectment by *Mrs. N. A. Dickerson* against *John Edenfield, Jr.*, executor of *John Edenfield, Sr.*, in which, after plaintiff's death, *W. A. Brinson*, administrator of her estate, was made party plaintiff. Judgment for plaintiff, and defendant brings error. Affirmed.

*F. H. Saffold*, of Swainsboro, for plaintiff in error.

*Williams & Bradley*, of Swainsboro, and *B. T. Rawlings*, of Sandersville, for defendant in error.

*FISH, C. J.* Judgment affirmed. All the Justices concur.

(149 Ga. 379)

**EDENFIELD v. BOYD. (No. 1223.)**

(Supreme Court of Georgia. Sept. 23, 1919.)

(Syllabus by the Court.)

**COMPANION CASE.**

This case is controlled by the rulings made in the case of *Edenfield v. Brinson*, 100 S. E. 373, this day decided.

Error from Superior Court, Emanuel County; *R. N. Hardeman*, Judge.

Action between *John Edenfield, Jr.*, executor, and *W. B. Boyd*. Judgment for the latter, and the former brings error. Affirmed.

*F. H. Saffold*, of Swainsboro, for plaintiff in error.

*Williams & Bradley*, of Swainsboro, and *B. T. Rawlings*, of Sandersville, for defendant in error.

*FISH, C. J.* Judgment affirmed. All the Justices concur.

§= For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(149 Ga. 422)

**McKINNEY v. POWELL et al. POWELL v. McKINNEY et al. HULSEY v. SAME.**  
(Nos. 1262, 1263, 1264.)

(Supreme Court of Georgia. Sept. 27, 1919.)

*(Syllabus by the Court.)*

**1. EQUITY —22—EVIDENCE INSUFFICIENT TO SHOW GROUNDS FOR EQUITABLE INTERFERENCE WITH ADMINISTRATION.**

Under the facts contained in this record, no grounds are shown for the interference by a court of equity with the administration of the estate in question, and the general demurrer to the petition was properly sustained.

**2. PLEADING —218(4)—SUSTAINING GENERAL DEMURRER BY PART OF DEFENDANTS GROUND FOR DISMISSAL.**

The general demurrers filed by certain of the defendants went to the substance and merit of the entire petition; and having held that they were properly sustained, it was proper that the entire petition should be dismissed.

*(Additional Syllabus by Editorial Staff.)*

**3. COURTS —472(4)—EQUITY HAS CONCURRENT JURISDICTION WITH ORDINARY ON DISTRIBUTION OF ESTATE.**

Equity has concurrent jurisdiction with the court of ordinary for the purpose of distributing estates when a proper case is made.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Suit by Charles D. McKinney, as administrator with will annexed of Mary J. Rucker, deceased, against Frank A. Powell, John M. Hulsey, executor of Martha A. J. Powell, deceased, and others. General demurrers filed by certain of the defendants sustained, and petition dismissed, motion for rehearing and to vacate judgment denied, and Frank A. Powell, administrator, made a party defendant by amendment, and amended demurrer by him and other defendants sustained, and petition dismissed as to all defendants except Frank A. Powell, administrator, John M. Hulsey, executor, and others, retaining the case as to such defendants. Plaintiff excepts, and Frank A. Powell, administrator, and J. M. Hulsey, executor, also separately except. Affirmed on plaintiff's exceptions, and reversed on the exceptions of defendants Powell and Hulsey.

Charles D. McKinney, as administrator with the will annexed of the estate of Mrs. Mary J. Rucker, filed his equitable petition in Fulton superior court against Frank A. Powell, Herbert A. Sage, John M. Hulsey, Mrs. Maude Powell Turner, Ernestine Turner, Atlanta Trust Company, H. Chapman Powell, Travers Leigh Powell, T. P. Hinman, W. F. Young, W. J. Houston, and others, the defendants named being legatees, or representatives of legatees, or heirs of deceased

legatees, or persons having claims against legatees under the will of petitioner's testator. In his petition he sets forth the circumstances under which he became such administrator, succeeding the executor, Herbert A. Sage, who served in that capacity for a short time, and recites also the history of his administration from the date of his appointment in January, 1911, up to the time of filing the equitable petition now under consideration, in August, 1917. Among the first acts of petitioner was his filing of a petition in the superior court for the construction of certain items of the will of his testator, one of which was item 3, reading as follows:

"I give to my sister, Mrs. Martha A. J. Powell, \$20,000.00 during her natural life, she to enjoy the income from the same, and at her death said amount with the accumulations, if any, to be equally divided between her children. If I should survive my sister Martha, then the legacy herein to be equally divided between her children."

In construing this item of the will the court held that the administrator should pay said fund of \$20,000 to a trustee, and not directly to the life tenant. A bequest of \$5,000 as an endowment fund for the Presbyterian Hospital of Atlanta was construed by the court to be a lapsed legacy, inasmuch as the said hospital had surrendered its charter and ceased to exist. And other items of the will, not necessary here to be mentioned, were construed in pursuance of the petition filed by McKinney, administrator.

In the present case the petitioner asks for a further construction of item 3 of the will, alleging that at the time of the aforementioned decree construing this item Mrs. Martha A. J. Powell, the life tenant, was in life and had four children, to wit, Frank A. Powell, Miss Ella M. Powell, Ned Powell, and H. Chapman Powell; that H. Chapman Powell died on or about January 20, 1915; that his mother, Mrs. Martha A. J. Powell, died in June, 1917; that the language of said item is such as to make it uncertain whether or not the remainder interest in said \$20,000 legacy vested in the four children of said Mrs. Martha A. J. Powell at the time of the death of the testator, or whether it was contingent; that H. Chapman Powell left two sons, who are his sole heirs at law and are parties to this litigation, who claim that said remainder interest vested and that they are entitled to the interest in said \$20,000 that would have gone to their father had he survived his mother; that upon the death of H. Chapman Powell, who died in Hall county, Ga., Frank A. Powell, his brother, applied to the ordinary of that county for letters of administration upon the estate of H. Chapman Powell, deceased, alleging in his application that he was the next of kin of



the said deceased, and upon this application an order was passed by the ordinary purporting to appoint Frank A. Powell administrator of the estate of H. Chapman Powell; that subsequently the administrator thus appointed filed his petition to the court of ordinary, praying leave to sell the remainder interest in said \$20,000 legacy, one-fourth of which he claimed vested in the estate which he represented. But McKinney, administrator, alleges that the language of the petition to sell, and the order passed thereon, are vague and inconsistent, and because of this indefiniteness there is a grave doubt as to whether or not any title passed under the attempted sale which was had pursuant to said petition; that at the time of said attempted sale Mrs. Martha A. J. Powell was in life and claimed to have purchased the remainder interest, which she alleged vested in the estate of H. Chapman Powell, deceased; that during her life she notified petitioner that she claimed this remainder interest by reason of her purchase of the same at said alleged sale; that subsequently to the death of Mrs. Martha A. J. Powell, John M. Hulsey, the executor of her will, also notified petitioner that he, as such executor, claims the one undivided fourth interest in said \$20,000 legacy; that the two sons of H. Chapman Powell, to wit, H. Chapman Powell, Jr., and Travers Leigh Powell, being his sole heirs at law, claim that said sale was void, for the reason that, in the first place, the appointment of Frank A. Powell as administrator was void, he having fraudulently stated in his application for appointment that he was the next of kin of the deceased, H. Chapman Powell, and that all proceedings predicated upon his appointment thus fraudulently procured were void. Frank A. Powell filed in the court of ordinary what purported to be his final return as administrator and obtained an order purporting to grant him a discharge.

In an amendment to the petition it was alleged that subsequently to the filing of the original petition Frank A. Powell filed another petition with the ordinary of Hall county, alleging that he is one of the next of kin of H. Chapman Powell, deceased, and praying that he be appointed administrator de bonis non of the latter's estate, and thereupon an order was passed by the ordinary, purporting to appoint him such administrator; and it is alleged that the sons of H. Chapman Powell, deceased, claim that this further action on the part of Frank Powell was a fraud upon the court and upon them, and that the order appointing him administrator de bonis non is void; and to determine this question petitioner McKinney asks a ruling of a court of equity, stating in his petition that he has paid over no part of the one-fourth undivided interest in the \$20,000 legacy in controversy.

One provision contained in a codicil to the will reads as follows:

"I appropriate from my estate the sum of \$4,000.00 to be invested by my executor in a home suitable for Maude Powell Turner and her daughter Ernestine. It is my intention that this realty when purchased shall be made over by my executor to Maude Powell Turner for her life, with remainder in fee to her daughter Ernestine."

At the time of the original petition for the construction of the will of Mrs. Rucker, Mrs. Maude Powell Turner and her daughter were residing together in the city of Atlanta; but now they reside apart and in different states, and do not contemplate again making their home together. Under this changed condition, petitioner alleges that it becomes necessary again to construe this provision of the will; and he desires the direction of the court as to the disposition of this \$4,000 legacy. He asks that the court determine, also, whether said legacy participates in the residuum of the estate of his testator.

By one item of her will Mrs. Rucker bequeathed to Mrs. Maude Powell Turner an individual legacy of \$1,000. This legacy has not been paid directly to Mrs. Turner, but at her request petitioner deposited in the Sixth Ward Bank of Atlanta, in his name as administrator, the amount estimated to be due to Mrs. Turner as her individual legacy, so as to enable her to secure a loan from said bank, which she did secure; the assets of that bank were afterwards taken over by Travelers' Bank & Trust Company, and petitioner as administrator allowed the deposit referred to to remain in said last-named bank, and, when Mrs. Turner renewed her note with Travelers' Bank & Trust Company for the sum of \$500, it took from Mrs. Turner an assignment by her of her individual legacy as security for the debt. When Travelers' Bank & Trust Company failed, its receiver, Atlanta Trust Company, brought suit against Mrs. Turner upon her promissory note, and sought to subject to its payment her individual legacy in the hands of petitioner and which had been assigned by her as above stated. Petitioner in the present suit seeks to enjoin the prosecution of that suit, and asks judgment against Atlanta Trust Company for an amount equal to the difference between Mrs. Turner's indebtedness to the bank and the amount of her individual legacy on deposits in the name of petitioner as administrator. Other suits are pending against Mrs. Turner, in which summons of garnishment have been served upon petitioner, and petitioner seeks to have these enjoined and an order requiring all such litigants to become parties to this suit and have their claims herein determined. Petitioner recites at length the transactions of his predecessor, Herbert A. Sage, in the administration of the estate, and the allowance to him of the sum of \$3,000 as extra compen-

sation; but, as there has never been a final settlement with said Sage, petitioner asks the court to determine whether under all the facts the estate is due Sage anything now, or whether he owes the estate an amount to be set off against this unpaid compensation allowed him by a former decree.

Petitioner sets forth a history of protracted litigation during the several years of his administration, involving, among other things, the title to certain city property belonging to the estate. He shows that this various litigation, together with the petitions filed, seeking the construction of several items of the will, consumed much of his own time but much more time and professional services on the part of his counsel; that the counsel employed by him were the members of his law firm, Green, Tilson, & McKinney; that their services were reasonably worth stated amounts; and petitioner asks the court to determine and authorize the payment of same. Petitioner also shows that whereas he did agree with his predecessor, Herbert A. Sage, that petitioner would accept the administration of the estate at one-half the legal fees allowed for receiving and distributing the estate, he did not contemplate at that time that there would be so much litigation, covering a period of several years, as it has; and that he is reasonably entitled to extra compensation in an amount not less than \$2,000 for his services as administrator.

To the position certain of the defendants named filed general and special demurrers. Upon consideration of the same, the court passed an order sustaining the general demurrers and dismissing the petition, and stated in the order that the special demurrers were not considered. To this ruling the plaintiff tendered his exceptions pendente lite, and these were duly certified. The judgment dismissing the petition was rendered on January 31, 1918; and on February 5, 1918, during the term of court at which the judgment was rendered, the plaintiff filed his motion for rehearing and to vacate the judgment sustaining the general demurrer, and upon this motion a rule nisi was issued and served upon the demurrants. Upon the hearing of the motion the court reserved his decision thereon and passed an order retaining jurisdiction of the case for the purpose of deciding the same during vacation. Thereafter, February 26, 1918, the court passed an order upon the motion for a rehearing and to vacate the judgment, in which it was adjudged that the rehearing be denied, but it was adjudged and ordered that the order of January 31st be so modified as to allow the plaintiff to present and file an amendment to his petition within 10 days. Within the 10 days thus allowed, the plaintiff filed a motion, with an amendment to his original petition attached, which amendment prayed, among other things, that Frank A. Powell,

as administrator of H. Chapman Powell, deceased, be made a party defendant to the case. After objections made and urged, this amendment was allowed. Subsequently Frank A. Powell and others of the defendants filed an amendment to their original demurrer, and the case was admitted to the court upon the original demurrer as amended, and the court thereupon passed an order sustaining said demurrer and dismissing the petition as to all of the defendants except as to Frank A. Powell, administrator de bonis non, John M. Hulsey, executor, H. Chapman Powell, Jr., and Travers Leigh Powell, retaining the case as to these defendants. To this judgment the plaintiff excepted; Frank Powell, administrator, and John Hulsey, executor, also separately excepted; and the questions raised were brought to this court for review.

J. Howell Green and W. J. Tilson, both of Atlanta, for plaintiff in error in No. 1262.

R. B. Blackburn, of Atlanta, for plaintiff in error in Nos. 1263 and 1264.

R. B. Blackburn, R. C. & P. H. Alston, Hughes Roberts, C. T., L. C. & J. L. Hopkins, Candler, Thomson & Hirsch, Evins & Moore, H. W. Belfor, W. J. Laney, and J. W. Bachman, all of Atlanta, for defendant in error in No. 1262.

J. Howell Green, W. J. Tilson, and R. C. & P. H. Alston, all of Atlanta, for defendants in error in Nos. 1263 and 1264.

BECK, P. J. (After stating the facts as above). [1] We are of the opinion that the court did not err in sustaining the general demurrer to the petition and dismissing the same. None of the questions raised are of such character as to render them peculiarly subjects of equity jurisdiction, but are all questions cognizable in a court of law and in the court of ordinary, which first had jurisdiction of the issues involved in this case. As will be observed from the statement of facts, a petition for construction of the will and direction had, some years prior to the filing of this petition, been brought in the superior court and there disposed of by a judgment and decree, construing certain parts of the will and giving the direction sought upon certain questions raised. Subsequently, on July 10, 1917, certain legatees under the will of Mrs. Mary J. Rucker, deceased, alleging that the estate was ready for settlement, filed their petition for settlement in the court of ordinary of Fulton county. Petitioner in the present suit prays that those legatees be enjoined from prosecuting their petition for settlement in the court of ordinary, and that they be required to come into the case made by this petition and raise all the questions and issues sought to be raised in said petition and citation against petitioner for settlement; that the Atlanta Trust Company, as receiver of the Travelers' Bank

& Trust Company, be enjoined from prosecuting its petition against petitioner, and be required to come into the case and set up all rights that it may claim or have, as set forth in its suit; that the question of the right of petitioner to extra compensation, and the attorneys fees claimed, be also decided in this suit; and that all the conflicting claims of those named as defendants and interested in the estate be settled in this one suit. While it is apparent from the reading of this lengthy petition that numerous questions are raised, they are such, as we have already said, as may be settled in a court of law and are cognizable in the court of ordinary under the petition for a settlement.

So far as relates to the question made by the amendment which brings in as a defendant Frank A. Powell, administrator of the estate of H. Chapman Powell, is concerned, it may be said that while there are allegations contained in the petition that the sons of Chapman Powell, Frank Powell's intestate, are claiming that the appointment of Frank Powell as administrator was procured by fraud, there is no direct attack in this petition upon the appointment nor any attempt to have it set aside. If he is now administrator, the distributive share of the estate going to Chapman Powell, being in cash, may be paid to him, or, if he is not administrator, paid to the heirs of Chapman Powell, or, if they are minors, to a guardian duly appointed. The character of the bequest to Chapman Powell and the nature of the latter's interest in the estate of Mrs. Rucker, and the question as to whether Mrs. M. A. J. Powell bought Chapman Powell's interest in the estate, raised no question peculiarly cognizable in a court of equity; and there was no good ground for the court's retaining the petition as to Frank Powell, and his exceptions to the judgment overruling his demurrer to the petition were well taken.

The item of the will of Mrs. Rucker, giving to Mrs. M. A. J. Powell the sum of \$20,000 during her life, with remainder to her children, was under consideration in the first petition filed for construction and direction referred to above, and in the decree passed upon that petition the court gave direction ordering:

"That the bequest of \$20,000 left to Mrs. M. A. J. Powell during her natural life, with remainder to her children, be paid into the hands of a trustee; and said trustee shall be appointed by the court upon application of the administrator with the will annexed."

Under the terms of this decree, the duty of the executor, Sage, and of his successor, McKinney, administrator de bonis non, is perfectly clear. If Sage paid over to Mrs. M. A. J. Powell money that she was not authorized to receive under this bequest, his

liability is clear; and the question of that liability, the nature and the extent of it, are questions for settlement in the court of ordinary, or other court of law, and affords no ground for retaining this petition in equity as against Hulsey, the executor of Mrs. Powell, nor against Herbert Sage, executor of Mrs. Rucker. Nor does the claim of Hulsey for the estate of Mrs. Powell, on account of the alleged purchase of the interest of Chapman Powell in certain realty, raise any equitable issue or question and the court should not have retained the petition against Hulsey.

The suit at law of Atlanta Trust Company against Mrs. Turner and the petitioner affords no ground for retaining this equitable petition. The facts and questions involved may be somewhat complicated, but they are strictly legal questions depending for their settlement upon the establishment of the facts alleged in the suit and in the answer thereto and the law controlling the issues raised. Certainly the legacies going to the other beneficiaries under the will of Mrs. Rucker should not be withheld while this question is being fought out in the courts.

One item in a codicil to the will contains the following provision:

"I appropriate from my estate the sum of \$4,000.00 to be invested by my executor in a home suitable for Maude Powell Turner and her daughter Ernestine. It is my intention that this realty when purchased shall be made over by my executor to Maude Powell Turner for her life, with remainder to her daughter Ernestine."

Nothing in this provision nor the facts alleged in connection therewith renders it proper that the petition should be retained for a construction of this item or for the giving of direction in regard to it.

The residuary clause of the will is as follows:

"The balance of my estate not herein devised I give to the legatees herein named, to be divided between them in proportion to the amounts devised, except Irvin Powell and his wife Urailla. I do not wish them to have any more of my estate than is given them in item 8 of this will."

We do not think the provisions contained in the residuary clause have any complications making it necessary to retain this petition in a court of equity.

In the petition there are set forth certain small claims, one by Hinman, another by Young, and still another by Houston, against Mrs. Turner, it being alleged that suit upon these claims had been filed and petitioner garnished; and petitioner prays that the prosecution of these suits be enjoined. Purely legal questions are raised in these proceedings, and they afford no ground for maintaining the suit in equity.

The claims made in the petition for the allowance of extra compensation for services rendered by petitioner as administrator and for the attorneys fees which it is alleged were necessarily incurred in protecting the estate and defending it in the protracted litigation are questions peculiarly within the jurisdiction of the court of ordinary, and they can there be determined and allowed in accordance with the facts.

[2] It is insisted that it was error for the court to dismiss the entire petition, because certain of the defendants did not join in the demurrers. But the demurrers which were filed, and which we have ruled were properly sustained, go to the substance of the whole petition and challenge the plaintiff's right to any relief in a court of equity. That being true, the demurrers inured to the benefit of all. *Tate v. Goode*, 135 Ga. 733, 70 S. E. 571, 33 L. R. A. (N. S.) 310. There it was ruled that—

"Where some of several joint defendants demur to the plaintiff's petition, and the demurrer goes to the substance of the whole petition and challenges the plaintiff's right to any relief, such demurrer inures to the benefit of all, though some may be in default."

[3] Upon consideration of the entire case, though we recognize that equity has concurrent jurisdiction with the court of ordinary for the purpose of distributing estates, when a proper case is made, we do not think that this is a case where equity should interfere with the regular administration of the estate, especially where the administrator has the benefit of the direction given by a decree rendered under a former petition regularly filed and disposed of.

Judgment affirmed in the case first stated (1262), and reversed in the other two cases.

All the Justices concur, except GEORGE, J., disqualified.

(149 Ga. 396)

MATHIS et al. v. CROWLEY.

CROWLEY v. MATHIS et al.

(Nos. 1167, 1178.)

(Supreme Court of Georgia. Sept. 27, 1919.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER ⇄ 123—PETITION INSUFFICIENT TO CHARGE FRAUD IN EXECUTION OF CONTRACT.

A vendee of land, upon payment of part of the purchase price, was admitted into possession under a deed, and thereupon executed certain promissory notes for the balance of the purchase price, and executed a security deed. After some of the notes fell due, all of the notes and the security deed were transferred by the payee to his mother-in-law, upon a

consideration less than the face value. When the land was about to be sold under a power contained in the security deed, the purchaser instituted a suit against his vendor and his transferee, alleging, in addition to the facts as just indicated, that some of the land included in the purchase was not embraced in the deed, because at that time it was not owned by the vendor, but it was in contemplation to be purchased by him from other persons, and it was omitted from the deed by consent of both parties, in order to facilitate the purchase of the property by the vendor; that the purchaser had made certain improvements on the property, of a stated value; and that, the vendor having failed to purchase the outstanding property and having refused to do so, the plaintiff elected to rescind the contract and offered to turn back the property upon restitution of the part of the purchase money paid and the purchase-money notes and the value of the improvements, and that the defendant refused to comply with his contract or to rescind. It was prayed that the contract be rescinded, and that the plaintiff have a judgment for a stated amount, and for such other relief as might be appropriate under the allegations in the petition. The judge overruled a demurrer to the petition, and on exception the judgment was reversed, this court holding: "A purchaser of land, who is in undisturbed possession under an absolute warranty deed, cannot have rescission and recover from the grantor partial payments made on the purchase price, or have damages covering the cost of improvements made on the land, solely upon the ground of a defect in the grantor's title. Such relief is dependent upon the grantee's equitable right of rescission or cancellation, which does not exist unless he allege that the grantor is insolvent or a nonresident, or allege fraud, mutual mistake, or some other fact which would make it inequitable for the grantor to hold the purchase money already paid and to collect the balance." *Mathis v. Crowley*, 146 Ga. 749, 92 S. E. 213 (2). After the case was returned to the trial court, the plaintiff amended his petition by alleging that he was induced to make the agreement to leave out the land from the contract by the promises of the vendor to purchase the land, which promises were made falsely and intentionally to defraud the petitioner, without any intention of carrying them out; that the vendor and his transferee were both insolvent; and that the plaintiff had no remedy except rescission or abatement of the purchase price. The defendants renewed their grounds of general demurrer to the petition as amended, which was overruled. Afterward the transferee amended her answer by filing a plea in the nature of a cross-petition, setting up the purchase-money notes and the security deed, and seeking to have a judgment for the amount of the notes and the lien of the security deed established. It appeared that the purchaser was not in a position to rescind; but evidence was introduced as to the parol contract to convey certain land not included in the deed, and its value. In the charge the judge, in effect, instructed the jury that there could be no rescission, and restricted the issue to the right of the plaintiff to a reduction of the amount sought to be recovered in the cross-petition, on account of the alleged deficiency in the land

agreed to be sold. The jury returned a verdict, on conflicting evidence, for the transferee (plaintiff in the cross-petition), for less than the amount of her demand. She and the plaintiff's vendor, being dissatisfied with the amount of the verdict, moved for a new trial. The motion was overruled, and they excepted. The plaintiff filed a cross-bill of exceptions. *Held*, the allegations contained in the amendment were insufficient to charge fraud in the execution of the contract. *Brousseau v. Jacobs' Pharmacy Co.*, 148 Ga. 651, 98 S. E. 79; *Capps v. Edwards*, 130 Ga. 146, 60 S. E. 455 (4). Under the former decision of this court, the petition did not set forth a cause of action for rescission or abatement of the purchase price of the land.

2. EVIDENCE ¶442(6)—PAROL EVIDENCE AS TO AGREEMENT RESULTING IN DEED INADMISSIBLE.

It was erroneous to admit evidence as to a parol agreement to the effect that other lots than those described in the deed were, by consent of the parties, omitted therefrom, and were to be subsequently purchased by the vendor and conveyed to the vendee, and as to breach of such agreement, in abatement of the purchase price, and to charge the jury that there might be an abatement of the purchase-price on the basis of such evidence. *Coleman v. Barber*, 137 Ga. 22, 72 S. E. 399(2).

3. VENDOR AND PURCHASER ¶123—ISSUES IN PURCHASER'S ACTION TO RESCIND LIMITED TO ABATEMENT OF PRICE.

The judge did not err, as against the plaintiff, in restricting the issue to a failure of consideration and abatement of the purchase price of the land.

*Atkinson and Gilbert, JJ., dissenting.*

Error from Superior Court, Berrien County; *W. E. Thomas*, Judge.

Action by *M. L. Crowley* against *P. N. Mathis* and his transferee, with plea by the transferee in the nature of a cross-petition. Verdict for the transferee for less than demanded, motion by defendant and his transferee for a new trial overruled, and they except and bring error, and plaintiff takes a cross-bill of exceptions. Reversed on main bill of exceptions, and affirmed on the cross-bill.

See, also, 146 Ga. 749, 92 S. E. 213.

*J. J. Murray* and *E. K. Wilcox*, both of *Valdosta*, for plaintiffs in error.

*R. A. Hendricks*, of *Nashville*, for defendant in error.

*HILL, J.* Judgment reversed on the main bill of exceptions, and affirmed on the cross-bill. All the Justices concur, except *ATKINSON* and *GILBERT, JJ.*, who dissent from the rulings announced in the first and second divisions. *Pavlovski v. Klassing*, 134 Ga. 704, 68 S. E. 511; *Garner v. State*, 100 Ga. 258, 28 S. E. 24; *Wilson v. State*, 138 Ga.

489, 75 S. E. 619; 1 Black on Rescission and Cancellation, 220 et seq., §§ 89, 90; *S. F. & W. Ry. Co. v. Atkinson*, 94 Ga. 780, 21 S. E. 1010.

(149 Ga. 434)

SOUTHERN RY. CO. v. LANCASTER et al  
LANCASTER et al. v. SOUTHERN RY. CO.

(Nos. 1122, 1123.)

(Supreme Court of Georgia. Oct. 1, 1919.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ¶329—MOTION TO DISMISS FOR FAILURE TO MAKE PARTY PLAINTIFF IN ERROR DENIED.

The motion to dismiss the writ of error, on the ground that the *Selma, Rome & Dalton Railroad Company* has not been made a party plaintiff in error, is not meritorious. If that company was a party to the action, it is apparent from the record and the assignments of error in the bill of exceptions that its proper place would be as a coplaintiff in error; and the plaintiff in error moves in this court to make such company a coplaintiff in error, which motion can prevail without notice.

2. RAILROADS ¶143—PARTY TO CONSOLIDATION AGREEMENT DE JURE CORPORATION.

Under the consolidation agreement of August, 1866, by the *Alabama & Tennessee River Railroad Company*, the *Georgia & Alabama Railroad Company*, and the *Dalton & Jacksonville Railroad Company*, and the statutes of *Alabama* and *Georgia* approving and adopting it, the *Selma, Rome & Dalton Railroad Company* became a de jure corporation, and was legally authorized to construct and operate a railroad from *Selma, Ala.*, to *Dalton*, by way of *Rome, Ga.*

3. RAILROADS ¶144(1)—ADOPTION OF CONSOLIDATION AGREEMENT EXTINGUISHED CONSTITUENT COMPANIES.

Such agreement and statutes approving and adopting it did not so extinguish the constituent companies that the new company could not adopt as its own the charter with its amendments of the *Alabama & Tennessee River Railroad Company*, and exercise all its charter rights, powers, and privileges.

4. CONSTITUTIONAL LAW ¶64—RATIFYING RAILROAD CONSOLIDATION AGREEMENT NOT DELEGATION OF LEGISLATIVE POWER.

The *Georgia* statute, enacted December 13, 1866 (*Laws 1866*, p. 124), approving and ratifying the consolidation agreement, was not unconstitutional as seeking to delegate legislative power to the new company by authorizing its board of directors to adopt for its name "*Selma, Rome & Dalton Railroad Company*," and to adopt as its charter that of the *Alabama & Tennessee River Railroad Company*.

5. RAILROADS ¶144(1)—MORTGAGE OF FUTURE-ACQUIRED PROPERTY VALID.

The *Selma, Rome & Dalton Railroad Company* had lawful charter power, when it executed the first mortgage, to mortgage future-

acquired property; and the lien of the first mortgage was superior to that of the second mortgage on all of the property acquired by the company after the date of the first mortgage, there being then in existence no constitutional inhibition of the enactment of a special law in any case for which provision has been made by an existing general law.

**6. RAILROADS ⇐144(1)—SECOND MORTGAGEES ESTOPPED TO DENY MORTGAGOR DE JURE CORPORATION.**

The second mortgagees are, in view of the facts of this case, estopped to deny that the Selma, Rome & Dalton Railroad Company was a de jure corporation, and that the lien of the first mortgage was a valid lien superior to that of the second mortgage.

**7. RAILROADS ⇐144(1)—SECOND MORTGAGEES ESTOPPED TO DENY STATEMENTS IN FIRST MORTGAGE.**

As privies in estate of the Selma, Rome & Dalton Railroad Company, the second mortgagees are estopped to deny the statements of material facts made by that company in the first mortgage.

**8. RAILROADS ⇐144(1)—SECOND MORTGAGEES ESTOPPED TO DENY RECITAL OF FACTS IN FIRST MORTGAGE.**

They are also estopped to deny the recital of material facts made by the company in the second mortgage.

**9. RAILROADS ⇐144(2)—SECOND MORTGAGEES ESTOPPED BY LACHES TO FORECLOSE CANNOT ENFORCE LEGAL RIGHTS.**

The second mortgagees are also estopped from foreclosing their mortgage in equity, because by the lapse of time and their laches it would be inequitable, in view of the facts of the case, to allow them to enforce the legal rights claimed by them.

**10. RAILROADS ⇐144(2)—SECOND MORTGAGEES BY LAPSE OF TIME AND LACHES ESTOPPED TO REDEEM FROM FORECLOSURE OF FIRST MORTGAGE.**

Even if the right of redemption by a mortgagor, or his privies in estate, exists in this state, as to realty sold under a foreclosure in equity to which the mortgagor or his privy was not a party, the second mortgagees, under the facts of this case, on account of the lapse of time and because of their laches, are barred from exercising such alleged right.

Error from Superior Court, Floyd County; W. J. Nunnally, Judge.

Suit by G. D. Lancaster for himself and others similarly situated who may join him against the Selma, Rome & Dalton Railroad Company to foreclose a trust deed or second mortgage, in which Samuel W. Winn intervened and was made a party plaintiff, and in which the Southern Railway Company petitioned for leave to intervene and was made a party defendant. Cause referred to an auditor to whose report plaintiffs excepted, and on a hearing, the court sustained in

whole nearly all of the exceptions and several of the exceptions in part and rendered a decree of foreclosure and sale, and the Southern Railway Company excepted and brings error, and plaintiffs and those joining them by intervention in the cause take a cross-bill of exceptions. Reversed on main bill of exceptions, and affirmed on cross-bill.

George D. Lancaster, for himself and others similarly situated who might join him in the action, brought an equitable petition in Floyd superior court, returnable to the July term, 1910, against the Selma, Rome & Dalton Railroad Company, to foreclose a trust deed or mortgage dated July 1, 1870, given to James P. Wallace as trustee, on the railroad of the Selma, Rome & Dalton Railroad Company, extending from Selma, Ala., via Rome, to Dalton, Ga., with all its appurtenances, etc., to secure an issue of \$6,000,000 of second mortgage bonds and the interest thereon; the foreclosure sought being upon the railroad and all property connected therewith of the Selma, Rome & Dalton Railroad Company situated in the state of Georgia. The bonds matured at the end of 30 years, with the stipulation for earlier maturity upon default in payment of interest, etc. Lancaster alleged that he was the holder and owner of 62 of such bonds, numbered as set forth in the petition, together with the interest coupons thereto attached, aggregating, January 1, 1910, \$311,187.08. Wallace died in 1897, and had no successor as trustee. The petition alleged, upon information and belief, that the board of directors of the Selma, Rome & Dalton Railroad Company last elected had for many years failed to hold meetings, maintain an office, or otherwise perform duties; and that, if there were any directors of such company in office, their names and addresses were unknown. Service of the petition was sought to be effected by publication. On October 5, 1910, Samuel W. Winn intervened in the case, claiming to be the owner of 100 of such bonds, numbered as set forth. He was made a party plaintiff.

On October 27, 1910, the Southern Railway Company filed its petition for leave to intervene in the case, claiming title to the railroad and all the property upon which the plaintiffs sought to foreclose, and that its title was derived by virtue of judicial sale to lines of road and property in Georgia, made on November 3, 1874, by virtue of a decree previously rendered in the same year, in Floyd superior court, in an equitable action brought by James Boorman Johnston and John A. Stewart, as trustees, to foreclose a mortgage given to them as trustees, on October 1, 1867, by the Selma, Rome & Dalton Railroad Company on all of its lines of roads both in Georgia and Alabama, extending from Selma, Ala., via Rome, Ga., to Dalton, Ga., to secure \$5,000,000 of bonds with inter-

est thereon. The petition for intervention alleged that the commissioners appointed to make the sale, which sale was duly confirmed, executed a deed to Cowan to all of the property sold, and further set up that a good title was acquired to the properties by Cowan, who, with certain associates, reorganized the railroad properties in Georgia, incorporating themselves as the Georgia Southern Railroad Company, such reorganization being under an act of the Georgia Legislature approved March 2, 1875 (Laws 1875, p. 223); that subsequently the Georgia Southern Railroad Company, under a power given by such act, sold the line of road to the East Tennessee, Virginia & Georgia Railroad Company, a corporation of the state of Tennessee, the southern terminus of which at the time was Dalton, Ga.; that the East Tennessee, Virginia & Georgia Railroad Company was later sold under foreclosure, and the purchasers thereof reorganized under the corporate name of the East Tennessee, Virginia & Georgia Railway Company, the property, including the lines of the old Selma, Rome & Dalton Railroad Company in Georgia, having passed by deed dated June 28, 1886, to the East Tennessee, Virginia & Georgia Railway Company; that the last-named company became insolvent, and all of its properties were sold under foreclosure on July 7, 1894, and on July 14, 1894, the special master of the court in which the foreclosure was had, and by which the sale was decreed and ordered, conveyed all of the properties, real and personal, of every kind whatsoever, to certain purchasers for the Southern Railway Company, and in this way the Southern Railway Company secured the lines of railroad of the old Selma, Rome & Dalton Railroad Company in Georgia; that it acquired legal title to the same, and had been in rightful and adverse possession thereof from July 14, 1894, up to the time of filing the intervention; that the Selma, Rome & Dalton Railroad Company had long since gone out of existence; that it had neither officers nor agents who could answer in the cause; that the proceeding begun by Lancaster, if allowed to continue, would be in effect ex parte, would necessarily result in default on the part of the Selma, Rome & Dalton Railroad Company, and a decree of foreclosure would be inevitable; that such a situation would cause incalculable inconvenience, harassment, and damage to the Southern Railway Company, in that its title would be clouded, securities which it had issued upon the faith of the property would be affected, and its credit damaged; and that a decree of foreclosure and sale would, in all probability, result in the seizure of the properties and in an interference with its possession, to its manifest hurt, damage, and inconvenience.

The court, after a hearing, granted an order making the Southern Railway Com-

pany a party defendant to the action. (Plaintiffs filed exceptions pendente lite to this order, but error was not assigned thereon in the Supreme Court.) The cause was referred to Hon. Joel Branham as auditor, with instructions to hear and pass upon all questions of fact and law. The auditor made and filed a report to which Lancaster and his coplaintiffs filed exceptions. These exceptions came on to be heard before Hon. W. J. Nunnally, Judge of the city court of Floyd county, who took jurisdiction by reason of the fact that the judge of the superior court held himself to be disqualified.

The Southern Railway Company made a motion to strike all the exceptions of fact and law, which motion was overruled, to which ruling that company excepted pendente lite; but the exceptions pendente lite were expressly withdrawn in the brief of counsel for the Southern Railway Company filed in this court.

On the hearing the court sustained in whole nearly all of the exceptions of law and of fact to the auditor's report, and several of such exceptions in part. A decree was then rendered giving effect to the rulings and decisions made by the court, and a bill of exceptions was sued out by the Southern Railway Company. A cross-bill of exceptions by Lancaster and the other plaintiffs who joined him in the cause through interventions was also sued out, basing error upon the decision of the court to the effect that the auditor correctly held that the petitioners did not have the right to redeem the mortgaged property upon the terms offered. The Judge in the decree stated that there were no conflicting issues of fact to be submitted to a jury; and, from an examination of what are called exceptions to the findings of fact by the auditor, it appears that practically all such findings were really in effect rulings of law rather than of fact; and, moreover, the brief for Lancaster et al., filed in the Supreme Court, states that the evidence was not conflicting.

The facts as they appear in the record, and material to be here considered, are to the following effect: The act of the Legislature of Alabama approved March 4, 1848 (Acts 1848, p. 265), chartering the Alabama & Tennessee River Railroad Company, and the amendment thereto approved November 4, 1862 (Laws 1862, p. 143), authorized that company to construct and operate a line of railroad from Selma, Ala., through certain designated counties in the state of Alabama, to the Georgia state line, and in the direction of Rome in the state of Georgia, and to connect with a railroad to be constructed within the state of Georgia from a point at or near Rome. An act of the Legislature of Alabama, approved February 20, 1866, amending the charter of the Alabama & Tennessee River Railroad Company (Acts 1865-66, p. 340), in the third section thereof—

Gave the company acting by its board of directors the power and right to connect, unite, and consolidate that company with any other railroad company or companies in that state or any other state "on such terms as may be agreed on by and with the interested and contracting companies. \* \* \* The objects of these provisions being to promote and facilitate, as far as practicable, connections between the railroads and system of roads in this state, and the railroads and system of roads in adjacent states, constructed and to be constructed. All the rights, powers and privileges possessed and to be possessed by the said Alabama & Tennessee River Railroad Company, under their act of incorporation and other acts, may and shall be extended and applicable to all railroads and railroad companies which may become connected, or united, or consolidated with the road, or stock, or franchise, in whole or in part, of said Alabama & Tennessee River Railroad Company, or any road to be constructed by them under the provisions of this act, so far as said rights, powers and privileges may be pertinent or applicable, or can be rendered pertinent or applicable to the companies or roads which may be united or consolidated with [it] in whole or in part. All contracts or agreements which may be made by said company with any other railroad company or companies, in pursuance of the provisions of this act, and having in view the objects and purposes of these enactments as above declared (that in promotion of connections between the railroads of this and any other states,) shall be valid according to the terms thereof, so far as the same shall not be contrary to law."

This act provides for the issuance of bonds by the corporation, and that—

"The said company, acting by their board of directors, shall have power to create a lien or liens by mortgage, or deed or deeds of trust, in such form and with such provisions and conditions as their board of directors shall prescribe, on all the property, means, effects, and rights of every kind, or any part thereof, possessed and to be possessed by said company, which shall be valid and binding according to the tenor and effect of such deed."

The Legislature of Georgia, on February 18, 1854 (Acts 1853-54, p. 438), chartered the Georgia & Alabama Railroad Company, with power to build a railroad from the city of Rome in Floyd county, Ga., to the Alabama state line, to connect with any railroad which might be chartered and authorized to be built by the state of Alabama to the Georgia line. On February 14, 1866, an act was passed by the Georgia Legislature (Acts 1865-66, p. 210) amending the charter of the Georgia & Alabama Railroad Company. In section 6 of this act, it was provided that this corporation could consolidate its road, stock, and franchise with those of the Dalton & Jacksonville Railroad Company, a corporation of this state, and any other railroad company of Georgia or an adjacent state, to such extent and on such terms as might be agreed on by the companies entering into the agreements of consolidation. In the

fourth section of this act, power was given the corporation, acting through its board of directors, to issue bonds "in such form and for such amounts, as may be deemed necessary in providing means for the completion and equipment of the railroad authorized to be constructed by them"; and to secure such bonds by mortgages or deeds of trust "covering the railroad of said company as constructed and to be constructed, and including all other property and rights possessed and to be possessed by said company," etc.

On February 18, 1854, the Legislature of Georgia (Acts 1853-54, p. 420) chartered the Dalton & Gadsden Railroad Company, with power to construct and operate a railroad from or near Dalton, Ga., along and over the most eligible route to the Alabama state line in the direction of Gadsden, Ala., on the Coosa river. On December 15, 1859, an act was passed by the Legislature of Georgia (Acts 1859, pp. 335-338) authorizing the Dalton & Gadsden Railroad Company to consolidate with any railroad company chartered by the state of Alabama; the consolidated company to be known as the Dalton & Gadsden Railroad Company. In the same year the Legislature of Georgia changed the name of the Dalton & Gadsden Railroad Company to that of the Dalton & Jacksonville Railroad Company. Acts 1859, p. 335.

By act of the Legislature of Georgia of December 19, 1860 (Acts 1860, p. 191), the Dalton & Jacksonville Railroad Company and the Georgia & Alabama Railroad Company were authorized to consolidate, and when consolidated to have all the powers, privileges, and immunities to which either of said companies were then entitled by their acts of incorporation; and the Dalton & Jacksonville Railroad Company was further authorized by that act to connect with, unite, and become consolidated with any railroad companies in the states of North Carolina, Georgia, and Alabama, as by the laws of the states of North Carolina and Alabama may be authorized to unite and be consolidated with them; and it was provided that the said companies thus consolidated should have all the rights, powers, and privileges of the said companies thus consolidating.

The act of February 23, 1866, of the Legislature of Georgia (Acts 1865-66, p. 209), amending the charter of the Dalton & Jacksonville Railroad Company, provided, in the sixth section, a method by which the corporation could raise money for the construction and completing of its line. It provided that the board of directors could issue bonds and could make mortgages or deeds of trust, creating liens thereby upon the railroad "as constructed and to be constructed, and all the other property and rights possessed and to be possessed, by said company, including their franchise," etc. On February 23, 1866, the Legislature of Georgia further amended



the charter of the Dalton & Jacksonville Railroad Company (Acts 1865-66, p. 207), and in the eighth section of this act provided for the consolidation of its stock, road, and franchise with the stock, road, and franchise of the Georgia & Alabama Railroad and any other railroad of Georgia or any adjacent state, on such terms and to such extent as might be agreed upon by the companies entering into consolidation agreements.

On August 8, 15, and 16, 1866, a tripartite consolidation agreement was entered into between the Alabama & Tennessee River Railroad Company, the Dalton & Jacksonville Railroad Company, and the Georgia & Alabama Railroad Company. The material parts of this agreement are set forth in the opinion, *infra*. On December 13, 1866, the Legislature of Georgia passed an act approving and ratifying this consolidation agreement. This act is set out in the opinion.

On February 8, 1867 (Acts 1866-67, p. 379), the Legislature of Alabama passed an act ratifying and approving the consolidation of the Dalton & Jacksonville Railroad Company, and the Georgia & Alabama Railroad Company, both of the state of Georgia, with the Alabama & Tennessee River Railroad Company, of the state of Alabama, so as to form one consolidated railroad company for the construction and use of the railroad to be constructed from Blue Mountain in the state of Alabama, and a continuation of the Alabama & Tennessee River Railroad Company, by way of Rome, to Dalton in the state of Georgia; the terms of this act of the Alabama Legislature being to the same effect as that of the Legislature of Georgia above referred to.

On October 1, 1867, the Selma, Rome & Dalton Railroad Company executed and delivered to James Boorman Johnston and John A. Stewart, as trustees, a mortgage on its line of railroad from Selma, Ala., by way of Rome, Ga., to Dalton, Ga., together with all of the appurtenances of the road. This mortgage contained a detailed statement of the history of the creation of the Selma, Rome & Dalton Railroad Company, including the charter rights, powers, and privileges of the constituent companies, the consolidation agreement, and the statutes approving and ratifying the same, and the adoption by the consolidated company of the name of "Selma, Rome & Dalton Railroad Company," as well as the adoption of the charter of the Alabama & Tennessee River Railroad Company, and other material facts referred to in the opinion. This mortgage was duly recorded.

On July 1, 1870, the Selma, Rome & Dalton Railroad Company executed and delivered to James P. Wallace, as trustee, a mortgage on all of the same property described and set forth in the first mortgage dated October 1, 1867, to secure a series of bonds executed by

the Selma, Rome & Dalton Railroad Company aggregating \$8,000,000, due July 1, 1900; these bonds being designated on the face thereof as second mortgage bonds. There was, both in the mortgage and in the bonds, a provision for their earlier maturity in case of default by the mortgagor in the payment of interest, taxes, etc. This mortgage contained, among others, recitals of all the material facts embodied in the first mortgage, as hereinbefore referred to. One of the recitals was to the effect that the Selma, Rome & Dalton Railroad Company was, at the time of the execution of the first mortgage, a corporation in and duly organized under the laws of the states of Alabama and Georgia. Other recitals were that the said three railroad companies were the owners of the respective portions of said Selma, Rome & Dalton Railroad Company mentioned in said second mortgage, and that said Selma, Rome & Dalton Railroad Company was the owner of the entire line of railroad constructed and to be constructed from Selma, in the state of Alabama, to Dalton, Ga., as described in said second mortgage; that said three pre-existing railroad companies, in conformity with express power and authority conferred upon them by the states of Georgia and Alabama, respectively, made and entered into an agreement whereby said three railroad companies became and were lawfully united and consolidated into one company existing and to exist and to organize under the laws of said states, and said consolidated company did business under the name and style of the Alabama & Tennessee River Railroad Company for a certain period of time and until the adoption of the name of the Selma, Rome & Dalton Railroad Company mentioned in said second mortgage; that said consolidation agreement of said railroad companies was expressly ratified and approved by the Legislature of said states of Georgia and Alabama, respectively; that said consolidated company was duly authorized and empowered to adopt the corporate name and style of the Selma, Rome & Dalton Railroad Company, and also to adopt as its charter the charter of the Alabama & Tennessee River Railroad Company, with all of its amendments and with all of the rights and powers granted to it in said charter and in the amendments thereto; that said railroad company adopted said charter and became a body corporate and politic, having and using a common seal, and as such it became and was vested with and entitled to all the rights, powers, and privileges, franchises, rights of way, and other property which had theretofore belonged to or was vested in or owned or possessed or claimed by either and each of the three above-named railroad companies; that said three railroad companies, with intent to give full power and effect to the terms of the consolidation, executed and delivered to the Selma, Rome & Dalton Rail-

road Company deeds or conveyances of all the railroads, franchises, rights, lands, and property of said companies; that said Selma, Rome & Dalton Railroad Company was the owner of the entire railroad, franchises, rights of way, ties, rails, and other property appurtenant to said railroad, acquired or to be acquired for the construction and operation thereof, as described in said second mortgage; that said second mortgage was given subject to all mortgages that had been theretofore made and duly recorded by the Selma, Rome & Dalton Railroad Company, on the same property; that said railroad extended from Selma, Ala., in a northeasterly direction, continuously through that state 172 miles, more or less, to the line of the state of Georgia, thence in the state of Georgia through the counties named therein to the town of Dalton, 63 miles, more or less, making, at the point of connection with the Western Atlantic Railroad and the East Tennessee & Georgia Railroad, the entire line thereof 235 miles more or less; that all rights of way and other property appurtenant to said railroad, owned and to be owned or used and acquired by the Selma, Rome & Dalton Railroad Company in and for the construction repairs, renewals, operation, and improvement thereof, constituted a part of the Selma, Rome & Dalton Railroad Company; that the Selma, Rome & Dalton Railroad Company also owned all charter rights, privileges, and franchises then possessed, or that might thereafter be acquired, by said company, appurtenant to said railroad, completed or to be completed, with all other property, of every kind either in law or in equity; that a series of 6,000 bonds secured by said second mortgage was so denominated in the resolution of the board of directors authorizing the issue of the mortgage, so denominated in the deed of trust, and so denominated in the face of the bonds; and that both of said mortgages covered the same property. This mortgage contained a general warranty, and it was duly recorded.

When the first mortgage was executed, the Georgia & Alabama Railroad Company held eight deeds to rights of way over designated lots of land in the state of Georgia. The Dalton & Gadsden Railroad Company, which, prior to the execution of the first mortgage, had become the Dalton & Jacksonville Railroad Company, had 31 conveyances to rights of way over designated lots of land in the state of Georgia, and the Dalton & Jacksonville Railroad Company at that time had two deeds to rights of way over designated lots of land in the state of Georgia. When the second mortgage was executed, the Selma, Rome & Dalton Railroad Company held 56 deeds to rights of way over designated lots of land in the state of Georgia, all executed subsequently to the date of the first mortgage.

100 S.E.—25

On March 1, 1873, Johnston and Stewart as trustees under the first mortgage, brought an equitable action returnable to the July term, 1873, of Floyd superior court, against the Selma, Rome & Dalton Railroad Company, for the foreclosure of the first mortgage on the entire line of railroad from Selma, Ala., to Dalton, Ga., and all appurtenances, fixtures, rolling stock, etc., of such railroad; praying for the appointment of a receiver, and the grant of an injunction. This action was consolidated with a proceeding which had been begun against the Selma, Rome & Dalton Railroad Company by Alfred Shorter, for the foreclosure of a mortgage held by him and given by the same mortgagor on the same property in Georgia. Upon the motion of the plaintiffs in both bills a receiver was appointed for the lines in Georgia. A similar bill was brought in March, 1873, by the trustees in the first mortgage, and against the Selma, Rome & Dalton Railroad Company, and for the same purpose as the Georgia bill, in the chancery court of Dallas county, Ala. The Alabama court having appointed a receiver, the Georgia court appointed the same person as receiver. A decree was rendered by the Alabama court as prayed for. A verdict and decree in the Georgia case were rendered, by virtue of which all the railroad lines and other property connected therewith of the Selma, Rome & Dalton Railroad Company were sold by commissioners appointed by the court in the year 1874, at which sale Cowan became the purchaser of all the properties; and a commissioners' deed was executed and delivered to him for such property on November 6, 1874. A statement as to the successorship of the Southern Railway Company to Cowan's title was shown to be as appears hereinbefore set forth in the petition of that company to intervene in the present case.

It is unnecessary to set forth in detail all of the auditor's findings of fact and of law, the exceptions thereto, and the rulings of the court thereon. It will suffice to say, in brief, that the auditor's findings were, in effect, that the three consolidating companies, under their respective charters, were authorized to lay out, construct, and operate their respective lines of railroad as designated, and to connect and consolidate with any other railroad corporation or corporations in the states of Alabama and Georgia; that each of such companies had power to mortgage future-acquired property to be used in connection with the construction and operation of its railroad; that the consolidation agreement executed by the three railroad companies was duly and legally made by them under their respective charters, and such agreement was duly and legally approved and ratified by the Legislatures of Georgia and Alabama; that under such legislative authority the name of the Selma, Rome & Dalton Rail-

road Company, and the charter of the Alabama & Tennessee River Railroad Company, were duly and legally adopted as the name and charter of the consolidated company; that the consolidated company—the Selma, Rome & Dalton Railroad Company—had legal authority to mortgage both property owned or possessed by it, or to which it had the right of possession, and also future-acquired property, for the purpose of constructing and operating its lines of railroad; that the first mortgage legally created a lien on all the line of railroad from Selma, Ala., by way of Rome, to Dalton, and all its appurtenances, fixtures, etc., as set out in that mortgage; that the first and second mortgages covered the same property; that the mortgagees in the second mortgage had both constructive and actual notice of the first mortgage, and therefore of all of its recitals, and were estopped to deny the recitals, both in the first and in the second mortgage, they being practically the same; that they were also estopped by their laches to foreclose the second mortgage; that the second mortgage could not be foreclosed against the property therein described, and therefore that the holders of the bonds secured by the second mortgage did not have the right to redeem the property at Cowan's bid, with interest thereon.

The court, in effect, sustained the exceptions to all such findings of the auditor, except as to the right of the petitioners to redeem the property at Cowan's bid, with interest thereon at 7 per cent., less the earnings of the property. The court decreed that the respective plaintiffs, the second mortgagees, are entitled to recover stated amounts of principal and interest; and that the Southern Railway Company pay into court \$172,000 principal, and \$1,575,532.60 interest, and all future interest at 7 per cent., within three months from the date of the decree, and that it pay all court costs, and, upon failure to pay as directed, the second mortgage is foreclosed, and all equity of redemption of the Southern Railway Company is barred as to all the Georgia end of the railroad, real estate, and improvements thereon acquired by the Selma, Rome & Dalton Railroad Company subsequently to the execution of the first mortgage; that the clerk of the court make the sale at public outcry; that the plaintiffs have no right to redeem so much of the property as was held by the Selma, Rome & Dalton Railroad Company at the date of the execution of the first mortgage; that the second mortgage is a first lien on all the property ordered to be sold; that if the Southern Railway Company pay into court, as ordered, the sums of money designated, then the case will be held open for future direction and decree. The Southern Railway Company filed exceptions to all the findings of the court made against

it; and the plaintiffs filed a cross-bill of exceptions, assigning error upon the ruling of the court that they did not have the right to redeem upon the terms offered.

L. E. Jeffries, of Richmond, Va., Maddox, McCamy & Shumate, of Dalton, McDaniel & Black, of Atlanta, and Hamilton & Hamilton, of Rome, for plaintiffs in error.

Dean & Dean, Maddox & Doyal, and R. A. Denny, all of Rome, Louis Marshall, of New York City, and G. H. Aubrey, of Cartersville, for defendant in error.

FISH, C. J. (after stating the facts as above). [1] The defendants in error move in this court to dismiss the main bill of exceptions, on the ground that the Selma, Rome & Dalton Railroad Company is not made a party to the bill of exceptions, citing the rule that, when one of two or more defendants against whom a decree has been rendered brings a writ of error to reverse it, it is necessary for him to join his codefendants as plaintiffs in error. The motion is not meritorious. While this case was brought originally against the Selma, Rome & Dalton Railroad Company, the petition alleges that the company has no known place of business and no officer or agent in this state upon whom service could be made; and it does not appear that service was perfected upon that company. The petition for intervention on the part of the Southern Railway Company contains practically the same allegation. However, the rulings, decisions, and decree upon which error is assigned in the main bill of exceptions demonstrate that they were adverse to the Selma, Rome & Dalton Railroad Company. It follows therefore that even if, in the circumstances stated, the Selma, Rome & Dalton Railroad Company could be made a party to the bill of exceptions, its proper position would be as a coplaintiff in error; and the plaintiff in error has moved to make that company such coplaintiff. This can be done without notice. See *Macon Navigation Co. v. Schofield's Sons*, 111 Ga. 881, 38 S. E. 965, and cases cited; *Ramey v. O'Byrne*, 121 Ga. 518, 49 S. E. 595.

[2, 3] One of the contentions urged in behalf of the petitioners Lancaster et al., whom we denominate the second mortgagees, which contention the trial judge sustained, is that the Selma, Rome & Dalton Railroad Company, the consolidated company, was never more than a de facto corporation, for the alleged reason that the consolidation of the three constituent corporations worked a dissolution of them all, and an extinguishment of all rights, privileges, and powers held under their respective charters; that the consolidation, if effective, created a new corporation; that none of the rights, privileges, and powers of the old corporations was transmitted to the new corporation; that the new company could exercise only such

powers, etc., as were granted it by the act of consolidation; and that the powers, etc., which it undertook to exercise, and which are contested in this case by the second mortgagees, were never legally conferred upon the new company. Another reason advanced in support of the contention that the consolidated company was a mere de facto corporation is that the act of the General Assembly of Georgia, approved December 13, 1866, purporting to authorize the consolidation of the three constituent corporations, is unconstitutional and void, on the ground that it was an attempt to delegate a legislative power to the board of directors of the consolidated company to adopt for it the name of "Selma, Rome & Dalton Railroad Company"; and, further, to adopt as its charter the charter of the Alabama & Tennessee River Railroad Company, as then existing, with the amendments thereto.

Generally, the consolidation of two or more corporations operates to dissolve them, and to create a new one, and the rights, privileges, and powers of the old corporations are not transmitted, by the act of consolidation, to the new corporation. Whether the rights, privileges, and powers of one or more of the old corporations are vested in the new corporation by the consolidation depends, however, in each case upon its own peculiar facts. The very purpose of the consolidation agreement, and of the statute authorizing it or ratifying and adopting it, may, in a given case, be to confer upon the new corporation some or all of the rights, privileges, and powers of any one or more of the old corporations, and thus to enable it, under a new name, to exercise such rights, privileges, and powers; and whether this be true is to be determined by the terms of the agreement of consolidation, and of the statute under authority of which the consolidation is affected. See *Wabash, St. Louis & Pac. Ry. Co. v. Ham*, 114 U. S. 587, 595, 5 Sup. Ct. 1081, 29 L. Ed. 235. In the case now under review it is apparent from the respective charters granted by the General Assembly of Georgia to the Georgia & Alabama Railroad Company, and to the Dalton & Jacksonville Railroad Company, and the charter granted by the General Assembly of Alabama to the Alabama & Tennessee River Railroad Company, that it was the purpose of such Legislatures that the charters granted respectively by them to these companies should enable them to connect and consolidate with each other, in the interest of the public, as well as for the benefit of the companies, and to construct and to operate an interstate railroad from Selma, Ala., by way of Rome, to Dalton, Ga. Each of the companies was given authority in its charter by which such purpose could be consummated on such terms as might be agreed on by and with the interested and contracting companies.

In August, 1866, the three companies, in pursuance of their respective charter rights, duly executed a consolidation agreement for the purpose stated therein, "so as to complete and own and use one continuous railroad from Selma, by way of Rome, to Dalton, under the authority and control of one set of officers." Under this agreement all the rights, powers, privileges, franchises, and all the properties (real, personal, and mixed) belonging to either one and all of the contracting corporations, were declared to be the property and franchises of the consolidated company; each stockholder who had paid for his stock in any one of the contracting companies should be, to the extent of his stock, a stockholder in the consolidated company; the president and board of directors of the Alabama & Tennessee River Railroad Company should exercise full power and control over all the property of all of the contracting companies, thereby made the property of the consolidated company, until it should be given a new name by legislation, and should cause the railroad then completed from Selma to Blue Mountain, Ala., to be extended and completed from the latter place, by way of Rome, to Dalton, Ga.; and to enable them to do so they were authorized to issue bonds and to execute mortgages on any part or all of the property and franchises of all of the companies, including the roadbed and right of way from Selma to Dalton; all the debts, contracts, obligations, and liabilities of each of the contracting companies were assumed by the consolidated company; all the obligations upon, and made or assumed by, the Alabama & Tennessee River Railroad Company, should be valid and binding on all the companies consolidated into one; until a common name should be lawfully given under which the franchises of each of the companies should be united, the Alabama & Tennessee River Railroad Company was to be the active and controlling corporation, though the organizations of the other companies were to be continued until the consolidated corporation should come into active and authorized being; at the next annual meeting of the stockholders of the Alabama & Tennessee River Railroad Company, each stockholder of the contracting companies should have the right to vote according to the amount of his stock; and each of the contracting companies should ask of the Legislature which chartered it the enactment of a law giving one name to all of the companies consolidated under the agreement. Subsequently, the Legislatures of Georgia and Alabama each passed a statute in reference to such consolidation, that of Georgia in December, 1866, that of Alabama in February, 1867; both acts employing the same language, and the statute of Georgia being as follows:

"An act approving the consolidation of the Dalton & Jacksonville Railroad Company, and the Georgia & Alabama Railroad Company, of the state of Georgia, with the Alabama & Tennessee River Railroad Company, of the state of Alabama, and to authorize the consolidated company to adopt a corporate name and charter, and act under the same.

"Section 1. Be it enacted, etc., that the consolidation of the Dalton & Jacksonville Railroad Company, and the Georgia & Alabama Railroad Company, of the state of Georgia, with the Alabama & Tennessee River Railroad Company, of the state of Alabama, so as to form one consolidated railroad company for the construction and use of a railroad to be constructed from Blue Mountain, in the state of Alabama, as a continuation of the Alabama & Tennessee River Railroad Company, by way of Rome, to Dalton, in the state of Georgia, be, and the same is hereby ratified and approved, and the said consolidated company, acting by its board of directors, shall be, and it is hereby authorized and empowered to adopt the corporate name and style of the 'Selma, Rome & Dalton Railroad Company,' and to adopt as its charter the charter of the said Alabama & Tennessee River Railroad Company, as now existing, with the amendments thereto, and under and by the said name and style and charter so authorized, may and shall have, possess, enjoy and exercise all its lawful rights, functions, powers and privileges, and shall be subject to all lawful liabilities and responsibilities incurred or contracted, or to be incurred or contracted, by said consolidated company: Provided, always, that nothing in this act shall be so construed as to release either of said companies from any obligation or liability incurred or contracted by them, or either of them, prior to their said consolidation."

Section 2 repeals conflicting laws.

It is perfectly clear, therefore, in view of the terms of the consolidation agreement, and so much of the statute above quoted as expressly satisfied and approved the agreement, that the new or consolidated company was vested with all the franchises and rights, privileges and powers, and all the properties of the three constituent corporations. Moreover, the latter part of the act expressly authorized the board of directors of the consolidated company to adopt the name of the Selma, Rome & Dalton Railroad Company, and also to adopt as its charter that of the Alabama & Tennessee River Railroad Company, as then existing, with the amendments thereto. However, if it should be granted, for the sake of the point, that under the terms of the consolidation agreement, and the statute ratifying and approving it, when the whole of the statute is considered, the three old companies were dissolved, it is nevertheless certain that the statute conferred upon the new or consolidated company the right and power to adopt the then existing charter of the Alabama & Tennessee River Railroad Company, with the amendments thereto, which contained all the powers and privileg-

es of either of the other two contracting companies. Accordingly, if the statute be valid and the name and charter designated by it were adopted by the consolidated company, a new corporation with a new name and charter came into existence, becoming what has been termed "an interstate corporation," for the ownership and management of an interstate line of railway, and entitled to the privileges and subject to the obligations imposed upon it by the laws of this state and of the state of Alabama. See the extensive and valuable notes of Judge Freeman in the case of *Morrison v. American Snuff Co.*, 89 Am. St. Rep. 598, 650.

[4] Is the Georgia statute unconstitutional, and therefore void, for the reasons assigned? We think not. It must be conclusively presumed that the Legislatures of Georgia and Alabama, when they respectively enacted a statute ratifying and approving the consolidation agreement previously made by the three consolidating corporations, and authorizing the consolidated or new corporation to adopt as its name "Selma, Rome & Dalton Railroad Company," and to also adopt the charter, with the amendments thereto, of the Alabama & Tennessee River Railroad Company, were actually cognizant of and fully understood all the terms of such agreement, and of course the full import of the statute respectively enacted by them. It was not essential that either the consolidation agreement so ratified and approved, or the charter with its amendments of the Alabama & Tennessee River Railroad Company, should be incorporated in the statutes approving and ratifying such agreement, and authorizing the new corporation to adopt as its own the charter of the Alabama corporation. *Bibb County Loan Association v. Richards*, 21 Ga. 592; *Neal v. Todd*, 28 Ga. 335; *Central of Ga. Ry. Co. v. Georgia*, 104 Ga. 831, 31 S. E. 531, 42 L. R. A. 518, and cases cited on this point.

The charter of the Alabama & Tennessee River Railroad Company and the amendments thereto were fixed. There was no uncertainty or contingency as to the powers which the consolidated corporation would take by the adoption of the Alabama & Tennessee River Railroad Company's charter, with its amendments. The consolidated company had no authority to add to the powers granted, nor to take away from the responsibilities created by that charter. Frequently laws are enacted by Legislatures and made dependent for their operation upon future events and contingencies. Judge Cooley, in his work on *Constitutional Limitations* (7th Ed.) 164, 165, after stating that it is one of the settled maxims of constitutional law that the power conferred upon the Legislature to make laws cannot be delegated to any other body or authority, says:

"But it is not always essential that a legislative act should be a completed statute which

must in any event take effect as law, at the time it leaves the hands of the legislative department. A statute may be conditional, and its taking effect may be made to depend upon some subsequent event. Affirmative legislation may in some cases be adopted, of which the parties interested are at liberty to avail themselves or not at their option. A private act of incorporation cannot be forced upon the incorporators; they may refuse the franchise if they so choose. [Citing Angell and Ames on Corp. § 81.] In these cases the legislative act is regarded as complete when it has passed through the constitutional formalities necessary to perfected legislation, notwithstanding its actually going into operation as law may depend upon its subsequent acceptance."

Among the cases cited in the text is that of *Lothrop v. Stedman*, 42 Conn. 583, Fed. Cas. No. 8,519, holding that it is not a delegation of legislative power to make the repeal of a charter depend upon the failure of the corporation to make up a deficiency which is to be ascertained and determined by a tribunal provided by the repealing act; as well as the case of *State v. New Haven, etc., Co.*, 43 Conn. 351, in which it is held that it is competent to make an act take effect on condition that those applying for it shall erect a station at a place named. Our own court in several cases has held that a statute can be enacted by the Legislature and its operation be made contingent upon the will of bodies and persons other than the Legislature. Some of the cases are *Murphey v. Educational Board of Burke County*, 91 Ga. 856 (provision of law for payment of school officers not to operate in a county after grand jury shall otherwise recommend); *Haney v. Commissioners of Bartow County*, 91 Ga. 770, 18 S. E. 28 (road law to go into effect in county on recommendation of grand jury). In the case at bar the consolidated corporation was given legislative authority and power to adopt the name of "Selma, Rome & Dalton Railroad Company," and to also adopt as its charter that of the Alabama & Tennessee River Railroad Company, with the amendments thereto, etc. Accordingly, an acceptance of such charter by the new corporation was only necessary for its actual existence with all the rights, privileges, and powers embodied in the charter of the Alabama & Tennessee River Railroad Company. The legislative power conferred upon the directors of the new corporation, to adopt as its own the charter of one of the constituent corporations, did not seek to confer upon them any legislative authority, but merely the option to adopt as its charter that of the named constituent corporation. There is evidence in the record showing that the Selma, Rome & Dalton Railroad Company, the consolidated company, after the statutes authorizing it to do so, did duly accept and adopt as its own charter that of the Alabama & Tennessee River Railroad Company, together with the amendments thereto. The

Selma, Rome & Dalton Railroad Company in its name created debts, issued bonds, and executed mortgages (including the one under which the second mortgagees seek to set up their alleged rights), and also purchased rights of way and took conveyances thereto.

The contention made by the second mortgagees, that the charter of the Alabama & Tennessee River Railroad Company, with the amendments thereto, gave that company the right to lay out, construct, and operate a railroad within certain prescribed limits only within the state of Alabama, is not meritorious as clearly appears from the charter and amendments thereto of that company, as well as the statutes ratifying and approving the consolidation agreement. And moreover, the second mortgagees themselves dealt with the Selma, Rome & Dalton Railroad Company operating under the charter of the Alabama & Tennessee River Railroad Company, because it had no other charter, whilst it was constructing and operating the end of the railroad situated in Georgia.

[5] Another contention made by the second mortgagees is that the first mortgage never operated as a lien upon so much of the railroad and other properties situated in Georgia not in the possession of the Selma, Rome & Dalton Railroad Company, or to which it did not have the right of possession at the time of the execution of first mortgage, but that all of such properties were covered by the lien of the second mortgage; and that the foreclosure and sale under the first mortgage did not pass the title to the property in Georgia acquired by the mortgagor between the dates of the first and second mortgages. We cannot concede the soundness of this contention. The Civil Code, which went into effect on January 1, 1883, declared (section 1956):

"A mortgage in this state is only a security for a debt, and passes no title. It may embrace all property in possession, or to which the mortgagor has the right of possession at the time," etc.

This was the statute law at the time of the execution of the first and second mortgages involved in this case. The act of 1899 (Acts 1899, p. 32) made a provision for mortgaging future-acquired property to secure an issue of bonds. There are a number of decisions by this court to the effect that (under the old statute) neither a corporation nor a natural person has a right to mortgage property which may be acquired after the execution of the mortgage. However, the charter of the Alabama & Tennessee River Railroad Company, including the amendments thereto, which was given by statute to the Selma, Rome & Dalton Railroad Company, and which was adopted in accordance with the statute as its own charter, expressly authorized the Alabama & Tennessee River Railroad Company to mortgage after-acquired property; and in pursuance of its charter so adopted the Sel-

ma, Rome & Dalton Railroad Company executed the first mortgage on its entire line of railroad, and all its properties situated in Georgia, including that of which it was then in possession, as well as that to which it then had the right of possession, and also that which it had legislative authority to subsequently acquire for the construction and operation of its railroad. Notwithstanding the provisions of the general law as stated in the Code section just above quoted, the special statute authorizing the Selma, Rome & Dalton Railroad Company, under its adopted charter, to mortgage after-acquired property, was valid. The Constitution of 1865 (which was in effect at the time of the enactment of the statute authorizing the consolidation involved in this case) declared:

"Laws should have a general operation, and no general law affecting private rights shall be varied in a particular case by special legislation, except with the free consent, in writing, of all persons to be affected thereby; and no person being under a legal disability to contract, is capable of such free consent." Civil Code of 1868, § 4904.

It will be observed that the Constitution of 1865 did not contain the provision of our present Constitution (1877) that—

"No special law shall be enacted in any case for which provision has been made by an existing general law."

In *Mattox v. Knox*, 96 Ga. 405, 23 S. E. 307, it was said:

"The Legislature was not prohibited, before the Constitution of 1877, from enacting special laws for particular localities, varying or changing a general law."

To the same effect is *Burks v. Morgan*, 84 Ga. 627, 10 S. E. 1096; *Massey v. Bowles*, 99 Ga. 216, 25 S. E. 270; *Thorpe v. Butt*, 106 Ga. 52, 31 S. E. 793.

We accordingly hold that the first mortgage was a valid lien on all the property covered by it, and which the Selma, Rome & Dalton Railroad Company, the mortgagor, then owned or had in possession, or to which it then had the right of possession, and also upon that acquired subsequently to the execution of that mortgage; that the foreclosure and sale under it passed the title to all such property.

[6-8] Furthermore, aside from the rulings hereinbefore announced, and in view of the facts of the case as set forth in the statement preceding this opinion, the trustee in the second mortgage was, and the holders of the bonds secured by that mortgage are, estopped to deny that the Selma, Rome & Dalton Railroad Company was a de jure corporation, and had, under its charter, authority to execute the first mortgage on all of its railroad property, including that after acquired, situated both in Georgia and in Alabama; and they are further estopped to

deny the validity of the first mortgage and the priority of its lien over that of the second mortgage as to all the property involved in the case. There was embodied in the first mortgage a statement of certain facts which the Selma, Rome & Dalton Railroad Company, the mortgagor, was estopped to deny; and the trustee in the second mortgage and the holders of the bonds secured thereby, being privies in estate of the mortgagor, are likewise estopped to deny such facts. The first mortgage gave a detailed history of the creation of the Selma, Rome & Dalton Railroad Company, denominating it as a corporation existing in and duly organized under the laws of the states of Alabama and Georgia. It set forth explicitly the respective charters of the three constituent companies, and the powers given them thereby. Among them, that each of the companies had the right to connect and consolidate with the others, and that each of them had express authority to mortgage future-acquired property for the construction and operation of their designated railroads; that the three companies, duly authorized so to do, entered into a consolidation agreement, under the terms of which each constituent company agreed to transfer all of its charter rights and powers to the consolidated company, and did so; that such agreement was approved and ratified by certain statutes of the state of Georgia and Alabama, which authorized the consolidated company to adopt the name of "Selma, Rome & Dalton Railroad Company," and also to adopt the charter of one of the constituent companies, viz., the Alabama & Tennessee River Railroad Company; that the consolidated company, duly and regularly authorized to do so, did adopt such name and charter. This mortgage contained a general warranty clause. These facts were material as to the parties to the first mortgage. They were certainly material, at least in one view; that is, that the first mortgagees were given facts by the Selma, Rome & Dalton Railroad Company which, in effect, constituted it a de jure corporation, with authority to mortgage all of its railroad property, including that to be after acquired, which facts were valuable not only to the first mortgagees, but to all who might desire to invest in the bonds secured by that mortgage. In other words, they tended to enhance the market value of the bonds. The mortgage was duly recorded. In *Galveston Railroad Co. v. Cowdrey*, 11 Wall. 459, 482 (20 L. Ed. 199), it was held:

The "holder of the fourth mortgage is an assignee of the railroad company [the mortgagor in all the mortgages], claiming under it, with full notice of the other mortgages. He is in privity with the company, and is bound by the estoppel."

Moreover, the petition of the second mortgage is brought against the Selma, Rome &

Dalton Railroad Company, to foreclose the second mortgage given by it. The original petition alleged that the defendant "is a corporation organized and existing under and by virtue of the laws of the state of Georgia." This last allegation was, however, stricken by an amendment to the petition.

There are other reasons for holding that the second mortgagees are estopped in respect of the matters above stated. On the face of the bonds secured by the second mortgage appear these words:

"Selma, Rome & Dalton Railroad Company, chartered by the states of Alabama and Georgia—second mortgage bonds."

They attached to their petition, as an exhibit made a part thereof, a copy of the second mortgage, which contains the same recitals of facts as stated in the first mortgage, showing in detail the various steps taken in the creation of the Selma, Rome & Dalton Railroad Company. The second mortgage itself contained the after-acquired property clause, which fact strongly indicated that the second mortgagees understood that the mortgagor company had the charter power to execute a lien upon such property. One of the recitals in the second mortgage is as follows:

"And whereas the said union and consolidation of the several railroad companies, so made as aforesaid, was expressly ratified and approved by laws duly enacted by the said states of Alabama and Georgia, respectively, in and of which said laws the consolidated company, the party of the first part hereto, was and is duly authorized and empowered to adopt as its corporate name and style the name of the Selma, Rome & Dalton Railroad Company, and to adopt as its charter the charter of the said Alabama & Tennessee River Railroad Company, with all of its amendments, and to have, possess, exercise, and enjoy all of its rights, franchises, powers, and privileges; and whereas said consolidated company did lawfully adopt said name and the said charter."

Another recital is:

"And whereas the Selma, Rome & Dalton Railroad Company, the said party of the first part, is the owner of a certain railroad above mentioned, and which is hereinafter particularly described, and all the franchises, rights of way, track, ties, rails, railway, culverts, structures, rolling stock, and all other property appertaining to said railroad and acquired or to be acquired for the construction and operation thereof as hereinafter more particularly described and set forth, subject to the lien of such mortgages thereon as have heretofore been made by said above-named corporation and duly recorded."

The second mortgage, by express provision, therefore, is subject to the first mortgage, which had been given and duly recorded prior to the date of the second mortgage,

as to all the property "acquired or to be acquired." Our holding that the second mortgagees, under this view of the case, are estopped from attacking the validity and the priority of the first mortgage under the facts stated, is to our minds so conclusive as to need no citation of the numerous authorities supporting it.

[9] We are also of the opinion that, as the bondholders secured by the second mortgage have brought their action for its foreclosure in a court of equity, they are subject to an equitable bar by reason of their laches in proceeding to establish the rights claimed by them. This equitable bar, though analogized as far as possible to the statutes of limitations prevailing at law, nevertheless exists apart from and independent of such limitations.

"The limitations herein provided [statutory limitations as to various actions] apply equally to all courts; and, in addition to the above, courts of equity may interpose an equitable bar, whenever, from the lapse of time and laches of the complainant, it would be inequitable to allow a party to enforce his legal rights." Civil Code, § 4369.

Again:

"Equity gives no relief to one whose long delay renders the ascertainment of the truth difficult, though no legal limitation bars the right." Id. § 4536.

In *Wilkes v. Phillips*, 120 Ga. 728, 48 S. E. 113, it was said:

"A person who is injured by fraud must be prompt in seeking redress, and he must prosecute his suit with diligence. Laches and neglect are always discountenanced. Nothing can call a court of chancery into activity but conscience, good faith, and reasonable diligence; and, where these are wanting, the court is passive and does nothing. A court of equity does not encourage stale claims, and a party may lose his right to complain of fraud by his delay"—citing *Bish. Eq.* § 260.

Some of the other cases in which this court has applied the equitable bar from the lapse of time and laches of the complainant are: *DeLaigle v. Denham*, 65 Ga. 482; *Pierce v. Middle Georgia Land Co.*, 131 Ga. 103, 61 S. E. 1114; *Basch v. Frankenstein*, 134 Ga. 518, 68 S. E. 75; *Aken v. Bullard*, 134 Ga. 665, 68 S. E. 482; *James v. Hill*, 140 Ga. 739, 79 S. E. 782. In *Alsop v. Riker*, 155 U. S. 448, 459, 461, 15 Sup. Ct. 162, 39 L. Ed. 218, the holder of certain construction bonds was held to be barred on account of his inaction and laches for a period of about seven years. In the opinion the court said:

"The record discloses no element of fraud or concealment upon the part of the trustees or of any of them. What they did was done openly and was known or might have been known by the exercise of the slightest diligence upon the part of every one interested in the property



of the old corporation. The plaintiff unquestionably knew, or could easily have ascertained, before the trustees bought the property at the foreclosure sale—at any rate, before they transferred it to the new corporation—that their purchase would be, and was, exclusively for the benefit of certificate holders interested in the trust. Although his bonds had not then matured, he could have taken steps to prevent any transfer of the property that would impair his equitable rights in it or instituted proper judicial proceedings, of which all would be required to take notice, to have his interest in the property adjudicated."

The court then said, in effect, that the plaintiff was barred by the statute of limitations of New York, to wit, six years, but added:

"But, without placing our decision upon that ground, and independently of the statute of limitations, the case is one in which a court of equity should refuse to interpose, because of laches upon the part of appellant in asserting the rights he now claims. Looking at all the circumstances, particularly the nature of the property, good faith demanded that if he intended to question the right of the trustees to acquire, hold, and transfer it for the exclusive benefit of certificate holders, he should have done so by formal proceedings, commenced within a reasonable time after he became cognizant of all the facts. The case is one peculiarly for the application of the rule that equity, in the exercise of its inherent power to do justice between parties, will, when justice demands it, refuse relief, even if the time elapsed without suit is less than that prescribed by the statute of limitations."

There are many other decisions of that court to the same effect. We cite only one of them, however, that is, *Waller v. Tex. & Pac. Ry. Co.*, 245 U. S. 398, 38 Sup. Ct. 142, 62 L. Ed. 362; some of the facts there being quite similar to those in the present case. In the case last cited certain holders of bonds were refused relief on account of delay over 10 years after their maturity, and 40 years after their issue. In *Scott v. Scott*, (Ala.) 80 South. 82, it was said:

"As a matter of public policy, antiquated demands will not be considered by the courts, and, without regard to any statute of limitations, there must be a time beyond which human transactions will not be inquired into."

See cases cited in notes to that case in 88 Central Law Journal, 161. See *Walker v. Warner*, 179 Ill. 16, 53 N. E. 594, 70 Am. St. Rep. 85.

In the present case the sale of the property covered by both mortgages occurred in 1874, under foreclosure proceedings instituted by the trustees in the first deed of trust or mortgage, and by Shorter Cowan, the purchaser, and his successors went into possession of the property soon thereafter, under deeds conveying full title, including the equity of redemption, changed the names of the railroads as successorship in ownership oc-

curred, so that the Selma, Rome & Dalton Railroad Company practically went out of existence in name, as well as in fact. The Southern Railway Company became the purchaser of the property in July, 1894, and has since remained in continuous possession of the same, has spent large sums of money in improving the railroad and its appurtenances; that part of the line between Dalton and Rome becoming a part of a trunk line from Chattanooga to the Atlantic Ocean, and the line from Rome to Selma becoming a part of another trunk line. Mortgages were placed on the properties, and debts incurred on account of them; there being no evidence that any of the owners, from Cowan down to the Southern Railway Company, had any notice that the bondholders under the second mortgage expected to make any claim until this suit was filed. The second mortgage was executed on July 1, 1870, and the bonds secured thereby matured in 1900, although there was a condition in them for earlier maturity upon default in the payment of interest and taxes. The present action was instituted in 1910. No reason whatever is alleged for the delay. The Selma, Rome & Dalton Railroad Company was always in default as to interest payments; and therefore, under the conditions in the bonds, the principal could have been declared due upon such default, and the second mortgage bondholders could have instituted foreclosure proceedings even before the sale of the property under the foreclosure of the first mortgage. Yet they waited, without any excuse whatever, for about 35 years before instituting an action for the establishment of their claims.

[10] There is one more question presented for decision, and that is whether the petitioners in this case have the right to redeem the railroad properties covered by the second mortgage and located in the state of Georgia; their counsel insisting that they have the right of redemption upon payment of the amount "as represented by the bid made by the purchaser at the foreclosure proceedings of the first mortgage, instituted in Floyd superior court, together with the 7 per cent. interest thereon, from which amount there should be deducted [net?] earnings made from the property." The auditor and the trial judge both held against the claim of the petitioners to redeem, and we concur in their decision. As already stated, "A mortgage in this state is only security for a debt, and passes no title." In *Suttles v. Sewell*, 105 Ga. 129, 31 S. E. 41, it was held:

"Neither the defendant in *fi. fa.* nor any person representing him has a right to redeem property sold at a mortgage foreclosure sale."

And in the opinion it was said:

"A mortgagor in this state cannot redeem after a sale has been had under a foreclosure judgment."

And it follows, of course, that his privies, such as assignees, and second mortgagees, cannot do so. It does not appear either from the report published in that case, or from the record of file in this court, whether the foreclosure judgment and sale thereunder were had in a statutory proceeding to foreclose the mortgage, or in an equity suit. Why there should be any difference in respect of the conclusiveness of the judgment of foreclosure in the two procedures is not apparent, though, in the view we take of this case, we are not required to render a decision as to that point. Nor do we decide whether the right of redemption, even where given by statute, is applicable after railroad properties in their entirety have been sold under mortgage foreclosure proceedings. See *Hammock v. Loan & Trust Co.*, 105 U. S. 77, 28 L. Ed. 1111, and cases collated in 10 *Rose's Notes*, 260. Nor are we called upon to decide whether the petitioners who hold only 172 of the 6,000 second mortgage bonds could in any event maintain the right to redeem; nor whether they could redeem on the terms they offer. We do decide, with confidence, that, if the petitioners ever had the right of redemption, they have lost it by their laches in seeking to enforce it. As we have seen, the first mortgage was given in 1867, and the second in 1870. The first mortgage was foreclosed in equity, and a decree of foreclosure rendered in 1874. A commissioners' sale under the decree, the confirmation thereof, and a deed to all the mortgaged property, were made in that year. The purchaser went immediately into possession, and he and those holding the properties under him by mesne conveyances down to the Southern Railway Company, which purchased in 1894, have all had open and continuous possession ever since. Large sums have been expended by the last-named company in betterments and improvements, and it has continuously and openly operated the railroad since its purchase. The second mortgage bonds matured in 1900, with a provision, however, for accelerated maturity upon default in payment of interest, etc., as designated therein. The petitioners instituted their equitable petition to foreclose the second mortgage in 1910. They sought to amend it in 1914, by asserting their claim to redeem. Surely, a court of equity will not aid them in the enforcement of such a stale claim; and this aside from any statute of limitations. It is needless to cite the many adjudicated cases in support of our holding. It has been said that the right to redeem and the right to foreclose are mutual and reciprocal, and that when the one is barred the other is barred.

We have already decided that these holders of the second mortgage bonds were estopped by laches from foreclosing the second mortgage. It must follow that they

are also estopped by laches from asserting their claim to redeem.

In view of the holdings above announced, the court erred in not enjoining the petitioners from prosecuting the action.

Judgment reversed on the main bill of exceptions, and affirmed on the cross-bill.

All the Justices concur.

(149 Ga. 464)

WARNER et al. v. HILL et al. (No. 1177.)

(Supreme Court of Georgia. Oct. 1, 1919.)

*(Syllabus by the Court.)*

**1. EXECUTORS AND ADMINISTRATORS' SALE ON THE PREMISES WITHOUT ORDER FROM COURT INVALID.**

This was a suit by certain parties to recover land formerly owned by an ancestor who died intestate, which land was subsequently sold at an administrator's sale, on the grounds that there was an irregularity in the sale, the same having been held on the premises without an order from the court of ordinary authorizing that the sale be so held, and that the sale was voidable because the administrator was actually the purchaser at his own sale, though he had gone through the form of knocking off the land to a by-bidder, who almost immediately thereafter conveyed the land to the administrator, and that the defendant at present in possession of the land purchased from the individual who was the administrator, with notice of the invalidity in the sale. Among other things, the plaintiffs pray for recovery of the land and for cancellation of the deeds by which title passed to the defendant in possession. *Held:*

(1) Under all the evidence in the record, the court erred in granting a nonsuit at the conclusion of the introduction of testimony by the plaintiffs.

(a) The evidence of the plaintiffs was insufficient to show notice to the last purchaser, the defendant in possession of the premises, that the sale by the administrator was virtually a sale to himself, or that he was chargeable with notice of the alleged defect in the title; and if the plaintiffs' case had been based entirely upon the alleged infirmity in title just referred to the grant of a nonsuit would not have been error.

(b) But while an order by the court of ordinary was regularly granted for the sale of the land by the administrator, the sale was not had at the courthouse of the county in which the land was situated, but was had upon the premises in another city in the same county, and there was sufficient evidence to authorize a jury to find that there was no order granted by the ordinary authorizing the sale upon the premises, and that the defendant in possession of the property had notice of the fact that the necessary order for a sale upon the premises had not been granted; which irregularity would render the sale invalid and voidable at the suit of heirs.

## 2. EVIDENCE ~~§~~256—ADMISSIBILITY OF EVIDENCE OF SALE BY ADMINISTRATOR TO HIMSELF.

The admission of the purchaser at the administrator's sale that he was not a bona fide purchaser, but that he was a by-bidder, and that as an ostensible payment he delivered to the administrator his check, which was not cashed but was torn up, and that he immediately deeded the property back to the administrator, can only be competent in the event, upon the next trial, there is evidence showing notice to the last purchaser of the alleged invalidity of the administrator's sale, and should then be admitted in evidence under instructions limiting the effect of such testimony to the party making it, and should not be considered by the jury in passing upon the question of notice to the defendant in possession of the invalidity of the sale or of the existence of the order authorizing the sale upon the premises.

## 3. QUESTION NOT DETERMINED.

Whether certain of the plaintiffs are estopped from maintaining their suit because of their receipt of certain sums, which were a part of the proceeds of the sale of the land at the administrator's sale, is a question that can be determined under all the circumstances as they are developed at the next trial under proper instructions of the court.

Error from Superior Court, Troup County; J. R. Terrell, Judge.

Suit by Mary Warner and others against B. H. Hill and others. Judgment of nonsuit, and plaintiffs bring error. Reversed.

T. T. Miller, of Columbus, and Hatton Lovejoy, of La Grange, for plaintiffs in error.

Little, Powell, Smith & Goldstein, of Atlanta, and E. T. Moon, of La Grange, for defendants in error.

PER CURIAM. Judgment reversed.

FISH, C. J., absent on account of sickness.

(124 Va. 736)

## BROOKS v. CLINTSMAN.

(Supreme Court of Appeals of Virginia.)

## GIFTS ~~§~~25—PAROL GIFTS OF LAND NOT ENFORCEABLE.

The history and express purpose of Code 1904, § 2413, providing that no estate in lands for a term of more than five years shall be conveyed unless by deed or will, discloses a legislative policy to deny the right to enforce parol gifts of such estates.

On petition for rehearing. Petition denied, and former determination upheld.

For former opinion, see 98 S. E. 742.

WHITTLE, P. In the petition of Ida R. Brooks for a rehearing in the above case,

our attention is called to a mistake in the printed record of the date of the probate of the will of Leslie L. Clintsman, deceased. The date as printed was February 2, 1904, instead of February 2, 1914, the correct date. From that circumstance the argument is again stressed that the right to maintain the suit was barred by laches. In the majority opinion, it is true, the question of laches was discussed from the standpoint of the former date; yet it by no means constitutes a bar to the suit when considered from the correct date. Even if it were conceded that a gift of the land was intended, the case would still be controlled by section 2413 of the Code, abolishing the enforceability of parol gifts of estates of inheritance or freehold, or a term for more than five years, in land, "although \* \* \* followed by possession thereunder and improvement of the land by the donee or those claiming under him." The history and expressed purpose of the section shows a legislative policy to deny the right to enforce parol gifts of such estates.

This statute was recently considered, and relief refused in a much stronger case for relief on the facts than those presented in this record. *Wohlford v. Wohlford*, 121 Va. 699, 93 S. E. 629.

Rehearing denied.

(84 W. Va. 500)

## MORLANG et al. v. CITY OF PARKERSBURG.

(Supreme Court of Appeals of West Virginia. Sept. 23, 1919.)

(Syllabus by the Court.)

## 1. DEDICATION ~~§~~15, 16(1), 43—INTENT NECESSARY TO EXPRESS DEDICATION AND IMPLIED DEDICATION.

The law recognizes two classes of dedications of a street to a city, express and implied, the intent to dedicate being essential to both, though in the latter case it may be shown by acts of the owner justifying the public authorities in believing the intention exists, where they act upon such belief, even though the owner may never have actually intended a dedication.

## 2. DEDICATION ~~§~~44—WHEN NOT SHOWN AS TO STRIP BETWEEN PROPERTY LINE AND BUILDING.

Dedication being an exceptional and peculiar mode of passing title to interest in land, the proof thereof must be full and clear; and the acts proved, which it is claimed constitute such dedication, must be inconsistent with any construction other than that of a dedication. Merely building the front of one's house back from the property line is alone not sufficient to prove intent to dedicate to the public the strip of land between the property line and the front of the house.

**3. MUNICIPAL CORPORATIONS §665 — RIGHT OF ABUTTING OWNER TO STRIP BETWEEN STREET LINE AND BUILDING.**

A municipal corporation cannot prevent the use by its owner, in a lawful way, of a paved strip between the street line and a building set a few feet back from the street, where it is not shown that the strip has become a part of the highway, or that the municipal authorities have so treated it.

**4. DEDICATION §20(5) — WHEN DEDICATION OF PAVED STRIP NOT SHOWN BY IMPLICATION.**

Where the owner of property abutting upon a city street constructs the building upon his property  $3\frac{1}{2}$  feet back from the street line, and paves the same in the same manner as the sidewalk is paved, and permits the public using such sidewalk to also use such paved strip between the front of his building and the street line as a sidewalk, he will not be held to have thereby dedicated the same to the public by implication, unless it be further shown that the public authorities, with his knowledge, exercise acts of dominion thereon indicative of their belief that the same has been dedicated to the public.

**5. DEDICATION §44 — PAYMENT OF TAX BUT SLIGHT EVIDENCE TO DEFEAT DEDICATION.**

Payment of taxes assessed by a municipality upon a strip of land claimed to have been dedicated to it, while evidence tending to defeat the presumption of a dedication, is, under most circumstances, of little probative force.

Appeal from Circuit Court, Wood County.

Suit for injunction by Bertha Morlang and others against the city of Parkersburg. Temporary injunction granted, defendant's counter injunction dissolved, and temporary injunction made perpetual, and defendant appeals. Affirmed.

McCluer & McCluer, of Parkersburg, for appellant.

Van Winkle & Ambler, of Parkersburg, for appellees.

**RITZ, J.** In the year 1878 one Fred R. Rose was the owner of a lot situate in the city of Parkersburg, fronting 23 feet on the east side of Market street, and extending back a distance of 90 feet. This lot is part of what is known on the original plat of the city as inlot No. 92, and is between what is now known as Fourth street and Fifth street in said city, the north line of the same being at a distance of 49 feet from the corner of said Market street and Fifth street. At that time, to wit, in the year 1878, there were erected upon this lot, and upon the adjoining lots to the north and south of it, frame structures which were used for various sorts of retail mercantile business. In May of that year a fire occurred which destroyed all of the buildings from the corner of Fifth street down to a point more than halfway in the block, where a brick building

stood owned by one Randolph Logan. Immediately thereafter the owners of the lots began to erect new buildings thereon. Rose, who owned the lot in question, as well as the lot next to it on the south, when he erected his new buildings, placed the front of them back  $3\frac{1}{2}$  feet from the street line. The two buildings on the two lots north of Rose, and between his lots and the corner of Fifth and Market streets, were erected upon the old line. South of Rose's the buildings were erected on a line  $3\frac{1}{2}$  feet from the street line down to the Logan brick building, which was not destroyed. This brick building stood some distance back from the street, and was occupied as a residence. Shortly after this time Logan extended this building to the street line, and it was occupied in this condition for many years as a cigar store. In 1913 it was torn down and replaced by a large brick building, the front of which was placed at a distance of  $2\frac{1}{2}$  feet from the street line. South of this Logan property new buildings have been erected at various times upon the lots, the fronts of none of which were placed upon the actual street line, being from  $2\frac{1}{2}$  to 3 feet back therefrom. In the block between Third and Fourth streets, on the east side thereof, all of the buildings are placed 3 feet back from the actual line of the street. After Rose and the adjoining property owners had erected the buildings, as above indicated, they paved the space between their buildings and the curb with brick at their own expense, making the sidewalk in front of their premises  $14\frac{1}{2}$  feet wide instead of 11 feet, as it had been prior to that time. In the year 1888 Rose sold the lot in controversy, together with the house thereon, to Theodore Morlang, the husband of one of the plaintiffs and the father of the other two. At that time the space in front of the building, between it and the curb, was paved with brick, and the whole thereof used as a sidewalk. Some time after this Morlang and the owners of the adjacent properties took up the brick paving, and put down concrete pavement in front of their premises. This pavement was extended clear back to the front of the buildings. The building on the lot immediately to the north of the Morlang lot extended out to the street line—that is,  $3\frac{1}{2}$  feet further than the Morlang building—and that condition has existed up until this time. The space of  $3\frac{1}{2}$  feet between the front of the Morlang building and the actual street line is in no way distinguished from the other part of the sidewalk. It is paved with the same character of material, and there are no marks to indicate where the street ends and the Morlang lot begins. A number of years ago the Morlang built a balcony on the front of their building at the level of the second floor, extending out over this  $3\frac{1}{2}$  feet of

space. No permission was asked of the city authorities to construct this balcony, nor was any objection made to the construction thereof by the city authorities without permission, although an ordinance of the city requires that permission be obtained from the city authorities before any structure may be erected overhanging any of the streets or public places of the city. It is further shown that this lot has been assessed and taxes paid thereon at all times as a lot 23x90 feet, no deduction having ever been made therefrom because of this 3½-foot strip. It is further shown that at various times this controverted strip was used by the merchants and others doing business in the buildings along this street for the display of their wares and merchandise, for the storage to some extent of boxes and barrels thereon, but it does not appear that this was done to any greater extent than was done by other merchants in other parts of the city, where the buildings were erected flush with the street line. There is some evidence indicating that in 1878, at the time of the fire above referred to, Rose, who was then the owner of the lot in question, had conversations with some of the owners of adjoining lots in regard to setting their buildings back. Some refused to do so, and some apparently followed the example set by Rose. The witnesses who testify upon this question say that they understood Rose's purpose to have been to create better conditions for the conduct of the business carried on in the buildings. Some of the witnesses say that Rose expressed the view that by setting the buildings back the owners would always have a clear space where the occupants of the storerooms could display their merchandise without obtaining permission from the public authorities to use part of the street. Not one of them testify that he ever suggested that the strip of land left between the building line and the actual street line was to be dedicated to the city or become a part of the public street. No ordinance was ever passed by the city of Parkersburg widening Market street at this point, nor is there any evidence that the city or its officers ever acted upon any supposed dedication of this strip to the city by Rose and the adjoining property owners. In 1914 Rose's tenant desired to extend the front of the building out to the street line. He was engaged in the business of selling ladies' wearing apparel, and this business required his goods to be displayed in such manner that passers-by would have a ready view thereof. This could not be with the wall of the adjoining building on the north projecting out 3½ feet. Prior to the time this tenant went into the building it was occupied as a saloon. At the request of this tenant the owners of the property made application to the mayor of the city of Parkersburg for permission

to erect the front upon this 3½-foot strip. They were informed by the mayor that he would submit the matter to the council. This was done, and the council, upon the advice of the city's attorney, refused the permission, claiming for the first time, so far as this record shows, that this 3½-foot strip had been dedicated to the city as a public street. The owners of the property, when informed by the mayor of this contention, immediately repudiated the same, and insisted that it was their private property, and that they would build thereon. Much is made in argument of the fact that they made the application to the city instead of proceeding with the building as above indicated. They say that it was their understanding that it was necessary to get a permit from the city authorities to make any such extensions or improvements to a building, and it was for such permission that they were applying. We cannot doubt their statements in this regard, inasmuch as the mayor to whom they made this application is not introduced by the city, and in no way contradicts their statements. Again, in 1917, when new city officers came in, they took it up with the city authorities through the new mayor, for the purpose of seeing if authority would not be granted to them to make this improvement of the building without, as they say, having a lawsuit. They had a conference with him and explained the situation, submitted to him a plan of the improvements contemplated, and, as they state, he advised them that he saw no objection thereto, but that he would submit the same to the council for its action. This was done, and the council, upon the advice of the city solicitor, refused to grant the permit. This action of the council was communicated to the plaintiffs by the mayor, and he advised them that it seemed to be a difference of opinion between the city's lawyer and the plaintiffs' lawyer as to who had the right to control the 3½-foot strip; that in his view the proper way to test it would be for the plaintiffs to go on with the improvements, regardless of the city's action in refusing the permit, and, when the city attempted to stop them, to apply for an injunction to enjoin the city's interference therewith. Plaintiffs adopted the mayor's advice in this regard. These negotiations with the mayor by the plaintiffs are testified to fully by them, and are in no wise contradicted by that officer. Plaintiffs did begin to make the improvements in accordance with the plan submitted to the mayor as aforesaid. The city authorities immediately stopped them from going on with the work, and the plaintiffs thereupon filed their bill, asking that the city and its agents be enjoined from interfering with them in making the improvements contemplated. A temporary injunction was granted, and the improvements proceeded with, when

the city made application for a counter injunction to prevent the plaintiffs from making the improvements pending the litigation. This injunction was also granted, but was subsequently modified so as to allow the improvements to be so far completed as to prevent damage to the building. Upon the hearing of the case the circuit court dissolved the injunction granted upon the city's cross-application, and perpetuated the injunction granted to the plaintiffs, holding that the strip of land belonged to the plaintiffs, and that the city had acquired no easement therein.

[1, 2] The chief reliance of the city upon this appeal is that there was an implied dedication of this strip of land to the city for public use, which implied dedication was accepted by the user thereof. There is no contention that there was an express dedication, either in writing or orally, nor that there was an express acceptance of any dedication by the city. Upon the other hand, the plaintiffs contend that there has never been any such conduct upon their part, or upon the part of their predecessors in title, in connection with this strip of land, as would imply a dedication thereof to the public. That an owner of real estate, under circumstances like this, may dedicate an easement therein to the public without any expression of his intent in that regard, or without any writing conveying the same, there is no doubt. It must be borne in mind that title to real estate, or any interest therein, is ordinarily passed by deed or will, and, while one may lose his land without an actual conveyance of the same, the acts and conduct upon his part, and upon the part of the one claiming to have acquired such title in such way, must be so unequivocal and positive as to leave little doubt that it was the intention of the owner to dedicate the same to the public use, and the intention of the public authorities to accept the same for that purpose. *McQuillin on Municipal Corporations*, § 1568, and authorities there cited. It may be said that, in order to the validity of such implied dedication, it must be shown that the owner intended to part with the easement in his property for the public use. By this we do not mean that an expression of such intent upon his part need be proven. In fact, he may not have actually had such purpose in his mind, but his acts and conduct in regard to the property must be of such character that the public, dealing with him upon the strength of such conduct, could not but believe that his intention was to vest an easement therein in the public. There seems to be no trouble about this general principle of law, but it is the application of it to the facts existing here which leads to the controversy.

[3, 4] Counsel for the city contend that the owners' conduct in connection with and treatment of this 3½-foot space, since the year

1878, was such as to indicate the clear intent and purpose upon their part to dedicate it to the public for public use, while the plaintiffs contend that the conduct shown is entirely consistent with the permissive use thereof by the public. As above stated, it is not proven that the plaintiffs, or Rose, under whom they claim, ever made any declaration of dedication of this property, nor is anything further shown than that Rose, in connection with some of the adjoining owners in erecting their buildings, left this space in front thereof. His purpose in doing so, some of the witnesses say, was to widen the sidewalk in order that the business conducted in the buildings might be more advantageously carried on. By others it is said that the purpose was to leave a space in front of the buildings so that merchants doing business therein could display their goods upon the outside without trespass upon the city street, and without getting any leave from the city therefor. That this space was used in the display of goods there can be no question. It appears that the balcony above referred to was erected, extending over this space, without permission from the city authorities. It also appears that cellar gratings were put in in front of the building in this space without any authority from the city. The only thing which it can be said that the owners of the property have done upon which an implied dedication can rest is that they permitted the public to travel over this part of the sidewalk constructed by them at their own expense, and not under any requirement imposed upon them by the city. Will a dedication be implied from this state of facts? Counsel for the respective parties, with commendable zeal and thoroughness, have examined the authorities bearing upon this question, and have given the result of their efforts to this court, not only in oral argument at the bar, but in elaborate printed briefs. From the textbooks may be gleaned the general statements of law above declared, but we must look to the decided cases to discover the application that has been made of these general principles to particular states of fact.

Counsel for the city cite and rely upon many cases wherein municipal corporations were held liable for damages for personal injury upon proof of a user of a street by the public, and insist that such proof is sufficient to show title to the public in the easement over the land. There is quite a different question involved when a contest arises between the owner of the fee and the public claiming an easement thereover than the one that arises between the public and a party injured because of the improper condition of what is used as a public street. As between a citizen using a street laid out and worked by the public officers as a public street, it has been frequently held that proof of the exercise of acts of dominion over the street by

the public is sufficient to charge liability upon a municipal corporation for an injury received because of the bad condition of such street. Proof that the city authorities expended the public moneys in improving such street or in working thereon has been held sufficient to establish it as a public street for the purpose of recovery for an injury caused by defects, but it could not be said that such proof would be sufficient to deprive the owner of land of his title thereto unless it could be further shown that he knew of such acts of ownership by the public and acquiesced therein. The proof in this case on behalf of the city is far short of that which has been required in the suits to recover damages for injuries above referred to. In those cases it has generally been required that it be shown that the public authorities have exercised dominion over the particular street or way by expending the public moneys thereon in the way of improvements, or by some such unequivocal conduct. In this case it is not shown that any public officer ever did anything indicating the intention upon the part of the city authorities to claim an interest in this strip of land. No public moneys were ever expended thereon. No public officer ever made any declaration or committed any act which indicated an intention upon the part of the public authorities to adopt this strip of land as a public way, but, even if they had, it would not be conclusive against the landowner, unless done with his full knowledge and acquiescence.

The case of *Denning v. Roome*, 6 Wend. (N. Y.) 651, is cited and relied upon by counsel for appellant as controlling in this case. It is true that case in its facts is somewhat similar to the case here. However, it has its distinguishing characteristics, and it is because of these elements, existing there which do not exist here, that there was held to be an implied dedication of the strip of land involved. In that case a street 40 feet wide extended in front of the plaintiff's property. This street by an ordinance was widened to the width of 60 feet, and after the passage of this ordinance so widening the street, which took a strip off the front of the plaintiff's lot, the same was used in this widened condition for a period of 19 years. During that time the street thus widened had been paved by the city, and an assessment for the cost thereof made against the abutting property owners, including the plaintiff, which assessment plaintiff paid without objection. It will thus be seen that in that case not only was the strip of land involved used by the public, but the public authorities, by passing an ordinance widening the street to 60 feet, incorporated it in the street as thus laid down, and by paving the same exercised dominion over it entirely inconsistent with the plaintiff's contention that the city had no easement therein, and by his payment of this assessment for improving the street in its

widened condition he acquiesced in the adoption of the same as a public street. Had the city of Parkersburg passed an ordinance widening Market street the additional distance of  $3\frac{1}{2}$  feet in front of the plaintiffs' property, and paved the same for this additional distance, and assessed the cost thereof against the plaintiffs or their predecessor, and collected such costs from them, it might be said that by the passage of such ordinance, and the making of such improvements, the city unequivocally claimed the right to the street in its widened state, and by the payment of such assessment the plaintiffs or their predecessor acquiesced in and approved that contention of the public authorities. These elements, however, which were controlling in that case, do not exist here.

This case is more like that of *Keppler v. City of Richmond* (Va.) 98 S. E. 747. In that case the plaintiff owned a lot fronting on one of the streets of the city, and extending back along another of the city streets to an alley. More than 50 years before the litigation arose plaintiff had built upon this lot a building fronting on the street in front thereof, and three other buildings fronting on the street at the side of the lot, leaving a space extending all the way across the rear of his lot, 11 feet wide, unoccupied by any building. About the time the buildings were erected the alley at the rear of the lot was paved by the plaintiff with cobblestones, including not only the public part of the alley, but the strip off the rear of his lot above referred to. A sidewalk next to the building about 3 feet wide was made, and a side entrance into the building from this walk. This paving, including the public alley and the strip off the rear of plaintiff's lot, was all of the same character. The public used all of the space thus paved, that part of it on the plaintiff's lot as well as the part thereof included in the public alley, and it so used the same for more than 50 years. There had been no improvement made upon this land of the plaintiff by the public authorities, and dominion had never been exercised thereover by such authorities. It will thus be seen that that case in its facts is very nearly like the case at bar. In the case we have here the erection of the balcony a few years ago, extending out over the  $3\frac{1}{2}$ -foot strip, by the plaintiffs, indicates upon their part that they did not consider this strip of land as belonging to the public. This element was lacking in the case above cited. In a well-reasoned opinion, in which the authorities are numerous cited and commented upon, the Court of Appeals of Virginia held that the public acquired no easement in the plaintiff's land by reason of the use of it for all that time; that this use was merely permissive, and was not inconsistent with his right to claim the same thereafter.

The case of *Weiss v. Borough of South Bethlehem*, 136 Pa. 294, 20 Atl. 801, is very

similar in its facts to the case here. There a strip off of plaintiff's lot had been used for many years by the public in connection with the use made thereof by himself, but, because of the fact that such public use was not inconsistent with the idea that it was permissive upon the part of the plaintiff, an implied dedication of the easement therein was denied. A similar holding was made upon a very similar state of facts in *Griffin's Appeal*, 109 Pa. 150.

In the case of *Gowen v. Philadelphia Exchange*, 5 Watts & S. 141, 40 Am. Dec. 489, the Supreme Court of Pennsylvania had before it a very similar question. The controversy there arose between adjoining property owners. The Philadelphia Exchange had erected a building upon its property, leaving in front thereof a space which had been paved by it and used in connection with the sidewalk in front of the same. The public had continuously used this space for many years, as though it had been part of the public sidewalk, without objection upon the part of the owners of the building; but it did not appear that the public authorities had ever laid any claim to the property or had ever done anything thereon. The owner of the adjoining property, whose building extended out to the actual street line, made a side-door opening upon this vacant space in front of the defendant's property. The defendant thereupon built a brick wall upon its property in front of this door, extending the same to the street line, blocking up plaintiff's side door. Suit was then brought to compel the removal of this wall, upon the theory that the defendant had impliedly dedicated the strip of land in front of its building to the public, and that the plaintiff had a right to have access to his building from this public street. The court, however, denied the relief, holding that there was no such state of facts as would raise a dedication by implication.

In the case of *Palmer v. City of Chicago*, 248 Ill. 201, 93 N. E. 765, it appeared that the public had been allowed to travel over a strip of plaintiff's land lying vacant adjoining a public street for a long time without objection upon his part. During all of the time there had been no denial of the right of the public to travel over the land. No public street was ever extended over the same, nor had the public authorities ever exercised any dominion thereover. It was held that such public use was not inconsistent with the ownership thereof by the plaintiff, and the theory of an implied dedication was denied. In the case of *Rose v. Village of Elizabethtown*, 275 Ill. 167, 114 N. E. 14, a similar holding upon a very analogous state of facts to that involved here was made.

[8] In the case of *City of Clatskanie v. McDonald*, 85 Or. 670, 167 Pac. 560, the Supreme Court of Oregon had before it the

question of an implied dedication arising from the use of a strip of land in front of a building, and held that where the owner of land built his hotel back from the street with a sidewalk to the street line, and with a roof over it, and induced other builders to conform to his building line, he was not estopped from claiming the title to the actual street line, in the absence of a showing that the other property owners constructed their buildings on the line because of their belief that they could use the sidewalk in front of the hotel. It was also held in that case that the fact that the whole of the lot continued to be assessed for taxation without any deduction for the part thus claimed to have been dedicated was evidence tending to rebut the presumption of the dedication. We think the probative force of such evidence would ordinarily be very slight, however.

From these authorities it would seem clear that to create a dedication by implication the owner of the real estate must have done some act from which a positive intent upon his part to dedicate the land to the public can be drawn. The fact that the public was permitted to use a strip of land under circumstances such as exist here, without objection by the owner, is not sufficient from which to imply a dedication. It is not shown that either the plaintiffs, or Rose, under whom they claim, ever did anything of an affirmative character, expressing an intention to dedicate, but during the time that the public have been permitted to use this strip of land it appears that the owners of it have made uses of it inconsistent with the theory that they had dedicated it to the public use. It is shown that the ordinance of the city of Parkersburg required any one desiring to erect any structure overhanging a street or sidewalk to obtain permission to do so. The owners of this property erected such a structure overhanging this space without obtaining this permission, and without their right thereto being questioned by the authorities. It is shown that they put in cellarways on this strip without authority from the city, and without their right thereto being questioned. During all of the time that the public have been permitted to use this strip of land the plaintiffs, and Rose, under whom they claim, have paid the taxes thereon to the city of Parkersburg; and while this, of itself, is not very strong evidence, still it is some evidence that they did not intend to dedicate it to the public, and likewise that the public authorities did not accept the dedication, else they would not have collected taxes from the plaintiffs upon the land. The first time, so far as this record discloses, that the public authorities ever asserted an interest or right in this strip of land was when the plaintiffs desired permission to erect an extension to their building over the same, and, instead of acquiescing in the city's claim



at that time, the same was resisted and contested by the plaintiffs, and their complete title to the land asserted and claimed.

Counsel for the city rely upon section 56aX of chapter 43 (sec. 1777) of the Code, and the construction placed thereon by the case of *Yates v. West Grafton*, 33 W. Va. 507, 11 S. E. 8, to support the city's contention of an implied dedication in this case. The construction given that statute in that case does not support counsel's contention. It is quite true, as we have above asserted, that if the public was permitted to use this strip of land, and the city had accepted the same and made claim thereto, then a dedication might be implied. In that case it was held that there had been no such user by the public or acquiescence therein by the owner, or recognition or acceptance by the town authorities, as constituted an easement by implication. The theory upon which acts of dominion over the property by the public officers is held to be evidence of an easement by implication is that such acts are inconsistent with any other theory than that the public has such easement in the property, and the owner, being fully cognizant of such acts and acquiescing therein, will be taken, without other proof, to have by such acquiescence shown an intent upon his part to appropriate the property to the use which the public is making of it. Nothing of that kind, however, is shown in this case.

Finding, as we do, that the state of facts disclosed by this record is not sufficient to show an implied dedication of this strip of land to the public, the court's decree perpetuating the injunction inhibiting the defendant from interfering with the plaintiffs in the construction of their addition thereon is clearly right, and the same is affirmed.

(84 W. Va. 600)

**GOLDMAN v. DANIEL FEDER & CO.**  
(No. 3851.)

(Supreme Court of Appeals of West Virginia.  
Sept. 30, 1919.)

*(Syllabus by the Court.)*

**1. LANDLORD AND TENANT §76(2)—COVENANT NOT TO SUBLET NOT BROKEN BY ASSIGNMENT OF LEASE.**

A covenant in a lease not to sublet the premises, the terms of which are not enlarged by anything in the context, nor otherwise, accompanied by a forfeiture and re-entry clause, is not broken by an assignment of the lease.

**2. LANDLORD AND TENANT §76(1)—SHORT COVENANT AGAINST ASSIGNMENT DOES NOT ENLARGE COVENANT AGAINST SUBLETTING.**

The statute, section 21, c. 72, Code (sec. 3800), providing a short and simple form of

covenant against assignment, does not enlarge a covenant against subletting.

*(Additional Syllabus by Editorial Staff.)*

**3. LANDLORD AND TENANT §76(3)—ON CONVEYANCE BY LESSOR HE CANNOT CONSENT TO ASSIGNMENT OF LEASE.**

A covenant in a lease not to sublet without lessor's written consent is for benefit of the lessor and his assigns, and after lessor has conveyed the premises within the term of the lease he has no interest in covenant, and no right thereafter to give assent to an assignment of the lease or of a subletting of the premises.

**Error to Circuit Court, Kanawha County.**

Action of unlawful detainer by M. B. Goldman against Daniel Feder & Co. Judgment for defendant in justice's court, judgment for plaintiff on appeal to the intermediate court, writ of error to such judgment refused by the circuit court and plaintiff brings error. Reversed, verdict set aside, and case remanded.

Morton & Mohler, of Charleston, for plaintiff in error.

Morgan Owen and E. B. Dyer, both of Charleston, for defendant in error.

**POFFENBARGER, J.** The judgment now under review is one for the plaintiff in an action of unlawful detainer, commenced in a justice's court, in which the defendant prevailed. On an appeal in the intermediate court of Kanawha county, the plaintiff prevailed, and the circuit court of said county refused a writ of error to the judgment.

The plaintiff having acquired the title to the premises in question, within the term prescribed by a lease thereof executed by his grantor, two years, commencing March 1, 1917, and while the lessee was in possession, on or about May 1, 1917, proceeds upon the theory of a forfeiture of the lease, occasioned by an assignment thereof by the lessee, executed April 3, 1918. It contains a covenant not to sublet the premises without the written consent of the lessor, but no covenant not to assign. The claim is that the assignment constitutes a breach of the covenant against subletting.

The lessor was U. G. Young; the lessee Adleberg & Berman, Incorporated; the purchaser of the property, M. B. Goldman; and the assignees of the lease, Daniel Feder & Co. The premises are described as the store at 25 Capitol street, in the city of Charleston.

[3] Failure of the plaintiff to disprove consent to the assignment, by his grantor, is relied upon by the defendant, as a defect in the case made by the evidence. Such consent, given long after the grantor had parted with his title, would have been unavailing. Such a covenant is for the benefit of the les-

sor and his assigns. The former no longer has any interest in it; wherefore he clearly has no right to give assent to an assignment of the lease or a subletting of the premises.

[1] The vital question in the case is whether the assignment constituted a breach of the covenant not to sublet, and, as to it, there is some conflict in the authorities. That it does has been distinctly held in at least two cases. *Greenaway v. Adams*, 12 Ves. 395; *Den v. Post*, 25 N. J. Law, 285. But the latter was overruled in *Field v. Mills*, 33 N. J. Law, 254. It is claimed that *Upton v. Hosmer*, 70 N. H. 493, 49 Atl. 96, asserts this doctrine, and there are some expressions in the opinion that seem to countenance it; but the covenant not to sublet was read in connection with other provisions of the lease, which, in the opinion of the court broadened its scope. In conclusion, the court said:

"The purpose of the restrictive clause appears to have been, not so much to control the sale of the cottage, as to prohibit the lessee, his heirs and assigns, from making an assignment of the lease without first obtaining the consent of the lessor, his heirs and assigns."

Hence the covenant was construed to be one not to assign as well as one against subletting. In *Railroad Co. v. Railroad Co.*, 65 N. H. 393, 23 Atl. 529, the covenant was not to assign, and the court held it had been broken by an assignment, not an underletting. In *Berry v. Taunton*, Cro. Eliz. 331, the tenant devised the term, and the question was whether his act violated a covenant not to demise for more than from year to year. The court merely held that a devise was within the meaning of the word "demise." In *Gregson v. Harrison*, 2 T. R. 425, the covenant was against both subletting and assignment, wherefore either constituted a breach. In *Holland v. Worsley*, 1 Camp. 20, the covenant was not to assign or otherwise part with the premises. It obviously included both, as the court held. In *Shattuck v. Lovejoy*, 8 Gray (74 Mass.) 204, the covenant by its terms went beyond a mere subletting. The tenant bound himself not to permit any other person or persons to occupy or improve the premises, without written consent of the lessor. Such, also, was the character of the covenant in *Austin v. Harris*, 10 Gray (76 Mass.) 296. Under a statute providing that, "if lands or tenements are rented by the landlord to any person or persons, such person or persons renting said lands or tenements shall not rent or lease said lands or tenements during the term of said lease to

any other person without first obtaining the consent of the landlord, his agent or attorney," both assignment and underletting, without consent, are forbidden. *Gulf, C. & S. F. R. Co. v. Settegast*, 79 Tex. 256, 11 S. W. 228. This conclusion was arrived at by application of the liberal rule of construction, which is generally held to be inapplicable to statutes imposing forfeitures.

Against this meagerness of authority for the proposition that an assignment is within the meaning of a covenant not to sublet, there stands a very considerable array of authority holding the contrary. *Field v. Mills*, 33 N. J. Law, 254; *Lynde v. Hough*, 27 Barb. (N. Y.) 415; *Tiffany, Land. & Ten. § 48*; *Taylor, Land. & Ten. § 403*. Covenants against assignments and against underletting are both strictly construed, because they are penal in character, working forfeitures, and because they are restraints upon alienation. 18 R. C. L. p. 832; *Tiffany, Real Prop. § 46*; *Minor, Real Prop. § 417*. To be within the operation of such a covenant, the thing done must fall within its terms, its letter, as well as within its spirit or purpose. This is the rule of strict construction. Besides, there is a vast difference in principle between an assignment and a sublease, as well as between their legal results. These differences render it impossible to say an assignment is within the terms of a covenant against subletting.

[2] In the argument submitted for the defendant in error, section 21 of chapter 72 of the Code (sec. 3800), defining the scope and effect of a covenant not to assign without leave, is invoked; but it clearly has no application. It does not define a covenant not to sublet. It merely provides a short and convenient form of the common-law covenant against assignments, or a substitute therefor; and all of its terms fall within the meaning of "assignment," not "demise" or "sublet." Though *Kanawha-Gauley C. & C. Co. v. Sharp*, 73 W. Va. 437, 80 S. E. 781, 52 L. R. A. (N. S.) 968, Ann. Cas. 1916E, 786, involved a lease containing a covenant not to sublet, and an assignment seems to have been treated by the parties as a possible breach, a decision as to its effect can hardly be said to have been rendered, since the case turned upon an issue as to waiver, and the court did not enter upon any inquiry as to the interpretation and effect of the covenant.

Under the principles and conclusion stated, there was no breach of the covenant, and the plaintiff was not entitled to recover. Hence the judgment must be reversed, the verdict set aside, and the case remanded.

(84 W. Va. 570)

**ALFORD v. KANAWHA & W. V. R. CO.**  
(No. 3872.)(Supreme Court of Appeals of West Virginia.  
Sept. 30, 1919.)*(Syllabus by the Court.)***1. EVIDENCE ⇨481(3)—COMPETENCY OF WITNESS AS TO DISTANCE IN WHICH TRAIN CAN BE STOPPED.**

One who is not familiar with the stopping and starting of railroad trains is not a competent witness to give an opinion as to the distance within which such a train can be stopped under a particular state of circumstances.

**2. APPEAL AND ERROR ⇨1050(1)—ADMISSION OF IMPROPER EVIDENCE REVERSIBLE ERROR, UNLESS CLEARLY HARMLESS.**

Where improper evidence is admitted over the objection of a party, it will be cause for setting aside the verdict, unless it clearly appears that the objecting party was not prejudiced thereby.

**3. APPEAL AND ERROR ⇨171(1)—WITHOUT EVIDENCE OF NEGLIGENCE, ALLEGED NEGLIGENCE IN ANOTHER RESPECT IMMATERIAL.**

Where an action having for its basis the alleged negligence of the defendant is tried in the court below upon the theory that such negligence arises from defendant's failure in a particular regard, which turns out to be unsupported by any competent evidence, a verdict and judgment rendered thereon cannot be supported, because it may appear that the defendant might be negligent upon another theory, not presented at the trial.

**4. APPEAL AND ERROR ⇨1050(1)—ON TWO THEORIES VERDICT SET ASIDE, WHERE IMPROPER EVIDENCE AS TO ONE IS ADMITTED.**

Where plaintiff's cause of action is based upon two separate theories of negligence upon the part of the defendant, one of which is supported only by improper evidence admitted over defendant's objection, and the court submits the same to the jury upon both of such theories, a verdict rendered in favor of the plaintiff will be set aside, for the reason that it is impossible to tell upon which theory the verdict is based; it being as likely that the jury based its verdict upon the theory supported only by improper evidence as upon the other.

**Error to Circuit Court, Kanawha County.**

Action by J. R. Alford against the Kanawha & West Virginia Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed, verdict set aside, and cause remanded for a new trial.

W. N. King and Leroy Allebach, both of Charleston, for plaintiff in error.

M. M. Robertson and C. J. Van Fleet, both of Charleston, for defendant in error.

RITZ, J. [1, 2] By this writ of error defendant seeks reversal of a judgment against it for damages for the alleged negligent kill-

ing of stock by one of its trains. The steer which it is contended was negligently killed was struck by defendant company's passenger train, consisting of eight passenger coaches and a locomotive. Approaching the place at which the steer was struck from the direction in which the train came, there is a curve about 250 to 300 feet from the point of the accident, which prevented the trainmen from seeing the point of accident until within that distance thereof. It was shown that the plaintiff's steer was on the track when the train came around this curve, and the fireman on the engine admits this, and says that he immediately communicated the fact to the engineer. This the engineer admits, and says that he did everything he could to stop the train before striking the animal. The sole theory upon which the case was tried in the court below was that by the use of reasonable diligence those in charge of the engine could have stopped the train after the animal was discovered on the track in time to have prevented striking it. To sustain his contention in this regard the plaintiff introduced a witness who had never operated a locomotive, and whose only familiarity with the distance within which passenger trains could be stopped was that he had seen one stopped on one occasion within 100 feet; that the train which he saw stopped was composed of two coaches and a locomotive, and from this he says that it is his opinion that the train in the instant case could have been stopped within from 75 to 100 feet. This evidence was permitted to go to the jury over the objection of the defendant. The engineman and the fireman in charge of the train, who were men of long experience, both testified that such a train as they were handling on that occasion could not be stopped in a less distance than 500 feet.

It is earnestly insisted by the defendant that the admission of the opinion of the witness above referred to was error, and that, inasmuch as this was all of the evidence upon which the plaintiff's contention was based, the court below should have directed a verdict in its favor. Was this evidence competent? The purpose of producing evidence in any particular case is to enlighten those charged with the duty of deciding the controversy. It would be difficult to procure a witness with less knowledge than the plaintiff's witness on the question about which he testified. Certainly it would be hard to find very many witnesses who had only seen a passenger train stopped on one occasion. Opinions of witnesses are not ordinarily admissible at all. It is only where such opinions are based upon expert knowledge. Where a transaction, in order to its understanding requires possession of technical knowledge or skill, one possessing the same is competent to give his opinion in regard

thereto; the reason being that the jury, not possessing such knowledge and skill, would not be enlightened by a simple statement of fact. *Aglonby v. N. & W. Ry. Co.*, 80 W. Va. 687, 93 S. E. 812. It cannot be doubted that in order to express an intelligent opinion upon the question as to the distance within which a railroad train can be stopped requires possession of mechanical skill and technical knowledge. In order for such an opinion to be enlightening, it must be by one who has knowledge of the operation of such trains, who is familiar with the workings of the machinery, and the time required to put the same in operation. This being true, the opinion of such a witness would be competent upon this question; but the opinion of one not possessing such knowledge would not be competent, for the very good reason that it would not tend in any degree to enlighten the jury trying the case.

The only ground upon which opinion evidence is admitted is because those giving the same have knowledge not ordinarily possessed. It is an exception to the general rule that opinions are not competent, being merely conclusions drawn from facts which, in cases not calling for expert or technical knowledge, the jury are as competent to draw as the witness. *Purkey v. Transportation Co.*, 57 W. Va. 595, 50 S. E. 755. As directly bearing upon the question that one unfamiliar with the operation of railroad trains is not competent to express an opinion as to the distance within which such a train can be stopped, see *Gourley v. Railway Co.*, 35 Mo. App. 87; *Igo v. Railroad Co.*, 38 Mo. App. 377; *Railroad Co. v. Burch*, 155 Ky. 731, 160 S. W. 252; *Railway Co. v. Corletto*, 100 Va. 355, 41 S. E. 740; *Passenger & Power Co. v. Racks*, 101 Va. 487, 44 S. E. 709; *Barry v. Railroad Co.*, 1 Misc. Rep. 502, 20 N. Y. Supp. 871; *Rogers on Expert Testimony*, § 104; *Lawson on Expert and Opinion Evidence*, pp. 92, 93. Clearly there was no competent evidence upon which to submit to the jury the question of defendant's negligence in failing to stop the train.

[3, 4] The plaintiff says that there is another theory of negligence upon which he is entitled to recover, and that is that it is not shown that the defendant sounded an alarm for the purpose of frightening this animal off the track. It does not appear whether or not such an alarm was sounded. The act

of negligence upon which recovery was sought was the failure to stop the train after the animal was discovered. The question of alarm is only mentioned in the most incidental way. The railroad employes do not testify upon this question at all, and none of the witnesses introduced on behalf of the plaintiff made any statements as to whether an alarm was sounded or was not sounded. Of course, it is ordinarily the duty of those in charge of a railroad train, upon discovering animals upon the track, to do everything that prudence dictates to prevent striking them, and this includes sounding the alarms provided, for the purpose of frightening the animals away, as well as making every reasonable effort to stop the train in time to avoid the impending accident. Where, however, a plaintiff tries his case upon one theory, and fails to produce competent evidence to support it, he will not be allowed to say that there is another theory which entitles him to recover, when that other theory was never presented to the trial court, and the defendant given an opportunity to meet it.

But, even if the plaintiff had presented this theory of negligence in failing to sound an alarm in the court below, the introduction of the incompetent evidence above referred to would require a reversal. Certain it is, where there are two theories of negligence upon which a plaintiff seeks recovery, and he submits the case upon both of them, one of which is not supported by any competent evidence, a judgment rendered upon a verdict in such case in favor of the plaintiff will be reversed, because it is impossible to tell upon which one of the theories the verdict is based, the one supported by the proper evidence, or the one not so supported. By submitting both theories to the jury, the court in effect told it that it might find liability on either thereof, and it is as probable that the jury found the verdict upon the theory supported by only incompetent evidence as upon the other. In fact, it is perfectly certain in this case that the jury's verdict was based upon the theory supported only by the improper evidence above mentioned, for the other theory is only incidentally touched upon.

It follows from what we have said that the judgment will be reversed, the verdict of the jury set aside, and the cause remanded for a new trial.

(84 W. Va. 655)

**AYERS v. EADS. (No. 3611.)**(Supreme Court of Appeals of West Virginia.  
Sept. 30, 1919.)*(Syllabus by the Court.)***APPEAL AND ERROR — 1002—VERDICT—CONFLICTING EVIDENCE—REVIEW.**

A judgment rendered upon a verdict based upon conflicting oral testimony will not be set aside by this court, unless the testimony so decidedly preponderates in favor of the complaining party as to indicate that the jury were unduly influenced, or were controlled by passion or prejudice.

**Error to Circuit Court, McDowell County.**

Action by Mrs. C. C. Ayers against T. J. Eads. From a judgment for plaintiff rendered upon a verdict on trial of an appeal from a like judgment rendered by a justice of the peace, defendant brings error. Affirmed.

Cook & Howard, of Welch, for plaintiff in error.

Litz & Harman, of Welch, for defendant in error.

**RITZ, J.** By this writ of error reversal is sought of a judgment of the circuit court in favor of the plaintiff, rendered upon the verdict of a jury upon the trial of an appeal from a like judgment rendered by justice of the peace.

The sole ground of error is insufficiency of the plaintiff's evidence to support the verdict and judgment in her favor. Plaintiff's claim is for a balance which she contends the defendant owes her for commissions or compensation for sales of sewing machines, pianos, organs, and phonographs, made by her and her husband for the defendant. It appears that the plaintiff bought a sewing machine from the defendant and agreed with him to make sales of other machines and musical instruments for certain compensation to be allowed her as a credit upon the price of the machine purchased by her. Plaintiff's husband assisted her in making such sales. The amounts to be paid under this arrangement as compensation for making these sales were fixed and determined by the contract, and about this there is no dispute. After a few sales were made under this arrangement plaintiff and her husband testify that the defendant desired to secure their services permanently in the conduct of his business, and with this view made a new contract with the plaintiff, by which he agreed that he would pay to her one-half of the profits upon each sewing machine, and upon each musical instrument sold by her and her husband, and that such one-half of the profits would be at least the sum of \$15 for each

sewing machine, \$17 for each organ, and \$50 for each piano, but no mention is made as to what his representations were, if any, as to the profits on phonographs. Pursuant to this contract, the plaintiff and her husband sold, according to their testimony, a number of sewing machines and musical instruments for the defendant's account, to wit, 12 sewing machines, 6 pianos, 22 organs, and 8 phonographs. It will thus be seen that at the minimum amounts which the plaintiff says she was to receive on each sale she was entitled to \$180 for the sale of the 12 sewing machines, \$300 for the 6 pianos, \$374 for the 22 organs, and so far as the phonographs were concerned plaintiff introduced no evidence as to what the profit was on each of these instruments, and consequently there is no basis in her evidence upon which to determine what she was entitled to therefor. However, the defendant in his evidence says that the profit on each of the phonographs was \$20, \$10 for the plaintiff, and \$10 for himself. This would entitle the plaintiff, therefore, to \$80 on the sale of the 8 phonographs, or a total of \$934 upon all of the sales which she claims were made by her and her husband. She admits that the defendant is entitled to a credit upon this amount for the sum of \$546.54, which would leave remaining unpaid a balance of \$387.46. She contends that the amount due her is very much more than this, but when we analyze the evidence of herself and her husband, this is the conclusion which must be reached, assuming that her contentions are true.

The defendant denies that he made any contract with the plaintiff, but claims that it was with her husband. He admits that he was to pay one-half of the profit made on each sale, but he denies that the profits were any such amounts as claimed by the plaintiff. He asserts that one-half of the profit on sewing machines was from \$6 to \$9, on organs about \$11, on pianos about \$40, and on phonographs \$10. He further claims that a number of the sales which she claims were made by her and her husband were made by himself, and that she is not entitled to charge him one-half of the profits on such sales. He also claims, in some instances, that the instruments delivered were not paid for, and had to be reclaimed, and in others that no such sales as plaintiff claims she and her husband made were ever in fact made by any one. So far as his contention is concerned as to who was to have the benefit of the contract, the plaintiff and her husband both state that the distinct understanding was that the contract was with her, and that she was to receive the benefit therefor, notwithstanding the work, or a large part of it, was to be done by her husband. The jury has found in her favor upon this contention, and we will not disturb their finding. So far as his evidence goes as

## CARTER v. UNITED STATES COAL &amp; COKE CO. et al. (No. 3775.)

(Supreme Court of Appeals of West Virginia.  
Sept. 30, 1919.)*(Syllabus by the Court.)*1. MASTER AND SERVANT  $\S$ 341—ONE INDUCING BREACH OF CONTRACT OF EMPLOYMENT LIABLE IN DAMAGES.

One who by himself or conspiring with others induces another to break his contract of employment with a third person, to the injury of that person, is liable in damages for the injury sustained by him, whether the injury done was for the benefit of the wrongdoer or not.

2. APPEAL AND ERROR  $\S$ 837(12)—ON EXCLUSION OF EVIDENCE APPELLATE COURT MAY CONSIDER ALL EVIDENCE.

On a motion to exclude the evidence, sustained by the trial court, an appellate court on writ of error may, if the record discloses it, consider all the evidence including any improperly rejected, in reaching a conclusion on the merits of such motion.

3. CORPORATIONS  $\S$ 433(1) — AUTHORITY OF CORPORATE AGENTS INDUCING BREACH OF CONTRACT OF EMPLOYMENT IS QUESTION FOR JURY.

The evidence in this case as to the authority of the respective representatives or agents of the defendants, and of the company employing the plaintiff, to do the acts complained of, was sufficient to carry the case to the jury on the question of such authority. *Rua v. Boyer Smokeless Coal Co.*, 99 S. E. 213.

## Error to Circuit Court, McDowell County.

Action by W. R. Carter against the United States Coal & Coke Company and others. Judgment for defendants upon a directed verdict, and plaintiff brings error. Reversed, verdict set aside, and a new trial awarded.

Greever, Gillespie & Divine and Cook & Howard, all of Welch, for plaintiff in error. Anderson, Strother, Hughes & Curd, of Welch, for defendants in error.

MILLER, P. In an action by the plaintiff against the United States Coal & Coke Company, and Edward O'Toole and J. M. Tully, for maliciously and unlawfully causing his discharge from employment by the Consolidated Engineering Company, in the construction of a public road in McDowell County, the case averred is that being so employed and engaged by said engineering company and earning therein at least ten dollars per day and thereby supporting himself and family, and the said United States Coal & Coke Company being at the same time owner and operator of numerous coal mines near the place where said road was being constructed and where plaintiff was so employed, and said coal company being then and there in-

to the profits made on each of these instruments, it is based on nothing but his own oral statements. He does not produce any records or invoices to show what these profits are. If, as the plaintiff and her husband claim, he represented to them what the minimum profit would be at the time he made the contract, the jury were warranted in believing that he was telling the truth then, when he procured the services of the plaintiff and her husband, instead of at the time he was testifying in a suit in which he was defendant. It was within his power to produce the invoices showing what these various instruments actually cost him, and to fix the amount of such profits by indisputable evidence. He did not choose to do this, but elected to go before the jury upon his unsupported statements, in opposition to the testimony of the plaintiff and her husband as to the representations he had made to them in this regard at the time he procured them to enter into the contract. As to his contention that some of the sales for which the plaintiff claims compensation were made by himself, the plaintiff and her husband testify that they made the same, and the plaintiff in rebuttal showed to the jury a book, according to the record, in which, as she swears, these very sales which the defendant claims were made by him were indicated in this book, in the handwriting of the defendant, as sales made by the plaintiff. The same state of facts is true in regard to certain sales which the defendant claims were not made at all. Plaintiff exhibited this book to the jury, as shown by the record, and testified that entries therein showing such sales as the defendant claims were fictitious were actually entered in this book in the defendant's handwriting as sales made by the plaintiff. The book is not in the record in this case, but the plaintiff testifies without objection as to what the entries therein show, and to the fact that the defendant made them, and the defendant does not contradict this testimony. As to the sales which he admits were made by the plaintiff and her husband, but which he contends were not completed because the instruments had to be reclaimed for failure to pay, it is not quite clear from his evidence just how many of these there were. However, they were inconsiderable, and were not sufficient to reduce the amount claimed by the plaintiff below the sum of \$300, for which the verdict was rendered. The jury might have allowed him credit for all he claimed in this regard, and there still would have been due the plaintiff, according to her contention, as much as she recovered. The verdict is based upon conflicting oral testimony, and the jury, having adopted the theory supported by plaintiff's evidence, we will not disturb it.

The judgment is therefore affirmed.

terested in preventing workmen located near their said mines from working at any other work or employment or for any other employer, and well knowing that plaintiff had the right to work for and be employed by said Consolidated Engineering Company without any interference or molestation by them, nevertheless in utter disregard of plaintiff's rights defendants did wickedly and maliciously and with intent to prevent him from continuing in said employment, in the month of July, 1917, by threats and other means induce, procure and compel the said Consolidated Engineering Company to discharge plaintiff from its service and to refuse him further employment, without any just cause, and thereby prevented plaintiff from working for or being further employed by said company and from making a living at such work, and whereby he was deprived of all employment for the space or time of eight weeks, to his damage five thousand dollars. A second count sets forth the same cause of action in substantially the same way, but averring in addition that plaintiff at the time of his alleged grievances was relying upon the said employment for the support of himself and family.

There was a demurrer to the original declaration, and as amended at the bar in some particulars not shown by the record, sustained as to the original, but overruled as to the declaration so amended; and issue was joined on the defendants' plea of not guilty. Upon the trial before the jury, at the conclusion of plaintiff's evidence, to which numerous objections were interposed by defendants, overruled as to some and sustained as to others, the court sustained the motions of the defendants respectively to strike out the evidence and direct the jury to return a verdict for them, and each of which was done; and the judgment thereon was that the plaintiff take nothing by his suit and that the defendants recover their costs.

[1] Counsel for plaintiff in their printed brief have not fairly complied with the rules of this court. It furnishes no practical aid to the court in arriving at a proper conclusion. The only legal proposition advanced, which is unsupported by citation of any authority or argument, is "that one who intentionally, without legal justification, procures any employer to discharge his employé, to the damage of the latter, is liable in an action for damages at the suit of the employé," a proposition, say counsel, so clear that they do not deem it necessary to cite authorities in support thereof.

But the proposition thus assumed to be so clear and applicable to this case as to excuse counsel from supporting it by any authority, even if generally true, is vigorously challenged by counsel for defendants as being inapplicable to the case at bar. They cite

us to *West Virginia Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611, 40 S. E. 591, 56 L. R. A. 804, 88 Am. St. Rep. 896, and to the note thereto, and quotations at page 626 of 50 W. Va., page 597 of 40 S. E., from the noted case of *Allen v. Flood*, L. R. Appeal Cases of 1898, which they say is the nearest authority they have found in this State applicable to the liability of one for securing the discharge of an employé. There are, however, at least two other decisions of this court in which the proposition laid down in the principal case and in the English case referred to was considered and in which the facts are more nearly analogous to those involved in this case. They are *Thacker Coal Co. v. Burke*, 59 W. Va. 253, 53 S. E. 161, 5 L. R. A. (N. S.) 1091, 8 Ann. Cas. 885, and *Hendricks v. Forshey*, 81 W. Va. 263, 94 S. E. 747, L. R. A. 1918C, 150. The proposition there affirmed is that one who by himself or conspiring with others induces another to break his contract with a third person, to the injury of that person, is liable in damages for the injury sustained by him; and this is the law according to these cases whether the injury done is for the benefit of the wrongdoer or not. In the first case the action was by the coal company for damages for enticing servants from the plaintiff's services; in the *Hendricks* case the suit was for conspiracy to deprive plaintiff of the benefit of his contracts with each of the defendants to haul their milk to market.

The proposition of *Allen v. Flood*, mainly relied on by counsel for defendants, is that an act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to render the doer of the act liable to a civil action. In the English case the court of appeals had held that *Allen*, a member of a boiler-makers' union, who had induced *Flood's* employers, shipbuilders, to discharge him, was liable. But the House of Lords reversed the judgment upon the ground that the defendant had violated no legal right of plaintiff, done no unlawful act, and used no unlawful means in procuring the discharge of the plaintiff. There was no proof in that case of any contract violated. The only proof relied on was that in the ordinary course plaintiff's employment would have continued, a fact which we think distinguishes it from the case at bar and from the three cases decided by this court.

Another case cited and relied on by counsel for defendants as particularly applicable to the case proven here, is *Raycroft v. Tayntor*, 68 Vt. 219, 35 Atl. 53, 33 L. R. A. 225, 54 Am. St. Rep. 882. It was held in that case that if one in the exercise of a lawful right threatens to terminate a contract between himself and another unless the latter dismisses an employé *not engaged for any definite time*, the discharged employé has no

right of action for damages against the party making the threat, although his motive in procuring the discharge may have been inspired by malice. We call attention to the provision which we have italicised, "not engaged for any definite time." We find the Maryland case of *Lucke v. Clothing Cutters and Trimmers' Assembly*, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408, 39 Am. St. Rep. 421, a well considered case, reviewing many English and American decisions, and distinguishing the cases involving term contracts from those in which no term contracts were the subject of transactions. It was held that the fact that plaintiff was not employed for any definite time made no difference, as his employment was to continue as long as his work proved satisfactory, though with the understanding that his employer might discharge him at the end of any week, but would not have discharged him but for the interference of defendants, made the conduct of defendants actionable. And answering a criticism of counsel that a recovery could not be had because plaintiff had only declared on a supposed contract when in point of fact there had been no contract violated, the court, citing cases and quoting from one or them, said:

"We concur in this view, and are clearly of opinion that the declaration sets out a cause of action, which the proof fails to sustain. The question of a contract vel non enters into the consideration of this case, but upon proper averment in the declaration ought to play but a small part in its determination. 'Where a contract would have been fulfilled, but for the false and fraudulent representations of a third person, an action will lie against such person, although the contract could not have been enforced by action.' *Benton v. Pratt*, 2 Wend. [N. Y.] 385, 20 Amer. Dec. 623."

In *Johnson Harvester Co. v. Meinhardt*, 9 Abb. N. C. (N. Y.) 396, 397, one of the cases cited in the Maryland case, it was said:

"A distinction has been sought to be made between cases when there was an unexpired time contract, and cases where the services were by the day or by the piece; but I do not think that such distinction rests upon any sound reason."

In Kentucky we find two cases somewhat pertinent, at least to one phase of the case here, *Chambers v. Baldwin*, 91 Ky. 121, 15 S. W. 57, 11 L. R. A. 545, 34 Am. St. Rep. 165, and *Bourlier v. Macauley*, 91 Ky. 135, 15 S. W. 60, 11 L. R. A. 550, 34 Am. St. Rep. 171. The first involved contracts for tobacco, not personal services; the other contracts of rival theatre owners with the same dramatic performer, in which the owner of one theatre, with notice of the previous contract, had induced the manager of the dramatist to break his contract with the owner of the other theatre. It was decided that the transaction though wrongful was not actionable,

and that the petition presented no cause of action. That holding was based on the fact that the wrongdoer, a competitor, owed no duty to the other contractor, and was engaged simply in promoting his own interest and business.

The declaration in this case avers employment, but it is not alleged as proven that plaintiff was employed for any length of time, or that he had a contract with the engineering company for work for any time. The declaration probably ought to have been amended so as to cover the case made by the evidence, agreeably to the practice pursued in *Lucke v. Clothing Cutters and Trimmers' Assembly*, supra; and as we have concluded to reverse the judgment, the plaintiff may be permitted to amend his declaration if so advised, in order to avoid another mistrial.

[2, 3] With these principles in view the question remains whether the court erred in directing a verdict and pronouncing judgment for defendant. The motion to exclude must be viewed as upon a demurrer to the evidence. While not fraught with all the dangers nor all the advantages of a demurrer, such motion challenges the sufficiency of the evidence to carry the case to the jury, and we may look not only to the evidence admitted but also to that which was improperly excluded, which is made a part of the record. Plaintiff proved that he had a contract with the engineering company for hauling with two teams in building the public road, beginning on July 1, 1917, at six dollars per day for each team, twelve dollars per day for both, which employment was to continue from fifteen to eighteen months or two years; that he was employed for such length of time as the engineering company had work, and that payment was to be made every two weeks; that at the time of his discharge he had been at work under the contract about six weeks; and that his work was entirely satisfactory, so far as he knew, for no complaint had been lodged by his employers, and that he knew of none. This is certainly sufficient evidence of a contract for definite employment, and partial execution thereof, and of right to its benefits.

But it is claimed by defendants that there was no proof that plaintiff was discharged by anyone in authority, nor that his discharge was the result of any unlawful interference by the coal company or any officer or agent with authority to act. We think the evidence was such that the jury in the absence of any evidence to the contrary might have concluded that plaintiff was discharged by the engineering company. That he was discharged and denied further employment is fully proven. The evidence is that he was twice discharged; that after the first time he was again put to work and shortly thereafter was a second time and finally discharged or laid off by the engineer-



ing company; that the first time he was discharged by Houck, the time keeper for the engineering company, but that when he went to the company's office for his pay, plaintiff swore that Smith, the "super," on learning from him that he did not live in the coal company's house, at the direction of Stansbury, who appears to have been the higher officer in charge, ordered plaintiff back to work, and he did go back and continued on the job after that time for about twelve days, when he was again discharged or laid off by one Wilson, another officer or agent of the engineering company, described as the walking boss, and was thereafter denied further employment.

The circumstances of plaintiff's first discharge, as related by him and other witnesses, connecting defendants with responsibility therefor, were that he was laid off by Houck, the time keeper, about the time O'Toole and Tully had notified Stansbury to cut off another employé, Thompson, and that Tully was on his horse going down the road when Houck cut him off; that afterwards when plaintiff was discharged the second time, Tully met him and Wilson going up the road, and that Tully said to Wilson, referring to plaintiff, "I thought I had told you to cut that man off," and said to him, "You can get rid of him or you can pull up your camp and get off our premises;" that the next morning Wilson came over where plaintiff and one Hawkins were taking the horses out of the barn, with a list of names, and that Wilson then cut him off; and that he had not thereafter worked for the Consolidated Engineering Company. Plaintiff further swore that afterwards he met Tully and inquired of him why he had been cut off, and Tully replied that it was Col. O'Toole's orders, and said, "I want you to understand that Col. O'Toole, Mr. Eavenson and myself is running this country, and you'll do what we say;" that afterwards plaintiff tried to get work from Tully, and that Tully answered that he would not give him one bit of employment.

The contention of counsel for defendant is that neither this evidence nor any other evidence in the case sufficiently shows authority of O'Toole or Tully, for the coal company; nor that of Smith, Houck or Wilson to bind the engineering company in the premises, or to make either of the defendants responsible for the act or conduct of the others. We think, however, that although the evidence is not as strong as it might have been, nor the facts as well developed as they should have been, the evidence was sufficient to carry the case to the jury on the main facts in issue, and that it should not have been withdrawn from them by the motion to exclude. This conclusion, we think, is justified by the

principles stated in *Rua v. Boyer Smokeless Coal Co.*, 99 S. E. 213.

Our conclusion is to reverse the judgment, set aside the verdict, and to award the plaintiff a new trial.

(84 W. Va. 619)

**STANLEY v. KANAWHA COUNTY COURT**  
et al. (No. 2907.)

(Supreme Court of Appeals of West Virginia.  
Sept. 30, 1919.)

(Syllabus by the Court.)

**1. COUNTIES  $\S$ 178—PUBLICATION OF ORDER FOR ROAD BOND ELECTION SUFFICIENT.**

Section 56aXXVa, chapter 43, serial section 1793, Code 1913, providing for the posting and publishing thirty days before the poll is taken, orders of the county court providing for the holding of elections for the purpose of taking the vote of the legal voters upon the question of issuing bonds the proceeds of which are to be used in permanently improving the public roads, considered in the light of a subsequent amendment of said act, and with reference to the decisions of this court interpreting other statutes on the subject of notice, is satisfied by the publication of such order once a week for four consecutive weeks, and the contract of the county court for the publication of such order for thirty consecutive days or oftener than once a week for four consecutive weeks, is illegal and void, and payment of a greater sum than the legal rate for four insertions of such publication should be enjoined.

**2. COUNTIES  $\S$ 178—LIBERAL CONSTRUCTION OF STATUTE FOR NEWSPAPER PUBLICATIONS ADOPTED.**

In construing such statute the liberal rather than the technical rule of construction should be applied.

Appeal from Circuit Court, Kanawha County.

Bill for injunction by I. J. Stanley against the County Court of Kanawha County and others. From a decree sustaining a demurrer to the bill, dissolving a preliminary injunction, and dismissing the bill, complainant appeals. Decree, so far as undertaking to dissolve the injunction and dismiss the bill, reversed and in other respects affirmed and injunction reinstated until further order, and cause remanded.

Linn & Byrne, of Charleston, for appellant.

**MILLER, P.** The decree below sustained the demurrer to the bill, dissolved the preliminary injunction awarded by four of the judges of this court on the 17th day of May, 1915, and dismissed the bill. The object of the bill was purely one for an injunction, and the injunction so awarded enjoined and restrained the defendants, the county court of Kanawha County, M. P. Malcolm, D. A.

Brawley and Grant Copenhaver, commissioners composing said court, from paying to the defendants, Daily Gazette Company, the Post Company and the Charleston Mail Association, corporations, or either of them, for or on account of the publication of the order described in the bill, out of the public revenues of Kanawha County, or any district thereof, any sum in excess of the legal rate for one insertion of said publication.

The order mentioned in said bill to which said injunction related was an order of said county court providing that a special election be held on the 29th day of May, 1915, in the districts of Pocahontas, Jefferson, Charleston, Loudon, and Malden, for the purpose of taking the vote of the legal voters of the said districts respectively, upon the question of the issuance of bonds, the proceeds of which were to be used for the purpose of making permanent improvements upon certain public roads of said districts.

The suit brought by plaintiff, as a citizen and taxpayer suing on behalf of himself and all other citizens and taxpayers, was, first, to enjoin the holding of a special election ordered, and, second, to enjoin the payment out of the public revenues, to the publishers, anything for such publications; but the preliminary injunction so granted was limited to payments in excess of the legal rates for one insertion thereof as already stated.

The bases of the relief so sought were, first, that the order for various reasons were illegal and that any election thereon would be wholly void; second, that under section 56aXXVa, chapter 43, serial section 1793, Code 1913, providing for the holding of such special elections and the posting and publication of the order therefor, the provisions of law respecting such posting and publication is that "such order must be published throughout the said district thirty days at least, before the poll is taken, as follows." Then follows the paragraph relating to posting the same in the clerk's office, at the front door of the court house, and by the sheriff at all the polling places. In the succeeding paragraph is the following provision:

*"The court shall direct a copy to be published in one or more newspapers if they are published in said county."*

The bill alleges that by proper construction of these provisions of the statute read together the court was limited to one publication in each newspaper, and was unauthorized by law, as the bill alleges it had undertaken to do, to contract with the Post Company for thirty insertions thereof, or one insertion each day for thirty consecutive days, at the aggregate price of \$2000, and with the other publishers for one insertion each week for four consecutive weeks preceding the election, for the aggregate price of six hundred dollars to each publisher, and from

which payment defendants should be enjoined.

[1] Counsel for defendants have not followed the case to this court, and we have not the benefit of their views except as disclosed by the answers. Nor have the counsel for plaintiff, either in their brief filed or in oral argument, cited us to any authority outside of the statute itself in support of their contention that the county court was limited to a single insertion of the order in each of the newspapers in which it was published. We find however many decisions of the courts holding that where a statute requires ten, twenty, thirty or any other number of days' notice, daily publication is not required but that the statute is satisfied with a single insertion thereof. *Southworth v. Glasgow*, 232 Mo. 108, 132 S. W. 1168, Ann. Cas. 1912B, 1267, and note p. 1274, where all the cases are collected. Many cases hold, however, that where publication is required "for" a given number of days or weeks, it must be for each day or each week for the required number of days or weeks, thereby giving force to the preposition "for," and distinguishing that class of statutes from those where continuity is not contemplated or so indicated by the use of the preposition. We have at least two cases bearing on the question in this State, that of *Benwood v. Railway Co.*, 53 W. Va. 465, 44 S. E. 271, and *Atkinson v. Washington and Jefferson College*, 54 W. Va. 32, 46 S. E. 253; the first holding that a statute requiring notice to be given by publication for thirty days in some newspaper of general circulation is sufficiently complied with by publication in the successive issues of a weekly newspaper through the period of time mentioned; the second holding that where a deed of trust provided that sale under it should be given by advertisement published thirty days previous thereto in some newspaper, the requirement was sufficiently complied with by publication in such newspaper once a week during such period of thirty days.

But we are not disposed to pursue the decisions further. We find that pending the publication of the order in this case, and pending this suit, the Legislature, in the second extraordinary session, on May 24, 1915, probably with reference to this very controversy, and in view of the different constructions put upon the statute involved, and the general and indefinite character thereof, by section 5 of chapter 8 of the acts of said session, put legislative construction upon said statute by providing that:

*"The court shall direct a copy to be published once each week for four successive weeks, prior to the date of said election in one or more newspapers, if they are published in said county or district."*

[2] We have said in a number of cases that in construing statutes requiring newspaper publication, the liberal rather than the tech-

nical rule should be applied. *Marling v. Robrecht*, 13 W. Va. 440; *Miller v. Neff*, 33 W. Va. 197, 10 S. E. 378, 6 L. R. A. 515; *Sandusky v. Faris*, 49 W. Va. 150, 38 S. E. 563. This was the rule applied in the two cases cited. Our conclusion is based on our own cases and the interpretation of the Legislature by the amendment of 1915, that the interpretation which the record shows was put upon the statute by the Attorney General at the time, is the correct one, and that the statute was satisfied by the publication of the order for four consecutive weeks as directed with respect to the *Daily Gazette Company* and the *Charleston Mail Association*, and that as to the contract for payment to these companies to the extent of the legal rates, the injunction was properly dissolved, but that the county court was not authorized by law to incur the extraordinary expense of daily publication of the order in the *Charleston Post*, and that its contract with the *Post Company* for payment of a sum in excess of the legal rate for four insertions, was illegal and void, and upon the record now presented, payment of a greater sum should be enjoined.

Another point urged is that at the time of the decree appealed from, the cause was still at rules and not matured for final hearing, and that the final decree pronounced over the protest of the plaintiff, who represented that further time to mature the cause was desired, was erroneous. There can be no doubt that this point is well founded.

Our conclusion is that in so far as the decree undertakes to dissolve the injunction against payment to the *Post Company* for publication of said order in excess of the legal rate for four insertions thereof and to dismiss the bill before maturity, the final decree should be reversed and in all other respects it should be affirmed. Accordingly the injunction to the extent indicated will be reinstated until the further order of the circuit court, and the cause will be remanded for further proceedings to be had therein, in accordance herewith, and further according to the rules and principles governing courts of equity.

(34 W. Va. 593)

CUNNINGHAM v. DUNN et al. (No. 3802.)  
(Supreme Court of Appeals of West Virginia.  
Sept. 30, 1919.)

(Syllabus by the Court.)

1. WILLS §191—"CHILD," IN STATUTE OF WILLS, MEANS CHILDREN.

The word "child," as used in section 16 of chapter 77 of the Code (sec. 3881), means "child or children"; the singular number having been adopted for convenience and brevity.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Child.]

2. WILLS §191—AFTER REVOCATION BY BIRTH OF ISSUE, REQUESTS DO NOT VEST UNTIL DEATH OF CHILDREN WITHOUT ISSUE.

The will of a person leaving two or more children at his death, made when he had no children and omitting provision for, and mention of, any child he might have, does not vest any of its devises or bequests, unless or until all of such children die unmarried and without issue.

3. WILLS §191—REVOCATION BY BIRTH OF ISSUE—DEFEASIBLE ESTATES VEST IN CHILDREN.

In such case, defeasible estates in the subject-matter of the will vest in the children by virtue of the statute of descents and distributions, and have all the qualities and characteristics of other defeasible estates.

4. CURTESY §11(2)—WILLS §191—DEVISE BY CHILDLESS WIFE TO HUSBAND REVOKED BY BIRTH OF ISSUE—DEFEASIBLE ESTATES.

If a devise be made by a wife to her husband, by a will executed when she had no children, and omitting provision for, and mention of, any child she might have, and she die leaving two children, the land descends to the children, subject to the husband's right of curtesy, and the devise does not take effect unless nor until both children die unmarried and without issue; but the estates so taken by the children are defeasible estates in fee simple, or base fees.

5. WILLS §191—DEFEASIBLE ESTATE OF CHILD BECAME ABSOLUTE BY MARRIAGE AND ISSUE.

If in such case one of the children dies unmarried and without issue, while the father is living, his share in the land goes to the father, by virtue of the statute of descents, subject to defeasance by the death of the other child unmarried and without issue; and by the marriage of such other child, and birth of issue, the father's estate in the part of the land so inherited by him becomes absolute.

Appeal from Circuit Court, Monroe County.

Suit by *Elvira Cunningham* against *Gertrude Dunn* and others. Demurrer to bill sustained, and bill dismissed, and plaintiff appeals. Reversed, demurrer overruled, and cause remanded.

*John L. Rowan*, of Union, and *J. A. Meadows*, of Athens, for appellant.

*W. M. La Fon*, of Union, for appellees.

POFFENBARGER, J. The correctness of the decree complained of depends upon the construction of section 16 of chapter 77 of the Code (sec. 3881), reading as follows:

"If any person die leaving a child, or his wife enceinte of a child, which shall be born alive, and leaving a will made when such person had no child living, wherein any child he might have is not provided for or mentioned, such will, except so far as it provides for the payment of the debts of the testator, shall be construed as if the devises and bequests therein had been limited to take effect, in the event that the child shall die unmarried and without issue."

The will involved was construed for certain purposes in *Cunningham v. Cunningham*, 30 W. Va. 599, 5 S. E. 139; the court holding that the will and the circumstances under which it was made brought it within the operation of the statute just quoted, wherefore the husband and devisee of the testatrix took under it only a contingent estate in fee simple. At the date of the making of the will purporting to give the land to the husband absolutely, his wife, the testatrix, had no children; but she afterwards had two children, both of whom survived her. As both of the children were then living, the court had no occasion to enter upon any inquiry as to what estate the husband would take, in the event of the death of one of the children unmarried and without issue. It held that, by operation of the statute, the devise to the husband was limited, to take effect only in the event the children should die unmarried and without issue. Some time after the rendition of that decision, one of the children died unmarried and without issue, and the effect this event has upon the construction of the will is the problem submitted upon this appeal. The other child survives, is married, and has children. She is one of the defendants, and the plaintiff was a subsequent wife of her father.

The tract of land involved was conveyed by James Philips and wife to Jane Cunningham, by a deed dated November 6, 1878, and originally contained 118 acres. By deed dated March 20, 1880, Jane Cunningham and George W. Cunningham, her husband, conveyed 21 acres and 3 poles of it to William H. Dunn. By her will, dated August 19, 1879, the wife devised and bequeathed all of her estate, real and personal, to her husband, George W. Cunningham. This will was probated May 7, 1883. The character and extent of the estate of George W. Cunningham, under the will, were determined by the court in 1888. Some time after the death of Jane Cunningham, George W. Cunningham married the plaintiff in this cause, Elvira Cunningham. He died testate in April, 1917, and by his will, after having made certain specific bequests, gave all of the residue of his property of every kind to his wife, for and during her natural life, and the remainder in fee therein to his children.

Claiming a life estate in one-half of the tract of land by virtue of this will, on the theory that her husband had inherited title to one-half of it from his son, who died unmarried and without issue, or that the devise to him failed as to only one-half of it, this son and Gertrude Dunn having been the two children of Jane Cunningham, born between the date of the making of her will and her death, Elvira Cunningham filed the bill in this cause, praying for partition of the land, to which the defendant Gertrude Dunn filed her demurrer and answer. George W. Cun-

ningham was survived by four other children, issue of his subsequent marriage or marriages, all of whom were made parties defendant. A purchaser of the alleged interest of one of them came into the cause by petition and filed an answer, by which he virtually joined in the prayer of the bill. By a decree entered April 12, 1918, the court adopted the theory of the plaintiff's bill and awarded her partition of the land; but on the next day this decree was set aside, by an order reciting unauthorized entry thereof. By a decree entered November 19, 1918, the court adopted the opposite theory, sustained the demurrer and dismissed the bill.

[1-4] The origin and purpose of the statute are well defined in *Wood v. Tredway*, 111 Va. 526, 69 S. E. 445. At common law, a will was not revoked by the subsequent birth of a child of the testator. *Wood v. Tredway*, cited; 2 Min. Inst. (3d Ed.) 1036, 1038; *Schouler on Wills*, 424. After the enactment of the statute of wills in England, the chancery court established a rule of constructive revocation of a will, as to the interest of a child not mentioned therein, nor otherwise provided for, founded upon a presumption that the testator did not intend to disinherit his child. 2 Min. Inst. (4th Ed.) 1026, 1027. This rule was also adopted in Virginia. *Yerby v. Yerby*, 3 Call (Va.) 334; *Savage v. Mears*, 2 Rob. (Va.) 570. Deeming it to be wise, equitable, and just, the General Assembly of Virginia made it, with some modifications, a part of the statutory law of wills at an early date. In the form in which it was originally passed, it had some defects or imperfections, which were eliminated by subsequent amendments. It substantially assumed its present form in Code 1849, c. 122, § 17, and has not since been changed in Virginia. With one slight alteration, it was adopted in our Code of 1868 (chapter 77, § 16). As found in the Code of 1860 (chapter 122, § 17) it made the will take effect in the event of the death of the child under the age of 21 years, unmarried, and without issue. Our statute makes it effective in the event of the death of the child unmarried and without issue.

The revocation recognized and enforced by the chancery courts, though equitable and just in the main, sometimes wrought unjust results by reason of its generality and far-reaching consequences. It wholly destroyed the devises and bequests made by the will, even though it happened that the child or children were infants and died in infancy, and no doubt sometimes let into the estate, by inheritance, persons to whom the testator never would have given it. In the judgment of the Legislature, it was more just and expedient to make the devises and bequests conditional, and not wholly void, in such cases. Accordingly it was provided that they should take effect only in the event of the

death of the child unmarried and without issue. While the child lives, the will vests no estate in the donee. At most, he has a mere possibility or expectancy of an estate. His interest is purely and manifestly contingent only. In the event of the death of the child unmarried and without issue, the estate given by the will vests in him, and, in this case, the devisee would have taken an estate in fee simple, if both children had died unmarried and without issue. Whether the death of only one of the two children let him into an estate in one-half of the land depends partly upon the sense in which the term "child" is used in the statute.

The word "child" in the statute under consideration obviously means child or children, and was adopted for convenience and brevity. It cannot be supposed that the Legislature intended the birth of one child to effect a partial revocation of a will under certain circumstances, and the birth of two or more children not to have such effect under the same or similar circumstances. The statute deals with a subject in which heirs, actual and prospective, including children, are interested. Wills step in between them and their ancestors, cutting off their inheritances and depriving them of what they otherwise would be entitled to. In dealing with wills, the Legislature incidentally dealt with and affected children and heirs and descents and distributions. It made a saving in the case of one class of heirs. It may well be assumed, therefore, that it dealt with them as classes, and not as individuals. When there are two or more of them, they take by classes and are excluded by classes. In *Cunningham v. Cunningham*, 30 W. Va. 599, 5 S. E. 139, the will under consideration was held to be within the statute, notwithstanding the testatrix left two children, neither of whom was in being at the date of the execution of the will. In *Kyle v. Kyle*, 18 Ind. 108, a statute providing that, if a husband or wife should die intestate, leaving no child, and no father or mother, the whole of his property, real and personal, should go to the survivor, was construed as if it had used the terms "children or their descendants," instead of the word "child."

The old equity rule and its successor, the statute, were designed to preserve rights under the statute of descents and distribution, under the circumstances upon which they are predicated. As between parent and child, there is a natural and moral duty on the part of the former, which the statute recognizes and enforces. It rests upon the presumption that a person who has made a will when childless, and died leaving children born after the making of the will, did not intend to disinherit them, break the highest obligation that can be imposed on a human being, and deprive his offspring of the protection and assistance to which they are naturally enti-

led. Upon this presumption, it is assumed that, under such circumstances, the breach of the obligation was not intended, and that the will was inadvertently allowed to stand, after the birth of children. To make this presumption effective, the statute provides that the will shall not take effect, unless the child dies unmarried and without issue. A necessary implication arising from this provision is that, under such circumstances, the statute of descents and distribution shall be operative and carry the estate to the child. It must go to him by virtue of that statute, for it does not vest in the devisee, nor in the child, by the will, and the testator does not take it with him. In the case of a devise of real estate, under such circumstances, the child takes by descent a defeasible estate in fee simple, a base fee. If he dies unmarried and without issue, the estate is defeated by that event, and the estate given by the will goes to the devisee in that instrument. If, on the contrary, he marries and has issue, the estate so taken becomes absolute, and the will never takes effect.

It is impossible to give the word "child" in the latter part of the statute a meaning different from what it has in the first part of it. If the birth of two or more children, after the making of the will, brings it within the statute, the death of all of them unmarried and without issue is essential to the vesting of any estate given by the will. While *Cunningham v. Cunningham* and *Wood v. Tredway*, cited, do not so decide, they both assert it by way of dicta. The language of the statute is the same in each case, wherefore the intent of the Legislature must have been the same in each. Not a word found in the statute indicates legislative purpose to let the devisee into an estate in the part of the property that goes to one of the children, on his death unmarried and without issue, in the event of the existence of two or more after-born children. Its plain purpose is to give the estate to the children of the testator, and that purpose would be largely defeated, in many cases, if the devisee were allowed to take the share of one child at his death unmarried and without issue, when there are two or more children. He may be a total stranger to the estate, and yet he would be let into a part of it by the will, as against children, the other children. In the case of the existence of one child, the statute intends that he shall have the whole of the estate; wherefore it is perfectly consistent to say that if, in the case of two or more children, one of them should die unmarried and without issue, his share should go to his heirs, who, ordinarily, would be his brothers and sisters. Under this construction, the survivor of the two children, the sister, would have taken an estate in the one-half of the land the title to which vested conditionally in her brother, if her father

had not been living. If the devisee had been some person other than her father, she would have taken that interest, and, on her marriage and the birth of her children, she would have had an absolute fee simple estate in all of the land. Under the circumstances of this case, the construction adopted keeps the land as nearly within the reach of the children as the law itself places it in the absence of a will. The daughter was the prospective heir of her father and would have taken a share of the brother's half, but for his will; and, but for the will and the existence of other children, she would have succeeded to all of it.

[6] The qualified or conditional fee-simple estates taken by the two children were inheritable estates, passing to the heirs, subject to the possibility of defeasance. 2 Min. Inst. (2d Ed.) 78; 2 Bl. Com. 111, note. Hence, on the death of the son, his share went to his father as his heir, and, when the daughter married and had issue, that estate in him became absolute, and was disposed of by his will, giving his then wife a life estate in it and the remainder in fee therein to his children.

This conclusion makes the decree complained of clearly wrong, and calls for reversal thereof. It will be reversed, the demurrer overruled, and the cause remanded.

(84 W. Va. 546)

#### STATE v. RINGER.

(Supreme Court of Appeals of West Virginia.  
Sept. 23, 1919.)

#### (Syllabus by the Court.)

#### 1. INDICTMENT AND INFORMATION §129(2)— BREAKING AND ENTERING RAILROAD CAR— INDICTMENT—MISJOINDER OF OFFENSES—DE- MURRER.

The charge in the second count of an indictment for house breaking and larceny that the defendant "afterwards" without breaking did enter the particular car alleged to have been broken and entered in the first count but referring to the same car by number and alleging the commission of the offense on the same day as the offense alleged in the first count, is not bad on demurrer for misjoinder of offenses unrelated to the same transaction, and the demurrer is properly overruled.

#### 2. INDICTMENT AND INFORMATION §129(2)— BREAKING AND ENTERING RAILROAD CAR— INDICTMENT—MISJOINDER OF OFFENSES.

Nor is the third count in such indictment bad on demurrer for misjoinder of unrelated offenses, which charges the larceny of certain goods not specifically described in either of the two preceding counts but which lays the time on the same day as the offenses charged in the previous counts.

#### 3. CRIMINAL LAW §1169(11)—BREAKING AND ENTERING RAILROAD CAR—HARMLESS ER- ROR IN ADMITTING EVIDENCE.

On the trial of such indictment the admission of evidence of the possession of other goods by defendant in the same room where the goods alleged to have been stolen were stored, and which the evidence tends to show were also stolen by defendant, does not constitute reversible error, in the absence of evidence showing that defendant was prejudiced thereby.

#### 4. CRIMINAL LAW §789(11)—INSTRUCTION— REASONABLE DOUBT.

An instruction on the subject of reasonable doubt telling the jury that "what they believe from the evidence as men they should believe as jurors," many times condemned, is erroneous and may constitute reversible error.

#### 5. CRIMINAL LAW §785(3)—CREDIBILITY OF WITNESS—INSTRUCTION.

An instruction telling the jury that they may believe or refuse to believe any witness is erroneous. An instruction covering this subject should state the law substantially as the one approved in *State v. Staley*, 45 W. Va. 792, 32 S. E. 198.

#### 6. CRIMINAL LAW §823(1)—ERRONEOUS IN- STRUCTION CURED BY GOOD INSTRUCTION.

A bad instruction is not cured by a good one properly stating the law of the case, given at the instance of the same or another party to the action.

#### 7. CRIMINAL LAW §814(3) — ABSTRACT IN- STRUCTION—REFUSAL.

An instruction containing a mere abstract proposition of law not applicable to the facts proven is properly rejected by the trial court.

#### (Additional Syllabus by Editorial Staff.)

#### 8. CRIMINAL LAW §815(11)—WEIGHT OF TES- TIMONY—INTEREST OF DEFENDANT—INSTRU- TION.

An instruction that there is no different rule for the jury to follow in weighing the testimony of the defendant than that of any other witness would disregard the interest, bias, and prejudice of defendant, always present in a criminal indictment, and would be misleading.

#### 9. BURGLARY §42—POSSESSION OF PROPERTY RECENTLY STOLEN.

The exclusive possession and control of property recently stolen are circumstances tending to show guilt, which the jury may consider in connection with all the other circumstances and facts in proof.

#### 10. BURGLARY §45—BREAKING AND ENTER- ING CAR—OWNERSHIP OF PROPERTY.

In a prosecution for breaking and entering a car and stealing goods therefrom, evidence that the car bore the initials "C. & N. W.," a waybill in evidence showing those initial letters, with testimony that they indicated that it was the property of that company, was sufficient to carry the ownership of the car to the jury.

Error to Circuit Court, Wood County.

Glen B. Ringer was convicted of breaking and entering a railroad car, etc., and he

brings error. Reversed, verdict set aside, and a new trial awarded.

W. R. Brown, of West Union, and R. E. Bills, of Parkersburg, for plaintiff in error.

E. T. England, Atty. Gen., Charles Ritchie, Asst. Atty. Gen., and James S. Wade, of Parkersburg, for the State.

MILLER, P. Found "guilty as charged in the within indictment," the judgment upon the verdict of the jury complained of was that defendant be confined in the penitentiary of this State for the period of three years.

Numerous points of error are relied on for reversal. The first we will consider is that the court upon the prisoner's motion should have quashed the indictment and each of the three counts thereof, upon two grounds: (1) That each of the counts charges a separate and distinct offense; (2) that the third count in no way connects the offense therein charged with the offenses alleged to have been committed by the defendant in the first and second counts by reference thereto or in time, place or circumstance, wherefore not properly joined in an indictment for the other offenses with which he is therein accused.

The first count charges the defendant with having on the — day of December, 1917, feloniously broken and entered a railroad car number 67658 belonging to the Chicago & Northwestern Railway Company, a corporation, in the possession of the Baltimore & Ohio Railroad Company, with intent the goods and chattels of the latter company in the said car feloniously to steal and carry away. The second count charges the defendant *afterwards*, to-wit, on the — day of December, 1917, without breaking did enter the same car, with like intent. The third count avers that defendant, on the — day of December, 1917, in Wood County, twenty-three (23) quarts of whiskey of the value of one dollar and fifty cents per quart and of the aggregate value of thirty-four dollars and fifty cents, the goods and chattels of the Baltimore & Ohio Railroad Company, then and there being found, unlawfully and feloniously did steal, take and carry away.

[1] To sustain their contention that the second count is in no way connected with or related to the crime charged in the first count, counsel for defendant lay much emphasis on the word "*afterwards*," contending that by the use of that word the grand jury intended another and distinct crime, not related to the one alleged in the first count, or arising out of the same transaction. We think this contention not well founded. Though the two counts charge different and distinct offenses, they are related to each other by reference to the same car number, the ownership and possession thereof, and of the goods therein, and we do not think the word "*afterwards*" in the second count should be construed as referring to a different transaction than that charged in the first

count and so as to render it improper within the rules of criminal pleading to include the two offenses in the same indictment. If after breaking and entering, the defendant at the same time and in the same connection re-entered without breaking with the same intent charged, the acts would be so connected as to constitute one continuous act, and the two offenses might well be said to arise out of that transaction, justifying the joining of the two counts. If all of the offenses charged in one or more counts of an indictment represent but one continuous transaction, it is well settled in this State and in Virginia that they may be so joined as distinct offenses in different counts, and that where properly joined as distinct offenses, and unless they appear on the face of the indictment to involve a different transaction, a motion to quash for misjoinder should be overruled. *State v. Smith*, 24 W. Va. 814, 818; *State v. Shores*, 31 W. Va. 491, 495, 7 S. E. 413, 13 Am. St. Rep. 875; *State v. McClung*, 35 W. Va. 280, 282, 13 S. E. 654, and cases cited; *Dowdy v. Commonwealth*, 9 Gratt. Anno. 728, and note, 60 Am. Dec. 314; *Benton's Case*, 91 Va. 782, 21 S. E. 495; *Hausenfluck v. Commonwealth*, 85 Va. 702, 8 S. E. 683.

[2] It is said however of the third count that the offense charged appears in no way connected in time, place or circumstance with those charged in the first and second counts. But the time is the same in all three counts; the offense is of the same general character, and while the goods alleged to have been stolen are not identified as those referred to in the previous counts, it does not appear that they are not, and the rule is that where it does not appear on the face of the indictment that the offenses charged represent distinct transactions, a motion to quash should not prevail. Should it afterwards appear, however, that the offenses charged in the several counts are not properly joined, the court may then require the State to elect upon which of the counts it proposes to stand, and proceed with the trial. *State v. Shores*, *State v. Smith*, and *Hausenfluck v. Commonwealth*, *supra*, and other cases cited *supra*. So we think the motion to quash and the subsequent motion in arrest of judgment, so far as based on the ground of misjoinder, were properly overruled.

[3] Numerous exceptions were taken and saved by bills of exception to the rulings of the court on the admission of testimony of several witnesses as to the finding of other goods in the room and possession of the defendant, some of which were identified as having been taken from the railroad car mentioned in the indictment. Among them is an exception to the admission of a statement in writing signed by defendant and proven by the officers who searched his room and found the whiskey described in the third count, in which statement defendant purported to con-

fess to the taking of the goods from the Baltimore & Ohio Railroad Company, of which he was an employee. We do not see how this evidence, though not particularly relevant, could have misled the jury or prejudiced the defendant. If the jury believed he made the written statement confessing the offenses charged in the indictment as testified to by the witnesses, and that the goods other than the whiskey were stolen by him, the evidence tended to show guilty intent, one of the issues on the case. For such purpose evidence of other crimes and of goods found in defendant's possession is sometimes admissible. *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, note relating to larceny page 231, and cases annotated.

Complaint is made of the instructions to the jury, six in number, given at the instance of the State. Instructions number 1, 2, 4, and 6 present correct legal propositions pertinent to the issues and evidence in this case, and having been frequently approved in prior decisions, it is unnecessary to repeat what has many times been said of them in other cases. Instructions numbers 3 and 5 have been repeatedly condemned by this court, number 3 as not necessarily calling for reversal unless shown to have been prejudicial, but not so as to instruction number 5. Number 3 told the jury "that a reasonable doubt is not a vague or uncertain doubt and that what the jury believe from the evidence as men they should believe as jurors." Number 5 told the jury "that they are the sole judges of the evidence and that they *may believe or refuse to believe any witness* and that when passing upon credibility of witnesses they may take into consideration his interest in the matter in controversy, the reasonableness or unreasonableness of his statement, his bias or prejudice in the matter, if any appear, and his demeanor upon the witness stand."

[4] Instruction number 3 we have many times and recently considered and said that it ought not to be given. We do not understand why counsel and some of the trial courts persist in the use of this instruction. The last case referred to and citing the previous cases considering it is that of *State v. Price*, 83 W. Va. 71, 97 S. E. 582. The giving of this instruction always imposes upon us the burden of determining in the particular case whether the party resisting it has been prejudiced thereby, not always an easy deduction, and one which the court ought not to be called upon to determine. In this case we have concluded that the judgment must be reversed upon another ground, and we are relieved thereby from determining whether the instruction was prejudicial.

[5] Instruction number 5, we think, was wrong and prejudicial. It was plainly intended to apply alone to the evidence of the prisoner. Section 19, chapter 152 (sec. 5476), of the Code, makes the accused competent to

testify in his own behalf, and it is not proper on his trial when accused of crime to tell the jury that they may at their will believe or refuse to believe his testimony, or that of any other witness. The only authority cited by the State to justify this instruction is *State v. Staley*, 45 W. Va. 792, 797, 32 S. E. 198, approving instruction number 4 given in that case. But instruction number 4 in that case is quite different in its terms and import from number 5 in this case, condemned in *State v. McCausland*, 82 W. Va. 525, 96 S. E. 938. The instruction approved in *State v. Staley* did not tell the jury they might believe or refuse to believe any witness. After telling them that they were the sole judges of the weight of the testimony and that they had the right to take into consideration the credibility of each witness as disclosed from his evidence etc., it did not tell them that they might believe or disbelieve the witness, as the jury were told in this case, but that if they believed any witness had testified falsely as to any material fact, they had the right to disregard all the evidence of such witness, or any part thereof, or give it such weight as in their opinion it was entitled to. That instruction properly embodied the law on this subject, but it is unlike the instruction here, which was specifically condemned in *State v. McCausland*. In the recent case of *Siever v. Coffman*, 80 W. Va. 420, 92 S. E. 669 referring to the previous case of *State v. Wilson*, 74 W. Va. 772, 780, 83 S. E. 44, we held it to be error to tell the jury they might disregard the entire testimony of a witness unless told in the same connection that they might give it such weight as in their judgment under all the facts and circumstances in the case it was entitled to.

[6] Defendant's instruction number 4 is substantially the instruction approved in *State v. Staley*, but as a general rule a bad instruction is not cured by the giving of a good one. *Cobb v. Dunlevie*, 63 W. Va. 398, 60 S. E. 384; *State v. Michael*, 74 W. Va. 613, 621, 82 S. E. 611, L. R. A. 1915A, 533; *Stuck v. K. & M. Ry. Co.*, 78 W. Va. 490, 89 S. E. 280. The instruction does not represent an incomplete statement of the law which, under authority cited by counsel, may be cured by another complete instruction, but propounds a proposition which is not law, and is not cured by another instruction propounding the law correctly.

[8] Of the rejection of defendant's instructions complaint is also made. Ten were proposed on his behalf. Numbers 3, 5, 7, 8, and 10 were rejected. Of those rejected 3 and 7, relating to the burden of proof and reasonable doubt, were substantially covered by number 1, given. Instruction number 5 would have told the jury that there is no different rule for them to follow in weighing the testimony of the defendant than that of any other witness. This would be to disregard the interest, bias and prejudice of the



defendant, always present in a criminal indictment, and would be misleading. The correct rule was stated in defendant's instruction number 4 given to the jury. *State v. Staley*, supra.

[7, 8] Instruction number 8 would have erroneously propounded the abstract proposition "that the mere possession by one of stolen property is not prima facie evidence that he is the thief." If a correct statement of the law, it does not cover the case, because much other evidence was before the jury tending to show defendant's guilt. Such possession may not amount of itself to prima facie evidence of guilt, as we held in *State v. Littleton*, 77 W. Va. 804, 88 S. E. 458. But as this case holds the exclusive possession and control of property recently stolen are circumstances tending to show guilt, which the jury may consider in connection with all the other circumstances and facts in proof. The instruction being wholly abstract was properly refused. *Parker v. National Mut. Bldg. & Loan Association*, 55 W. Va. 134, 48 S. E. 811.

Instruction number 10 proposed to tell the jury that if they believed from the evidence beyond a reasonable doubt that defendant did take and carry away the whiskey mentioned and described in the indictment, but the evidence left them in doubt as to the value thereof and as to whether it was worth twenty dollars or more, at the time and place taken, then they should find the defendant guilty of petit larceny, a misdemeanor punishable by confinement in jail not to exceed one year. But there stand counts 1 and 2 charging defendant with the offense of house breaking, and entry without breaking, with felonious intent, and as to which the value of the property stolen is not material, wherefore this instruction would have withdrawn from the jury the questions depending on those counts. We know it is contended that there was no evidence of the breaking, or entry without breaking with felonious intent, but that question will be disposed of when we come to consider the alleged error in overruling defendant's motion for a new trial and in arrest of judgment. It is proper to say in this connection, however, that in our opinion the value of the twenty-three quarts of whiskey found in the possession of defendant at the time and place alleged was more than twenty dollars, sufficient to constitute the felony charged in the third count.

The motion of defendant to set aside the verdict and award him a new trial, and in arrest of judgment, overruled, are relied on as errors. These motions were predicated on three grounds: (1) The theory of a bad indictment, already disposed of; (2) alleged variance between the allegata and probata; (3) the theory that no lawful judgment could be pronounced against defendant on the general verdict of guilty not limited to the third count, for want of sufficient evidence to sup-

port either of the other counts. As there is to be another trial we do not wish to be understood as expressing any opinion on the weight and credibility of the evidence on the question of the defendant's guilt of breaking or entering without breaking the railroad car as charged in the first and second counts. All that it is necessary for us to say at this time is that there was evidence tending to show guilt of these offenses. That the car was broken and entered is fully established; that the whiskey and containers found in the possession of the defendant were a part of the goods contained in the car is supported by the evidence, and unless defendant's written admission to the officers causing his arrest was changed after he signed it, a fact for the jury, he confesses taking the liquor from the Baltimore & Ohio Railroad Company, though not specifying the car from which it was taken. But can it be doubted that this and much other evidence was competent to go to the jury on the question of defendant's guilt of the crimes charged in the first and second counts? We think not. So that on the principles of *State v. McClung*, syllabus 4, and *State v. Littleton*, syllabus 1, relied on, there was evidence enough to go to the jury on the question of guilt or innocence of the defendant of these offenses, and in support of the offense of house breaking. Counsel for defendant are in error in assuming that the State did not attempt to prove defendant broke or entered the car.

[10] Nor is counsel for defendant correct in assuming that the State wholly failed to prove the car broken open and from which the whiskey and other property was taken was the car of the Chicago & Northwestern Railway. There was ample evidence that the car bore the initials "C. & N. W." The way bill in evidence showed these initial letters, and witnesses explained that these letters indicated that it was the property of that company. True, it was held in *State v. Hill*, 48 W. Va. 132, 35 S. E. 831, that the charge in an indictment that the accused broke and entered a sealed box car, the property of the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company was not sustained by proof tending to show that the accused broke and entered a freight car belonging to the Pittsburgh, Cleveland, Chicago & St. Louis Railroad Company, or the C., C. & St. L., or the B. & O. R. R. Co. But there was no proof of ownership in this case other than that the initial letters on the car indicated that it was the property of the company described in the indictment. In the absence of any evidence to the contrary, we think the proof was sufficient to carry the case to the jury on the question of ownership of the car.

For the errors referred to committed on the trial, the judgment will be reversed, the verdict set aside, and the defendant will be awarded a new trial.

(78 N. C. 370)

MONTAGUE et al. v. LUMPKIN & PERRY.  
(No. 249.)(Supreme Court of North Carolina. Oct. 15,  
1919.)**1. JUDGMENT  $\S$ 106(1)—DEFAULT JUDGMENT  
ON FAILURE TO ANSWER.**

Where a regularly verified complaint alleged an express promise to pay a definite sum of money, it was not irregular to enter a judgment in favor of plaintiff by default final upon failure to answer.

**2. JUDGMENT  $\S$ 145(3) — To SET ASIDE DEFAULT, NECESSARY TO SHOW FACTS CONSTITUTING DEFENSE.**

A judgment by default for want of an answer will not be set aside unless facts are alleged, which, if true, would establish a defense.

**3. CONTRACTS  $\S$ 176(1) — CONSTRUCTION OF CONTRACT FOR COURT.**

The construction of a contract is a question of law for the court.

**4. CONTRACTS  $\S$ 175(1)—SALES  $\S$ 75—WRITTEN CONTRACT TO PURCHASE PRESUMED TO COVER ALL REASONABLE CONTINGENCIES.**

Contract reciting that buyer had bought seller's tobacco crop "for one thousand dollars, not less than three thousand pounds," payable "six hundred dollars when tips is delivered, three hundred when next load, and one hundred when the last is delivered, if there is 3,000 pounds," did not leave buyers, in the event that the crop did not weigh 3,000 pounds, to pay nothing or upon a quantum valebat, but was an agreement to pay \$1,000, if crop weighed 3,000 pounds, and, if less, \$900; for the presumption is that a written contract covers the different contingencies that may arise as far as they can be reasonably foreseen.

**5. JUDGMENT  $\S$ 159—AFFIDAVIT TO SET ASIDE DEFAULT BY ATTORNEY SPEAKING FROM HEARSAY INSUFFICIENT.**

In an action upon motion to set aside a default judgment, on the ground of excusable neglect, to recover a balance due under contract for sale of tobacco, defendant's allegations as to damage to the tobacco held too indefinite, and as not showing that plaintiffs were in any way responsible therefor, and particularly where the affidavit was that of the attorney who could only speak from hearsay and not of defendants.

Appeal from Superior Court, Wake County; Allen, Judge.

Action by Lonza Montague and another against Lumpkin & Perry. Default judgment for plaintiffs, defendants' motion to set aside the judgment denied, and defendants appeal. Affirmed.

This is a motion to set aside a judgment on the ground of excusable neglect.

The action is to recover a balance of \$300 alleged to be due for tobacco sold and delivered to the defendants under the following contract:

"This is to certify that I have bought Lonza Montague's crop of tobacco for one thousand dollars, not less than three thousand pounds, one lot of tips, next to tips, and primings graded. He is to draw six hundred dollars when tips is delivered, three hundred when the next load, and one hundred when the last is delivered, if there is 3,000 pounds.

"October 16, 1918.

"[Signed] Lumpkin & Perry, per J. R. P."

The plaintiffs filed a duly verified complaint, alleging the delivery of the tobacco to the defendants, and the payment of \$600 thereon.

It was not alleged that there were 3,000 pounds of the tobacco.

The plaintiffs also alleged that the defendants owed them \$24.16 for stripping the last load of tobacco, which they had promised to pay.

One of the defendants filed an affidavit in support of the motion to set aside the judgment, and in it he stated no facts showing a meritorious defense. The following affidavit was also filed:

"J. W. Bunn, being duly sworn, says that he is attorney for the defendants in the above-entitled action; that the said defendants have a good and meritorious defense to the cause of action alleged in the complaint as follows:

"The plaintiffs failed to comply with the terms of the contract, which is set forth in the complaint, in that they delivered to the defendants only about 2,500 pounds of tobacco, when, according to the defendants' construction of the contract, the quantity of tobacco should have been three thousand pounds; that the tobacco, as delivered to the defendants, was in such damaged condition as to greatly decrease its value, and that it did not measure up in quality and condition to what it was at the time it was purchased by the defendants from the plaintiffs. That taking into consideration the quantity of tobacco and the condition at the time of its delivery by plaintiffs to the defendants, the defendants are indebted to plaintiffs in the sum of about one hundred and eighteen dollars (\$118), which sum has been tendered by the defendants to the plaintiffs, and the plaintiffs refused to accept same in payment of the balance due them under the terms of the contract.

"J. W. Bunn.

"Subscribed and sworn to before me this 19th day of June, 1919.

"Vitruius Royster, Clerk Superior Court."

There were other affidavits filed on the question of excusable neglect.

The motion was denied, and the defendants appealed.

J. W. Bunn and Murray Allen, both of Raleigh, for appellants.

J. G. Mills, of Wake Forest, and Douglass & Douglass, of Raleigh, for appellees.

ALLEN, J. [1] The complaint, which is verified, alleges an express promise to pay a definite sum of money, and under the au-

thorities it was not irregular to enter judgment in favor of the plaintiffs by default final upon failure to answer. *Hartman v. Farrlor*, 95 N. C. 177; *Miller v. Smith*, 169 N. C. 210, 85 S. E. 379.

[2] It is also equally well settled that a judgment by default will not be set aside unless facts are alleged which, if true, would establish a defense.

"The court having jurisdiction of the subject and the parties, there is a presumption in favor of its judgment, and the burden of overcoming this presumption is with the party seeking to set aside the judgment. He must set forth facts showing prima facie a valid defense, and the validity of the defense is for the court, and not with the party. Although there was irregularity in entering the judgment, yet unless the court can now see reasonably that defendants had a good defense, or that they could now make a defense that would affect the judgment, why should it engage in the vain work of setting the judgment aside now, and then be called upon soon thereafter to render just such another between the same parties? To avoid this, the law requires that a prima facie valid defense must be set forth." *Jeffries v. Aaron*, 120 N. C. 169, 26 S. E. 696, approved in *Miller v. Smith*, 169 N. C. 210, 85 S. E. 379, and in other cases.

[3, 4] Counsel do not contest the correctness of these principles, and they further admit that no defense has been shown unless the contract sued on required the plaintiffs to deliver 3,000 pounds of tobacco, which has not been done.

The determination of the appeal turns then on the construction of the contract, which is a question of law for the court (*Young v. L. Co.*, 147 N. C. 26, 60 S. E. 654, 16 L. R. A. [N. S.] 255), and in the effort to ascertain the intent of the parties, which is the purpose of all construction, we must deal with the contract as an entirety.

"In *Paige on Contracts*, § 1112, we find it stated: 'Since the object of construction is to ascertain the intent of the parties, the contract must be considered as an entirety. The problem is, not what the separate parts mean, but what the contract means when considered as a whole.'" *Railroad v. Railroad*, 147 N. C. 382, 61 S. E. 190, 23 L. R. A. (N. S.) 223, 125 Am. St. Rep. 550, 15 Ann. Cas. 363.

Following this principle and looking at the whole contract and not at separate parts, it seems to us clear that the plaintiffs sold their entire crop of tobacco, and that the defendants agreed to pay \$1,000 if it weighed 3,000 pounds, but if less only \$900.

Provision is made for the payment of \$600 "when tips is delivered," \$300 "when the next load," "and then \$100 when the last is delivered, if there is 3,000 pounds."

If this is not what the parties intended, they have made a contract for the sale of a crop of tobacco, making no provision for the

purchase price if it should not weigh 3,000 pounds, leaving the defendants in that event to pay nothing or upon a quantum valebat, which is contrary to the presumption that a written contract covers the different contingencies that may arise as far as they can be reasonably foreseen.

We are therefore of opinion no defense has been shown, and that the motion was properly denied.

[5] The allegations as to damage to the tobacco, contained in the affidavit, are too indefinite, and do not show that the plaintiffs are in any way responsible; and, besides, these allegations are in the affidavit of the attorney, who could only speak by hearsay, and not in the affidavit of either of the defendants.

Affirmed.

(178 N. C. 273)

SOUTHERN RY. CO. v. W. A. SIMPKINS  
CO. et al. (No. 255.)

(Supreme Court of North Carolina. Oct. 15, 1919.)

1. CHATTEL MORTGAGES ⇨189—MORTGAGOR AGENT OF MORTGAGEE IN SALE OF GOODS FREE OF LIEN.

A chattel mortgagor, left in possession of goods which in the contemplation of the parties are to be disposed of by the mortgagor in the ordinary course of trade, is the agent of the mortgagee to the extent that he may pass the title to the goods, sold in the usual way to a purchaser, freed of the mortgage lien, and he has implied authority to use the necessary and proper means to that end.

2. PRINCIPAL AND AGENT ⇨145(2)—UNDISCLOSED PRINCIPAL IGNORANT OF FREIGHT UNPAID NOT LIABLE TO RAILROAD ON SETTLEMENT WITH CONSIGNEE.

Where a railroad marked bills of lading "freight prepaid" and gave credit solely to shipper, who represented an undisclosed principal, the principal was not liable to the railroad for the freight, where such principal without objection by the railroad settled with the shipper in good faith without notice that the freight had not been paid.

3. PRINCIPAL AND AGENT ⇨133—LIABILITY OF UNKNOWN PRINCIPAL WHERE CREDIT GIVEN EXCLUSIVELY TO AGENT.

Where one dealing with an agent with knowledge of his agency gave credit exclusively to the agent, he cannot thereafter recover from the principal who has in good faith settled with the agent.

4. PRINCIPAL AND AGENT ⇨142—REGISTRATION OF CHATTEL MORTGAGE NOTICE TO RAILROAD OF OWNERSHIP OF GOODS SHIPPED.

Where a chattel mortgage was registered, it was notice to a railroad shipping the mortgaged goods, as far as the ownership of the goods and the liability for freight were concerned.

**5. CARRIERS ⇐194—ASSIGNMENT OF BILLS OF LADING FOR COLLECTION DOES NOT RENDER ASSIGNEE LIABLE FOR FREIGHT CHARGES.**

Where a bank takes drafts with bills of lading attached for purpose of collection, the title does not pass so as to render the bank liable for freight charges.

**6. ESTOPPEL ⇐95—CARRIERS MARKING BILL OF LADING "FREIGHT PREPAID" CANNOT AFTER THREE YEARS COLLECT OF SHIPPER.**

Where a carrier taking goods from an agent for shipment marked the bill of lading, "Freight prepaid," gave agent credit, allowed principal to settle with the agent, remained silent for three years, and did not notify the principal that the freight had not been paid, thus preventing the principal from indemnifying itself when it had several opportunities, it was estopped as against principal to deny that the freight had been paid.

Appeal from Superior Court, Wake County; Allen, Judge.

Suit by the Southern Railway Company against the W. A. Simpkins Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

This is a suit brought by the plaintiff to recover the freight charges on seven cars of cotton seed shipped from Raleigh, N. C., in interstate commerce, in the name of, W. A. Simpkins Company; three cars being shipped October 18, 1912, to W. A. Simpkins Company order notify J. P. Savant, New Orleans, La., and three cars being shipped October 31st to the same order notify and the same consignee, and one car being shipped October 24th by W. A. Simpkins Company to itself order notify Frierson Company, Limited, Frierson, La. The complaint sets forth three causes of action, being: (1) That W. B. Drake, Jr., cashier, by virtue of a chattel mortgage not yet due, as mortgagee consenting, was liable for the shipping out and the turning into money by the mortgage; (2) that the arrangements between the W. A. Simpkins Company and the Merchants' National Bank and W. B. Drake, Jr., cashier, were such as to constitute a partnership; and (3) that the assignment of the draft and bill of lading before these shipments left Raleigh to W. B. Drake, Jr., cashier, for the Merchants' National Bank, made them liable for the freight charges as assignee of the bill of lading.

There is no dispute as to the amount of the freight charges and the chattel mortgage on 28,000 bushels of cotton seed, the same reciting a \$10,000 indebtedness due November 30, 1912 (four to seven weeks after the shipment took place), was introduced.

This mortgage was to Drake, cashier, and was executed in July, 1912, and was registered.

In October, 1912, W. A. Simpkins Company made seven shipments of cotton seed over

the Southern Railroad to Southern points. The custom, which had existed between the said shipper and railroad for six or seven years, was that the railroad charged the freight, and "in ten days, two weeks or thirty days collection was made." "The Simpkins Company had a line of credit with the railroad, at the time these shipments were made." Referring to the B. L. it will be seen that the same had been marked "prepaid" before the seed left Raleigh. Plaintiff's witness states "that although the bill of lading was marked 'Freight prepaid,' it had not been prepaid, but credit had been extended to the Simpkins Company by the railroad and is still due the railroad."

Sight drafts were drawn on Savant and others, with bills of lading attached, and the defendant bank collected the drafts, in the usual course, and placed the proceeds to the credit of the Simpkins Company, and this company, by its checks on said bank, from time to time, drew out said funds, paying its debts and paying in part a mortgage debt to the bank.

The collections from the drafts amounted to about \$6,000, of which \$4,000 was retained by the bank on debts due by the Simpkins Company and the remainder paid out on its check.

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

A. B. Andrews and W. B. Snow, both of Raleigh, for appellant.

Robert W. Winston and J. C. Biggs, both of Raleigh, for appellees.

ALLEN, J. The plaintiff's counsel admit that there is no evidence of a partnership between the Simpkins Company and either of the defendants, and this cause of action is abandoned.

They, however, insist that the defendants are liable for the freight upon two grounds:

(1) That the Simpkins Company was the agent of Drake, cashier, in making the contract of shipment, and that Drake is liable on the contract as an undisclosed principal.

(2) That the defendant bank, having taken an assignment of drafts with bills of lading attached, and having collected the money thereon, is liable for the freight as the owner of the property.

[1] There is no evidence of agency except such as arises from the relation of mortgagor and mortgagee, and while the mortgagor, left in possession of goods, which, in the contemplation of the parties, are to be disposed of by the mortgagor in the ordinary course of trade, is the agent of the mortgagee to the extent that he may pass the title to the goods, sold in the usual way, to a purchaser, freed of the mortgage lien (*Bynum v. Miller*, 89 N. C. 393), which carries with it "the im-

pled authority to use the necessary and proper means to that end" (*Etheridge v. Hilliard*, 100 N. C. 253, 6 S. E. 572), the plaintiff is not in a position to take advantage of this principle.

[2] In the first place, if we assume that *Drake* is an undisclosed principal, and as such ordinarily liable on the contract of the agent, there is no evidence that either of the defendants had any notice that there was anything due for freight, and, on the contrary, the plaintiff marked the bills of lading "Freight prepaid," credit was given solely to the agent, the defendants afterwards, without objection by the plaintiff, settled with *Simpkins Company*, paying out on its check from the proceeds of the draft more than enough to pay the freight, and the plaintiff waited nearly three years before making any demand on the defendants, during which time the defendants had numerous opportunities to reimburse themselves, if liable for the freight.

"The qualification of the principal's liability to respond to his agent's contract, as stated in the earlier authorities mentioned, was narrowed by the interpretation adopted in *Heald v. Kenworthy*, 10 Exch. 739, to the effect that the principal is not discharged from full responsibility unless he has been led by the conduct of the seller to make payment to or settle with the agent; and the doctrine of this case has been reiterated in many subsequent cases, both in England and in this country, where the agent did not contract as for himself, but as a broker, or otherwise as representing an undisclosed principal. One of the more recent English cases of this class is *Davison v. Donaldson*, L. R. 9 Q. B. Div. 623.

"But, as is shown in *Armstrong v. Stokes*, L. R. 7 Q. B. 599, the version of *Heald v. Kenworthy*, while a correct interpretation of the rule of the principal's liability, when applied to cases in which the seller deals with the agent relying upon the existence of an undisclosed principal, is not to be applied in those in which the seller has given credit solely to the agent, supposing him to be the principal. This case decides that the principal is not liable when the seller has dealt with the agent supposing him to be the principal, if he has in good faith paid the agent at a time when the seller still gave credit to the agent, and knew of no one else. See, also, *Irvine v. Watson*, L. R. 5 Q. B. Div. 102.

"Under such circumstances, it is immaterial that the principal has not been misled by the seller's conduct or laches into paying or settling with his agent. It is enough to absolve him from liability that he has in good faith paid or settled with his agent. In that case the court was dealing with a contract made by an agent which was within the scope of the authority conferred on him, but which was nevertheless made by the agent as though he were acting for himself as principal."

*Fradley v. Hyland* (C. C.) 37 Fed. 51, 2 L. R. A. 750.

The same principle is stated in 31 Cyc. 1580, as follows:

"An undisclosed principal may be relieved from liability by reason of a changed state of accounts between him and the agent, the rule being formerly laid down in England, and now very generally followed in the United States, that where the principal, acting in good faith, has settled with the agent so that he would be subjected to loss were he compelled to pay the third person, he is relieved of liability to the latter. This doctrine is now held in England and in a few cases in the United States to be too broad, and in these jurisdictions the better rule is stated to be that the principal is discharged only where he has been induced to believe that such person has settled with the agent or has elected to hold the latter. In any event, the principal is relieved from liability where he has been induced by the conduct of the third person to settle with the agent."

And in *Taintor v. Prendergast*, 3 Hill (N. Y.) 73, 38 Am. Dec. 619:

"It may be admitted, as was urged in the argument, that, whether the principal be considered a foreigner or not, his agent, omitting to disclose his name, would be personally liable to an action. Even in case of a foreign principal, however, I apprehend it would be too strong to say that when discovered he would not be liable for the price of the commodity purchased by his agent. This may indeed be said when a clear intent is shown to give an exclusive credit to the agent."

[3, 4] And the same result would follow if *Drake* is a disclosed principal on the facts in this record.

He has no relation to the transaction except as mortgagee, and his mortgage was registered, which was notice to the plaintiff, the contract was made with the *Simpkins Company* as principal, not as agent, the *Simpkins Company* had property rights in the cotton seed, credit was given exclusively to the *Simpkins Company*, and the bills of lading were marked "Freight prepaid," pursuant to the contract between the plaintiff and the *Simpkins Company*.

The editor, in the note to *Fradley v. Hyland*, supra, cites numerous authorities in support of the proposition that—

"Where a third party, knowing that the agent acts for his principal, elects at the time of the making of the contract to give exclusive credit to the agent, he cannot afterwards sue the principal."

And in 31 Cyc. 1570, the author says:

"A person who upon entering into contractual relations with an agent, has full knowledge of the principal, but extends credit to the agent exclusively, cannot thereafter resort to the principal, and the latter is not bound, although the agent acted in the course of his employment and for the principal's benefit."

[5] We are therefore of opinion the plaintiff cannot recover on the ground of agency, and its cause of action against the bank as the owner of the property is equally without foundation, as the undisputed evidence is

that the bank took the drafts with bills of lading attached for collection, and in such case no title passes. 3 R. C. L. 633; *Packing Co. v. Davis*, 118 N. C. 553, 24 S. E. 365.

The plaintiff does not seek to recover against the bank as assignee of the bill of lading under the authority of *Finch v. Gregg*, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679, recognizing that it has been overruled by *Mason v. Cotton Co.*, 148 N. C. 495, 62 S. E. 625, 18 L. R. A. (N. S.) 1221, 128 Am. St. Rep. 635.

[6] Again, every element of an equitable estoppel is present in this case which "arises when any one, by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist, and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts." *Boddie v. Bond*, 154 N. C. 365, 70 S. E. 826. Or as stated in different language in *Mason v. Williams*, 66 N. C. 571, quoting from *Barnwell, B.*, in *Cornish v. Abingdon*, 4 Hurl. & Nor. 549, and approved in *Redman v. Graham*, 80 N. C. 235:

"The rule is that if a man so conducts himself, whether intentionally or not, that a reasonable person would infer that a certain state of things exists, and acts on that inference, he shall be afterwards estopped from denying it."

The plaintiff represented to the defendants that the freight had been paid, and relying on this representation, and without knowledge that it was not true, the defendants, having in hand more than enough money to pay the freight, turned it over to the Simpkins Company, and thereafter, during numerous dealings between the Simpkins Company and the defendants, when there was the opportunity for indemnity, the plaintiff remained silent and did not notify the defendants that the freight had not been paid and made no demand for the freight for near three years.

Under these circumstances, the plaintiff ought not to be permitted to assert its claims, if there was liability on the part of the defendants originally.

Affirmed.

(178 N. C. 170)

BOARD OF COM'RS OF SURRY COUNTY  
v. WACHOVIA BANK & TRUST CO.  
(No. 358.)

(Supreme Court of North Carolina. Oct. 8, 1919.)

1. STATUTES  $\S$  97(2) — SPECIAL LEGISLATION RELATING TO HIGHWAYS VALID.

Pub. Loc. Laws 1919, c. 235, creating a highway commission for Surry county, is not

invalid, as violating Const. art. 2, § 29, prohibiting passage of local or special acts authorizing the laying out, opening, or maintaining, etc., of highways.

2. COUNTIES  $\S$  174 — STATUTE RELATING TO ROAD BONDS VALID.

Pub. Loc. Laws 1919, c. 235, creating a highway commission for Surry county, which, in section 24, provides that \$349,000 of the \$500,000 bond issue might be used to retire certain township road bonds, if that could be arranged, but, if not, the issue of bonds should be restricted, is valid.

3. COUNTIES  $\S$  181 — LIMITATIONS AS TO ASSESSMENT FOR SINKING FUND TO PAY ROAD BONDS VALID.

Pub. Loc. Laws 1919, c. 235, creating a highway commission for Surry county, and authorizing the issuance of highway bonds, but which limits the levy for sinking fund to 40 cents on the \$100 and \$1.20 per poll, is not invalid for that reason, because, if there should arise a possibility of the levy not raising a sufficient amount, the bondholders could proceed by mandamus to compel application of proceeds to payment of interest and maintenance and corresponding reduction of the sinking fund, leaving the principal to be provided for at maturity.

4. COUNTIES  $\S$  174 — ASSESSMENT OF TAXES TO MEET ROAD BOND VALID.

Highway bonds issued under Pub. Loc. Laws 1919, c. 235, creating a highway commission for Surry county, are for necessary expenses, and sufficient taxes therefor can be levied under Laws 1917, c. 103, as amended by Laws 1919, c. 185, authorizing counties to construct roads and bridges.

5. COUNTIES  $\S$  190(2) — GENERAL APPROVAL SUFFICIENT AS TO SPECIAL LAWS AS TO ROAD BONDS.

Pub. Loc. Laws 1919, c. 235, creating highway commission for Surry county and authorizing issuance of bonds, held not open to attack on the ground that permission to levy taxes in excess of constitutional limitation can be granted under article 5, § 6, only by special approval of the General Assembly, for special approval is not required to be given by special act to a single county, but may be given by general statute giving option to any county which may see fit to avail itself of the permission.

6. COUNTIES  $\S$  182 — PUBLICATION OF NOTICE OF SALE OF ROAD BONDS SUFFICIENT.

Publication of notice of sale of bonds once a week for 5 consecutive weeks, beginning more than 30 days before sale, is a sufficient advertisement for 30 days, as required by Pub. Loc. Laws 1919, c. 235, § 23, authorizing Surry county to issue bonds.

7. COUNTIES  $\S$  182 — NOTICE OF PUBLIC SALE OF ROAD BONDS UNNECESSARY.

In view of amendment to the general bond sales act, made by Laws 1919, c. 185, § 6, which authorizes the board of commissioners to sell bonds at public or private sale, held, that

the provisions of Laws 1917, c. 147, as to notice of sale, are no longer mandatory.

**8. COUNTIES ~~§~~183(2) — ALL ROAD BONDS NEED NOT BE CALLABLE OR OPTIONAL BONDS.**

Laws 1917, c. 147, relating to highway bonds, does not require all bonds to be made callable or optional bonds, but merely provides for calling designated bonds before maturity, where they contain such provision.

**9. COUNTIES ~~§~~183(1)—COUNTY ROAD BONDS NOT SUBJECT TO RESTRICTIONS IN GENERAL ACT AS TO ISSUANCE.**

While taxation may be levied under Laws 1917, c. 103, as amended by Laws 1919, c. 185, to discharge bonds issued by Surry county under Pub. Loc. Laws 1919, c. 235, *held*, that such bonds are not subject to restrictions in the general act as to their issuance.

**Appeal from Superior Court, Surry County; McElroy, Judge.**

Submission of controversy between the Board of Commissioners of Surry County and the Wachovia Bank & Trust Company. From a judgment for the County, the Wachovia Bank & Trust Company appeals. Affirmed.

This is a controversy submitted upon an agreed statement of facts without action, in regard to \$151,000 of Surry county road bonds which were awarded to the defendant at its bid of par and accrued interest; this bid being the highest bid submitted pursuant to the published notice of sale. The defendant afterwards declined to take the bonds, alleging they were unconstitutional. The court sustained the validity of the bonds, and defendant appealed.

Manly, Hendren & Womble, of Winston-Salem, for appellants.

Carter & Carter, of Mt. Airy, E. M. Linville, of Winston-Salem, and Wm. Henry Hoyt, of New York City, for appellee.

CLARK, C. J. On March 3, 1919, the General Assembly ratified chapter 235, Public Local Laws 1919, entitled "An act to create a highway commission for Surry county for the improvement of the public roads." This act created the highway commission of Surry county, and among other provisions authorized in sections 21, 22, and 23, the issuance of \$500,000 of "Surry county good roads bonds," to be made payable at such times as the Board of County Commissioners may designate, not exceeding 30 years, and bearing interest not exceeding 5 per cent. per annum, payable semiannually to carry out the purposes of the act. Section 22 provided that for the creation of a sinking fund for the payment of the bonds, and for the payment of interest thereon and for maintenance of

the said roads, the county commissioners should annually levy taxes "not to exceed 40 cents on the \$100, and not exceeding \$1.20 on the poll."

The defendants attack the constitutionality of this act upon two grounds:

[1] I. That the act was passed in violation of section 29, art. 2, of the Constitution, which prohibits the passage of "any local, private or special act \* \* \* authorizing the laying out, opening, altering, maintaining or discontinuing of highways." This objection has been fully discussed and similar acts to this held constitutional in *Brown v. Com'rs*, 173 N. C. 598, 92 S. E. 502, which was approved and affirmed in *Mills v. Com'rs*, 175 N. C. 215, 95 S. E. 481, and reaffirmed at this term in *Martin v. Trust Co.*, 100 S. E. 134, and *Davis v. Lenoir*, 101 S. E. 260. It is unnecessary to repeat what has been so fully discussed and so recently decided. We can add nothing thereto.

[2] II. The defendant further contends that section 24 of the act before us is unconstitutional. That section provides that \$349,000 of this issue of \$500,000 of bonds authorized by this act may be used to retire certain township bonds of said county which have been issued for road purposes in exchange for said township bonds, if this can be arranged; but that if the holders of said township bonds, or any of them, refuse to accept these county bonds in exchange, then the issue of county bonds under this act shall be reduced to that extent.

We do not see that the defendant, who has purchased and is to receive the other \$151,000 of this bond issue, is at all concerned in the validity of the \$349,000 of bonds to be issued in exchange for the township bonds. But, as the question is presented, it may be well to state that this provision is an almost exact copy of similar provisions in the act in regard to Person County which was held valid in *Wagstaff v. Highway Commissioners*, 174 N. C. 377, 93 S. E. 908, and which we reaffirm.

The object of this provision is to equalize the burden by relieving the townships, which have already issued bonds for this purpose, by substituting county bonds to the same extent by exchange with the holders of said township bonds, and, where this cannot be done, by abating the proposed issue of \$500,000 to the extent that said township bonds cannot be retired by exchange with the holders thereof. The object of the statute is as far as possible to make this road system a county and not a township burden. The cases of *Bladen v. Boring*, 175 N. C. 105, 95 S. E. 43, and *Johnston v. State Treasurer*, 174 N. C. 141, 93 S. E. 482, 2 A. L. R. 726, cited by the defendant, have no application to the provisions of this statute.

[3] The defendant further attacks the

validity of the bonds and their issue by the county commissioners because of the limitation, in the act, of the levy to 40 cents on \$100 and \$1.20 per poll, to create a sinking fund for the ultimate payment of the bonds, for the payment of interest, and for the maintenance of the roads. There is no evidence, or finding of fact, that it will be insufficient for that purpose, and it is to be presumed that those who drafted the act made an estimate whether the sum which would be raised by such levy would be sufficient, especially in view of the steadily increasing wealth of Surry county and the policy of revaluation of property at its full value which has been adopted by the state. But, if it should prove insufficient, it in no wise affects the constitutionality of the bonds or their validity in any respect. The defendant purchased with full notice of that provision in the act, and the bonds in any view will be a valid obligation of the county of Surry. The defendant, if there arose a possibility of this not raising a sufficient amount, could proceed by mandamus to compel the application of the proceeds of the levy to the payment first of interest and maintenance and a corresponding reduction in the sinking fund, if necessary, leaving the principal of the bonds to be provided for at maturity, if the sinking fund is not sufficient, since the indebtedness in any event is a valid obligation of the county.

[4] The bonds being issued for a necessary expense, "sufficient" taxes can be levied under the general statute authorizing counties to construct roads and bridges (chapter 103, Laws 1917, amended by chapter 185, Laws 1919). *Martin v. Trust Co.*, at this term.

[5] The objection that permission to levy taxes in excess of the constitutional limitation can be granted under article 5, § 6, only by "special approval" of the General Assembly; and that by the decision in *Railroad v. Cherokee*, 177 N. C. 86, 97 S. E. 758, it was held that such approval could not be given by a general act was fully met by the decisions in *Parvin v. Commissioners*, 177 N. C. 508, 99 S. E. 432, and *Martin v. Trust Co.*, at this term, which held that "special approval" is not required to be given by a "special act" restricted to a single county, but may be by general statute giving an option to any county which shall see fit to avail itself of such permission. In *Parvin v.*

*Com'rs, Railroad v. Cherokee*, was distinguished.

The defendant further contends that section 24 required, by implication, that notice shall be issued to the holders of township bonds to give them an opportunity to exchange them for county bonds, and that it does not appear that this was done. This in no wise concerns this defendant, for these \$151,000 of bonds are not a part of the \$349,000 to be used for the exchange with the holders of township bonds.

[6, 7] Publication of the notice of sale of these bonds was made "once a week for 5 successive weeks, beginning more than 30 days before the sale of the bonds." This is sufficient advertisement "for 30 days" as required by section 23 of the act. We know of no precedent or reasoning that can sustain the objection on this ground. We presume that it was put in *ex abundanti cautela*. Besides, the express grant of power in the general act to sell bonds "at public or private sale as the board of commissioners may determine," in section 6, c. 185, Laws 1919, ratified March 8, 1919, 5 days after this special Surry County Act was passed, makes it clear that the 30 days' advertisement was not absolutely necessary. Such restriction in the bond sale act (Laws 1917, c. 147) is no longer mandatory.

[8, 9] There is no merit in the contention that the general act of 1917 (chapter 147) requires that the bonds issued under it shall be "callable" or "optional" bonds. In subdivision (f) of section 1 of that act, following the provisions for calling designated bonds before maturity, are the following words: "Provided, the bonds designated shall express such condition on their face." Such proviso means that only such bonds can be called as have that provision expressed on their face, and there is no requirement that it shall be so expressed on any bond. Besides, these bonds are issued under this special act for Surry county, which has no such requirement. While taxation may be levied for the payment of these and other bonds in any county under chapter 103, Laws 1917, amended by chapter 185, Laws 1919, when issued for roads and bridges these bonds are not subject to any restrictions and provisions as to their issue and sale, other than those provided in this act under which they are issued.

Affirmed.



(178 N. C. 243)

POWELL et al. v. SEABOARD AIR LINE RY. CO. et al. (No. 253.)

(Supreme Court of North Carolina. Oct. 15, 1919.)

**1. RAILROADS ⇨94(2)—RIGHT OF CITY TO REQUIRE CONSTRUCTION OF BRIDGES.**

A city government, both under its police powers and Revisal 1905, §§ 2569-2700, can require railroads to construct bridges along streets running over their tracks.

**2. EMINENT DOMAIN ⇨20(1)—INVASION OF PROPERTY RIGHTS OF ABUTTING OWNER BY RAILROAD THROUGH CONSTRUCTION OF BRIDGE A "TAKING."**

Railroad's invasion of the proprietary rights of an abutting owner through construction of a bridge, when wrongfully made, pursuant to requirement by the city, constitutes a "taking," within the principles of eminent domain, and cannot be lawfully insisted on, except on compensation duly made.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Taking.]

**3. EMINENT DOMAIN ⇨271—RAILROAD'S LIABILITY TO ABUTTING OWNER DAMAGED BY BUILDING BRIDGE.**

Where a railroad constructs a bridge, causing injury to an abutting owner, of its own motion or for its own benefit, the road is liable, though it has acted under plans submitted to a municipal board and approved by them.

**4. EMINENT DOMAIN ⇨101(2)—CHANGE OF GRADE OF HIGHWAY IN FAVOR OF RAILROAD REQUIRES COMPENSATION.**

Though a city may alter the grade of a highway ordinarily without making further compensation to abutting owners, the right exists for public benefit, and may not be used or sanctioned by the city in favor of a railroad controlled by private owners, thus creating additional burdens to the injury of abutting owners, except on compensation duly made.

**5. APPEAL AND ERROR ⇨1026—REVERSAL ONLY FOR SUBSTANTIAL PREJUDICIAL ERROR.**

Where a cause requiring much time and work has been fully and carefully tried, with the assistance of competent and diligent counsel, and the decisive issues have been fairly decided, the results of the hearing should not be disturbed, except on reasonable showing of substantial and prejudicial error.

**6. EMINENT DOMAIN ⇨124—DAMAGES FROM CHANGE OF GRADE TO BE DETERMINED AS OF TIME CHANGE WAS MADE.**

The measure of damages to a property owner through an elevation in grade of the adjacent street is the difference in value of the property caused by the elevation in grade, more properly at the time when the structure causing the elevation was completed by the railroad doing the work under authority of the city.

**7. EVIDENCE ⇨474(18)—OPINION TESTIMONY AS TO DAMAGES FROM CHANGE IN GRADE RELEVANT.**

Opinion of witnesses predicated on personal examination of the property in 1916 held relevant on the question of the value of the prop-

erty injured in 1914 by the alteration in grade of the adjacent street through the building of a bridge by a railroad under authority of the city.

**8. EMINENT DOMAIN ⇨298—EVIDENCE OF COST OF REGRADING LOT, ON ALTERATION OF GRADE, ADMISSIBLE.**

In an action for damage to property through change in grade of adjacent street by building of bridge by railroad under authority of city, evidence as to what it would cost to restore lot by jacking up house and hauling in earth held admissible, though not the measure of damages, and not to be considered to make them greater than depreciation in market value.

**9. APPEAL AND ERROR ⇨1056(1)—ON QUESTION OF VALUE OF PREMISES EXCLUSION OF EVIDENCE OF OWNER'S ATTEMPT TO REDUCE ASSESSMENT HARMLESS.**

In an action against a railroad and the city for damages to adjacent property from change in grade of a street, exclusion from evidence of the circumstances that, where the board of valuation had assessed the property at a higher rating after the injury, the then owner, ancestor of plaintiff, endeavored to have the assessment reduced, held harmless to defendant.

Appeal from Superior Court, Wake County; Allen, Judge.

Action by Mrs. Jennie S. Powell and others against the Seaboard Air Line Railway Company, the Norfolk Southern Railroad Company, and the City of Raleigh. From a judgment for plaintiffs, defendant Seaboard Air Line Railway Company appeals. No error.

The action is to recover damages alleged to have been caused to the lands of plaintiffs, a house and lot, in Raleigh, N. C., by the construction of a concrete bridge on Hillsboro street, in said city, over the tracks of the railroad companies raising the approaches to said bridge, to the injury of plaintiffs' lot abutting on the street. During the progress of the cause a nonsuit was as to the Norfolk Southern Railroad Company and the city of Raleigh, and the issues were determined as between plaintiffs, owners of the lot, and the Seaboard Air Line Railway Company; liability being resisted chiefly on the ground that the bridge in question had been constructed by the railroad pursuant to an ordinance and requirement of the Raleigh city government.

On issues submitted, the jury rendered the following verdict:

(1) Are the parties whose names are set forth in the amended complaint the owners of the property alleged to have been damaged? A. Yes.

(2) Are T. C. Powell and R. H. Merritt the duly appointed and qualified executors of the will of Jennie S. Powell, as alleged in the complaint? A. Yes.

(3) Are the parties named in the amended

complaint the devisees in the will of Jennie S. Powell, as alleged? A. Yes.

(4) Was the defendant Seaboard Air Line Railway Company required by the city of Raleigh to construct a bridge over its tracks on Hillsboro street? A. Yes.

(5) Did the defendant Seaboard Air Line Railway Company construct the bridge according to plans approved by the board of aldermen of the city of Raleigh? A. Yes.

(6) Did the Seaboard Air Line Railway Company, in constructing the bridge over its tracks on Hillsboro street, of its own accord increase or cause to be increased the grade of said street abutting upon the land described in the complaint? A. Yes.

(7) Did the defendant Seaboard Air Line Railway Company, in building said bridge, increase or cause to be increased the grade of said street for the benefit of said Seaboard Air Line Railway Company? A. Yes.

(8) Was the land (house and lot) described in the complaint damaged by reason of the building of said bridge and the alleged increase in the grade of the street in front of said land, as alleged in the complaint? A. Yes.

(9) If so, what damages did plaintiffs sustain as a consequence thereof? A. Three thousand dollars (\$3,000).

Judgment on the verdict for plaintiffs, and said defendant Seaboard Company appealed, assigning errors.

Murray Allen, of Raleigh, for appellant.

Jones & Bailey, of Raleigh, for appellees.

HOKE, J. [1] The right of the city government, both under its police powers and the several statutes applicable, to require railroads to construct bridges along streets running over their tracks, is fully established in this jurisdiction, and is recognized in well-considered cases elsewhere. *Railroad v. Goldsboro*, 155 N. C. 356, 71 S. E. 514; *State ex rel. City of Minneapolis v. St. Paul, M. & M. R. Co.*, 98 Minn. 380, 108 N. W. 261, 28 L. R. A. (N. S.) 298, 120 Am. St. Rep. 581, 8 Ann. Cas. 1047; *Cleveland v. City Council of Augusta*, 102 Ga. 233, 29 S. E. 584, 43 L. R. A. 638; *Railroad v. Duluth*, 208 U. S. 583, 28 Sup. Ct. 341, 52 L. Ed. 630; 3 *Elliott on Railroads* (2d Ed.) § 1092; *Revisal*, §§ 2569-2700, etc. And there is high authority for the position that, when such a bridge has been constructed pursuant to the city's requirement, and the bridge itself, or the necessary and proper approaches thereto, "invade the proprietary rights of an abutting owner, causing material injury to the same, recovery may be had by such owner against the company"—this for the reason, among others, that the railroad acquires and holds its right to pass under public streets subject to all reasonable orders of this kind; and when they are obeyed, and the structure is completed, or while it is being built the undertaking is considered as being in the exercise of its chartered rights and duties, and so becomes the act of the company for which it may be properly held accountable. *Bur-*

*ritt v. City of New Haven*, 42 Conn. 174; *English, Treas., v. New Haven & Northampton Co.*, 32 Conn. 240; *Baltimore & Ohio R. R. v. Kane and Wife*, 124 Md. 231, 92 Atl. 532.

[2] In this connection it may be well to note that under the law prevailing in this state an invasion of this kind, when wrongfully made, constitutes a taking within the meaning and application of the principles of eminent domain, and cannot be lawfully insisted upon, except on compensation duly made to the owner. *Caveness v. Railroad*, 172 N. C. 305, 90 S. E. 244.

[3] While we are disposed to approve the position above stated, it is not necessary for appellees to rely upon it in order to sustain the recovery had by them in this instance, as the jury, under a charge free from reversible error, have determined that the raising of the grade of the Hillsboro bridge was done by the company of its own motion and for its own benefit. See verdict on sixth and seventh issues. A perusal of the record will show that, because the old wooden bridge had become "rotten and unsafe," the city ordinance required the company to substitute a steel or concrete bridge without specifications as to any elevation of grade, and that while the plans were approved by the city, the elevation which worked the injury complained of was done, as stated, for its own benefit; there being facts in evidence permitting such inference and that it was done for the reason that the company thereby procured a greater clearance from the top of the tracks to the bottom floor of the bridge, rendering the operation of their trains less liable to accidents and injuries, the evidence on part of plaintiff being that the additional clearance amounted to as much as 2 feet and 7 inches. And where this is true—that is, where the road has constructed the bridge so as to cause injury to an abutting owner of its own motion or for its own benefit—all of the authorities, so far as examined, concur in the ruling that the company may be held liable, notwithstanding it has acted under plans submitted to the municipal board and approved by them. *Bennett v. R. R.*, 170 N. C. 389, 87 S. E. 133, L. R. A. 1916D, 1074; *Brown v. Electric Co.*, 138 N. C. 534, 51 S. E. 62, 69 L. R. A. 631, 107 Am. St. Rep. 554; *White v. R. R.*, 113 N. C. 610, 18 S. E. 330, 22 L. R. A. 627, 37 Am. St. Rep. 639; *Midland Co. v. Williams*, 92 Ala. 277, 9 South. 203; *Shrader v. Cleveland & City Ry.*, 242 Ill. 227, 89 N. E. 997, reported also with an instructive note in 26 L. R. A. (N. S.) 226. In this last publication the general principle referred to is stated in the first headnote as follows:

(1) "A railroad company is, under a constitutional provision requiring payment of damages for property injured for public use, liable for

injury to property abutting on the street, by the construction of a viaduct, under authority of the municipality, to carry a street over its tracks which intersect it, if the work is done for its benefit, to enable it to lay its tracks through the municipality."

[4] While it is fully recognized here and elsewhere that a municipal corporation may alter and change the grade of an established highway in their discretion and ordinarily without making further compensation to abutting owners (*Wood v. Land Co.*, 185 N. C. 367, 81 S. E. 422, and authorities cited), this right and immunity only exists for the public benefit, and may not be used or sanctioned by contract or ordinance of the municipality in favor of a private or public service corporation controlled by private owners and creating additional burdens to the injury of abutting owners, except on compensation duly made. Thus it was held, in the well-considered case of *Bennett v. Railroad*, that:

"The right conferred upon a municipality to grade its streets without liability to abutting owners, within the proper exercise of its discretionary power, is for the public benefit, and cannot be transferred to a railroad company to do so for the furtherance of its own business."

And in *Brown v. Electric Co.*, *supra*, it was held that:

"1. The right acquired by a city by condemnation of a street and sidewalk is confined to the public necessity and to the uses for which property is taken or burdened with the easement and for any additional burden placed upon the servient tenement compensation must be made.

"2. The power of the city to confer upon the defendants a franchise to lay their tracks, erect their poles, and string their wires along the streets or sidewalks cannot affect the right of abutting owners to demand compensation for any additional burden placed upon their property."

The verdict, therefore, having established, as stated, that this elevation of the bridge, rendering necessary an elevation in the approaching street, was done by defendant company of its own motion and for its own advantage, it is liable for the damages thereby caused to abutting owners, notwithstanding the plans for the bridge were approved by the governing authorities of the city and the defendant's motion for nonsuit has therefore been properly disallowed.

[5] It was objected to the charge on the seventh issue that the same does not state and apply the law to the evidence with sufficient fullness and was no proper compliance with section 535 of the Revisal, appertaining to the instructions of the trial court to

juries; but, considering his honor's charge on this issue as an entirety, we do not think it is justly open to the objection. The issue referred to was very largely one of fact, with the pertinent testimony very restricted in its nature, and the court, after stating the position of the parties concerning the issue and the evidence, putting the burden on the plaintiff, left it to them to determine the question involved. No jury could have been misled or failed to apprehend fully the significance of the issue and the evidence relevant to its proper determination, and assuredly there is no case presented for reversible error. This cause, requiring much time and work, has been fully and carefully tried, with the assistance of competent, alert, and diligent counsel on both sides. The determinative issues have been fairly decided and the results of the hearing should not be disturbed, unless it is reasonably made to appear that the appellant's defense has been in some way prejudiced by substantial error. In a well-considered case at the last term, *Brewer v. Ring*, 177 N. C. 478, 99 S. E. 358, opinion by Associate Justice Walker, it was 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 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. *Hilliard on New Trials* (2d Ed.) §§ 1 to 7."

Appellant also insisted on several exceptions to the rulings of the court as to the reception of evidence on the issue as to damages:

[6, 7] (1) That *D. F. Fort, V. O. Parker*, and perhaps one or two others were allowed to give their opinion as to the difference in the value of the property caused by changes of grade in the approach to the bridge, their opinion being predicated on examination of the property and conditions attending the change, three years before the trial—i. e., 1916—when the time of the estimate should have been when the bridge was completed, to wit, in 1914.

Undoubtedly the time when this estimate of damages should be made is the difference in value of the property caused by the elevation of grade, and more properly at the time when the structure was completed, and the court so instructed the jury. But, conceding that the bridge was completed in 1914, as defendant contends, though this does not very satisfactorily appear, under permanent physical conditions of the kind presented here, and in the absence of any definite testimony showing, meantime, a substantial change in values, we think that the opinion of these witnesses, qualified by extended ex-

perience and from personal examination of the property in 1916, is relevant on the question of value and was properly admitted. *Myers v. Charlotte*, 146 N. C. 246, 59 S. E. 674; *Creighton v. Water Com'rs*, 143 N. C. 171, 55 S. E. 511, 10 Ann. Cas. 218; *Blevins v. Cotton Mills*, 150 N. C. 493, 64 S. E. 428.

[8] (2) That evidence was received over defendant's objection as to how much it would cost to restore the lot, by jacking up the house and hauling in earth to restore the same to its former relative grade.

This was admitted by his honor as a relevant circumstance on the question of injury to market value and in so far as it tended to provide a reasonable method of relief. His honor, however, was careful to tell the jury that this was not the measure of damages, and should in no event be considered or allowed for, so as to enhance the damages and make them greater than the depreciation of market value. So restricted, the testimony was properly allowed. 10 R. C. L. pp. 175, 176, title "Eminent Domain," § 152. As a matter of fact both the evidence and the ruling thereon had a natural tendency to moderate the damages, and could not have worked harm to defendant's position on the issue.

[9] (3) That the court excluded the circumstance that, where the official board of valuation had assessed property at a higher rating after the alleged injury, the then owner, ancestor in title of the present plaintiff, appeared before them and endeavored to have same reduced.

So far as the action of the board of assessors was concerned it has been generally ruled irrelevant on the question of valuation. *Hamilton v. Railroad*, 150 N. C. 193, 63 S. E. 730. And as to the action of plaintiff's predecessor in title, his action, as indicated, tended to favor his own position on the issue, and its exclusion could in no sense be held to have prejudiced defendant's case.

His honor's instructions as to the exclusion of damages and benefits common to the community at large is in general accord with our decisions on the subject, and we concur in his view that there are no facts in evidence which called for or permitted a reduction by reason of benefits or advantages peculiar to the property. *Phifer v. Commissioners*, 157 N. C. 150, 72 S. E. 852; *Bost v. Cabarrus County*, 152 N. C. 531, 67 S. E. 1066.

On careful consideration of the record and the many exceptions, we are of opinion that no reversible error has been shown, and the judgment of the superior court must be affirmed.

No error.

CLARK, C. J., did not sit.

(178 N. C. 257)

MCDONALD et al. v. HOWE et al. (No. 286.)

(Supreme Court of North Carolina. Oct. 15, 1919.)

1. JUDGMENT  $\S$  282—VALID WITHOUT SIGNATURE BY JUDGE.

The requirement that a judgment be signed by the judge is only directory, and a judgment passed in open court and filed with the papers as a part of the judgment roll is valid, though not signed.

2. JUDGMENT  $\S$  282 — COMPLETION OF UNSIGNED RECORD NUNC PRO TUNC AT SUCCEEDING TERM.

Even if the judgment had not been signed by the judge, the record could have been completed nunc pro tunc at a succeeding term of court.

3. WILLS  $\S$  439—INTENTION OBJECT IN CONSTRUCTION.

In the construction of a will the object is to arrive at testator's intention.

4. WILLS  $\S$  630(3)—DEVISE CREATING FEE ON HAPPENING OF CONTINGENCY.

Under a will devising property to a sister, to use until her two daughters became of age, when it should become theirs, and providing that, should they die leaving sisters or brothers of their mother's children, the sisters or brothers should inherit, but, should they die, the property was to be sold and the proceeds divided between the children of testatrix's brothers, the two daughters acquired a fee simple absolute on their arriving at 21.

5. WILLS  $\S$  629—VESTING OF ESTATE DEVISED FAVORED.

It is the policy of the law that a devise shall take effect at the earliest moment the language permits.

Appeal from Superior Court, New Hanover County; Calvert, Judge.

Action by Nada R. McDonald and another against Alfred G. Howe and others. From judgment dismissing the action, plaintiffs appeal. Reversed.

Mary Washington Howe, the aunt of the plaintiffs, provided in her will as follows:

"The remainder of my property I give to my sister, Rebecca Jane McDonald, for her use until her daughters, Nada Roberta and Alfreda Eloise, become of age, when it becomes theirs. Should Nada and Alfreda die, leaving sister or sisters, brother or brothers, of their mother's children, the sister or sisters, brother or brothers, shall inherit the property here mentioned. Should they die, the property is to be sold and proceeds divided between the children of my brothers, John T. Howe and A. P. Howe."

This proceeding is to have the adverse claims of the defendants set aside and to have the plaintiff declared the owner in fee of the land described in the will. The plaintiffs, Nada Roberta and Alfreda Eloise

McDonald, are both of age. The defendants are their minor sisters, who through their guardian ad litem demurred to the complaint upon the ground that it does not state a cause of action, because it appears from the will under which the plaintiffs claim the land that they—

"were only given a life estate in said property and not the fee, and at most they only own a determinable fee, and that in the event they should die leaving a brother or sister of their mother's children that the fee simple estate would be given to such brother or sister; and this being true, the plaintiffs are not entitled to have the court adjudge that these defendants have no interest in said property and that the plaintiffs own the same in fee simple."

The other defendants are the sons of John T. and A. P. Howe. The case coming before Stacy, Judge, at Fall term, 1918, he sustained the demurrer and held that the plaintiffs were not the owners in fee of the land described in the complaint, but the court adjourned before the judgment sustaining the demurrer was signed.

The case was brought before Calvert, J., at April term, 1919, of the same court, who ruled that "plaintiffs are not the owners in fee of the land, but only have a life estate therein, or at most a determinable fee, and therefore are not entitled to the relief prayed for," and dismissed the action. Appeal by plaintiffs.

A. S. Williams, of Wilmington, for appellants.

CLARK, C. J. [1] There was no irregularity upon the face of the proceedings. This court has repeatedly held that the requirement that a judgment should be signed by the judge is "only directory, and a judgment passed in open court and filed with the papers as a part of the judgment roll is a valid judgment, though not signed by the judge." *Range Co. v. Carver*, 118 N. C. 328, 24 S. E. 352, citing *Rollins v. Henry*, 78 N. C. 342; *Matthews v. Joyce*, 85 N. C. 258; *Keener v. Goodson*, 89 N. C. 273; *Spencer v. Credle*, 102 N. C. 68, 8 S. E. 901; *Bond v. Wool*, 113 N. C. 20, 18 S. E. 77.

[2] Even if the judgment should have been signed, the record could be completed by entering judgment nunc pro tunc at a succeeding term of the court. *Ferrell v. Hales*, 119 N. C. 212, 25 S. E. 821, and cases there cited, which has been approved in *Taylor v. Ervin*, 119 N. C. 274, 25 S. E. 875; *Knowles v. Savage*, 140 N. C. 374, 52 S. E. 930; *Brown v. Harding*, 171 N. C. 687, 89 S. E. 222; *Hardware Co. v. Holt*, 173 N. C. 311, 92 S. E. 8; and especially in *Pfeifer v. Drug Co.*, 171 N. C. 216, 88 S. E. 343, where the authorities are fully cited.

[3, 4] In the construction of a will the ob-

ject is to arrive at the intention of the testator. The testator here gave her daughter the property until her daughters, the plaintiffs, should become of age, "when it becomes theirs." These words indicate an intention that the property should be theirs absolutely upon the happening of that contingency. The words, "Should Nada and Alfreda die, leaving sister or sisters, brother or brothers, of their mother's children, the sister or sisters, brother or brothers shall inherit the property herein mentioned" indicate, we think, an intention that, should the contingency fall upon which the plaintiffs should have the property absolutely, i. e., should they die before arriving at age, then this property should go to their sisters or brothers. The further clause, "Should they [evidently meaning such sisters or brothers] die, the property to be sold and the proceeds divided between the children of my brothers, John T. Howe and A. P. Howe," presents more difficulty; but we need not consider that, since, the property having become absolutely the property of Nada and Alfreda by their arriving at age, the contingency upon which the property should go over to the children of John T. and A. P. Howe cannot happen.

[5] It is the policy of the law that a devise should take effect at the earliest moment that the language will permit, which in this case is the arrival at age, at which time the property should become vested in fee. The act of 1827 (now Rev. § 1581), construing limitations contingent upon any person dying without heirs, has no application to this case.

The plaintiffs, we think, acquired a fee simple absolute upon their arriving at 21.

Reversed.

(178 N. C. 254)

ATLANTIC COAST LINE R. CO. v. BRUNSWICK COUNTY. (No. 285.)

(Supreme Court of North Carolina. Oct. 15, 1919.)

1. TAXATION §543(2)—DEMAND REQUIRED BY STATUTE SUFFICIENT IN SUIT FOR TAXES ILLEGALLY COLLECTED.

A railroad's demand against a county for taxes unlawfully collected having averred full compliance with all preliminary requirements of Revisal 1905, § 2855, such statute explicitly authorizes the suit, though there was no demand by plaintiff further than protest and demand on the county treasurer under the statute.

2. APPEAL AND ERROR §960(1) — PLEADING §222—DISCRETIONARY TO PERMIT DEFENDANT TO ANSWER OVER AFTER FRIVOLOUS DEMURRER.

Even when a demurrer is frivolous in the first instance, the matter is referred to the sound discretion of the trial judge, and his judgment permitting the demurring defendant to an-

answer over will not be interfered with, except perhaps in case of great abuse, nor can his action be reviewed by appeal.

Appeal from Superior Court, Brunswick County; Calver, Judge.

Action by the Atlantic Coast Line Railroad Company against Brunswick County. From a judgment overruling the defendant's demurrer, it appeals. Affirmed.

Civil action under section 2855, Revisal, to recover an amount of taxes agreed to have been unlawfully and wrongfully collected from plaintiff, heard on demurrer to complaint. There was judgment overruling demurrer, and defendant excepted and appealed.

C. Ed. Taylor, of Southport, for appellant.

Rountree & Davis, of Wilmington, and Cranmer & Davis, of Southport, for appellee.

HOKE, J. The statute under which the present action is instituted (Revisal, § 2855), on matter relevant to this inquiry, provides as follows:

"Whenever any person shall claim to have a valid defense to the enforcement of a tax or assessment charged or assessed upon his property or poll, such person shall pay such tax or assessment to the sheriff; but if, at the time of such payment, he shall notify the sheriff in writing that he pays the same under protest, such payment shall be without prejudice to any defenses or rights he may have in the premises, and he may, at any time within thirty days after such payment, demand the same in writing from the treasurer of the state or of the county, city or town, for the benefit or under the authority or by request of which the same was levied; and if the same shall not be refunded within ninety days thereafter, may sue such county, city or town for the amount so demanded, including in his action against the county both state and county tax; and if upon the trial it shall be determined that such tax or any part thereof was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefore, with interest, and the same shall be collected as in other cases."

In the present instance the complaint alleges that for the year 1914 there was collected from plaintiff company illegal taxes to the amount of \$824.67, setting forth with fullness and detail the facts showing the illegality complained of and the amount as stated. It also states that at the time of payment the company, through its duly authorized officers, filed a written protest with the sheriff of the county, and within 30 days made formal demand in writing on the

county treasurer, containing notice that, if the tax so wrongfully collected was not refunded in 90 days, action would be brought under Revisal, § 2855, etc.

Defendant's demurrer is on the ground that no previous demand had been made of the proper municipal authorities that the claim be audited and examined as required by section 1384, Revisal, nor to the chairman of the board of county commissioners as contemplated and directed by section 396.

[1] The complaint having averred full compliance with all the preliminary requirements of section 2855, the statute in explicit terms authorizes the suit. There is no reason for requiring further demand, when in the protest and the demand on the treasurer, which was required to be made in writing, the county officials were fully informed of the nature and amount of the claim, and we are of opinion that by correct interpretation this section confers a present right of action, without making the presentation and demands referred to in the sections of the Revisal upon which defendant relies. Railroad v. Reidsville, 109 N. C. 494, 13 S. E. 865. Under proper construction, this later act, under which the suit was brought, must be regarded as an exception withdrawing claims controlled by it from the operation and effect of the general requirements of the former portions of the law. Cecil v. High Point, 165 N. C. 431, 81 S. E. 616; Rodgers v. United States, 185 U. S. 83, 22 Sup. Ct. 582, 46 L. Ed. 816; 1 Lewis' Sutherland, Stat. Construction, § 268.

[2] While we approve his honor's judgment overruling the demurrer, we do not concur in the view insisted upon by the appellee that the demurrer is so devoid of merit that it should be held frivolous and judgment entered in this court for the sum demanded. Apart from this, the question has not been passed upon in court below, and our later decisions on the subject are to the effect that, even when frivolous, this matter in the first instance is referred to the "sound discretion" of the trial judge, and that his judgment permitting a defendant to answer over will not be interfered with, except perhaps in case of great abuse, nor can his action be reviewed by appeal. Parker v. Railroad, 150 N. C. 433, 64 S. E. 186, citing Dunn v. Barnes, 73 N. C. 273; Clark's Code (3d. Ed.) § 272, p. 295, and notes; Morgan v. Harris, 141 N. C. 360, 54 S. E. 381; Walters v. Starnes, 118 N. C. 842, 24 S. E. 713; Abbott v. Hancock, 123 N. C. 89, 31 S. E. 271. There is no error, and judgment overruling demurrer is affirmed.

Affirmed.

(178 N. C. 702)

## STATE v. BRYANT. (No. 274.)

(Supreme Court of North Carolina. Oct. 15, 1919.)

1. HOMICIDE  $\S$ 254 — CIRCUMSTANTIAL EVIDENCE SUSTAINING CONVICTION OF SECOND DEGREE MURDER.

Circumstantial evidence held to sustain conviction of murder in the second degree of a woman with whom defendant had been intimate.

2. CRIMINAL LAW  $\S$ 448(7, 11) — EVIDENCE AS TO APPEARANCES OF LOCATION AND DECEDENT NOT INADMISSIBLE OPINION.

In a prosecution for murder of defendant's mistress, objections to the testimony of a doctor, describing the situation, surroundings, and the appearances at the place of killing, and also the condition of deceased's person, were properly overruled, not being inadmissible opinion, but instantaneous conclusions of the mind.

3. CRIMINAL LAW  $\S$ 1137(3)—ADMISSION OF EVIDENCE HARMLESS TO DEFENDANT.

In prosecution for murder of defendant's mistress, where the court admitted evidence of a difficulty between the parties, but later, convinced that he had erred, announced he would order mistrial, and defendant's counsel insisted trial should go on, and that they would be content with his honor instructing the jury to disregard the testimony, which he did repeatedly, any error in the matter was harmless to defendant.

4. CRIMINAL LAW  $\S$ 1172(2) — INSTRUCTION HARMLESS TO DEFENDANT.

In a prosecution for murder of defendant's mistress, the part of the charge in which the court told the jury they might consider evidence of defendant's not fleeing when he had an opportunity as a circumstance in his favor was harmless to defendant.

5. CRIMINAL LAW  $\S$ 775(1)—INSTRUCTION ON ALIBI.

In a prosecution for murder of defendant's mistress, the court's charge on alibi held not erroneous, and therefore not prejudicial to defendant.

6. HOMICIDE  $\S$ 268—IDENTITY OF VOICES A JURY QUESTION.

In a prosecution for murder of defendant's mistress, the question as to certain voices heard by a witness, and whether they were those of defendant and deceased, held for the jury to determine on all the evidence, which suggested they were the voices of defendant and deceased, and that defendant was threatening deceased, and using angry and abusive language.

7. CRIMINAL LAW  $\S$ 1059(2) — GENERAL ATTACK ON CHARGE WILL NOT BE CONSIDERED.

A general or broadside attack on the charge cannot succeed, but the error must be specified, both as to the charge and failure to give all instructions when there are more than one; for if any of the instructions are correct, or any of the requests should not have been given, the exception fails.

Appeal from Superior Court, Brunswick County; Calvert, Judge.

Jake Bryant was convicted of murder in the second degree, and appeals. No error.

## Indictment for murder.

The defendant was indicted for the murder of Susie Spicer, and was convicted at March term, 1919, or Brunswick superior court, Judge Calvert presiding, of murder in the second degree. From the judgment upon the verdict, he appealed to this court.

There is no doubt that there was evidence of the corpus delicti, so the principal question in the case is: Who killed Susie Spicer? The state's evidence is circumstantial, while the defendant set up an alibi. If the state's evidence was believed by the jury, and they made the proper deductions therefrom, then he was properly convicted; whereas, if they believed defendant's evidence, there was no time in which he could commit the murder, which was unaccounted for.

The principal circumstances upon which the state relied to justify the verdict of guilty were as follows:

There were intimate relations between the deceased and the defendant extending over a considerable period of time prior to the homicide. When the defendant went to Beaufort for work, the deceased accompanied him, and they lived together there. At this time, the defendant admitted, in his testimony, that he was married; but while he was in Beaufort his wife was at home with her folks, and died there. In March or April the defendant went to Beaufort and stayed there until July 6th. He also stated that on September 3d, of the same year (1918), he married Frances Livingstone in Wilmington. On the afternoon of Saturday, September 21, 1918, he was at the house of Florence Hendricks, the mother of the deceased, where deceased also lived. There was an interview between them there, and the defendant told the deceased to meet him at Burton's crossroads. He went off in the direction of the crossroads, and the deceased soon followed. She was seen no more alive, and her body was found the following Monday morning in a thicket near the crossroads. The deceased was soon to leave for Philadelphia, and had made preparations for leaving on Monday, the 23d, which was probable known to defendant. She had money, which was usually carried in her stocking, and no money was found on her person or about the house after her death; and when found one stocking was pulled down, the other being in place. When defendant called at the house to see deceased he was in a bad humor, at least. He said to the deceased:

"Meet me at Ed. Burton's crossroads. We had just as well have a war here as to go to France and have it."

He then went out at the gate and up the road towards Burton's crossroads, and the deceased soon followed him, going in the same direction. The prisoner had given the deceased a ring, which she wore with other rings, and when she was found all the rings were in place except the one ring that the prisoner had given her. The deceased's finger nails on the left hand were trimmed to the quick; those of the right hand were long.

The Hendricks house was about 250 yards from where the body was found, and it was about three-quarters of a mile from where the body was found to the defendant's house at the mill, near Lanvale. The prisoner was seen at home lacing his shoes late in the afternoon by George Morriss, and he wore different clothes from those he had on at the home of Susie Spicer, the deceased, a few hours before; and, on the search by the officer in his house, no clothing of defendant could be found. Defendant's conduct, when asked to assist in the search for Susie on Sunday afternoon, was thus described by the witness Ed. Burton:

"I told Jake, the defendant: 'Susie is missing. I feel uneasy about her. Won't you come and help me hunt her?' Jake said, 'Yes,' and they walked with me to Lanvale station. When we got about 200 yards from the fence where we started, Jake said, 'Now, Ed, if there is anything the matter, I am expecting the blame to be put on me.' I said: 'Well, I don't accuse you of anything. I don't know where the woman is.' He said, 'I have been around there so much, if there is anything the matter, the blame will be put on me.'"

He was in a visibly unnerved condition when he talked with Florence Hendricks on the train Sunday afternoon, the day after the homicide, and also when examining the knife before Coroner Boyette.

There was some evidence of robbery. Susie Spicer was preparing to go to Philadelphia on Monday, the 23d. She had at least \$40 to her mother's knowledge, and usually kept her money in her stocking. When her body was found that Monday morning, the witness Dr. Boyette testified:

"The right foot was pushed out and the knee kind of turned up, and her stocking was below the knee. The right stocking was down. The left stocking was intact. Her leg was perfectly straight."

The state contended that this evidence pointed to the defendant, a man who had been intimate with her and who must have known where she kept her money, as the murderer, particularly when taken in connection with the missing ring referred to above.

There was testimony of Dr. Boyette, and other witnesses, who viewed the body and its surroundings, before it was moved, which tended to refute any suggestion of suicide. This evidence also tended to show that there had been sexual intercourse by consent between the parties before the murder. The act of copulation had taken place about 50 yards from the place the body was found. After this, it appears that the parties had gone about 50 yards towards the road. One of them sat down at the root of a gum tree. The state contends that it is quite likely there was a quarrel here between the parties, there being evidence that Susie Spicer, the deceased, carried the knife with her from her home; that in the quarrel she may have attempted to use it upon the defendant, who, grasping her wrist and wringing it from her, threw her upon the ground and cut her throat. The jury seems to have taken this view of the case, convicting the prisoner of second degree murder.

The state further contends that the killing could have been done and the defendant have been at Evans' store in Lanvale at 3 o'clock the same afternoon, as the distance from the place where the body was found to this store, as estimated by the witnesses, was three-fourths of a mile; in other words, about ten minutes for a moderately rapid walker. George Morriss, who, the state contends, seems to have been perhaps the most intelligent of the negro witnesses, and not connected with any of the parties, says:

"On the Saturday she was missing, I went from my work (railroad section) between 1 and 2 o'clock. I passed by the home of Susie and saw Jake Bryant and her two little boys there. Jake was eating grapes under an arbor. I stopped and talked with him about 20 minutes. I did not see Susie at this time."

The state further contends that it is evident the time referred to by George, he being a railroad hand, was new time, so that, compared with the time used by all the other witnesses, he was at Susie's house between 12 and 1 o'clock. It was after this that Jake went off and Susie followed him. But as the state insists, assuming that an hour intervened between the time that Morriss saw the defendant at the deceased's house and the time that Needham saw him at Evans' store at Lanvale, said by the witnesses to have been 3 or 3:10 p. m., there would have been ample time for the murder to have been committed and the defendant afterwards to have gone to Lanvale. Of course, if Needham's watch had been set by sun time, there would have been two hours instead of one, and it is noticeable that all the witnesses for the defense are evidently alluding to sun time. To them the mill whistle blew at 5 o'clock. To account for the interval of time not accounted for by the other witnesses, the defendant introduced an old colored woman, named Mary Anderson. She does, if believed, account for it, but the jury refused to yield any credence to her testimony on this point. It does seem to have been "tongued and grooved" to fit in with defendant's own testimony. The same may be said with reference to the testimony of Turner Hazel and Ivey Hobbs. The deceased by no possibility could have been sitting on her front porch dressed in silk the afternoon of September 21st about 3:45 o'clock. There was evidence of threats to break her neck made by the prisoner against deceased prior to the time of the homicide, and of his angry words heard by one of the witnesses at a distance from the two, and that the woman was crying.

This is the material evidence, and the contentions of the state, based thereon, to identify the prisoner as the murderer. The state therefore insisted that the motion for a nonsuit was properly overruled.

Cranmer & Davis, of Southport, for appellant. James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

WALKER, J. (after stating the facts as above). [1] We have stated above only those



facts which the evidence tended to prove, and which are material to the case, upon the motion to nonsuit. We do not see how we could well decide that there was no evidence of the prisoner's guilt. It is true that the evidence was circumstantial; but sometimes, and not infrequently, such evidence is of the most convincing character. The prisoner was the last person who was seen with the deceased before the homicide was committed. She followed him, at his request to the place named by him for their meeting, Burton's crossroads, and for some reason, not disclosed, they had quarreled, for he said to her, when he asked her to meet him at the crossroads, "We had just as well have a war here as to go to France and have it." She followed him, and was not seen again until her body was found in a thicket near the crossroads. The jury might have fairly and reasonably inferred that they had a difficulty of some kind, and that he was the aggressor; but they took a milder view of the facts, and reduced the grade of the homicide to the second degree. There was ample evidence to prove that the deceased had been killed, that she did not commit suicide, and further that she was murdered by the prisoner. And this is true, without considering the testimony as to his conduct, the missing money and ring, and what the prisoner said after the homicide had been committed.

The facts in *State v. Bridgers*, 172 N. C. 879, 89 S. E. 804, if stronger to support a verdict of guilty in that case than those we have here, are very slightly stronger, and not enough so to prevent that case, where the conviction was sustained, from being an authority in support of our present conclusion. It would unreasonably extend the discussion if we attempted any further statement or analysis of the evidence. There is so plainly sufficient evidence for the jury, that any further comment would add nothing to the force or strength of the evidence itself.

[2] The objections to the testimony of Dr. Boyette, describing the situation, surroundings, and the appearance at the place of the homicide, and also the condition of the deceased's person, were properly overruled.

"The instantaneous conclusion of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time, are, legally speaking, matters of fact, and are admissible in evidence." *State v. Leak*, 156 N. C. 643, 72 S. E. 567; *Renn v. R. R.*, 170 N. C. 128, 86 S. E. 964; *State v. Spencer*, 176 N. C. 709, 97 S. E. 155.

This covers, also several of the other exceptions.

[3, 4] The judge admitted evidence of a difficulty between deceased and defendant on July 6th preceding. Afterwards, having convinced himself that he had erred in this, he announced that he would order a mistrial. Defendant's counsel insisted that the trial should go on, and that they would be perfectly content with his honor instructing the jury to disregard this testimony. He did so, instructed them at the time, and again in his

charge. If there was any error in this, it was clearly not against the defendant. *State v. Johnson*, 176 N. C. 722, 97 S. E. 14. The same may be said as to that part of the charge in which he told the jury they might consider evidence of defendant's not feeling, when he had an opportunity to do so, as a circumstance in his favor. 2 Wharton's Evidence in Criminal Cases, p. 1498.

[5] The judge's charge on the question of alibi was, it seems to us, not prejudicial to the defendant. He charged substantially that the prisoner relies upon an alibi, which means that he was not, and could not have been, at the place of the homicide when it was committed, as he was elsewhere at that time. He is not required to satisfy the jury of the truth of his allegations beyond a reasonable doubt, but if the jury is satisfied from the evidence that he was not at the place when the homicide was committed, and at the time when the deceased met her death, then a verdict of not guilty should be returned, etc. But if the jury is not so satisfied, then it is for the jury to consider all the evidence, and say whether or not they are satisfied from the evidence, beyond a reasonable doubt, that the prisoner killed the deceased, etc. This instruction was not erroneous, but followed our decisions. *State v. Jaynes*, 78 N. C. 504; *State v. Reitz*, 83 N. C. 634; *State v. Starnes*, 94 N. C. 973; *State v. Freeman*, 100 N. C. 429, 5 S. E. 921; *State v. Rochelle*, 156 N. C. 641, 72 S. E. 481.

[6] The question as to the voices heard by the witness R. L. Garrison, and whether they were those of the prisoner and Susie Spicer, was for the jury to determine upon all the evidence relating thereto. The jury might well have found that they were the voices of those two persons, and that the prisoner was threatening the deceased, and using angry and abusive language addressed to her.

[7] The other exceptions to evidence have no merit and require no discussion. The objections to the charge of the court and to the refusal to give instructions are entirely too general to be considered. *McKinnon v. Morrison*, 104 N. C. 354, 10 S. E. 513, and the cases cited in *Anno. Edition*. See, also, *Hendricks v. Ireland*, 162 N. C. 523, 77 S. E. 1011; *State v. Herron*, 175 N. C. 754, at page 759, 84 S. E. 698, at page 701. A general, or what has been called a "broadside," attack on the charge of the court, will not do. The error must be specified, both as to the charge, and the failure to give all of the instructions when there is more than one, for if any of the instructions in the charge are correct (and that surely is the case here), or any of the requested instructions should not have been given, the exception fails. *State v. Ledford*, 183 N. C. 714, 45 S. E. 944; *Nance v. Telegraph Co.*, 177 N. C. 313, at page 315, 98 S. E. 838; *State v. Evans*, 177 N. C. 564, at page 570, 98 S. E. 788.

We have carefully considered and reviewed this case, and have not been able to discover any error therein.

No error.

(178 N. C. 285)

SEARS v. ATLANTIC COAST LINE R. CO.  
(No. 289.)

(Supreme Court of North Carolina. Oct. 18, 1919.)

## 1. APPEAL AND ERROR ¶230—OBJECTION TO INSTRUCTIONS NOT TAKEN UNTIL MOTION FOR NEW TRIAL TOO LATE.

Objection that the charge of the court did not summarize the party's contentions fully, not taken until motion for new trial, cannot be considered on appeal.

## 2. TRIAL ¶255(1) — NECESSITY OF REQUEST FOR INSTRUCTIONS.

If instructions other than those given are desired, there must be a special request for them.

Appeal from Superior Court, Pender County; Calvert, Judge.

Action by J. W. Sears against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant appeals. No error.

The plaintiff alleged that he had recently been married; that he had been for a short while at the seashore with his bride, and started on his first trip to visit his parents after the marriage; that he arrived a little late at the station in Wilmington, N. C., but in time to get his ticket and to get on the train; that his wife had gotten on, and that he was getting on, with suit cases and other impedimenta in his hands, when the conductor abused him and pushed him off the train, and he fell upon the ground and was injured; that he was left behind, and suffered excruciating mental agony, for fear his wife should be grieved at his failure to accompany her. He admitted that his people met her at the proper station, Watha, N. C., with a conveyance and took her out home. He says that it cost him \$1.50 for hotel accommodation, and that he went home the next morning. The conductor told him that he was on the wrong train and shoved him off rudely. The defendant denied these allegations, and especially denied that the conductor, or any other employé of the defendant, used abusive language to the plaintiff and pushed him off the train.

Both sides offered evidence, which appears in full in the record. Issues were submitted to the jury, and the jury answered in favor of the plaintiff and assessed his damages at \$500. Counsel for defendant moved to set aside the verdict upon the ground that the damages were grossly excessive, which was denied. Counsel then moved for a new trial, for error in the charge. The record discloses that both sides offered considerable testimony in support of their respective contentions. Plaintiff's counsel argued strongly, persuasively, and successfully, as defend-

ant alleges; but this he had a right to do, and it was his duty, in loyalty to his client, that it should be done. It is not contended that he exceeded the limit of fair and legitimate debate. Defendant's counsel urged that plaintiff's statement of the facts was unreasonable; that, unless there was some animus on the part of the employés against him, they could not, and would not, have shoved him off the car, especially if he had gotten on it; that the transaction had occurred several years previously, and that plaintiff had forgotten the details; that the truth is that plaintiff, as he himself admits, had arrived late, and had to go to the baggage room to get his luggage, which had been brought up from the beach, and that, if his story had been true, his wife, who was also called as a witness, would have testified to the act of violence. Defendant also argued that it had called both the conductor and the flagman of the train, which plaintiff alleges he took, and both of them denied plaintiff's statement. Defendant further argued that Miss Newton was a friend and neighbor of the plaintiff, that she had seen the plaintiff the morning after he had gotten left, and that she ought to be believed when she stated that the plaintiff had told her the next day that the reason he had gotten left was that he was late and had to go to the baggage room for his luggage, and that the burden of proof was upon the plaintiff, and that it had not been sustained.

There was a verdict for plaintiff, as above stated, and judgment. Defendant appealed.

Rountree & Davis, of Wilmington, for appellant.

C. E. McCullen, of Burgaw, for appellee.

WALKER, J. (after stating the facts as above). It is assigned as error that the court did not summarize the defendant's contentions, but stated the plaintiff's rather fully, and that the court laid special stress upon the issue as to damages, which led the jury to believe that there should be a recovery. We state the exceptions in defendant's own words, as they appear in its brief:

"The defendant assigns as error the charge of the court, and particularly the following: 'On the other hand, the defendant contends that you cannot so find from the evidence and by the greater weight of it. The defendant contends that you should find from the evidence that the plaintiff and his wife were late, and that he put his wife on board the train, and then went back to get tickets and baggage, and that before he returned to the train that the train had left.' The defendant submits that this charge of the court is inadequate and not in compliance with the statute [Revisal 1905, § 535], which is as follows: 'He shall state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon.' The only question in the case, then, is: Whether the charge of the court is sufficient, under Re-

visal, § 535, the last clause of which reads: 'But he shall state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon.' We insist that there was an utter failure of the court to comply with that provision of the statute."

[1] We are not persuaded that the criticism of the charge in the respect indicated is justified; but, if it is, we have held repeatedly that such objections must be taken promptly, or at the proper time, so that the judge may have opportunity to make the needed correction, if he has misstated the contention of either party. In the absence of any such action on the part of the appellant at the trial, we must assume that it was satisfied with what the judge had done. *Manufacturing Co. v. Building Co.*, 177 N. C. 103, 97 S. E. 718; *Alexander v. Cedare Works*, 177 N. C. 139, 98 S. E. 312.

[2] But we do not think that, in this case, the statement of the plaintiff's contentions and the statement of the defendant's were so unequal as to bring the case within the principle of *Jarrett v. Trunk Co.*, 144 N. C. 299, 56 S. E. 937, and *Lea v. Utilities Co.*, 176 N. C. 511, 514, 97 S. E. 492. The defendant's contentions were sufficiently stated, so far as appears, and especially is this true, in the absence of any suggestion, at the time, from the defendant that it was not so. We have no doubt that, if the matter had been brought to the judge's attention, he would have added any other contention of defendant, which had been inadvertently omitted. The invariable rule is that, if other instructions than those given are desired, there must be a special request for them. *Simmons v. Davenport*, 140 N. C. 407, 53 S. E. 225; *Davis v. Keen*, 142 N. C. at page 502, 55 S. E. 359; *Ives v. Railroad Co.*, 142 N. C. 131, 55 S. E. 74, 115 Am. St. Rep. 732, 9 Ann. Cas. 188; *Turrentine v. Wellington*, 136 N. C. 313, 48 S. E. 739; *State v. Kinsauls*, 126 N. C. 1097, 36 S. E. 31. We said in *Davis v. Keen*, supra:

"Any omission to state the evidence, or to charge in any particular way, should be called to the attention of the court before verdict, so that the judge may have opportunity to correct the oversight. A party cannot be silent under such circumstances, and, after availing himself of the chance to win a verdict, raise an objection afterwards. He is too late. His silence will be adjudged a waiver of his right to object."

The defendant did not ask for any additional statement of its contentions, but elected to abide by the one made by the court, and there was no complaint until the verdict had been returned. This is too late. Silence seems to give consent.

The case of *Blake v. Smith*, 163 N. C. 274, 79 S. E. 596, is not an authority in favor of defendant's position. There the judge only

said to the jury: "Take the case and settle it as between man and man." There was no attempt to instruct the jury, but it was simply leaving it to them to decide the issues "as between man and man," without any rule, or principle, at all to assist them. But in the opinion it was said by the court:

"The manner in which the judge is to state the law and evidence for the assistance of the jury must necessarily be left to a great extent to his sound discretion and good sense."

And in *State v. Beard*, 124 N. C. 811, 32 S. E. 804, the court stated the same rule:

"The manner in which" the judge is to state the law and assist the jury to apply the law to the facts "must be left, to a very great extent, to the good sense and sound judgment of the trial judge."

We cannot sustain the exception.  
No error.

(178 N. C. 379)

**SORRELL v. MCGHEE et al.** (No. 257.)

(Supreme Court of North Carolina. Oct. 15, 1919.)

# 1. WITNESSES ⇨125—COMPETENCY IN TRANSACTIONS WITH PERSONS SINCE DECEASED.

Revisal 1905, § 1631, relating to competency of witnesses as to transactions with persons since deceased, disqualifies parties to the action, persons interested in the event, and persons through or under whom parties or those interested claim, but those witnesses disqualified are incompetent only to testify in behalf of themselves, etc., and only as to personal transactions between the witness and the person since deceased, etc.

## 2. WITNESSES ⇨171—TESTIMONY AGAINST INTEREST AS TO TRANSACTIONS WITH DECEASED.

In an action for goods sold and delivered to intestate, the son and administrator of the intestate might be called by plaintiff to testify that he made a part payment on the account, etc.; the witness testifying against his own interest.

## 3. WITNESSES ⇨178(2)—RIGHT TO CALL ADMINISTRATOR AS WITNESS.

In an action against the estate of a deceased person, plaintiff may call the administrator to testify against his interest, and testimony of the administrator cannot be excluded on the ground that if he testified it would open the door to plaintiff's testimony, for that result follows only when the administrator is a voluntary witness testifying in his own behalf.

## 4. WITNESSES ⇨138—COMPETENCY OF TENANT AS TO TRANSACTIONS WITH LANDLORD SINCE DECEASED.

In an action for goods sold and delivered to intestate, a tenant of intestate who was furnished with goods from plaintiff's store, and who had settled with the intestate, is competent to

testify in plaintiff's behalf as to intestate's delivery to him of the merchandise.

Appeal from Superior Court, Wake County; Allen, Judge.

Action by R. L. Sorrell against J. C. McGhee and R. L. McGhee, administrators, begun in justice court and appealed to the superior court. From a judgment there of nonsuit, plaintiff appeals. Reversed.

This is an action to recover \$54.66, alleged to be due by account for goods sold and delivered, commenced before a justice of the peace and heard on appeal in the superior court.

The plaintiff introduced evidence showing that he was a farmer and also had a gin and store, and he produced upon the trial his account book or ledger, in which he kept the account against the intestate of the defendants in his own handwriting. This book was excluded upon the trial.

There are several exceptions to the exclusion of evidence which will be referred to in the opinion.

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

W. G. Briggs, of Raleigh, for appellant.  
R. N. Simms, of Raleigh, for appellees.

ALLEN, J. [1,2] In *Bunn v. Todd*, 107 N. C. 266, 11 S. E. 1043, the present Chief Justice gives an accurate and valuable analysis of section 1831 of the Revisal, as follows:

"It disqualifies—Whom?

"(1) Parties to the action.

"(2) Persons interested in the event of the action.

"(3) Persons through or under whom the persons in the first two classes derive their title or interest.

"A witness belonging to one of these three classes is incompetent only in the following cases:

"When—To testify in behalf of himself, or the person succeeding to his title or interest, against the representative of a deceased person, or committee of a lunatic, or any one deriving his title or interest through them.

"And the disqualification of such person, and in such instances, is restricted to the following:

"Subject-matter—A personal transaction or communication between the witness and the person since deceased or lunatic.

"And even in those cases there are the following

"Exceptions.—When the representative of, or person claiming through or under the deceased person or lunatic, is examined in his own behalf, or the testimony of the deceased person or lunatic is given in evidence concerning the same transaction."

This is a guide and standard for determining the competency of evidence under this section, and, when properly applied, we are of

opinion error has been committed in the exclusion of evidence, which entitles the plaintiff to a new trial.

The plaintiff offered evidence tending to prove that he kept his account against the intestate of the defendants in a book at his store, and he then called one of the administrators and a son of the intestate, and he offered "to show by the witness, who is a defendant in this action, that in the lifetime of his father, and a short time before his death, the witness went to the store of the plaintiff for his said father and made a part payment on this specific account in this particular ledger, taking a written receipt therefor from plaintiff, and then and there setting a day when he would return and get a statement of the amount of balance his said father owed, but never did so; and further to show that this account was known by the witness and the deceased to exist and to be due the plaintiff."

This evidence was excluded, and plaintiff excepted.

The witness is a party, but he was testifying against his own interest, and not in his own behalf, and he is therefore not excluded by the statute.

"In *Tredwell v. Graham*, supra [88 N. C. 208], it was said that, 'Notwithstanding the statute, a party may be called to testify touching a transaction of the opposite party, when it is against his own interest.' In *Weinstein v. Patrick*, 75 N. C. 344, Justice Reade said that 'it would seem that there could be no objection against allowing a witness to testify against his own interest.' It is not within the spirit or letter of the statute, as his own interest is supposed to be a sufficient protection for the opposite party against false or fabricated testimony. This appears to be well settled by the cases." *Seals v. Seals*, 165 N. C. 412, 81 S. E. 614, Ann. Cas. 1915D, 134.

[3] The apprehension of the defendant that if we permit a plaintiff to call an administrator as a witness it will open the door to testimony of the plaintiff, which would otherwise be incompetent, is groundless, as this result only follows when the administrator is a voluntary witness testifying in his own behalf, and not when he is forced upon the witness stand to testify against his interest.

[4] The plaintiff also introduced Ell Thompson, and offered to prove by him that he was a tenant of the intestate during the years 1916 and 1917 and lived on the farm with him; that the intestate furnished him from the store of the plaintiff, and offered to show, the sale and delivery by the plaintiff to the witness of articles of merchandise which were charged in the account against the defendant. This was objected to, and the plaintiff excepted.

The witness stated, without objection, that he had settled in full with the intestate for all he owed him.

This witness is not a party to the action, and, as the record now stands, he is not interested in the event of the action, as it does not appear that the plaintiff has any charge against him or holds him in any way responsible for any part of the account.

The evidence was material, and we see no reason for its exclusion, as the witness does not come within any of the prohibitions of the statute.

These errors are material, and a new trial is therefore ordered.

Reversed.

(178 N. C. 282)

**FUTCH v. ATLANTIC COAST LINE R. CO.**  
(No. 288.)

(Supreme Court of North Carolina. Oct. 15, 1919.)

**1. CARRIERS ⇨69(5)—INSTRUCTION AS TO ORDER FOR CARS NOT ERRONEOUS IN VIEW OF THE TESTIMONY.**

Where, in an action for failure to furnish a refrigerator car to receive lettuce, the one ordering the car testified that he also ordered two cars for another, designating the number of cars by raising two fingers and then one, an instruction to find for plaintiff if order was given and "understood" by defendant's agent was not erroneous, in that use of quoted word referred to understanding of terms of order.

**2. CARRIERS ⇨69(5)—MAKING OF PROMISE TO PLACE CAR FOR SHIPPER A QUESTION OF FACT.**

In an action against a railroad for failure to place a refrigerator car to receive lettuce, whether a new promise was made, on the day after the first attempt to order the car, to place it by 2:30 p. m., *held* a question for the jury.

**3. APPEAL AND ERROR ⇨216(2)—SPECIAL INSTRUCTION WAIVED BY FAILURE TO REQUEST BELOW.**

Where, without a special instruction on a point, the instruction given was sufficient, plaintiff, who asked no special instruction concerning it, cannot complain.

**4. CARRIERS ⇨44—REASONABLE NOTICE NECESSARY WHEN CAR IS ORDERED.**

A railroad company is entitled to reasonable notice when a freight car is ordered.

**5. TRIAL ⇨256(3) — NECESSARY TO CALL COURT'S ATTENTION TO OMISSION FROM CHARGE.**

If the trial court failed to state any of plaintiff's contentions in its charge, the omission should have been called to its attention.

Appeal from Superior Court, New Hanover County; Calvert, Judge.

Action by D. K. Futch against the Atlantic Coast Line Railroad Company. From a judgment for defendant, plaintiff appeals. No error.

E. K. Bryan, of Wilmington, for appellant.  
Rountree & Davis, of Wilmington, for appellee.

**WALKER, J.** The grievance alleged by the plaintiff is that the defendant failed to place a refrigerating car for him at Wrightsboro, by 2:30 o'clock p. m., on May 16, 1918, to receive a certain lot of lettuce, which he had cut for shipment, as it had promised the day before to do. The evidence was conflicting, and we think it was submitted to the jury under proper instructions from the court.

[1] The plaintiff specially complains of the judge's instruction to the jury, that if the order for the three cars, two for the Wilmington Truckers' Association and one for the plaintiff, was given by Freeman and understood by the defendant's agent, they should answer the first issue "Yes," or in favor of the plaintiff, or if the next morning, the 16th of May, the car not having arrived, defendant's agent promised to have it at Wrightsboro by 2:30 o'clock in the afternoon, they should answer the issue in the same way. The particular objection is to the use of the words, "and understood by the defendant's agent"; the contention being that it made no difference whether the agent understood the terms of the order, if it was in fact given. This may or may not be so. The word "understood" was manifestly not used in any such sense, that is, whether he was intelligent enough to understand it, but its meaning is whether it was understandingly given by Freeman. Freeman, plaintiff's own witness, had testified that the agent may not have "understood" that he ordered the third car for Futch, as he gave the number of cars with his fingers, raising two first, and then the one. He further testified:

"After I got home in the afternoon of May 15th, I told Mr. Moore that I thought perhaps the clerk did not understand me, and that I had phoned down to the office, and it was closed. I told them this in Mr. Elliott's office, when I went down there with Mr. Futch; that after I left there I began to think about it, and remember the surroundings and what was taking place down there at the office at the time. I was not positive in my mind whether the young man who took the order understood me or not, so I phoned back to the office to find out, but the office was closed. That was after 6 o'clock."

The judge only submitted this evidence to the jury, that they might say whether the order was so given as to cause a prudent man to mistake it. That was all he meant. It was a question of fact, and the jury settled it.

[2] Whether a new promise was made on the 16th to place the car by 2:30 p. m. was another question of fact, and the judge sufficiently stated it to the jury. The car or-

dered at 9 o'clock on May 18th was placed in the first train out that day. It was contended by the defendant before us that to have given a special or quicker service, by using an extra engine, would have been a discrimination, which is forbidden by the Interstate Commerce Act; this being an interstate shipment moving from Wrightshoro, N. C., to Buffalo, N. Y., and C. & A. Railroad Co. v. Kirby, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033, Ann. Cas. 1914A, 501, was cited to support the position. But we need not consider it, as the jury have decided the facts against the plaintiff. We have considered the question of discrimination and rebates at this term in Edenton Cotton Mills v. N. S. Railroad Co., 100 S. E. 341.

[3] The judge stated and explained fully—and if not, sufficiently, as we think—the question whether the defendant had abandoned its rule, or regulation, that it should have 24 hours' written notice, when a car is ordered. After stating that a railroad company may adopt reasonable regulations for placing a car under an order, the court said that the regulation might be waived orally by a promise or agreement to place the car at an earlier time. This exception is not open to the plaintiff, as he asked for no special instruction concerning it, and without one the instruction was sufficient. If plaintiff desired more to be said, he should have requested it. We said in *Alexander v. Cedar Works*, 177 N. C. 137, 149, 98 S. E. 312, 318:

"If the instructions of the court to the jury were not sufficiently full and explicit, or plaintiffs desired any particular phase of the case to be stated, they should have submitted a special request for what they wanted"—citing *Simmons v. Davenport*, 140 N. C. 407, 53 S. E. 225; *Potato Co. v. Jeanette*, 174 N. C. 237, 93 S. E. 795.

And in *Power Co. v. Power Co.*, 175 N. C. 668, 680, 96 S. E. 99, we said that, if a party deems the charge not full enough in a particular phase of the case, he should ask that it be enlarged and made more definite, citing *McKinnon v. Morrison*, 104 N. C. 354, 10 S. E. 513; *State v. Yellowday*, 152 N. C. 793, 67 S. E. 480; *Orvis v. Holt*, 173 N. C. 231, 91 S. E. 948. The rule is a familiar one and must be complied with. *Gay v. Mitchell*, 146 N. C. 509, 60 S. E. 426. The law will not permit a party to be silent, when he can so easily, by asking for an instruction, bring the charge to such shape as he may consider is required by the contentions and the evidence. He must guard his own interests as the trial is progressing. But we think the jury understood the matter, and that the verdict is fully warranted by the evidence. He told the jury that if, upon all the circumstances revealed by the evidence, they found that the company had agreed to place the car at a different time that it was required to do by its own regulation, this was a departure from its rule, and an abandonment of it. *Power Co. v. Power Co.*, supra.

[4, 5] The company is entitled to reasonable notice, when a car is ordered. *Elliott on Railroads*, § 1476, and also section 202a; *Revisal*, § 2632. If the court failed to state any of plaintiff's contentions, the omission should have been called to its attention, and the judges, we are sure, will always correct any error in this respect. *Manufacturing Co. v. Building Co.*, 177 N. C. 103, 97 S. E. 718; *Jeffress v. Railroad Co.*, 158 N. C. 215, 73 S. E. 1013; *Alexander v. Cedar Works*, supra.

We have considered the plaintiff's exceptions with some detail, because they were argued with zeal by counsel; but the case really was reduced to a very few questions of fact, which the jury decided for the defendant after a fair contest in an open field.

No error.

(178 N. C. 708)

## STATE v. O'HIGGINS. (No. 273.)

(Supreme Court of North Carolina. Oct. 15, 1919.)

1. ABDUCTION  $\S$ 12—SUFFICIENCY OF EVIDENCE TO SHOW VIRTUE OF MARRIED WOMAN BEFORE ELOPEMENT.

In a prosecution for elopement with a married woman, evidence of the woman's husband held to show she had been innocent and virtuous since her marriage, as required by statute to authorize the prosecution.

2. CRIMINAL LAW  $\S$ 369(2)—EVIDENCE OF ABANDONMENT OF CHILDREN TO ELOPE WITH MARRIED WOMAN COMPETENT.

In a prosecution for elopement with a married woman, evidence that defendant abandoned his motherless children to elope with the woman was competent to prove the strength of his infatuation.

3. ABDUCTION  $\S$ 1—"ELOPEMENT" DEFINED.

An "elopement" was correctly defined by the court, in a prosecution for abduction, as the act of a wife who voluntarily deserts her husband to go away with and cohabit with another man.

[Ed. Note.—For other definitions, see Words and Phrases, Elopement.]

Appeal from Superior Court, Cumberland County; Stacy, Judge.

Charles L. O'Higgins was convicted of elopement with a married woman, and he appeals. No error.

H. McD. Robinson, W. C. Downing, and Robert S. McNeill, all of Fayetteville, for appellant.

Jas. S. Manning, Atty. Gen., Frank Nash, Asst. Atty. Gen., and Sinclair & Dye, of Fayetteville, for the State.

BROWN, J. The statute under which the defendant was indicted (Rev.  $\S$  3360), is as follows:

"If any male person shall abduct or elope with the wife of another he shall be guilty of a felony, and upon conviction shall be imprisoned not less than one year nor more than ten years: Provided, that the woman, since her marriage, has been an innocent and virtuous woman: Provided, that no conviction shall be had upon the unsupported testimony of any such married woman."

[1, 2] The points presented by this appeal may be stated as follows: (1) Was there any evidence that the eloping wife had been since her marriage an innocent and virtuous woman? (2) Was evidence that the defendant abandoned his two motherless children, when he eloped with the woman, admissible?

The husband testified that his wife was not a bad woman, that he was "wrapt up in her," and that he knew that his wife was an innocent and virtuous woman. We think this evidence tends very strongly to establish the virtuous character of the wife by the person who had opportunity to know her better than any one else, and that it was amply sufficient to justify the verdict of the jury. The evidence that the defendant abandoned his motherless children in order to elope with Mrs. Miller was competent to prove how strong the infatuation was which induced him to leave his own children in a helpless condition in order to elope with another man's wife.

[3] In charging the jury his honor placed the matter clearly before them, and we think his definition as to what constitutes elopement is in accord with established authority. 2 Bl. Com. p. 130; Black's Law Dict. p. 418. These authorities declare an elopement to be the act of the wife, who voluntarily deserts her husband to go away with and cohabit with another man. This is substantially what the judge told the jury.

No error.

CLARK, C. J., concurs fully in all that is said by BROWN, J., in his very clear and terse opinion in this case and adds:

It is proper that attention should be called to the following anomalous and extraordinary provision in Rev.  $\S$  3360, under which this indictment is had:

"Provided, that no conviction shall be had upon the unsupported testimony of any such married woman."

This is without any parallel in the laws of North Carolina, except in the similar provision in Rev.  $\S$  3354, for seduction under promise of marriage, which provides:

"The unsupported testimony of the woman shall not be sufficient to convict."

In these two cases the witness summoned by the state steps upon the witness stand branded with the provision of law that the jury shall not believe her, even though, on their oaths, they do believe her, unless some one else swears to the same state of facts. There is no such provision discrediting the woman when a witness on an indictment for rape, or for an assault with intent, yet such provision would not have been more illogical or unjust than this.

Parties to civil actions and defendants in criminal actions were formerly disqualified to testify; but when made competent by statute there was no such provision branding them as unworthy of belief, as in this case.

On the contrary, notwithstanding their interest, the court must tell the jury that, if they believe their testimony, they must give it the same weight as that of any other witness. Even an unsupported accomplice is sufficient to convict for any crime, if the jury shall believe him. *State v. Jones*, 176 N. C. 703, 97 S. E. 32; *State v. Barber*, 113 N. C. 711, 18 S. E. 515. A convict is competent and entitled to exactly the same credit as any witness, if believed. Negroes were formerly incompetent, and some other classes of citizens. But now any witness who is competent to testify has the weight to be given to his testimony left entirely to the judgment of the jury, save and except women. There is no class discrimination in the administration of justice permitted, much less required, by our laws in any other instance.

In these two cases, though the woman is ordinarily the most necessary witness and goes to the stand at the call of the state, she is branded as unfit to be believed, and the jury are forbidden to give her testimony any weight whatever, unless some one else, of whatever character he may be, possibly a convict, shall testify to the same purport.

It must be an oversight that such class discrimination on the witness stand has been permitted to remain upon our statute book. It is a slur and a brand upon those who know more about the transaction to be investigated than any one else, except the defendant himself, and as to him his testimony is not only not discredited, but if he is a witness in his own behalf, or offers other witnesses (or even his silence, if he offers no testimony), has such enhanced weight that he must be found not guilty unless the jury shall find him guilty "beyond a reasonable doubt." Why this discrimination in a court of justice between the two sexes, when it is absolutely unknown in any other instance, or as to any other class, under our laws?

(149 Ga. 434)

ERWIN et al. v. BROOKE et al. (No. 1095.)

(Supreme Court of Georgia. Oct. 1, 1919.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR §80(6)—DECREE NOT DISPOSING OF ENTIRE CASE REVERSED.**

The plaintiffs in an equitable action sought relief as to several distinct matters. Certain pleas were filed, which sought affirmative relief. On submission to the judge without a jury a decree was rendered, granting certain relief and denying relief as to some of the particular matters, leaving undisposed of other matters of relief of a substantial and material character,

and declaring that as to such matters the case would be held open for future disposition, and further providing for the filing of additional pleadings. The plaintiffs excepted. *Held*, the decree is somewhat confused, but it sufficiently appears, in so far as it affects the plaintiffs, that it did not dispose of the whole case. Without dealing with other questions made by the bill of exceptions, the assignment of error which complains that the whole case was not decided requires a reversal.

**2. ASSIGNMENTS OF ERROR—EXCEPTIONS PENDENTE LITE.**

The assignments of error in the bill of exceptions to the judgment overruling the demurrer to certain pleas are not now decided; but, under the peculiar facts of the case, leave is granted to treat and consider the official copy of the bill of exceptions on file in the trial court as exceptions pendente lite.

Error from Superior Court, Bartow County; M. C. Tarver, Judge.

Equitable action by T. C. Erwin, receiver, and others against G. W. Brooke and others, with pleas seeking affirmative relief. From the decree, plaintiffs bring error. Reversed.

Winfield P. Jones, of Atlanta, and J. T. Norris, of Cartersville, for plaintiffs in error.

Jones & Chambers and Walter A. Sims, all of Atlanta, and Paul F. Akin, W. C. Henson, and J. T. Norris, all of Cartersville, for defendants in error.

PER CURIAM. Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(149 Ga. 405)

CITY OF ATLANTA et al. v. ATLANTA GASLIGHT CO. et al. (No. 1193.)

(Supreme Court of Georgia. Sept. 27, 1919.)

*(Syllabus by the Court.)***1. GAS §14(1) — GEORGIA RAILROAD COMMISSION CAN FIX GAS RATES.**

The Railroad Commission of this state has by statute authority to fix just and reasonable gas rates to be paid by the consumers to the corporation owning or operating public gas plants.

**2. GAS §14(1)—RATE-FIXING ORDER MAY BE ATTACKED AS VOID FOR ANY CAUSE.**

An order of the Railroad Commission, fixing gas rates, is presumed to be valid, but may be attacked in the courts on the ground that it is unjust and unreasonable, or void for other cause, and where such order is attacked as being void the burden of proof is upon the party attacking it.



### 3. ORDER OF GEORGIA RAILROAD COMMISSION FIXING GAS RATES VALID—INJUNCTION REFUSED.

Under the pleadings and the evidence, the trial judge was authorized to hold that the order of the Railroad Commission was valid, and there was no error in refusing an injunction.

*(Additional Syllabus by Editorial Staff.)*

### 4. GAS $\S$ 14(1)—ORDER OF RAILROAD COMMISSION INCREASING RATES BECAUSE OF NATIONAL CONDITIONS VALID.

An order of Railroad Commission as to gas rates was not void because adopted because "of an emergency arising out of national conditions existing at this time," resulting in an advanced cost of production, as it was to meet just such conditions that Legislature provided in Civ. Code 1910,  $\S$  2631, that commission, from time to time and when circumstances required, should change and revise schedules of rates.

Error from Superior Court, Fulton County; Z. A. Littlejohn, Judge.

Suit for injunction by the City of Atlanta and others against the Atlanta Gaslight Company and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Jas. L. Mayson, S. D. Hewlett, R. R. Arnold, C. E. Cotterill, and E. E. Pomeroy, all of Atlanta, for plaintiffs in error.

Jas. K. Hines, Smith, Hammond & Smith, and Jones & Chambers, all of Atlanta, for defendants in error.

HILL, J. The Atlanta Gaslight Company petitioned the Railroad Commission of Georgia, in April, 1918, for authority to increase its gas rates in the city of Atlanta. Due notice of the application was given to the city of Atlanta and the citizens thereof, and pursuant to such notice a public hearing was had by the commission, at which the city and citizens appeared by counsel and opposed the granting of the proposed increase in rates. At the conclusion of an elaborate hearing the commission granted an increase in the gas rates, and the present suit is brought by the city of Atlanta and its citizens against the Railroad Commission of Georgia and the Atlanta Gaslight Company, to enjoin as void the order thus promulgated by the commission. The trial judge, after hearing evidence, decided in effect that the challenged order was not unreasonable and void, and refused an injunction, and the plaintiffs in error excepted.

[1] Civil Code 1910,  $\S$  2631 (Acts 1878-79, p. 127), provides that—

"The railroad commissioners are required to make for each of the railroad corporations doing business in this state, as soon as practicable, a schedule of just and reasonable rates of charges for transportation of passengers and freights and cars on each of said railroads; and

said schedule shall, in suits brought against any such corporation, wherein is involved the charges of any such corporation for the transportation of any passenger or freight or cars or unjust discrimination in relation thereto, be deemed and taken in all the courts of this state as sufficient evidence that the rates therein fixed are just and reasonable rates of charges for the transportation of passengers and freights and cars upon the railroads; and said commissioners shall, from time to time and as often as the circumstances may require, change and revise such schedules."

And section 2862, codified from section 5 of the act of 1907 (Acts 1907, p. 74), amending the act of 1878, 79, declares that—

"The powers and duties hereinbefore conferred by law upon the Railroad Commission are hereby extended and enlarged, so that its authority and control shall extend \* \* \* over gas and electric light and power companies, corporations, or persons owning, leasing, or operating public gas plants or electric light and power plants furnishing service to the public."

It will thus be seen that the Legislature has conferred on the railroad commissioners the power and authority to make just and reasonable gas rates. Orders of the Railroad Commission fixing rates are presumed to be valid, just, and reasonable. The courts may inquire into the validity of rates prescribed by the Railroad Commission, and where such rates are attacked in the courts for one cause or another, such, for instance, as that the Railroad Commission is without authority to make them, or that they are not just and reasonable, the burden is upon the plaintiff, or attacking party, to show that the rates are void. *Union Dry Goods Co. v. Ga. Public Service Corp.*, 142 Ga. 841, 83 S. E. 946, L. R. A. 1918E, 358; *Id.*, 145 Ga. 658, 89 S. E. 779; *Id.*, 248 U. S. 372, 39 Sup. Ct. 117, 63 L. Ed. 309; *Southern Ry. Co. v. Atlanta Stove Works*, 128 Ga. 208, 57 S. E. 429; *Interstate Commerce Com. v. Pacific R.*, 222 U. S. 541, 32 Sup. Ct. 108, 56 L. Ed. 308; *L. & N. R. Co. v. United States*, 238 U. S. 1, 11 (3), 35 Sup. Ct. 696, 59 L. Ed. 1177; *R. Com. of La. v. Cumberland Tel. Co.*, 212 U. S. 414, 29 Sup. Ct. 357, 53 L. Ed. 577; *R. Com. v. L. & N. R. Co.*, 140 Ga. 817, 832, 833, 80 S. E. 327, L. R. A. 1915E, 902, *Ann. Cas.* 1915A, 1018.

No fixed or arbitrary rule for rate making has been prescribed by law. Many elements may enter into the fixing of just and reasonable rates—those that are just and reasonable both to the corporation and to the public. Each case must in a measure stand upon its special facts. In the following case the Supreme Court of the United States has clearly set forth some of the elements entering into the question of rate making. In *Smyth v. Ames*, 169 U. S. 467, 18 Sup. Ct. 418, 42 L. Ed. 819, it was held:

←For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

"The basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public; and in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience; and, on the other hand, what the public is entitled to demand is that no more be exacted from it for the use of the public highway than the services rendered by it are reasonably worth."

Mr. Justice Harlan, in delivering the opinion of the court, said:

"A corporation maintaining a public highway, although it owns the property it employs for accomplishing public objects, must be held to have accepted its rights, privileges, and franchises subject to the condition that the government creating it, or the government within whose limits it conducts its business, may by legislation protect the people against unreasonable charges for the services rendered by it. It cannot be assumed that any railroad corporation, accepting franchises, rights, and privileges at the hands of the public, ever supposed that it acquired, or that it was intended to grant to it, the power to construct and maintain a public highway simply for its benefit, without regard to the rights of the public. But it is equally true that the corporation performing such public services and the people financially interested in its business and affairs have rights that may not be invaded by legislative enactment in disregard of the fundamental guaranties for the protection of property. The corporation may not be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it. How such compensation may be ascertained, and what are the necessary elements in such an inquiry, will always be an embarrassing question. As said in the case last cited: 'Each case must depend upon its special facts; and when a court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the Legislature for a corporation controlling a public highway are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and of the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the Legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law. \* \* \* The utmost that any corporation operating a public highway can rightfully demand at the hands of the Legislature, when exerting its general powers, is that it receive what, under all the

circumstances, is such compensation for the use of its property as will be just both to it and to the public.' We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property."

And to the same effect are the cases cited supra. The attack in the instant case on the order of the commission is by the consumers of gas in Atlanta for the alleged reason, amongst others, that the rates are higher than the services are reasonably worth. The presumption is that the commission has considered all the elements entering into the making of just and reasonable rates.

[2, 3] It is insisted in this case that the order of the Railroad Commission is void, because it is not based upon any competent evidence submitted to the commission, and particularly because there was not submitted to the commission at the hearing any evidence showing, or tending to show, the kind, quantity, quality, age, condition, or other elements of value of the gas company's properties devoted to the public service in Atlanta, and consequently that under the ruling in the cases of *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, and subsequent cases elaborating the doctrine—viz. *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034; *Omaha v. Omaha Water Co.*, 218 U. S. 180, 30 Sup. Ct. 615, 54 L. Ed. 991, 48 L. R. A. (N. S.) 1084; *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 223 U. S. 655, 32 Sup. Ct. 389, 56 L. Ed. 594; *Minnesota Rate Cases*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18; *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153, 35 Sup. Ct. 811, 59 L. Ed. 1244; *Denver v. Denver Union Water Co.*, 246 U. S. 178, 38 Sup. Ct. 278, 62 L. Ed. 649—there was no legal basis upon which the Railroad Commission could determine whether the defendant gas company was then deriving a fair return upon the reasonable value of its property devoted to the public service at the time of the inquiry. The answer to this contention is, as already observed, that the presumption is in favor of

the validity of the order fixing the rate, and the burden of showing that it was void is upon the party attacking the rate. The evidence submitted to the court upon the trial, though voluminous, was insufficient to show that the rate was unreasonable, unjust, or arbitrary.

[4] Another contention was that the order was void on the ground that it was adopted because "of an emergency arising out of national conditions existing at this time." It was shown on the trial that on account of the advance in material, wages, the cost of operation, additions, etc., the expense of the corporation had enormously increased on account of war conditions, and that its net income had correspondingly decreased, etc. It was to meet just such conditions, no doubt, that the Legislature provided in the act of 1879, *supra*, that the "commissioners shall, from time to time and as often as circumstances may require, change and revise such schedules" of rates. When circumstances are such that the price of everything else has increased, it may well be that the commission may see the necessity, under the mandate of the law, of increasing the price of gas to the consumers as being required by the circumstances. From a careful review of the entire record, and numerous authorities bearing upon the subject, we cannot say that the judge erred in refusing to hold that the rate fixed by the order of the commission was unjust and unreasonable, or was greater than the service was reasonably worth to the consumer, under the then existing circumstances, or that it was void for any reason assigned. The trial judge did not err in refusing an injunction.

Judgment affirmed.

All the Justices concur.

(149 Ga. 411)

**CITY OF ATLANTA et al. v. GEORGIA RY. & POWER CO. et al.** (No. 1192.)

(Supreme Court of Georgia. Sept. 27, 1919.)

*(Syllabus by the Court.)*

**1. ELECTRICITY ☞11—POWERS OF RAILROAD COMMISSION TO FIX RATES FOR ELECTRIC LIGHT AND POWER COMPANIES.**

The Railroad Commission of this state has statutory power to prescribe schedules of "just and reasonable rates" of charges for services by electric light and power companies.

**2. PUBLIC SERVICE COMMISSIONS ☞7—POWERS OF RAILROAD COMMISSION APPLY TO ALL COMPANIES SPECIFIED IN ACT.**

The provisions of Civil Code 1910, § 2862, which restrict the power of the Railroad Commission in regard to contracts existing at the

time of the passage of the act embodied in that section, and contracts which might be made subsequently to that act, apply alike to all of the several classes of companies specified in the act.

**3. PUBLIC SERVICE COMMISSIONS ☞7—POWER OF RAILROAD COMMISSION TO REVISE RATES NOTWITHSTANDING MUNICIPAL CONTRACT OR ORDINANCE.**

That part of the proviso of the act just mentioned which declares "that this act shall not \* \* \* impair nor invalidate any future contract or ordinance of any municipality, as to the public uses of such company, that shall receive the assent of the Railroad Commission," does not deprive the Railroad Commission of power, after assenting to a contract or ordinance of the character mentioned in such provision, made after the passage of the act, to revise or make new rates, where future conditions render the rates specified in the contract or ordinance unreasonable and unjust to the companies or to the public.

**4. PUBLIC SERVICE COMMISSIONS ☞17, 21 — RAILROAD COMMISSION NEED NOT AFFORD HEARING BEFORE MAKING NEW SCHEDULE OF RATES.**

The statutes creating the Railroad Commission of Georgia and giving it power over public service corporations do not require the Railroad Commission to afford a hearing before it in the exercise of its function to make schedules of rates to be applied in the future; and where, in the formation of rates, the Railroad Commission considers a document on file in its office as to the value of the property of a company for which rates are to be prescribed, without formally introducing such document in evidence at a hearing which has been held, the fact that such document is so considered will not be sufficient ground to authorize the courts to set aside as void the order of the Railroad Commission prescribing rates.

**5. PUBLIC SERVICE COMMISSIONS ☞22 — COURT MAY DECLINE TO COMPEL RAILROAD COMMISSION TO PRODUCE ORIGINAL PAPERS IN ITS FILES.**

Under the statutes providing for the production of papers in court by a party to a case after written notice by his adversary, the court may decline to require the Railroad Commission to produce in response to such notice original papers of file in the office of the Railroad Commission.

**6. ORDER OF RAILROAD COMMISSION INCREASING RATES—REFUSAL OF INJUNCTION.**

Under the pleadings and evidence, there was no error in refusing the injunction.

Fish, C. J., dissenting.

Error from Superior Court, Fulton County; Z. A. Littlejohn, Judge.

Suit for injunction by the City of Atlanta and others against the Georgia Railway & Power Company and others. Interlocutory injunction denied, and plaintiffs bring error. Affirmed.

Jas. L. Mayson, S. D. Hewlett, R. R. Arnold, C. E. Cotterill, and E. E. Pomeroy, all of Atlanta, for plaintiffs in error.

Jas. K. Hines, King & Spalding, Rosser, Slaton, Phillips & Hopkins, Colquitt & Conyers, and Chas. T., L. C. & J. L. Hopkins, all of Atlanta, for defendants in error.

ATKINSON, J. The Railroad Commission of Georgia passed an order allowing an increase of rates to be charged by the Georgia Railway & Power Company for electric service rendered to its customers. The increase allowed over the old rates for residential lighting was 12½ per cent., for retail power 20 per cent., and for wholesale power 25 per cent. After the order was promulgated, a suit was instituted in the superior court by the city of Atlanta and certain customers of the Georgia Railway & Power Company, seeking to set up an alleged contract between the city and the company, fixing rates less than those specified in the order, to declare the order null and void, and to enjoin the company from putting it into effect. An interlocutory injunction was denied, and the plaintiffs excepted.

[1] 1. Civil Code, § 2631 (Ga. Laws 1878-79, p. 127), provides:

"The railroad commissioners are required to make for each of the railroad corporations doing business in this state, as soon as practicable, a schedule of just and reasonable rates of charges, \* \* \* and said commissioners shall, from time to time and as often as the circumstances may require, change and revise such schedules."

Sections 2630, 2626, and 2662, codified from section 5 of the act of 1907 (Ga. Laws 1907, p. 72), amending the act of 1879, *supra*, declare:

"The power to determine what are just and reasonable rates and charges is vested exclusively in said commission. The printed reports of the Railroad Commission, published by its authority, shall be admissible as evidence in any court in Georgia without further proof, and the schedules of rates made by the commission and any order passed or rule or regulation prescribed by the commission shall be admissible in evidence in any court in Georgia upon the certificate of the secretary of the commission. The powers and duties heretofore conferred by law upon the Railroad Commission are hereby extended and enlarged, so that its authority and control shall extend to street railroads and street railroad corporations, companies or persons owning, leasing or operating street railroads in this state: Provided, however, that nothing herein shall be construed to impair any valid, subsisting contract now in existence between any municipality and any such company; and provided that this act shall not operate as a repeal of any existing municipal ordinance; nor shall it impair nor invalidate any future contract or ordinance of any municipality as to the public uses of such company, that shall receive the assent of the Railroad Commission; over docks and wharves and corporations, companies or persons owning, leasing or operating

the same; over terminals or terminal stations and corporations, companies or persons, owning, leasing or operating such; cotton compress corporations or associations, and persons or companies owning, leasing or operating the same; and over telegraph or telephone corporations, companies or persons owning, leasing, or operating a public telephone service or telephone lines in this state; over gas and electric light and power company corporations or persons owning, leasing or operating public gas plants or electric light and power plants furnishing service to the public."

It thus appears that the Legislature conferred on the railroad commissioners the power to make schedules of "just and reasonable rates of charges" for service by electric light and power companies. City of Atlanta v. Atlanta Gaslight Co., 100 S. E. 439, this day decided.

[2] 2. As just noted, Civil Code, § 2662, contains the following:

"Provided, however, that nothing herein shall be construed to impair any valid, subsisting contract now in existence between any municipality and any such company; and provided that this section shall not operate as a repeal of any existing municipal ordinance; nor shall it impair nor invalidate any future contract or ordinance of any municipality, as to the public uses of such company, that shall receive the assent of the Railroad Commission."

It is urged that the provisos quoted above refer only to street railroad companies, and do not affect the power of the Railroad Commission in regard to fixing rates for the other enumerated kinds of companies. The language quoted is a proviso in the middle of the section, which renders that part of the section awkwardly expressed. Its meaning would be more apparent if the language quoted were transposed from the middle to the end of the section in which it is contained. In construing the law the context must be considered, and the better view is that the proviso applies alike to all the specified kinds of companies. There is no reason why they should apply to street railroad companies, and not to companies engaged in the other classes of business.

[3] 3. Another contention was that the proviso, "that this act shall not \* \* \* impair or invalidate any future contract or ordinance of any municipality, as to the public uses of such company, that shall receive the assent of the Railroad Commission," protected an ordinance subsequently (in 1912) passed by the city of Atlanta and agreed to by the electric light and power company, which was alleged to have received the assent of the Railroad Commission; such ordinance and contract providing a lower rate than that specified in the order of the Railroad Commission which was under attack. Assuming, without deciding, that the words "public uses," as employed in this part of the statute, comprehend rates that the com-

pany might charge the public, and likewise assuming, without deciding, that certain stipulated rates, when assented to by the Railroad Commission, were contemplated, the statute, properly construed, leaves it to the municipalities by contract or ordinance to specify rates, not unconditionally, but subject to the assent of the Railroad Commission. The annexing of such condition amounts to affirmation rather than a denial of the power of the railroad commissioners to say what rates might be stipulated by contract or specified by ordinance, which after all would amount to the commission making rates. The rates which might be so fixed would be subject to the continued approval of the Railroad Commission and authority to revise them. If it were otherwise, the commission, by assenting to rates reasonable at one time under existing conditions, would be stripped of the power to revise them at other times, however unreasonable they might become under changed conditions. No such result was intended. This view makes the proviso harmonize with that part of Civil Code, § 2631, which provides:

"Said commissioners shall, from time to time and as often as the circumstances may require, change and revise such schedules."

Under this construction any rates fixed by contract or ordinance, assented to by the Railroad Commission in 1912, would not prevent the commissioners from prescribing just and reasonable rates under conditions existing in 1918.

[4] 4. It appeared that the Railroad Commission, before passing the order complained of, had a public hearing on the application of the power company to increase its rates for electric light and power, and among other things granted to the applicant, and also to the city and various customers who were protesting the application, the right to be heard and to offer evidence. The hearing consumed many days, and the evidence took a broad range. Several years previously an engineer had made a report as to the value of certain property then and now employed by the power company, which was on file and included among the records of the Railroad Commission. An expert employed by the protestants was given permission and opportunity to investigate the files of the Railroad Commission, and was aware of this report. This report was not formally introduced at the hearing before the Railroad Commission, but after the hearing it was called for and taken into consideration by the commission in determining what rate the company should be allowed to charge. It is contended that the order of the Railroad Commission, fixing the rate which the company might charge for electric light and power, was void, because the Railroad Commission took this report into consideration in prescribing

the schedules of rates which they finally made. Under the ruling in *Wadley Southern Ry. Co. v. State*, 137 Ga. 497, 73 S. E. 741, if the Railroad Commission had been engaged in the determination of a judicial question, affecting an existing right of some person, that person would have been entitled by constitutional guaranty to a hearing. The right to a hearing would carry with it the right to object to the admissibility of the evidence, and the right to meet it by other evidence. The case cited was where the Railroad Commission of Georgia, under its statutory powers, was conducting a quasi judicial inquiry based upon a complaint made against certain railroad companies, charging an unlawful discrimination. It was held that the Railroad Commission was vested with power to determine what would be an unlawful discrimination, and that—

"Section 6 of the Railroad Commission Act of 1907 (Civil Code 1910, § 2663) contemplates that notice and an opportunity of a hearing be given to persons, railroads, or other corporations interested in the orders issued by the commission, and that provision may be made for such notice either by statute or rule of the commission. This section is to be construed to mean that the commission shall not issue a special order in a particular case, directed to a person or corporation, without first giving notice and an opportunity for hearing to the person or corporation so to be affected thereby."

Whether a hearing should be afforded by the Railroad Commission on a quasi legislative question, or a question that was not quasi judicial, was not before the court, and the decision did not purport to deal with such a question. In *Carr v. Augusta*, 124 Ga. 116, 52 S. E. 300, in discussing the difference between a quasi legislative and quasi judicial question, it was said:

"The duties of a municipal council are varied. Some are merely ministerial, some are legislative, some are executive; but there are still others which are judicial in their nature, and the determination of where the legislative or ministerial duty ends and where the judicial duty begins is often attended with extreme difficulty. *Harris on Certiorari*, § 48. Where the duty is purely ministerial, or purely legislative, the error cannot be corrected by certiorari; but where the duty imposed upon the municipal council clearly requires the exercise of judicial powers, or even the exercise of quasi judicial powers, the general rule is that an error committed may be reviewed on certiorari. 1 *Smith on Mun. Corp.* § 561. When a municipal council passes an ordinance, it acts in its legislative capacity, and certiorari will not lie; but when, after having passed an ordinance, it proceeds to enforce the same, according to its terms, against one who has become liable to a penalty provided by the ordinance, in the determination of whether such person has violated it, and has thereby become subject to be proceeded against under its provisions, a municipal council is exercising a judicial power of the same nature that any court would exercise in investigating whether a given person has violated a given law. The

action of the council, no matter by what name it might be called, order, resolution, or otherwise, which declares that a person has laid himself liable to penalties prescribed in the ordinance, is a judgment of the council, which can only be reached by the exercise of judicial functions; that is, an application of the law as laid down in the ordinance to the facts that appear before the council at the time the resolution is passed. The ordinance in effect imposed a penalty upon one holding a license to sell liquor when he did any one or more of the acts referred to in the ordinance. The ordinance devolved upon the council the determination of the question of fact as to whether he had been guilty of the acts declared illegal. Without reference to whether the ordinance was invalid for not providing notice to the party proceeded against for a forfeiture of his license, the act of the council declaring the person proceeded against guilty of a violation of the ordinance was in its very nature a judicial act. See *Black on Intoxicating Liquors*, § 195."

The doctrine here announced was approved and applied in *Daniels v. Commissioners of Pilotage*, 147 Ga. 297, 93 S. E. 887, holding that the commissioners of pilotage, in declining to authorize licensed pilots upon the bar of Tybee and river of Savannah to operate a boat separate and independent from the pilot boat to which, under the rules of the commissioners, all pilots are required to be attached, were not exercising a judicial function. In that case the commissioners took under consideration certain letters and reports obtained from other boards which were material, but were not formally introduced as evidence before the commissioners. In *Union Dry Goods Co. v. Georgia Public Service Corporation*, 145 Ga. 658, 89 S. E. 779, it was held:

"An order of the Railroad Commission, fixing a schedule of rates to be charged by public service companies in a given municipality, is not invalid solely because a contract holder of one of the public service companies was not made a party and notified of the proceedings before the commission."

The soundness of this decision rests upon the proposition that on the question of making rates for future application the Railroad Commission was not bound to afford a hearing, because the act of the commission in fixing such rates was quasi legislative; and if prescribed rates are unreasonable or void for any reason, there is a remedy by resort to the courts, as held in *Union Dry Goods Co. v. Georgia Public Service Corporation*, 142 Ga. 841, 83 S. E. 946, L. R. A. 1916E, 358 (s. c. 248 U. S. 372, 39 Sup. Ct. 117). The Railroad Commission of Georgia may afford a hearing on such questions, by rule or otherwise, as a matter of discretion. Such hearings are permitted, but not required. On investigation of an order prescribing rates in the courts, the order is presumptively reasonable and just; but the complaining party will be permitted to submit any

evidence tending to show the order unreasonable or unjust, or otherwise illegal, without restriction on account of the action of the Railroad Commission in passing the order. See *City of Atlanta v. Atlanta Gaslight Co.*, supra. Under the circumstances it would not be obligatory to afford, to a person to be affected by a schedule of rates applicable in the future, a hearing before the Railroad Commission on the question of making such rates. It is recognized generally that in prescribing rates for future application a rate-making body does so in the exercise of quasi legislative functions. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Knoxville v. Water Co.*, 212 U. S. 1, 8, 29 Sup. Ct. 148, 53 L. Ed. 371; *Louisville & Nashville R. Co. v. Garrett*, 231 U. S. 298, 305, 307, 34 Sup. Ct. 48, 58 L. Ed. 229.

For the reasons indicated, the fact that the Railroad Commission may have acted in part upon information not formally introduced in evidence before it, would not render void its order fixing a schedule of rates to be applied in the future. The plaintiffs in error rely, among others, upon the rulings in *Interstate Commerce Commission v. Louisville & Nashville R. Co.*, 227 U. S. 88, 33 Sup. Ct. 185, 57 L. Ed. 431; *Interstate Commerce Commission v. Union Pacific Railroad Co.*, 222 U. S. 541, 32 Sup. Ct. 108, 56 L. Ed. 308. Both of those cases had reference to the powers of the Interstate Commerce Commission, and related to the action of the commission while exercising its quasi judicial functions under section 15 of the Hepburn amendment to the Interstate Commerce Commission Act (Act June 29, 1906, 34 Stat. 584, c. 3591, § 15), which required them to afford a hearing. The reasoning employed in those cases is inapplicable to the present case, where the power of the state Railroad Commission was under a different statute that authorized the Railroad Commission, in the exercise of a quasi legislative function, to prescribe rates applicable in the future, and does not require them to afford a hearing, and where the order of the Railroad Commission under attack was passed in the exercise of a quasi legislative function.

[§] 5. In the suit of *City of Atlanta et al. v. Railroad Commission of Georgia*, the Georgia Railway & Power Company, and the Georgia Railway & Electric Company, to enjoin the order of the Railroad Commission referred to in the preceding division, the plaintiffs served the Railroad Commission with notice to produce—

"the following papers and documents to be used as evidence for the plaintiffs: (a) All reports, returns, or schedules made by the Georgia Railway & Power Company or under its authority or by any of its officers or agents for it, and whether under oath or not, in the years 1911, 1912, 1913, 1914, 1915, 1916, 1917, and 1918, showing for any periods the net earnings of said

corporations, and likewise showing in any way the value of any of the property and assets or franchises of said corporation. (b) The record and report which you have in your possession of all the evidence, oral or documentary, delivered upon the application of the Georgia Railway & Power Company for increased rates for electric current for light, power, and other purposes, which application was decided by your body on August 14, 1918. (c) A detailed inventory and appraisal of the property of the Georgia Railway & Electric Company, as made March 18, 1912, by W. A. Baehr. (d) All applications made to your body at any time by the Georgia Railway & Power Company or the Georgia Railway & Electric Company, for permission to issue stocks or bonds, together with the action of the commission thereon. All the documents and papers aforesaid are in your possession; and the plaintiff gives this notice in order to use them at the hearing of the injunction as hereinbefore set forth. The file containing the petition of the city of Atlanta against the Georgia Railway & Electric Company or Georgia Railway & Power Company, asking for a reduction in the electric current for heat, light, and power. (e) All papers accompanying said file just mentioned, whether the same be petitions by other persons for like reduction in rates, and also papers showing the proposed rates finally agreed on between the city of Atlanta and said electric company. (f) All schedules of rates for light, heat, or power filed by the Georgia Railway & Electric Company, or the Georgia Railway & Power Company, during the years 1911, 1912, 1913, 1914, 1915, 1916, 1917, and 1918. (g) Any action by the Railroad Commission of Georgia upon any of the applications or schedules hereinbefore referred to. Said papers and documents to be used as evidence by the plaintiff upon the hearing of the injunction above referred to."

The Railroad Commission declined to respond to the notice, on the ground that the papers and documents called for were public papers required to be kept in the office of the commission, and that the Railroad Commission was not subject to the process of notice to produce. The court held that the Railroad Commission was not bound to produce the papers, and error was assigned on this ruling. Error was also assigned upon the ruling of the court declining to require the Railroad Commission to produce, in response to a notice to produce, certain "green books" kept by the Georgia Railway & Power Company, which contained a statement of the assets and liabilities of the power company and its subsidiary companies, which "green books" had been turned over to the Railroad Commission by the Georgia Railway & Power Company and were used at the hearing before the Railroad Commission. The judgment refusing to require the Railroad Commission to produce such "green books" was upon the ground that it was not required by law to produce its original documents. It is declared in Civil Code, § 5798:

"The certificate or attestation of any public officer, either of this state or any county there-

of, shall give sufficient validity or authenticity to any copy or transcript of any record, document, paper of file, or other matter or thing in their respective offices, or pertaining thereto, to admit the same in evidence in any court of this state."

Section 5 of the act of 1907, *supra*, in part declares:

"The printed reports of the Railroad Commission, published by its authority, shall be admissible as evidence in any court in Georgia without further proof, and the schedules of rates made by the commission and any order passed or rule or regulation prescribed by the commission shall be admissible in evidence in any court in Georgia upon the certificate of the secretary of the commission." Ga. L. 1907, p. 73.

In *Richardson v. Whitworth*, 103 Ga. 741, 30 S. E. 573, it was held:

"Since administrators' bonds are required by law to be recorded and kept of file in the ordinary's office, a duly certified copy of such a bond is admissible as primary evidence. Consequently, the introduction of 'the record' of such a bond was properly allowed over objection thereto based on the ground that the original had not been produced nor a copy thereof 'established.'"

In *Metropolitan Street Railroad Co. v. Johnson*, 90 Ga. 500, 16 S. E. 49 (3), it was held:

"A municipal ordinance may be proved by the production of the original book of ordinances, identified as such by the clerk of the corporation and shown to have come from his custody. Notwithstanding the statute of September 19, 1891 (Acts 1890-91, p. 109), make an official certified copy evidence, it is not the exclusive evidence."

In Civil Code, § 5837, it is provided:

"The several courts shall have power on the trial of any cause cognizable before them respectively, on notice and proof thereof, being previously given by the opposite party or his attorney, to require either party to produce books, writings, and other documents in his possession, power, custody, or control, which shall contain evidence pertinent to the cause in question, under circumstances where such party might be compelled to produce the same by the ordinary rules of proceeding in equity."

Under the strict letter of this law, it might have been in the power of the court to have required the Railroad Commission to produce the papers called for by the notice; but all of the papers held by the commission called for by the notice were public records of the commissioners, who were public officers of this state. As such they were open to inspection by the public under proper regulation, and certified copies of any part of these records were admissible as primary evidence. It would be a great inconvenience to the Railroad Commission, and at the risk of losing the papers of file in that office, if it should be required to remove original documents from that office to the several courts

of this state, to be used as evidence. If the commission should be required to produce its original papers on notice to produce in cases where the commissioners were themselves parties to a suit, it would likewise be done under a subpoena duces tecum in a case in which the commissioners were not parties. These and other reasons might be suggested why the court should not require the production of the original papers.

[8] 6. Under the pleadings and the evidence, the judge was authorized to hold that the order increasing the rates was not shown to be unreasonable or unjust, or void on any ground of attack. Under such circumstances there was no error in refusing an injunction.

Judgment affirmed. All the Justices concur, except

FISH, C. J. (dissenting). I am constrained to dissent from so much of the opinion of the majority of the court as is embodied in the third headnote and the corresponding division of the opinion. In my judgment the express provisions of the statute set out in section 2662 of the Civil Code preclude the Railroad Commission from impairing or invalidating any contract, made with its assent subsequently to the passage of the act of 1907, between a municipality and a public utility corporation such as the one which is a party to this case.

HILL, J. (concurring specially as to division 3 of the opinion). The authority to determine what are just and reasonable rates is vested exclusively in the Railroad Commission of Georgia; and regardless of contracts between the city of Atlanta and the Georgia Railway & Power Company fixing rates, and whether the commission assented thereto, the commission properly exercised its power in fixing the rates under review.

(149 Ga. 397)

COWART v. STRICKLAND.

STRICKLAND v. COWART.

(Nos. 1236, 1238.)

(Supreme Court of Georgia. Sept. 27, 1919.)

(Syllabus by the Court.)

**1. NEW TRIAL §9—MAY BE GRANTED ON PART OF ISSUES.**

Where, in an ejectment case, the plaintiff recovers a verdict for the premises, with mesne profits, the trial judge may grant a new trial on the issue of mesne profits alone for errors of law, or if he disapproves the verdict on that issue, and the judgment being divisible, refuse a new trial on the issue of title, if that issue was adjudicated without error of law, and if the trial judge approves the verdict.

**2. NEW TRIAL §35—WITNESSES §269(2)—EXTENT OF CROSS-EXAMINATION OF WITNESS CALLED TO FORMAL POINT ONLY.**

Where a witness is voluntarily called by a party and examined, even though to a formal point only, the court cannot restrict the right of cross-examination of the witness to the formal point upon which the party has examined him; but the opposite party has the right to cross-examine the witness as to all points in the case.

(a) Nevertheless, where the trial judge requires a party to call a witness on whom the party has caused a subpoena duces tecum to be served, and at the time announces that the examination will be restricted to the sole question of the witness' ability to produce the original document called for by the subpoena, and the examination is limited to that question alone, it is not error to refuse to allow the opposite party to cross-examine the witness generally on the merits of the case.

(b) Nor is it error requiring a new trial to permit the witness to be examined, in the presence of the court, but in the absence of the jury, on the sole question of his ability to produce the original of the document described in the subpoena.

**3. DEEDS §193, 207—BURDEN OF PROOF IS ON PARTY ALLEGING DEED A FORGERY.**

Where, on the trial of an ejectment case, a deed is attacked as a forgery, the burden is on the party asserting the affirmative of the issue to establish his contention by a preponderance of the testimony. He is not required to prove the forgery of the deed beyond a reasonable doubt.

**4. TRIAL §255(3)—FAILURE TO INSTRUCT ON CIRCUMSTANTIAL EVIDENCE IN ABSENCE OF REQUEST NOT ERROR.**

In the absence of a request, the failure of the judge on the trial of an ejectment case to give in charge to the jury the rule of circumstantial evidence as applicable to civil cases is not cause for new trial, even though the evidence upon a single and controlling issue is entirely circumstantial.

**5. DEEDS §207—EJECTMENT §110—TRIAL §251(3)—SUFFICIENCY OF EVIDENCE TO SUSTAIN JUDGMENT FOR PLAINTIFF.**

The evidence authorized the verdict, and none of the assignments of error show cause for reversal of the judgment to which exception is taken in the main bill of exceptions.

**6. APPEAL AND ERROR §977(4)—FIRST GRANT OF NEW TRIAL WILL NOT BE DISTURBED.**

The judgment granting a new trial on the issue of mesne profits alone, assigned as error in the cross-bill of exceptions, is within the rule that the first grant of a new trial will not be disturbed, unless the evidence demands the verdict rendered.

Error from Superior Court, Calhoun County; W. M. Harrell, Judge.

Ejectment by E. P. Strickland against J. S. Cowart. Verdict and judgment for plaintiff, motion for new trial denied in part and



granted in part, and defendant brings error, and plaintiff takes a cross-bill of exceptions. Affirmed on both bills of exceptions.

Miss Eunice Price (now Mrs. Eunice Price Strickland) brought an action of ejectment against J. S. Cowart for the recovery of two lots of land and for mesne profits. The plaintiff relied for recovery upon a demise from herself as the sole heir at law of her father, J. N. Price. She contended: (1) That her father died in possession of the land. (2) That the defendant claimed under a chain of title which originated in Margaret Williams, running (a) from Margaret Williams to J. C. Price; (b) from J. C. Price to J. N. Price; (c) from J. N. Price back to J. C. Price; (d) from J. C. Price to J. L. Boynton; (e) from J. L. Boynton to the defendant. The plaintiff attacked the alleged deed from J. N. Price to J. C. Price as a forgery. The trial of the case resulted in a verdict and judgment for the plaintiff for the premises in dispute, and for \$1,960 mesne profits. The defendant filed a motion for new trial, which was subsequently amended. The court denied the motion "in so far as the recovery of the land is concerned," but granted the defendant a new trial "on the issue as to mesne profits," and "as to the issue of mesne profits only," for the following reasons, as set out in the order:

"This judgment of the court granting a new trial on the issue of mesne profits is based solely on the ground that the plaintiff could not recover mesne profits, except for such time as the plaintiff might by evidence show that the defendant was in possession of the premises in dispute; and plaintiff having failed to show that defendant was at any time in possession of the premises, the recovery for mesne profits was without any evidence to support it."

To this judgment the defendant excepted, assigning error thereon in the main bill of exceptions. The plaintiff filed a cross-bill of exceptions, in which she complains that the court erred in granting to the plaintiff a new trial on the issue of mesne profits.

B. W. Fortson, of Arlington, Pope & Bennett, of Albany, and Samuel H. Sibley, of Union Point, for plaintiff in error.

R. C. Bell, of Cairo, and W. V. Custer, of Bainbridge, for defendant in error.

FISH, C. J. [1] 1. The plaintiff in error contends that the court may only grant an entire new trial, either of the cause or of a collateral issue (Civil Code, § 6079); that the court cannot separate the case into two distinct issues, to be tried separately by the jury, especially in an action of ejectment, with a prayer for recovery of mesne profits, since a separate action cannot be maintained for the recovery of mesne profits. It is therefore insisted that the legal effect of the judgment of the trial court on the motion for

new trial is either (1) to grant a new trial of the entire cause, or (2) to deny the motion entirely, on condition that the recovery for mesne profits be written off. The case of *McCarthy v. Lazarus*, 137 Ga. 282, 73 S. E. 493, was an action of ejectment, with a prayer for mesne profits. The trial court directed a verdict in behalf of the plaintiff for the premises in dispute and for mesne profits. The judgment was affirmed "as to the direction of a verdict for the recovery of the premises," but a new trial was ordered "on the sole question as to mesne profits, with direction that the issue as to mesne profits alone be submitted to a jury on another trial." It is true that the power of the Supreme Court to give direction depends on special statute (Civil Code, § 6205), but it is also true that—

"Where a judgment appealed from can be segregated, so that the correct portions can be separated from the erroneous, the court will not set aside the entire judgment, but only that portion which is erroneous." *Chicago Building Co. v. Butler*, 139 Ga. 816(1), 819, 78 S. E. 244, 246.

It is not to be assumed that in an ejectment suit this court would order a new trial "on the sole question as to mesne profits, with direction that the issue as to mesne profits alone be submitted to a jury on another trial," unless it were in the first instance permissible, in a proper case, for the trial court itself to so direct. Where in an ejectment case the issue as to title is adjudicated in favor of the plaintiff, and the trial court is of the opinion that the adjudication was without error of law, and is satisfied with the verdict, a new trial may be denied as to the issue of title, and a new trial granted on the issue of mesne profits, if the trial court is of the opinion that errors of law were committed upon the latter issue, or if he disapproves the verdict. *Brooke v. Lowry Nat. Bank*, 141 Ga. 493, 81 S. E. 223 (5). The fact that the case is one of ejectment, with a prayer for mesne profits, is immaterial. While section 5576 of the Civil Code declares:

"No plaintiff in ejectment shall have and maintain a separate action in his behalf for the recovery of mesne profits which may have accrued to him from the premises in dispute"

—it is sufficient to say that in such case the action is not a separate one. In the practical administration of the law, an issue once adjudicated without error may remain closed, where the judgment is divisible, while at the same time the trial court has it within his power to grant a new trial upon a separate, distinct, and independent issue involved in the same case.

[2] 2. The plaintiff in the court below desired to put in evidence a certified copy of a deed from J. C. Price to J. N. Price, con-

veying the lands in controversy. She had duly served the defendant with a notice to produce the original. During the progress of the trial the plaintiff testified that she did not have the deed in her possession, power, custody, or control, and that she had made diligent search for it and had failed to find it. She then exhibited to the court an affidavit of B. Isler, administrator of the estate of J. N. Price, filed by him in response to a subpoena duces tecum, calling upon him to produce the original of said deed. The administrator in his affidavit averred that he did not have and had never had the original of said deed in his power, custody, or control, and therefore could not produce it. The plaintiff insisted that she be allowed to introduce the certified copy of the deed in question upon the showing made, whereupon the court directed and required the plaintiff's counsel to put the administrator upon the stand, with the statement that the examination would be confined to the question of his ability to produce the original deed. The witness was then examined by the plaintiff's counsel touching his possession of the deed in question, and testified in substance that he did not have the deed and that the same had never been in his possession, power, custody, or control. He was then fully examined by the defendant's counsel upon the same point, and the court ruled that the witness could not be cross-examined by the defendant's counsel upon other and separate and distinct issues in the case. However, the defendant was given the privilege to swear the witness in chief; and the witness was sworn and examined in behalf of the defendant after the plaintiff had closed her case. In the motion for new trial error is assigned on the ruling of the court in refusing to permit the defendant to cross-examine the witness generally upon the merits of the case, and also because the court permitted the examination of the witness on the question of his ability to produce the deed out of the presence of the jury. The rule in this state is that—

"When a witness is called and examined, even to only a formal point, by one party, the other party has the right to cross-examine him as to all points." *Aiken v. Cato*, 23 Ga. 154; *News Publishing Co. v. Butler*, 95 Ga. 559, 22 S. E. 282.

The rule undoubtedly applies when the witness is voluntarily called by the party. In that event the court cannot restrict the right of cross-examination to the points upon which the party has examined the witness in chief. If, however, in response to a subpoena duces tecum, the court is not satisfied with the affidavit of the witness, but is yet unwilling to exclude the secondary evidence offered, and directs and requires counsel for the party by whom the witness was subpoenaed to call the witness in person and ex-

amine him orally in the presence of the court, we are of the opinion that it is not reversible error to refuse the right of cross-examination to the opposite party generally on the merits of the case. The plaintiff may have preferred to insist upon the introduction of the secondary evidence upon the showing made; and in this case it appears that the plaintiff did insist upon the sufficiency of such showing. It would be manifestly unfair to compel counsel to call a witness, or to compel him to examine a witness called by the direction of the court, upon the sole question of the ability of the witness to produce an original document, with the right to the opposite party to cross-examine the witness on the merits of the case. If error at all, it was certainly not reversible error to permit the witness to be examined, out of the presence of the jury, on the sole question of his ability to produce the deed described in the subpoena duces tecum. See Civil Code, § 5759; *Powell on Actions for Land*, 241, 242, § 198.

[3] 3. The vital issue in the case was whether the deed from J. N. Price to J. C. Price was a forgery. The plaintiff did not file an affidavit of forgery. She relied entirely upon circumstantial evidence to establish her contention that the deed was a forgery. The court in effect instructed the jury that the plaintiff, had the burden of showing, by a preponderance of evidence, that the deed from J. N. Price to J. C. Price was a forgery. The plaintiff in error contends that the court should have charged that the forgery of the deed must be proved beyond a reasonable doubt. The case of *Williams v. Gunnels*, 66 Ga. 521, is cited in support of this contention. It was there said that to support a plea of justification, in a suit for slander on account of words imputing a crime, "the same degree of evidence is required as would be necessary to convict the plaintiff on a criminal prosecution for the offense." But see *Atlanta Journal v. Mayson*, 92 Ga. 640, 18 S. E. 1010, 44 Am. St. Rep. 104, where it was ruled that the question was neither directly made nor decided in *Williams v. Gunnels*, supra. Where in an ejectment suit a deed is attacked as a forgery, the burden is upon the party asserting the affirmative of the issue to establish his contention by a preponderance of the testimony. The case falls within the rule announced in section 5730 of the Civil Code, as follows:

"Moral and reasonable certainty is all that can be expected in legal investigation. In all civil cases the preponderance of testimony is considered sufficient to produce mental conviction."

[4] 4. It is also insisted that the court erred in failing to charge, without request, the rule of circumstantial evidence as applicable to a civil case. We cannot agree with this

contention. It is true, as pointed out by counsel for the plaintiff in error, that in a criminal case, where the evidence is entirely circumstantial, it is error for the court to fail to charge the rule applicable to a case of that character, with or without a request to so charge. The rule announced by this court in criminal cases has no application to the issue of forgery in a civil action. As a rule in criminal cases, it must have resulted, in part at least, from the positive requirement of section 1010 of the Penal Code, which is as follows:

"To warrant a conviction on circumstantial evidence, the proved facts must not only be consistent with the hypothesis of guilt, but must exclude every other reasonable hypothesis save that of the guilt of the accused."

[5] 5. In one ground of the motion for new trial error is assigned upon the following charge of the court to the jury:

"Referring again to the question as to whether the deed referred to from J. N. Price to J. C. Price was a forgery, this involves a question of fraud; and I charge you in this connection that fraud may not be presumed, but, being subtle in its nature, slight circumstances may be sufficient to carry conviction of its existence."

It is insisted that this charge was inapplicable to the issues in the case, and misled and confused the jury. In *Smith v. Stone*, 127 Ga. 483, 56 S. E. 640 (3), it is held:

"Upon the trial of the issue of forgery, \* \* \* when a registered deed is offered in evidence, nothing is involved except the factum of the deed assailed; and when the uncontradicted evidence shows that the deed was executed, a finding that it was a forgery is unauthorized, notwithstanding there may be evidence tending to show that the grantee had, by his conduct and sayings, estopped himself from asserting title under the deed, as against certain persons."

We agree with counsel for the plaintiff in error that the charge was inapplicable to any issue in the case, but we cannot say that it either misled or confused the jury. The court clearly stated the issues to the jury, and instructed them that the burden was upon the plaintiff to show that the deed from J. N. Price to J. C. Price was in fact a forgery. In immediate connection with the excerpt to which exception is taken, the court charged as follows:

"You would have no right to find for the plaintiff in this case unless you should, by the testimony or the circumstances, determine that the deed in question was never in fact executed by J. N. Price; but you may consider all the circumstances of the case in determining whether the deed was genuine or whether it was a forgery."

In view of the entire charge, considered in the light of the evidence in the record, we

do not feel authorized to reverse the case upon this ground. The evidence authorized the jury to find that the plaintiff's intestate died in possession of the land in controversy, that the defendant claimed under the plaintiff's intestate, and that the deed from the plaintiff's intestate to J. C. Price was a forgery. None of the assignments of error upon the rulings of the court in admitting or rejecting evidence, in charging the jury, or in failing to charge, assigned as erroneous in the motion for new trial, will require a reversal of the case on the main bill of exceptions.

[6] 6. The grant of the new trial on the issue of mesne profits, assigned as error in the cross-bill of exceptions, is within the rule that the first grant of a new trial will not be disturbed, unless the evidence demands the verdict rendered, nor will the court undertake to make any ruling with respect to the reason assigned by the trial judge as the basis of his action, although the new trial be granted upon a special ground of the motion. *Van Glesen v. Queen Insurance Co.*, 132 Ga. 515, 64 S. E. 456, and cases cited; *Ballenger v. Ballenger*, 147 Ga. 351, 94 S. E. 237. It goes without saying that the verdict for \$1,960 for mesne profits was not demanded, under the rule recognized in this state. See *McCarthy v. Lazarus*, 137 Ga. 282, 73 S. E. 493.

Judgment affirmed on both bills of exceptions.

All the Justices concur.

(149 Ga. 474)

BOARD OF COM'RS OF BERRIEN COUNTY et al. v. FIRST NAT. BANK OF ADEL et al. (No. 1269.)

(Supreme Court of Georgia. Oct. 15, 1919.)

(Syllabus by the Court.)

GRANT OF INTERLOCUTORY INJUNCTION.

Under the pleadings and evidence in this case, the court did not err in granting an interlocutory injunction.

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

Action between the Board of Commissioners of Berrien County and others and the First National Bank of Adel and others. Judgment for the latter, and the former bring error. Affirmed.

W. D. Bule and R. A. Hendricks, both of Nashville, for plaintiffs in error.

J. Z. Jackson, of Adel, for defendants in error.

GEORGE, J. Judgment affirmed. All the Justices concur.

(149 Ga. 474)

**McKENZIE v. MERRY.** (No. 1484.)

(Supreme Court of Georgia. Oct. 14, 1919.)

*(Syllabus by the Court.)***INTERLOCUTORY INJUNCTION.**

Under the pleadings and evidence in this case, the court did not err in granting an interlocutory injunction.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by W. D. Merry against J. H. McKenzie. From a judgment granting an interlocutory injunction, defendant brings error. Affirmed.

Wm. H. Fleming, of Augusta, for plaintiff in error.

C. Henry & R. S. Cohen, of Augusta, for defendant in error.

**GEORGE, J.** Judgment affirmed. All the Justices concur.

(149 Ga. 470)

**TOOLE v. TAYLOR.** (No. 1274.)

(Supreme Court of Georgia. Oct. 14, 1919.)

*(Syllabus by the Court.)***INTERLOCUTORY INJUNCTION.**

Upon the hearing of this case on the petition and answer alone, the court did not err in granting an interlocutory injunction.

Error from Superior Court, Effingham County; W. W. Sheppard, Judge.

Action between W. B. Toole and R. J. Taylor. Interlocutory injunction granted, and the former brings error. Affirmed.

W. Inman Curry, of Augusta, for plaintiff in error.

**FISH, C. J.** Judgment affirmed. All the Justices concur.

(149 Ga. 483)

**STACER v. WHITE & HAMILTON LUMBER CO. et al.** (No. 1276.)

(Supreme Court of Georgia. Oct. 16, 1919.)

*(Syllabus by the Court.)***INTERLOCUTORY INJUNCTION — CONFLICTING EVIDENCE.**

Under conflicting evidence, the court did not err in refusing to grant an interlocutory injunction.

Error from Superior Court, Hancock County; J. P. Park, Judge.

Action between G. L. Stacer and the White and Hamilton Lumber Company and others.

Interlocutory injunction denied, and the former brings error. Affirmed.

Robert H. Lewis, of Sparta, for plaintiff in error.

Burwell & Fleming, of Sparta, for defendants in error.

**GEORGE, J.** Judgment affirmed. All the Justices concur.

(149 Ga. 475)

**MOBLEY v. DICKERSON, Tax Collector, et al.** (No. 1308.)

(Supreme Court of Georgia. Oct. 15, 1919.)

*(Syllabus by the Court.)***DENIAL OF NEW TRIAL.**

Under the evidence in this case the verdict was demanded, and the court did not err in refusing a new trial.

Error from Superior Court, Clinch County; J. I. Summerall, Judge.

Action between W. H. Mobley and C. H. Dickerson, Tax Collector, and others. Judgment for the latter, motion for new trial denied, and the former brings error. Affirmed.

S. Burkhalter, of Homerville, and E. K. Wilcox, of Valdosta, for plaintiff in error.

Franklin & Langdale, of Valdosta, and Parker & Parker, of Waycross, for defendants in error.

**HILL, J.** Judgment affirmed. All the Justices concur.

(24 Ga. App. 207)

**JACKSON v. MULKEY.** (No. 10301.)

(Court of Appeals of Georgia, Division No. 1. Oct. 9, 1919.)

*(Syllabus by the Court.)***OVERRULING OF CERTIORARI.**

The judge of the superior court did not err in overruling the certiorari.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action between P. P. Jackson and Jesse Mulkey. Judgment for the latter, certiorari overruled, and the former brings error. Affirmed.

R. R. Jackson, of Atlanta, for plaintiff in error.

M. Herzberg, of Atlanta, for defendant in error.

**BLOODWORTH, J.** Judgment affirmed.

**BROYLES, C. J., and LUKE, J.,** concur.

(24 Ga. App. 229)

**LOFTIS BROS. & CO. v. CREEL**  
(No. 10442.)(Court of Appeals of Georgia, Division No. 1.  
Oct. 9, 1919.)*(Syllabus by the Court.)***OVERRULING OF ORAL MOTION TO DISMISS PETITION.**

The petition in this case does not set out a cause of action, and the judge erred in overruling the oral motion to dismiss it.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by J. F. Creel against Loftis Bros. & Co. Oral motion to dismiss petition overruled, and defendant brings error. Reversed.

Rosser, Slaton, Phillips & Hopkins, of Atlanta, for plaintiff in error.

W. H. Terrell, of Atlanta, for defendant in error.

**BLOODWORTH, J.** Judgment reversed.

**BROYLES, C. J., and LUKE, J.,** concur.

(24 Ga. App. 268)

**BROWN v. STATE.** (No. 10662.)(Court of Appeals of Georgia, Division No. 1.  
Oct. 10, 1919.)*(Syllabus by the Court.)***1. CRIMINAL LAW §1178 — OBJECTION NOT REFERRED TO IN BRIEF ABANDONED.**

The second ground of the amendment to the motion for new trial is not referred to in the brief of counsel for plaintiff in error, and will be treated as abandoned.

**2. CHARGE OF COURT.**

When read in connection with the entire charge, there is no error in any of the excerpts from the charge of which complaint is made.

**3. CRIMINAL LAW §826, 829(1) — REQUEST TO CHARGE MUST BE MADE BEFORE JURY RETIRE.**

As far as legal and pertinent, the principle embraced in the request to charge was fully covered in the charge given. Besides, it does not appear that the request was made before the jury retired "to consider of their verdict."

**4. VERDICT SUPPORTED BY EVIDENCE AND APPROVED BY TRIAL COURT—REVIEW.**

The evidence supports the verdict which has the approval of the trial judge, and this court will not disturb it.

Error from Superior Court, Bibb County; H. A. Matthews, Judge.

Proceeding between the State and Charlie Brown. From the judgment, Brown brings error. Affirmed.

John R. Cooper, W. A. McClellan, and W. O. Cooper, Jr., all of Macon, for plaintiff in error.

John P. Ross, Sol. Gen., of Macon, for the State.

**BLOODWORTH, J.** Judgment affirmed.

**BROYLES, C. J., and LUKE, J.,** concur.

(24 Ga. App. 267)

**PARKER v. STATE.** (No. 10661.)(Court of Appeals of Georgia, Division No. 1.  
Oct. 10, 1919.)*(Syllabus by the Court.)***1. CHARGE ON CIRCUMSTANTIAL EVIDENCE.**

The court properly charged the law of circumstantial evidence.

**2. ANIMALS §34—CRIMINAL LAW §824(4) —FAILURE TO SUBMIT DEFENDANT'S CONTENTIONS REVERSIBLE ERROR.**

The defendant was charged with the violation of a rule and regulation of the state veterinarian, approved by the commissioner of agriculture, to wit, regulation 16, paragraph 3, of Bulletin 14, Series A, which prohibited the sale of hogs exposed to, or infected with, hog cholera. The defendant's main contention, supported by his statement and by the testimony of witnesses, was that he did not know that the hogs sold by him were infected with, or had been exposed to, hog cholera. It was therefore reversible error for the court, even in the absence of a timely and appropriate written request, to fail to submit to the jury this contention of the defendant, with instructions that, if they found this contention to be true, the defendant should be acquitted.

Error from City Court of Dublin; R. D. Flynt, Judge.

C. H. Parker was prosecuted for a violation of a rule and regulation of the state veterinarian, prohibiting sale of hogs exposed to or infected with hog cholera, and from the judgment he brings error. Reversed.

Geo. H. Carswell, of Irwinton, and J. S. Adams, of Dublin, for plaintiff in error.

T. E. Hightower, Sol., and R. Earl Camp, both of Dublin, for the State.

**BROYLES, C. J.** Judgment reversed.

**LUKE and BLOODWORTH, JJ.,** concur.

(24 Ga. App. 242)

**VAUGHN-CARLTON CO. v. STUDEBAKER  
CORPORATION OF AMERICA et al.**  
(No. 10614.)(Court of Appeals of Georgia, Division No. 1.  
Oct. 9, 1919.)*(Syllabus by the Court.)***1. ASSIGNMENTS OF ERROR.**

None of the assignments of error is meritorious.

**2. COSTS  $\S$ 260(1)—DAMAGES AWARDED ON  
APPEAL FOR DELAY ONLY.**

It appearing that this writ of error was prosecuted for the purpose of delay only, the petition of the defendant in error that 10 per cent. damages be awarded against the plaintiff in error is granted.

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Action between the Vaughn-Carlton Company and the Studebaker Corporation of America and others. Decree for the latter, and the former brings error. Affirmed, with damages.

See, also, 22 Ga. App. 684, 97 S. E. 99.

Shipp &amp; Kline and D. P. Starr, all of Moultrie, for plaintiff in error.

P. Q. Bryan, of Moultrie, for defendants in error.

**BROYLES, C. J.** Judgment affirmed, with damages.**LUKE and BLOODWORTH, JJ.,** concur.

(24 Ga. App. 275)

**ETTER v. STATE.** (No. 10633.)(Court of Appeals of Georgia, Division No. 1.  
Oct. 14, 1919.)*(Syllabus by the Court.)***CRIMINAL LAW  $\S$ 824(9) — FAILURE TO  
CHARGE ON CIRCUMSTANTIAL EVIDENCE IN  
ABSENCE OF REQUEST NOT ERROR.**The defendant was indicted and tried for the offense of assault with intent to murder, and was convicted of the offense of shooting at another. By motion for a new trial she assigned error upon the court's failure to charge the jury the law of circumstantial evidence, and upon the charge on the defense of alibi. The person alleged to have been shot having testified positively that the defendant shot her, and the state's case not depending wholly upon circumstantial evidence, it was not error (there being no request so to do) to fail to charge the law as to circumstantial evidence. See *Nobles v. State*, 127 Ga. 212, 56 S. E. 125. The charge on alibi was full and in accord with *Ransom v. State*, 2 Ga. App. 828, 59 S. E. 101, and cases cited. For no reason assigned, there being evidence to authorize the verdict approved

by the trial judge, was it error to overrule the motion for a new trial.

Error from Superior Court, Walker County; Moses Wright, Judge.

Nora Etter was convicted of the offense of shooting at another, and she brings error. Affirmed.

O. N. Chambers, of Rossville, and Rosser &amp; Shaw, of La Fayette, for plaintiff in error. C. H. Porter, Sol. Gen., of Rome, and E. S. Taylor, of Summerville, for the State.

**LUKE, J.** Judgment affirmed.**BROYLES, C. J., and BLOODWORTH, J.,** concur.

(24 Ga. App. 280)

**RABURN v. STATE.** (No. 10694.)(Court of Appeals of Georgia, Division No. 1.  
Oct. 14, 1919.)*(Syllabus by the Court.)***REFUSAL OF MOTION FOR NEW TRIAL.**

The special grounds of the motion for new trial are without merit. There is evidence to support the verdict, and a new trial was properly refused.

Error from City Court of Carrollton; Jas. Beall, Judge.

Proceeding by the State against Babe Raburn. From the judgment, Raburn brings error. Affirmed.

Leon Hood, of Carrollton, for plaintiff in error.

Willis Smith, Sol., of Carrollton, for the State.

**LUKE, J.** Judgment affirmed.**BROYLES, C. J., and BLOODWORTH, J.,** concur.

(24 Ga. App. 284)

**CLINE v. STATE.** (No. 10705.)(Court of Appeals of Georgia, Division No. 1.  
Oct. 14, 1919.)*(Syllabus by the Court.)***1. EXCERPTS FROM CHARGE.**

In the excerpts from the charge of which complaint is made we find no error.

**2. CRIMINAL LAW  $\S$ 1160 — VERDICT SUPPORTED BY SOME EVIDENCE AFFIRMED.**

The verdict is supported by some evidence, has the approval of the trial judge, and, under the law governing this court, the judgment must be affirmed.

Error from Superior Court, Cherokee County; N. A. Morris, Judge.

Proceeding by the State against Charlie Cline. From the judgment, Cline brings error. Affirmed.

John S. Wood, of Canton, for plaintiff in error.

John T. Dorsey, Sol. Gen., of Marietta, and Wm. Butt, of Blue Ridge, for the State.

BLOODWORTH, J. Affirmed.

BROYLES, C. J., and LUKE, J., concur.

(125 Va. 604)

BLIZZARD et al. v. SALYER et al.  
(two cases).

(Supreme Court of Appeal of Virginia.  
Sept. 17, 1919.)

1. VENDOR AND PURCHASER ⇨220—UNRECORDED CONVEYANCE INEFFECTIVE AGAINST BONA FIDE PURCHASER.

To be protected by Code 1904, § 2465, against a prior unrecorded deed, one must have been a complete purchaser for valuable consideration without notice of such prior unrecorded deed.

2. VENDOR AND PURCHASER ⇨240—SUBSEQUENT PURCHASER IN ACTION BY GRANTEE IN UNRECORDED DEED MUST PLEAD BONA FIDE PURCHASE.

In an action by a grantee, who failed to record his deed under Code 1904, § 2465, to set aside a subsequent transfer by the grantor, the subsequent purchaser, if entitled to the protection of such statute, must affirmatively plead and set up such defense.

3. VENDOR AND PURCHASER ⇨240—SUBSEQUENT PURCHASER MUST PLEAD IGNORANCE OF PRIOR UNRECORDED TRANSFER THOUGH AN INFANT.

The rule that a purchaser of land, to protect himself under the registry statute (Code 1904, § 2465) from prior unrecorded deed, in an action by the prior grantee to set aside the transfer to him, must affirmatively plead and prove that he was a purchaser without notice, etc., applies to infants who seek under section 3424 to show cause against a decree setting aside a transfer to them.

4. VENDOR AND PURCHASER ⇨240—PLEADING INSUFFICIENT AS DEFENSE OF PURCHASERS FOR VALUE.

An allegation in a bill that a deed to plaintiff was made in consideration of \$150 is not a sufficient allegation that plaintiff was a purchaser for a valuable consideration under the registry statute (Code 1904, § 2465); it being necessary to plead actual payment by plaintiff of the whole consideration.

5. VENDOR AND PURCHASER ⇨240—PLEADING INSUFFICIENT TO ALLEGE PURCHASE WITHOUT NOTICE OF UNRECORDED DEED.

Allegations in a bill, from which it might be deduced by calculation that the plaintiffs were of a very tender age when a deed to them

was made, was not a sufficient allegation that they were purchasers without notice of a prior unrecorded deed under the registry statute (Code 1904, § 2465).

6. PLEADING ⇨48—NECESSITY OF STATING FACTS DISCLOSING RIGHTS.

When parties, whether infants or adults, seek the aid of courts to enforce their rights, it is essential that they should allege the facts disclosing what those rights are, as a court cannot base its decree on facts not alleged or put in issue by the pleadings.

Appeal from Circuit Court, Russell County.

Bill by Reed G. Blizzard and another against one Salyer and others. Decree for defendants, and plaintiffs appeal. Affirmed.

The appellants were plaintiffs in the court below, and the object of their bill was to show cause against a certain decree which will be hereinafter more particularly mentioned, which was entered in a certain chancery cause to which they were infant parties defendant at the time of such decree.

The appellants are two in number, namely, Reed G. Blizzard and Rawle Payne Blizzard. The former had but recently attained the age of 21 years, and the latter, being about 2 years younger, was still an infant when the suit was instituted in which the bill aforesaid was filed.

In filing such bill the adult appellant proceeded under section 3424 of the Code, which, so far as material, is as follows:

"It shall not be necessary to insert in any decree or order a provision allowing an infant to show cause against it within a certain time after he attains the age of twenty-one years. But in any case in which, but for this section, such provision would have been proper, the infant may, within six months after attaining the age of twenty-one years, show such cause in like manner as if the decree or order contained such provision."

The proceeding by the infant appellant was of the same character, the suit being instituted by him, suing by his next friend, before attaining the age of 21 years, he having the right to so proceed. *Harrison v. Walton's Ex'r*, 95 Va. 721, 30 S. E. 372, 41 L. R. A. 703, 64 Am. St. Rep. 830.

The allegations of the said bill, so far as material to be mentioned, are in substance, as follows:

That appellants are the owners of two-thirds undivided interest in a certain tract of 19 acres of land. That such land was conveyed to appellants and an elder brother, Beecher B. Blizzard, by deed of date of June 28, 1897, from one Nellie Meade and husband, it being alleged in the language of the bill that—

"The consideration for said conveyance being the sum of \$150 cash, \* \* \* all of which will more fully and at large appear by

a reference to the said deed recorded in the clerk's office of Russell county, Va., in Deed Book No. 30, page 636, and a duplicate copy of which is herewith filed as a part of this bill marked 'Exhibit Deed No. 1,' and prayed to be read and taken as if the same were herein copied at large."

That this deed was declared to be null and void and set aside by the decree aforesaid which was entered on September 14, 1909, in the chancery cause first above mentioned. That Susie A. Blizzard, the mother of appellants was the complainant in that suit, and appellants and their elder brother were infant defendants along with other adult and infant defendants. That their said mother in her bill in that suit alleged that she was the equitable owner of said land by virtue of an alleged title bond, bearing date May 12, 1897, signed by one Elam and wife, a copy of which was filed with such bill. That such bill further alleged that said Elam derived title to said land from the aforesaid Nellie Meade and husband by deed prior in date to that to appellants aforesaid, to wit, by deed of January 10, 1894, a copy of which was filed with such bill, but which deed the bill of appellants alleges has never been recorded. That the prayer of the bill of their said mother was that the said deed to appellants "be set aside and declared null and void, and also that a deed be caused to be made to said complainant in said cause," conveying the title to said land from said Elam's heirs, he having died before making conveyance in accordance with said title bond. That a formal answer of appellants as infants along with their elder brother and certain Elam heirs, who were also infants, was filed by their guardian ad litem in said cause in which their mother was complainant as aforesaid, which answer stated that by reason of their age said infants knew nothing of the allegations of the complainant's bill, but supposed that they had rights involved in the cause, and placed appellants under "the protection of the court," and asked "that the complainant be required to make out her case to the satisfaction of the court." That none of the adult Elam heirs demurred, pleaded, or answered, and the bill was taken for confessed as to them. That no proof was introduced in said cause to justify the decree aforesaid other than the exhibits of said title bond and deeds from Nellie Meade and husband to Elam and to appellants. That nevertheless upon such status of the pleadings and proof such decree was entered. The bill of appellants thereupon alleges that the adult appellant reached his majority within 6 months next preceding the commencement of appellants' suit, and that the younger appellant is still within the age of 21 years and states that appellants are advised that by virtue of the foregoing allegations of fact they are en-

titled to come into a court of equity praying the court to review the said decree, and that "the court will set aside said decree for the manifest errors therein committed appearing on the face of the record, \* \* \* and that the court will cause the said two-thirds interest in the tract of land mentioned in the bill to be reconveyed to your complainants, \* \* \* or will set aside and decree null and void the said decree and deeds mentioned that affect their two-thirds interest in said tract or which create a cloud upon their title to their two-thirds interest"; and the prayer of the bill is for relief accordingly and for recovery of rents of the land.

There was a demurrer to the bill which was sustained by the court below on the ground that the bill did not contain an allegation that appellants were purchasers of the land for valuable consideration without notice of the deed to Elam aforesaid, whereupon the decree under review was entered accordingly, sustaining the demurrer, with provision therein giving appellants leave to file an amended bill, if they should be so advised.

Other material facts are referred to in the opinion of the court below.

Joseph E. Duff, of Lebanon, for appellants.

W. W. Bird, of Lebanon, for the appellees.

SIMS, J. (after stating the facts as above). There were a number of assignments of error in the petition for the appeal all of which, however, were stated in oral argument by counsel for appellants to be waived or not relied on, except one, which so far as material, is as follows:

(1) "The court erred in the original suit" (above referred to, in which Susie A. Blizzard, the mother of appellants, was complainant, and appellants and the Elam heirs were defendants) "in decreeing the deed to petitioners set aside, when the suit was heard and determined only upon the bill and exhibits filed with the bill and the denial in toto of the allegations of the bill by the answer of the infants by their guardian ad litem \* \* \* and no proof or depositions taken and filed in support of the allegations made in the bill."

It will be seen from the statements preceding this opinion that the bill in the cause before us assails the decree entered in the original suit mentioned as void because of lack of sufficient proof in the record to sustain it in setting aside a recorded deed to appellants in favor of a prior unrecorded deed from the grantors of appellants to another (one Elam) from whom the complainant in such original suit derived equitable title to the land in controversy by purchase as evidenced by a certain title bond given her by said Elam.

[1] It is plain from the bill in the cause be-



fore us that the decree in the original cause was amply supported in proof by the exhibits filed with the bill in such original cause and that such decree was right in setting aside the deed to appellants, unless, indeed, they were protected by the registry statute (section 2465 of the Code) against the said prior unrecorded deed of their grantors to another. To be so protected appellants must have been complete purchasers for valuable consideration without notice of such prior unrecorded deed.

From the bill in the cause before us it does not appear that such an issue as that last named was made by the pleadings in said original cause. And on referring to the bill in such original cause we see that it is not disclosed by its allegations that appellants were purchasers for valuable consideration without notice of the deed to Elam or that the deed to Elam was unrecorded. So far as appears from that bill the issue made thereby, to the extent that the suit concerned appellants, was whether the deed to appellants could have operated to convey to them the legal or equitable title to land which their grantors had theretofore conveyed away to another by a prior deed which was in proper form and in every way valid and sufficient to so operate at law and in equity; it not appearing from the allegations of the bill or other pleadings in the cause that the registry statute had any application to the case. That such statute had any application to the case was not put in issue by any other pleading therein.

[2, 3] Such being the nature of said original suit, if the appellants were entitled to the protection of the registry statute aforesaid, that was a matter of defense to the benefit of which they could entitle themselves only by affirmative pleading, setting up such defense and by proof sustaining such pleading. *Lamar v. Hale*, 79 Va. 147, 157; *Rorer Iron Co. v. Trout*, 83 Va. 397, 414, 417, 2 S. E. 713, 5 Am. St. Rep. 285 and authorities cited; 39 Cyc. pp. 1778-1780. Such is the general rule applicable to such defense. The same rule applies to infants who seek to show cause against a decree affecting them. See *Pierce v. Trigg*, 10 Leigh, 406 and note to that case in Va. Rep. Anno.

[4] The allegation in the bill in the cause before us of the recital in the deed to appellants that the deed was made in consideration of \$150 is not a sufficient allegation that appellants were purchasers for valuable consideration. As said in *Lamar v. Hale*, supra (79 Va. at page 157), quoting with approval from *Perry on Trusts*, § 219:

" \* \* \* It is not enough that the consideration was secured to be paid, nor is a recital of payment in the deed sufficient; there must be actual payment." (Italics supplied.)

Hence the bill should have alleged actual payment by appellants of the whole consideration.

[5] And there is no allegation anywhere in the bill that appellants were purchasers without notice of the prior unrecorded deed aforesaid. It is true that it may be deduced by calculation based on the age of the elder appellant as alleged in the bill that both of appellants were of a very tender age when the deed to them was made which bears date June 28, 1897 (so young that it may have been impossible for them to have had notice of said prior deed at that time), but that goes only to the matter of proof, if an issue had been made by the pleading sufficient to have rendered such proof admissible. Moreover, the bill does not allege when the deed to appellants was delivered, or when the consideration therefor was paid, if actually paid, or that it was in fact paid for their benefit.

[6] So far as is disclosed by the allegations of the bill in the cause before us, the appellants may have been of sufficient age to have known, and they may have in fact known, of the prior purchase by their mother before any purchase money was paid by or for them for the land and before the deed to them was delivered, or it may have been that no purchase money for the land was ever paid by or for them. It may have been that their grantors supposed that they could disregard the prior deed they had made to Elam because such deed had been lost or destroyed and had not been recorded, and they may have mistakenly supposed that the purchase from Elam by the mother of appellants was for appellants' benefit, and have, without authority from the mother, undertaken to convey the land to appellants in disregard of the prior deed to Elam. The bill in said original suit rather indicates that the latter may have been the true state of the case, as it alleges that "said Nellie Meade and husband, without authority," attempted to convey the land to appellants and their said elder brother. The facts touching this subject have not been alleged in the pleadings in the original suit or in the bill of appellants. When parties, whether infants or adults, seek the aid of courts to enforce their rights, it is essential that they should allege the facts disclosing what those rights are. Neither the court below nor can this court base its decree on facts not alleged or put in issue by the pleadings, nor safely grant relief, except upon issues both made by the pleadings and sustained by the evidence in the cause.

It is plain, therefore, that there is no error in the decree under review and it will be

Affirmed.

KELLY, J., absent.

(125 Va. 723)

## FREY'S EX'RS v. TILLET.

(Supreme Court of Appeals of Virginia.  
Sept. 17, 1919.)1. ASSIGNMENTS FOR BENEFIT OF CREDITORS  
⌘323—RIGHT OF CREDITOR OF SECOND  
CLASS ON RELINQUISHMENT BY CREDITOR OF  
FIRST CLASS.

If property conveyed to a creditor of the first class by the debtor's trustee for creditors was in good faith applied to debts of the first class, the estate of a creditor of the second class has no right to complain, though after the application was made the creditor of the first class relinquished part or all of his interest to the debtor's wife.

2. ASSIGNMENTS FOR BENEFIT OF CREDITORS  
⌘161—NECESSITY CLEARLY TO CHARGE AND  
PROVE FRAUD.

Though the evidence may point strongly to fraud, unless the fraud complained of is clearly charged in the pleadings and clearly established by proof, it cannot be made the basis of a decree for relief.

3. EXECUTORS AND ADMINISTRATORS ⌘437  
(1)—LACHES IN SUIT BY EXECUTORS OF  
CREDITOR AGAINST GUARDIAN OF DEBTOR'S  
CHILDREN.

Executors of a preferred creditor of the second class, of a debtor who assigned to a trustee for creditors, *held* barred by their own laches and the laches of their decedent from collecting from funds in the hands of the guardian of the children of the debtor the balance due on the debt.

Appeal from Corporation Court of Roanoke.

Suit by Frey's executors against one Tillet, as guardian. From a decree dismissing the bill, complainants appeal. Affirmed.

Jas. D. Johnston and Johnston & Izard, all of Roanoke, for appellants.

Dillard & Dillard, of Bluefield, W. Va., for appellee.

KELLY, J. In the year of 1894 Owen Duggan, a liquor dealer, became involved in debt and executed a deed of assignment conveying all of his real estate and personal property to Edward Lyle, trustee, for the benefit of his creditors. In this deed he placed in the first preferred class only two debts, one to James A. Martin for about \$1,800, and the other to Louis Obermeyer for about \$8,000. The second preferred class embraced a number of smaller debts aggregating about \$2,800, the largest of which was the debt of Otto Frey, for about \$800. The other debts provided for in the deed of assignment are immaterial to this controversy.

In 1897 Lyle, trustee, acting under the deed of assignment, sold and conveyed the real estate held by him thereunder to Obermeyer for a recited consideration of \$9,500 in cash,

and in 1899 Obermeyer conveyed the greater part of the real estate thus acquired by him to M. A. Duggan, the wife of Owen Duggan, for a total consideration of \$8,000, \$2,081.70 cash, and the balance in two equal installments, of \$2,959.15 each, represented by negotiable notes to the order of Obermeyer, payable in one and two years, and secured by vendor's lien. These notes were assigned by Obermeyer to Lyle, trustee, without recourse and without consideration. The purpose of this assignment is not satisfactorily explained by any evidence in the case. The subsequent disposition of them by Lyle, trustee, would seem to indicate that Obermeyer, as a gratuity to Mrs. Duggan, accepted in full settlement of his debt the cash payment she made to him and such of the Owen Duggan real estate as he did not convey to her, and donated to her his interest in the notes, subject to the rights of Martin, the other creditor of the first class, a due proportion of whose debt was afterwards paid from the proceeds. At any rate, Mrs. Duggan, who seems to have taken over and acquired a license to continue her husband's business, became indebted to the Virginia Brewing Company in the sum of \$1,200, and Lyle, trustee, transferred the Obermeyer notes to that company as collateral security. Mrs. Duggan died in 1900, owing the brewing company a balance of about \$500 and having paid nothing on the two Obermeyer notes. Thereupon the brewing company, through its attorney, Edward Lyle (who was also the trustee aforesaid), brought a suit in equity, making Mrs. Duggan's administrator and her two infant children, Charles and Margaret, and the trustee, defendants, for the purpose of enforcing the vendor's lien which secured the notes held by it as collateral. The bill in that suit contained the following allegation:

"Your orator [Virginia Brewing Company] further shows unto your honor that the said notes referred to are held for the security of a debt due your orator in the sum of \$—, with interest, etc., and that residue of the said notes is payable to Edward Lyle, trustee, by whom they were delivered to your orator as collateral security for the above debt, and that your orator is informed that the said trustee has an equity in the residue of said notes after the payment of the above amount due your orator, to secure certain beneficiaries of his trust, the details of which is not sufficiently informed to incorporate into his bill."

About this time the American Credit Indemnity Company filed a general creditors' bill against the administrator of Mrs. Duggan and others, and this cause was brought on to be heard with the vendor's lien suit of the Virginia Brewing Company. In these causes a commissioner, appointed to report upon sundry questions, incorporated in his report the following note:

"It appearing from the statement of Obermeyer that he has been satisfied in full, and he having transferred the notes indorsed without recourse on him to Edw. Lyle, trustee, as collateral to secure his commission for making the sale under the trust deed from Duggan to Lyle, trustee, and the amount due Mrs. ——— Martin under the sale, Obermeyer having paid no cash thereunder, but taking credit for the amount of his debt secured in said deed of trust, which amount due Mrs. Martin is admitted to be \$1,200, and to be prorated with other debts of the said Mrs. Duggan."

The only deposition of Obermeyer taken in these causes, so far as the record before us shows, does not cover all the facts stated in the note above quoted. His deposition was very brief, however, and there was no cross-examination. The deposition is not inconsistent with the commissioner's note, and the commissioner may not and perhaps did not base his report solely upon the information therein contained. As a matter of fact the proceeds of the note appear to have been actually applied, so far as Lyle, trustee, was concerned, substantially in conformity with the report of the commissioner in respect thereto.

Pursuant to a decree rendered in the two causes above mentioned, the real estate conveyed by Obermeyer to Mrs. Duggan was sold, and after paying certain delinquent taxes, funeral expenses, and other obligations of her estate, and certain commissions to Lyle, trustee, and a pro rata payment upon the Martin debt, there remained a balance of \$2,883.62, which, pursuant to a decree of November 12, 1903, was paid to T. R. Tillett, guardian of Charles and Margaret Duggan.

In March, 1906, the causes aforesaid still pending on the docket, Otto Frey was permitted to file his petition, in which he alleged that when Obermeyer bought the Duggan property there was an agreement between him and Frey to give the latter a lien thereon for his debt, that Obermeyer disregarded this agreement, that Mrs. Duggan had full knowledge of the agreement, and that the conveyance from Obermeyer to Duggan was without consideration, fraudulent and void. No evidence of any such agreement appears in the record. The order allowing this petition to be filed directed Tillett, guardian, to retain the funds then in his hands until the further order of the court.

Shortly after Frey's petition was filed, Charles Duggan attained his majority, and by his authority the guardian paid over to the attorney for Frey the sum of \$600, which discharged in full one-half of the principal and accrued interest on the Frey debt. No other steps or action seem to have been taken on this petition from the time it was filed in March, 1906, until April 24, 1915, when, on motion of the defendants thereto, it was dismissed on the ground that the decree of November 13, 1903 (directing the fund to be

paid to Tillett, guardian), was a final decree, and the petition came too late.

In June, 1915, shortly after the petition was dismissed, the present suit was brought by the executors of Otto Frey, the purpose of which was to collect from the funds in the hands of Tillett, guardian, the balance of the debt due from Owen Duggan to Otto Frey. The bill made no allusion to any such agreement between Obermeyer and Frey as was alleged in the above-recited litigation, and made no attack on the deed from Obermeyer to Duggan, but charged Lyle with a breach of trust in transferring the notes to the Virginia Brewing Company and in his subsequent course of dealing with regard thereto, and sought to recover the balance of the Frey debt by treating the funds in the hands of Tillett, guardian, as a trust fund for the benefit of the Duggan creditors.

The lower court, on final hearing, being of opinion that the complainant had failed to establish his claim as set out in the bill, and further that the claim was barred by the statute of limitations, entered a decree dismissing the bill. From that decree this appeal was allowed.

The case on both sides has been very fully and ably argued before us, orally and in briefs. The argument took a wide range and dealt with a number of interesting questions. We are of opinion, however, that the decree complained of was right, for reasons which may very briefly be stated.

[1, 2] 1. The complainants manifestly cannot maintain their contention, and secure the relief which they seek, unless they are entitled to have the court treat the deed of trust from Owen Duggan to Lyle, trustee, and the indebtedness therein secured to Obermeyer as fraudulent and fictitious. In other words, if there was an indebtedness of over \$9,500 from Duggan to creditors of the first class, and the property conveyed in the Lyle deed of trust was in good faith applied to those debts, then Otto Frey's estate has no right to complain, even though after the application was made Obermeyer should have seen fit to relinquish any part or all of his interest to Mrs. Duggan. There is no allegation in the bill, and no proof, of any fraud on the part of Owen Duggan in the execution of the deed of trust, or of anything fictitious in the first preferred debts mentioned therein. It is argued, and with some reason, that the transaction as it appears in the record before us is a very suspicious one; but it is a familiar rule that, although evidence may point strongly to fraud, unless the fraud complained of is clearly charged in the pleadings and clearly established by proof, it cannot be made the basis of a decree for relief. *Fleenor v. Hensley*, 121 Va. 367, 93 S. E. 582.

[3] 2. It is apparent from the petition filed by Otto Frey in his lifetime and by the allegations of the bill filed by his executors that he himself was fully apprised of the

transfer of the property from Obermeyer to Mrs. Duggan and the assignment of the notes by Lyle to the Virginia Brewing Company. He made no attack on these transactions until 1906, when he filed his petition. Within a few months thereafter he collected one-half of his debt from one of the children of Mrs. Duggan. As appears from what has already been said, it would seem highly probable that, if young Charles Duggan had seen fit to resist the demand made upon him, the petitioner, Frey, being a creditor in the second class, would have been unable to show that he was in any way interested in the funds in the hands of the guardian. As a matter of fact, both Charles Duggan and his sister make that exact claim in their answer to the bill in this case. However this may be, nothing further was done from 1906 until 1915, and we think it clear under this state of facts that the complainants are barred from recovery by their laches and the laches of their decedent, Otto Frey. Owen Duggan, Martha Duggan, and L. Obermeyer are dead, and the record indicates that Lyle, trustee, himself has disappeared, or that his whereabouts are unknown. It is true that Obermeyer's deposition was taken in the litigation which we have recited, but that deposition was not taken with reference to any attack upon bona fides of the Obermeyer deed, nor any attack upon the transactions of the trustees. The deposition was very meager and the witness was not cross-examined.

Upon the record before us, we are unable to say that the complainants are entitled to any relief, and the decree of the lower court must be affirmed.

**Affirmed.**

(125 Va. 648)

**COVER v. WIDENER et al.**

(Supreme Court of Appeals of Virginia. Sept. 17, 1919.)

**HABEAS CORPUS §—99(4)—GRANDMOTHER ENTITLED TO CUSTODY OF CHILD AS AGAINST FATHER.**

Maternal grandmother of 13 year old girl *held*, in habeas corpus proceedings, entitled to her custody as against her father, awarded access merely, who had deserted his wife, the child's mother, during the child's infancy, and never thereafter supported them, but had left such obligation to be met by the grandmother; his intention being to place the girl with his sister.

**Error to Circuit Court, Washington County.**

Habeas corpus by Edward L. Cover against Mrs. Davis Widener and others. To review an order dividing the custody of the child involved between the respective parties, Cover brings error. Order affirmed.

Oglesby & Burks, of Roanoke, for plaintiff in error.

L. P. Summers, of Abingdon, for defendants in error.

**SIMS, J.** This is a habeas corpus proceeding involving the custody and control of the infant daughter of appellant.

The sole assignment of error is, in substance, that under the facts of the case the custody and control of the child should have been given to the father as most likely to promote the welfare and best interest of the child.

The order under review is as follows:

"This day Mildred Roberta Cover was brought before the court, in obedience to the writ of habeas corpus ad subjiciendum awarded on the 30th day of September, 1918, against the defendants. And the said defendants made answer that they had cared for and maintained said child for about 11 years, said child now being 12 years of age, and who had been abandoned by her father, the petitioner; and the court, having heard the evidence and arguments of counsel, is of opinion that the said cause of detention is legal and sufficient. It is therefore ordered that the custody of the said Mildred Roberta Cover shall remain in the said defendants. It is further ordered that said child shall remain with said defendants from the 1st day of September to the 1st day of June, and that the plaintiff, the petitioner, may have the child from the 1st of June to the 1st of September, respectively, until the further order of the court."

The material facts and the reasons for the decision of the court below will appear from the opinion of the learned judge of that court which is adopted as a part of this opinion and is as follows:

"Edward L. Cover, a citizen of Bristol, has filed his petition in this court, alleging that his infant daughter, Mildred Cover, is illegally detained in the custody of Davis Widener and wife.

"The record shows that more than 14 years ago, in the city of Bristol, Edward L. Cover intermarried with Miss Sally De Busk of Abingdon, Va. As a result of this union one child was born, who is the subject of this controversy. For several years Cover and wife seemed to live together very happily. It is then testified by Cover that his wife became addicted to the use of laudanum, which caused, according to his statement, an estrangement between him and his wife. Their marital differences became such that Cover sent his wife and infant daughter to her mother, Mrs. Davis Widener, who lives at Damascus, Va. From the time of this separation, according to the evidence, Cover seems to have relinquished all claims to the custody of his child, and to have forgotten all obligations resting upon him as to the support of his wife.

"During the period Mrs. Cover remained at the home of her mother, Cover did not contribute one cent to her support, nor did he even so much as write a letter to his wife, or make inquiry as to her state of health or the condi-

tion of his child. Every effort, according to letters filed in the record, was made by Mrs. Cover to ascertain the whereabouts of her husband, but without avail for a long period of time. Cover, when at work, was usually found in the employ of some tanning extract company, and it was to a number of these concerns that Mrs. Cover directed her inquiries as to his whereabouts, eventually writing to his brother, seeking information as to Cover's whereabouts, which he, the brother, was unable to give.

"Finally Cover was located in the city of Asheville, N. C., and it was there that Mrs. Cover, who took her child with her, found him. Mrs. Cover's condition while in Asheville became such that Cover notified her mother, Mrs. Widener, to come to Asheville, which she did, and Mrs. Cover was placed in a hospital, and the expense of her stay in the hospital was borne in the main by Mrs. Widener.

"When Mrs. Cover was taken to the hospital, the infant Mildred, who at the time was a few months old, was placed in the care of Mrs. Widener, with the full consent and knowledge of Cover, who brought the child to her home in Damascus, Washington county, Va.

"After remaining in the hospital for some time, Mrs. Cover went to Knoxville, in search of her husband, who had disappeared from Asheville. Being unable to find him, in a fit of despondency, as evidenced by a note written by her to her mother, the supposition is that she took an overdose of laudanum, which resulted in her death.

"Cover's whereabouts being unknown, Mrs. Widener was communicated with, and went to Knoxville, and brought back the remains of her daughter, which were buried in Washington county. The efforts of Mrs. Widener to locate Cover were unsuccessful.

"As he himself states, he did not know of the death of his wife until some 2 or 3 months thereafter. The testimony of Cover himself is that he had been unsuccessful in business, that the principal disturbance in his married life was his wife's use of opiates, that for 10 years after the death of his wife he wandered from place to place seeking employment, that during all this period of 10 years he held no communication whatever with Mrs. Widener in regard to his infant daughter, that he contributed very little, if any, to her support, and that he only saw her one time, and that was when he was walking or tramping from Mountain City, Tenn., to the coal fields of Virginia, and passed through the town of Damascus, and saw a child playing in a yard at the home, as he understood, of Mr. Widener, and he supposed that it was his child.

"He did not stop to make inquiry, nor to linger long enough to speak to his child, but passed on through the town of Damascus.

"No evidence was introduced as to his financial or moral standing, except the testimony of petitioner himself. In answer to a question propounded by counsel for Mrs. Widener, Cover stated that he had been guilty of about the entire category of crimes; that his life in the past had not been what it should have been, but for the past 2 years he had reformed from his evil way, and was in the employment of the Dixie Tannery Company at a salary of \$112 per month; that he lived in a boarding house; that he had no relatives in this section of the state; that during the summer of 1917, since he had

rehabilitated himself in business, as he states, he began to take an interest in his child Mildred; that he visited the home of Mrs. Widener, who received him cordially and affectionately; that he gave his child money and clothing to the amount of about \$50; that with the consent of Mrs. Widener he took his daughter on a visit to his sister, Mrs. John L. Cover, of Elkton, Va., where she remained during the summer months.

"That it is not his intention to look after the rearing and training to his child himself, but that, if awarded the custody of his child, Mildred, that it is his intention to place her in the home of his sister, Mrs. John L. Cover, of Elkton, who as he states is the wife of a very wealthy extract manufacturer of Rockingham county.

"That his sister, Mrs. Cover, is a woman of mature years, is the mother of four boys, all grown; two are married and have children of their own. The reason assigned by Cover for desiring the custody of his child is to take her away from her grandmother, as he does not deem the social position of Mrs. Widener conducive to the best interest of his child. No charge is made by Cover that Mrs. Widener is not a proper and fit person to have the care and custody of the child Mildred, except that, as he alleges, she is unable to properly educate the child, and that Mrs. Widener is not capable of properly rearing his daughter to be an ornament to the society in which he would see her placed.

"The only evidence of the willingness of Mrs. John L. Cover to take the child Mildred and educate and care for her are several letters, filed in the record by Cover.

"On the other hand, Mrs. Widener testifies that from the time the child Mildred was placed in her hands in Asheville, N. C., that she has given it her constant care and attention; that she is 67 years of age, in a fair state of health; that she resides with her husband, Mr. Davis Widener, in the town of Damascus, and that while she is not a woman of wealth, or, as she expresses it, 'a society woman,' she is fully able, with the help of her husband's son, who is devoted both to her and the child, to amply provide for the child so long as she (Mrs. Widener) may live; that she has always permitted the father of the child to visit it whenever he saw fit; that it is her earnest desire that the relation between father and child may be as close and affectionate as possible; that she has no desire to deprive the father of any pleasure he may derive from associating with his child, and that she is willing for the child to visit him at all convenient times and is more than willing that Mr. Cover, after a neglect of 10 years, may have an opportunity of furnishing the child with means with which to clothe and educate it; that all she shall ask of him is to let the child remain with her a few years longer, and then she is willing to relinquish any claim she may have upon it.

"That the child has been given all Christian instruction of which she is capable; that it is a constant attendant upon the Methodist Sunday school and church, and that since it became of school age it has been a pupil of the Damascus high school, which is one of the very best in the state, employing 10 teachers, and, that the child is successfully progressing from

the school grades, until now it is in the fifth grade, the highest grade permissible, according to her age.

"That the child's associates are the children of Henry Diggs.

"Mrs. Widener further testifies that she is the daughter of Daniel Musser, of Abingdon, Va., and the sister of Wm. H. Musser; that her first husband was Isaac De Busk, of Washington county, and that her second husband, to whom she has been married for 20 years or more, is Davis Widener; that there are no children as a result of this union. It was agreed by counsel, inasmuch as the court was personally acquainted with the father and husband of Mrs. Widener, that no evidence would be introduced as to their moral, religious, and financial standing. This being conceded to be good, Mrs. Widener further stated that she had reared three sets of children; that her mother died leaving a house full of young children, and that upon her, as the elder daughter, fell the responsibility of their rearing; that by her former husband, Isaac De Busk, she was the mother of three children; that since her marriage to Mr. Widener, who was a widower with several children, upon her had fallen the responsibility of the care and rearing of his children; that she had been a consistent member of the Methodist Church for 50 years, and that, while she was unable to leave as a heritage, either to her own children now living or to the grandchild Mildred, worldly goods of any large amount, yet she had the consolation of knowing that of those who had been intrusted to her care not a single one had ever gone astray.

"The child Mildred, who is now in her thirteenth year, testifies that her grandmother, to whom she is devoted, has given her every care and attention possible; that until last summer she had never seen her father, nor did she know that she had a father; that she sleeps in the room with her grandmother, and that, while she desires to know her father better and to love him more, she does not wish to leave her grandmother and to live with her aunt, whom she only met twice in her life; that she was treated kindly by her aunt when she visited her last summer, and that she wishes to become better acquainted with her father's people, but that she cannot bear the idea of being separated from her grandmother, who has been to her, up to this time, the only father or mother she has ever known.

"I have been somewhat tedious, perhaps, in trying to detail the evidence, in order to present the situation exactly as I see it is.

"As I understand the rule of law laid down by our Supreme Court, that in controversies over the custody of children, while our law fully recognizes the primary right of the father to the custody of the child, the court will exercise its discretion according to the facts and what appears to be best calculated to promote the infant's welfare, having due regard to the legal rights of the party claiming the custody. *Coffee v. Black*, 82 Va. 567; *Parrish v. Parrish*, 116 Va. 476, 82 S. E. 119, L. R. A. 1915A, 576.

"As has been repeatedly stated by the courts, there is no duty which a court has to perform more difficult than that which confronts a court when it comes to the disposition of a child in a habeas corpus proceeding.

"I have given a careful consideration to the evidence in this case, and I cannot resist the

conclusion that, however strong the naked legal right of the parent, Edward L. Cover, to the custody of his child may be, the best interest of the child at the present time demands that he be denied the custody thereof.

"Inasmuch as to the court was left the consideration of the standing and character of Mrs. Widener, I deem it but proper to state that the state of facts shows that for womanly virtue, Christian character, and motherly devotion Mrs. Widener is without a superior, in my opinion. Her father, Daniel M. Musser, was one of the most esteemed citizens the town of Abingdon has ever produced, a man who had lived to the ripe old age of 70-odd years, was a consistent member of the Methodist Church for 60 years, against whom, so far as the agreed facts show and so far as I know of my own knowledge, naught of evil was ever spoken. He was a successful contractor and builder, and there are many evidences of his constructive work in the town of Abingdon, which bear testimony to the fact that he was a laborer who wrought well and honestly. Though he was the architect and builder of the majority of homes and buildings in the town, the court records fail to disclose any evidence of any litigation whatsoever in regard to his many contracts. The brother of Mrs. Widener, W. H. Musser, has followed closely in the footsteps of his father. So firmly has his reputation for honesty been established that in business dealings with his fellow men it is seldom that a bond is required, conditioned upon the faithful performance of his contract.

"As an evidence of what I mean, but recently the board of supervisors of Washington county has awarded him the contract to remodel and repair the county courthouse, calling for an expenditure of several thousands of dollars, and this without requiring him to execute bond for its performance.

"For 100 years or more the ancestors of Mrs. Widener have lived and dwelt in the county of Washington, and not once has there ever been a charge against any male member of the family of a violation of the laws of the land, nor against any female member of the family for any departure from the strict paths of morality.

"As stated by Mrs. Widener, she does not belong to the set known as the society set, but the heritage which she will leave to those who come after her, that 'no one who has ever been intrusted to her care has ever gone astray,' is a heritage any one should be proud to leave behind. Petitioner, Cover, states that he wished to place his child in a different environment. The evidence shows that the child's associates are the children of Henry Diggs. Those who are acquainted with the Diggsses, Grays, and Bakers, who are the pioneer families of Washington county, could not desire more suitable companions for their children than the members of this most distinguished family.

"It is not contended by the petitioner that he personally is in a position to administer to the wants of his adolescent daughter, nor is it contended that, if the court would give him the custody of his child, his sister, Mrs. Cover, would make this child her daughter or the beneficiary of her means.

"All that he contends for is that the court take this child out of a home of comfort, re-

finement, and Christianity and place it in a home of luxury.

"That it be placed in a situation by which it will acquire luxurious habits, without the prospect of a father, who is past the meridian of life, and who now earns only \$112 a month, in a subordinate position, ever being able to minister to the luxurious habits acquired by the child.

"As stated by Judge Keith, in delivering the opinion in the case of *Stringfellow v. Somerville*, 95 Va. 701, 29 S. E. 685, 40 L. R. A. 623: 'The question is not which of the two claimants can surround the infant with greater luxury, or which of the two will be able to give or bequeath him the greater amount of money or property, but with which of them is he likely to be reared and trained so as to make him the better man and the better citizen.'

"Mr. Cover seems fully resolved as far as he is able to atone for the long neglect of his flesh and blood and to be willing to look after the comfort and welfare of his child. His statement that he had been guilty of every crime in the category of crimes conveys to my mind the impression, not that he is a criminal, but that he had been in the past a man of dissipated habits, moral and otherwise, and that now he is seeking to rehabilitate himself in the estimation of society in general. And while the court according to its best judgment is constrained to deprive him of the legal custody of his child, an order will be entered, giving to him the freest access possible, in order, as the child stated, that she may become better acquainted with her father, to whom she is growing firmly attached. I think that during the school months, beginning with September and ending with June of each year, the child should remain with its grandmother, and that during the remainder of the year it should remain with its father, and that he should have the right to take the child upon visits to the members of his own family. It is his, and the best interest of the child, in my opinion, require that it should have some associations with the members of its father's family. The court, instead of dismissing the proceedings, will retain same upon docket for any future disposition that the welfare of the child may require."

The features of the case and the considerations adverted to in the opinion above quoted, which seems to us especially controlling in favor of the correctness of the decision of the court below, are the following: That

the father is not in a position to administer to the wants of the daughter, or to himself provide for or to assure a provision for her in the future of a home with any better associations or advantages than those of the present home of the child, if as good. That "it is not contended that, if the court would give him the custody of his child, his sister, Mrs. Cover, would make this child her daughter or the beneficiary of her means." And, indeed, the record does not show that Mrs. Cover has any wealth of her own. That the court is asked to take the child from her present home "of comfort, refinement, and Christianity, and place it in a home of luxury. That it be placed in a situation" (which so far as the record discloses may be but temporary) "by which it will acquire luxurious habits, without the prospect of the father \* \* \* ever being able to minister to the luxurious habits acquired by the child." And while it is true that the record shows that Mrs. Cover, from the bounty of her husband, may give the child better educational and social advantages than it now enjoys, which are not to be undervalued, such advantages are not always unmixed blessings; for, if they are to be but temporary surroundings, they might and would most likely prove to be adverse, instead of beneficial, in influence upon the future character, happiness, and welfare of the child. Hence, in view of the present showing of the record as to the probable future position in life of the child, we are of opinion that the court below acted wisely and rightly in the premises.

As to the future: The suit still remains upon the docket of the court below, and should Mrs. Cover be willing, or the father demonstrate his ability, to make such provision for the child that the latter may be assured both of better educational advantages and of adequate means during the coming years to minister to the tastes and habits which would be the normal result of the changed environment, the court may make such future orders in the cause as may best subserve the welfare and best interest of the child.

The order under review will therefore be affirmed.

KELLY, J., absent.

(125 Va. 638)

DAVIS et al. v. BOSTIC et al.

(Supreme Court of Appeals of Virginia. Sept. 17, 1919.)

**EJECTMENT ⇐13—EQUITABLE TITLE INSUFFICIENT TO MAINTAIN ACTION.**

In ejectment to recover the coal under certain land, it appearing that plaintiffs claimed under a deed given when common grantors had no title, that eight years after such deed such grantors acquired legal title and thereupon conveyed to defendants' grantor by general warranty deed, reciting, after description of the land in question, "on this survey a coal bank, timber room and some privileges was sold to" plaintiffs, but no title paper was introduced effecting a severance of the surface from the underlying coal or investing plaintiffs with legal title thereto, plaintiffs could not recover; for plaintiffs' title must be a legal title.

Error to Circuit Court, Russell County.

Ejectment by Davis and others against Bostic and others. To review judgment for defendants, plaintiffs bring error. Affirmed.

Finney & Wilson, of Lebanon, for plaintiffs in error.

W. W. Bird, of Lebanon, and A. G. Lively and A. T. Griffith, both of Honaker, for defendants in error.

WHITTLE, P. Plaintiffs in error brought ejectment against defendants in error to recover the coal under 59 acres of land in Russell county. There was a verdict and judgment for defendants, to which judgment this writ of error was awarded.

The plaintiffs claim title to the coal in controversy under a deed from Meshack Vencill and wife to Thomas J. Davis and William R. Davis, dated June 10, 1880. At that time neither of the grantors had the legal title to the land, and the record does not disclose that they or either of them owned the equitable title or had any claim thereto. On February 22, 1888, nearly eight years after the date of the first-named deed, Meshack Vencill acquired the legal title to the land by deed from George Warder; and on the same day Vencill and wife conveyed the land to James B. Call, by deed with covenants of general warranty. In this deed, following the description of the 59 acres thereby conveyed, this language occurs:

"On this survey a coal bank, timber room and some privileges was sold to Thomas J. Davis and Wm. R. Davis, all of which is understood by the parties."

By deed of October 7, 1895, James B. Call conveyed the land with general warranty to Electra C. Call, his wife; the deed making no reference to any coal or other privileges sold to the Davises. And by deed of July 13, 1907, Electra C. Call and her husband

conveyed the same land with special warranty to defendants in error, who are the defendants in the action of ejectment. The defendants purchased the land two years prior to receiving a conveyance under a title bond, and have had continuous and exclusive adverse possession of the land under actual inclosure hitherto.

In Burks' PL. & Pr. pp. 195, 196, the general rule that in ejectment the basis of plaintiff's right to recover depends upon his own legal title is stated as follows:

"Generally, a plaintiff in ejectment must recover solely on the strength of his own title, and not on the weakness of that of his adversary, and this title of the plaintiff must be a legal title. \* \* \* There can be no recovery except in special instances (none of which are present in this case), unless the evidence shows that at the time the action was brought the plaintiff was the owner of the legal title."

This fundamental principle is too well settled to call for the citation of additional authority to sustain or illustrate it.

No title paper has been introduced which operates a severance of the surface from the underlying coal or invests the plaintiffs with the legal title thereto. In these circumstances, it is unnecessary to notice in detail the assignments of error, since in no view of the case are the plaintiffs entitled to recover.

The judgment of the circuit court is plainly right and must be affirmed.

Affirmed.

KELLY, J., absent.

(125 Va. 586)

BLANCHARD v. DOMINION NAT. BANK.

(Supreme Court of Appeals of Virginia.  
Sept. 17, 1919.)**1. EQUITY ⇐207—EFFECT OF GENERAL REPLICATION.**

General replication cannot have the effect of denying a statement of the answer, which was merely a concurrence in admissions of the bill.

**2. MORTGAGES ⇐338—BURDEN OF PROOF IN SUIT TO ENJOIN SALE.**

Bill in suit to enjoin sale under deed of trust to secure a debt evidenced by notes and any renewal thereof, not charging that the original debt had been paid, but simply that the original notes had been discharged, statement of the answer that the notes now held by defendant were renewals of the originals is not an affirmative allegation, which defendant must prove.

**3. MORTGAGES ⇐338—IN SUIT TO ENJOIN SALE, RENEWAL NOTES PART OF DEBT SECURED.**

Bill to enjoin sale under deed of trust to secure a debt evidenced by notes and renewals



thereof, admitting that notes of a later date were part of the debt secured, no evidence to show they were renewals was necessary; production of the original notes and checks for the amount thereof, stamped "paid," not being inconsistent with the claim and admission that the later notes were part of the debt secured.

**4. EQUITY  $\Leftrightarrow$  316—WAIVING IN BILL ANSWER UNDER OATH.**

Where it is desired to waive an answer under oath, it is better form for the bill to simply pray that the desired parties "be made defendants to this bill, and, waiving an answer under oath, that," etc.

**5. MORTGAGES  $\Leftrightarrow$  338—DECREE FOR DEFENDANT IN SUIT TO ENJOIN SALE, REFERRING IT FOR ACCOUNTING, SUFFICIENT.**

The decree for defendant, in suit to enjoin sale under deed of trust, not finally disposing of the case, but referring it to a commissioner to take accounts, is not objectionable because failing to state from what time the amounts due shall bear interest.

Appeal from Circuit Court, Washington County.

Suit by F. T. Blanchard against the Dominion National Bank. From an adverse decree, complainant appeals. Affirmed.

Hutton & Hutton, of Abingdon, and A. H. Blanchard, of Bristol, for appellant.

Peters & Lavinder, of Bristol, for appellee.

**BURKS, J.** The object of this suit was to enjoin the sale of certain real estate under a deed of trust executed December 31, 1912, by the appellant, to secure a loan made to the F. T. Blanchard Company. The deed was made to secure a debt of \$9,500, evidenced by bonds of the company, indorsed by F. T. Blanchard and W. T. Neeley, and any renewal or renewals of said bonds, or any part thereof. One of these bonds was for \$2,000, payable at 60 days after date, and the other for \$7,500, payable 4 months after date, each with 6 per cent. interest. The deed also provided that, when this debt was reduced to \$7,500 or less, certain designated portions of the real estate conveyed should be released. This release was made on October 13, 1913. Afterwards the trustee, at the request of the bank, advertised the residue of the property for sale on November 24, 1914. Thereupon an injunction was obtained from the circuit court of Washington county to enjoin the sale. The grounds upon which the injunction was prayed for and granted were: That the debt was a debt of the company, upon which Neeley was the first indorser, and the appellant second indorser; that he was a mere surety for the debt; that he had taken active steps to induce the bank to collect the debt out of Neeley, who was bound as first indorser, and he was then amply solvent and about

to remove his effects to a distant state, but that he was unable to induce the bank to take any steps against Neeley, and as a result of its failure to take the necessary steps all recourse against Neeley had been lost; that he had given the bank written notice to sue Neeley, which it had not done, and that therefore the appellant was released; that the amount due on appellee's debt had not been ascertained and there should be no sale of the property until the amount of the debt had been ascertained; that the notice for the sale by the trustee was, for several reasons, insufficient; that there were outstanding assets of the company in controversy, and, if the controversy were decided in favor of the company, it would have ample assets with which to pay its debts; that it would be inequitable and unjust to sell the property under the deed of trust until all remedies against the principal debtor had been exhausted; and that there was a prior deed of trust on the property, the amount of which should be ascertained before the property was sold. The bill makes no suggestion that the debt secured by the deed of trust has been paid. It admits the power and duty of W. T. Neeley, the secretary and treasurer of the company, "to handle the finances and books of the company," and nowhere in any of the subsequent pleadings is this power denied, or is any suggestion made that the company does not owe the debts for which he issued its notes. The bill sets forth the making on April 30, 1913, of the notes of the company by Neeley, as secretary and treasurer, now held by the appellee, and their indorsement by Neeley as first indorser and by the appellant as second indorser, and alleges that they are subject to certain enumerated credits leaving due thereon \$4,584 of principal upon which there is interest due. The bill then admits that—

"The trust deed is a collateral security simply for the payment of any balance on said notes that is not liquidated by the F. T. Blanchard Company or W. T. Neeley as first indorser of said notes."

The answer of the appellee to this bill states that the bill of complaint correctly describes the amounts of the notes making up the said \$9,500; that the sum was secured by a deed of trust upon the storehouse of the said F. T. Blanchard; and that—

"It is further true that the amounts have been paid which are referred to in said bill of complaint, and that the balance unpaid on the said deed of trust is correctly stated."

The answer denies that the bank was under any obligation to go out of the state into the state of Tennessee to pursue remedies against Neeley, who was a resident of Tennessee, and not of the state of Virginia, and

further denies that there was any uncertainty as to the amount of its debt, or of the prior deed of trust on the property. No replication was filed to this answer at the time the answer was filed. A special replication was made a part of the amended and supplemental bill hereinafter referred to. This replication will be referred to later.

At the February term, 1917, the appellant filed an amended and supplemental bill. This bill sets out more in detail than the original bill the efforts of the appellant to get the bank to collect the notes or bonds of Neeley and its refusal to do so, and indirectly charges collusion between the bank and Neeley. It alleges, for the first time, payment of the notes secured, and produces the checks of the company, and the original bonds to show their payment, but it is significant that it does not allege that the *debt secured* had been paid. It further charges that the position of the indorsers had been changed since the original bonds were given, whereby Neeley had become the first indorser and the appellant second indorser, and alleged the release of the appellant by reason of the bank's failure to make the money out of Neeley unless it could be shown that Neeley was insolvent. It also makes a special replication to the defendant's answer to the original bill in these words:

"That all of the averments of defendant's answer which are not heretofore referred to in this amended and supplemental bill are here denied and issue is taken upon the same as fully and completely as if a general replication had been filed to said answer."

The prayer of this bill, among other things, is that the original bill be treated as a part of this amended and supplemental bill as fully as if said original bill were here copied into this bill. There is a further prayer that the defendant be required to answer each and every allegation of said amended and supplemental bill, and that it answer all of said allegations fully and truthfully, but not on oath.

[1-3] The complainant does not profess to have discovered any new evidence since the filing of his original bill, and in fact assigns no reason or necessity for filing it. If the debt of the appellee had been paid, the appellant knew it as well when the original bill was filed as when he filed his amended and supplemental bill, and yet no reference is made in the original bill to any such payment. It is a significant fact that nowhere in the pleadings does the appellant charge that the debt of the appellee has been paid. The deed which he executed secured the debt and not merely the evidence of it. It not only secured the debt, but all renewals thereof, in whole or in part, and it remained a security for the debt until it was paid, unless there was some novation of the debt, which is not claimed. The defendant, in answer to this bill, says that the notes were not paid—

"except those particular notes might have been paid as stated, but notes in their stead were given, which is frequently the custom of the bank where notes are not paid, but only renewed."

And further:

"This defendant insists that the notes now held by it are not paid, and are covered by the deed of trust in question, and are a charge upon the storehouse and lot."

There was a general replication to this answer. Inasmuch as the appellant had, in his original bill, admitted that the trust deed was a security for the notes dated April 30, 1913, and that the balance due thereon was \$4,458, and the defendant, in its answer to that bill, had stated that complainant had correctly set forth the notes held by it and the balance due thereon, the replication made to this answer cannot have the effect of denying this statement of the answer, which was simply a concurrence in the admissions of the bill. There is nothing in the answer to the amended bill which is in any wise in conflict with this statement in the answer to the original bill. Indeed, in the latter answer it is said:

"This defendant now says that there is owing to it by the said complainant the sum of \$4,584, which bears interest from the — day of —, 19—; that the same is just, due, and unpaid; and that it is secured by the said deed of trust involved in this suit."

In view of the fact that the appellant makes no charge in either of his bills that the original *debt* has been paid, but simply that the original *notes* have been discharged, the statement of the answer to the amended bill that the notes now held by the bank were renewals of the original notes cannot be taken as an affirmative allegation which the defendant was bound to prove. The deed secured the original debt, and was a continuing security for the debt and every part thereof until it was paid. If the appellant relied upon its payment, it was incumbent upon him to allege and prove such payment, as that is an affirmative defense. But, as already pointed out, the appellant does not anywhere in his pleadings allege the payment of the *debt*, but, on the contrary, admits in his original bill that the notes dated April 30, 1913, are a part of the debt secured by the deed of trust, and correctly states the balance due thereon. Furthermore, the amended bill prays specifically that the original bill be treated as a part thereof as fully as if it were copied into the amended bill. Under these circumstances, the production of the original bonds secured and of checks for the amount thereof, stamped "paid," dated about the time said bonds fall due, is entirely consistent with the claim of the appellee and the admissions of the appellant that the notes dated April 30, 1913, which are the notes now held by the appellee, are a part of the debt secured by the deed of

trust, and no further evidence was needed to show that said notes were renewals of the original bonds secured. An allegation that the original debt had been paid was as necessary as the proof thereof, but there was no such allegation, and even if there had been the proof offered was insufficient, in view of the appellant's admission in his pleadings. Sundry payments were made to the appellee on the notes dated April 30, 1913, by the F. T. Blanchard Company after that date. There was no oral testimony in the case, and the indorsement of credits on the notes does not show by whom the payments were made, but they do show in each instance what per cent. of the principal of the note was paid each time. The aggregate of these is 52 per cent., which is exactly the amount which the pleadings show was paid from the assets of the F. T. Blanchard Company.

The other questions involved in this cause were abandoned, as will appear from the following statement in the reply brief for the appellant:

"It is contended on the part of the appellant that the notes secured in the deed of trust of date December 21, 1912, are paid, and the appellees contend that they are not paid, and the only question to be decided is whether they are or are not paid."

The real controversy in the case is whether the debt secured has been paid. We are of opinion that such payment has not been shown.

[4] As to the effect of calling for answers to specific interrogatories or allegations, and then waiving oath thereto, see *Johnson v. Mundy*, 123 Va. 730, 97 S. E. 564. If it is desired to waive an answer under oath, we would suggest that, instead of the form in common use, the bill should simply pray that the desired parties "be made defendants to this bill, and, waiving an answer under oath, that," etc.

[5] Objection is made to the decree appealed from on the ground that it is uncertain, because it fails to state from what time the amounts due the bank should bear interest. The decree did not finally dispose of the case, but referred it to a commissioner to take certain accounts, which would of necessity disclose, not only the amount of the bank's claims, but the time from which it bore interest. This decree properly ordered accounts of liens and their priority, before directing a sale under the trust deed.

The other assignments of error have been sufficiently disposed of in what has already been said. We find no error in the decree of the circuit court, and its decree will therefore be affirmed.

Affirmed.

KELLY, J., absent.

(125 Va. 701)

# DUDLEY v. CARTER RED ASH COLLIERIES CO.

(Supreme Court of Appeals of Virginia.  
Sept. 17, 1919.)

## 1. PLEADING $\S$ 400—WAIVER OF REQUIREMENT THAT PLEA BE SWORN TO.

In an action of assumpsit on a contract, not to pay money, but to do a collateral thing, if it was necessary that defendant's plea should be sworn to, under Code 1904, § 3286, plaintiff had the right to waive the provision of the statute enacted for his benefit.

## 2. PLEADING $\S$ 87—DEFENSE TO BE MADE BY DEMURRER OR PLEA AND NOT BY MOTION TO DISMISS.

In actions at law, where no question is raised as to the validity of the process and its due execution, while the court has jurisdiction of the subject-matter and parties, defense can be made only by demurrer or plea, and motion cannot be made to dismiss on the ground there is no liability of defendant to plaintiff.

## 3. CORPORATIONS $\S$ 514(2)—MOTION TO DISMISS ON GROUND AMOUNTING TO GENERAL ISSUE ERROR.

In an action of assumpsit against a coal company for failure to deliver coal according to contract, the court erred in dismissing the action, on motion of an administrator, not a party to the action, for dismissal on the ground that defendant company was not a corporation, etc., a defense amounting to the general issue and which should have been so pleaded.

## 4. ASSUMPSIT, ACTION OF $\S$ 20—MATTER AMOUNTING TO GENERAL ISSUE MUST BE PLEADED.

In assumpsit, matter which amounts to the general issue of non assumpsit must be so pleaded.

## 5. CORPORATIONS $\S$ 517—AFFIDAVIT DENYING INCORPORATION WITH PLEA RAISING ISSUE WHERE DEFENDANT NOT INCORPORATED.

If defendant, sued in assumpsit, as a corporation, desired to contest the fact of its incorporation, and to throw on plaintiff the necessity of proving it, it was necessary, under Code 1904, § 3280, that with the plea putting the matter in issue there should have been an affidavit denying the incorporation.

## 6. PLEADING $\S$ 8—ON AFFIDAVIT DENYING DEFENDANT'S INCORPORATION, ACCOMPANYING PLEA NEED NOT BE WRITTEN.

In an action of assumpsit against a corporation, if the affidavit denying the fact of defendant's incorporation accompanied a plea of non assumpsit, it was not necessary that the plea should have been in writing.

## 7. PLEADING $\S$ 339—WITHDRAWAL OF DEFENDANT'S PLEA ON MOTION OF ONE NOT A PARTY ERROR.

In assumpsit against a coal company, the trial court erred in allowing defendant company's plea of non assumpsit to be withdrawn on the motion of an administrator not a party.

Error to Circuit Court, Tazewell County.

Action by Dudley, trading, etc., against the Carter Red Ash Collieries Company. To review judgment of dismissal, plaintiff brings error. Judgment reversed and annulled, and cause remanded with direction.

R. O. Crockett, of Tazewell, and Jas. S. Kahle, of Bluefield, W. Va., for plaintiff in error.

**BURKS, J.** The plaintiff brought his action of assumpsit against the defendant to recover damages for failure to deliver according to contract certain coal which he had purchased of the Domestic Coal Company. The declaration contained the general counts and two special counts. The special counts set out, in varying form, the contract between the plaintiff and the Domestic Coal Company, and averred that the latter company had, in due form, changed its name to that of the Carter Red Ash Collieries Company, and that this company had assumed and taken over all existing contracts of the said Domestic Coal Company, with all liabilities on account of the same, and especially the liabilities of said last-mentioned company to the plaintiff. The special counts then set forth with the necessary particularity the undertakings of the defendant and the breach thereof. There was no demurrer to the declaration. It averred that the defendant was a corporation, and it is not claimed that it does not state a case for recovery if the facts therein alleged were proved. There was filed with the declaration an itemized statement of the plaintiff's claim against the defendant, supported by his affidavit to its correctness.

[1] The case was regularly matured at the rules, and, at the next succeeding term of the court, the defendant appeared and pleaded non assumpsit, and issue was joined thereon and the case continued. This plea was not sworn to. This was not an action on a contract for the payment of money, but to do a collateral thing, and, if it was necessary that the plea should have been sworn to, the plaintiff waived the provision of the statute which was enacted for his benefit, as he had the right to do. Code 1904, § 3286; Price v. Marks, 103 Va. 18, 48 S. E. 499; Lewis v. Hicks, 96 Va. 91, 30 S. E. 466; Spencer's Adm'r v. Fields, 97 Va. 38, 33 S. E. 380. For discussion and citation of cases, see Burks' Pl. & Pr. § 91.

[2-6] At the next term of the court, after issue had been thus joined, Garland H. Carter, administrator of the estate of E. R. Carter, deceased, by his attorneys, moved the court that the plea of the general issue theretofore filed by the Carter Red Ash Collieries Company be withdrawn, which motion was resisted by the plaintiff, and the court al-

lowed such plea to be withdrawn, to which ruling of the court the plaintiff excepted. Thereupon the plaintiff moved the court to require the Carter Red Ash Collieries Company to again plead, and that the writ of inquiry be executed, which motion was overruled and the plaintiff excepted. Garland R. Carter, administrator of the estate of E. E. Carter, deceased, then tendered his motion in writing supported by affidavit, to dismiss the case upon the grounds that the Carter Red Ash Collieries Company was not a corporation, stating that the name of Domestic Coal Company has never been changed, and that Carter Red Ash Collieries Company is not the new or changed name of Domestic Coal Company, to the filing of which motion the plaintiff objected, which objection was overruled. The motion was filed and the plaintiff excepted. The plaintiff then moved the court to strike out such motion, which motion was overruled and the plaintiff excepted, and all matters of law and fact were then submitted to the court for adjudication. Evidence was introduced before the court, and by its final order entered in September, 1918, the said court dismissed the case, to which ruling of the court the plaintiff excepted.

The effect of this procedure was to permit a third person, to wit, Garland R. Carter, administrator of E. E. Carter, deceased, not sued nor in any way a party to the action, to come into the action by motion and deny that the defendant was, or ever had been, a corporation; to deny that the Domestic Coal Corporation had ever changed its name, or that the defendant had ever undertaken or promised as is in the declaration alleged, and to aver that "the said promises and undertakings in the declaration mentioned, if any such were made, were made by the Domestic Coal Company, a corporation," and not by the defendant. Such a procedure is unknown to the common law or to the practice in this state. Not only did Garland R. Carter, administrator, have no right to thus inject himself into litigation of other persons, but the defendant itself could not have made such a motion. In actions at law where no question is raised as to the validity of the process and the due execution thereof, and the court has jurisdiction of the subject-matter and the parties, defense can only be made by demurrer or plea. A motion cannot be made to dismiss a case because there is no liability on the defendant to the plaintiff. We have no such practice. The defense sought to be set up by the motion went to the foundation of the plaintiff's right of recovery, and denied facts which the plaintiff was obliged to prove in order to maintain his action. This amounted to the general issue and hence should have been so pleaded. Baltimore &

O. R. Co. v. Polly, 14 Grat. (55 Va.) 447; Catron v. Bostic, 123 Va. 355, 96 S. E. 845. But Garland R. Carter, administrator, was not before the court, and could not tender this or any other plea in the cause, nor could he, indirectly by motion, accomplish any such result. He was not before the court, and could not be either required or allowed to plead. Even the defendant, who had been served with process and was before the court, could not have made such defense by motion, but would have been required to plead the general issue of non assumpsit, because matter which amounts to the general issue must be so pleaded. The general issue of non assumpsit on an unsealed contract is one of the broadest general issues known to our system of pleading, and it is said that anything may be shown under it except tender, bankruptcy, and the act of limitation, and that these defenses are excepted because they do not contest liability, but only that no action can be maintained therefor. Va. Fire & Marine Ins. Co. v. Buck, 88 Va. 517, 519, 13 S. E. 973; 4 Minor's Inst. 641.

The defendant, however, was sued as a corporation, and, if it desired to contest the fact of its incorporation and to throw upon the plaintiff the necessity of proving it, it was necessary, under section 3280 of the Code (1904), that, with the plea which put the matter in issue, there should have been an affidavit denying such incorporation. If the affidavit accompanied a plea of non assumpsit, it was not necessary that the plea should have been in writing. Moreland v. Moreland, 108 Va. 93, 60 S. E. 730. In the case at bar, an affidavit accompanied the motion, but the motion itself was unavailing.

[7] A further error was committed in allowing the plea of non assumpsit filed by the defendant to be withdrawn on the motion of Garland R. Carter, administrator of E. E. Carter. The defendant alone, in person or by its attorney, could withdraw its plea. Carter had no power over it. The result of the errors aforesaid was to try an issue between the plaintiff and a third person whom he had not sued, and who was not a party to the suit. A recognition of the validity of such a proceeding would destroy the orderly conduct of judicial proceedings and seriously jeopardize the rights of litigants. The judgment of the circuit court will therefore be reversed and annulled, and the cause remanded to that court with directions to set aside all orders and proceedings in the cause subsequent to its order of December 12, 1917, and to proceed to the trial of the case upon the pleadings as they then stood and such additions thereto as may seem to the court proper to attain the ends of justice between the parties litigant.

Reversed.

(125 Va. 626)

# CLARK et al. v. REYNOLDS.

(Supreme Court of Appeals of Virginia.  
Sept. 17, 1919.)

1. TRIAL  $\S$ 105(2) — HEARSAY TESTIMONY, UNOBJECTED TO, GOOD.

Hearsay testimony, unobjected to, is good.

2. EASEMENTS  $\S$ 5—EVIDENCE OF RIGHT OF WAY BY PRESCRIPTION.

Complainants, in suit to enjoin and restrain defendant from interfering with the use of a private road or right of way through his premises, under the facts held entitled to a right of way by prescription.

3. EASEMENTS  $\S$ 5—PRESCRIPTIVE RIGHT OF WAY NOT AFFECTED BY OTHER ACCESS TO LAND.

A prescriptive right in a right of way, implying an original grant, is in no way dependent upon or affected by the fact that there may be other ways of reaching the dominant land.

4. ESTOPPEL  $\S$ 78(3) — VIOLATED CONTRACT NO DEFENSE IN SUIT TO ENJOIN INTERFERENCE WITH RIGHT OF WAY.

Defendant, in suit to enjoin and restrain interference with complainants' use of a private road or right of way through his premises, cannot defend his position by the terms of a contract regarding the right of way which he himself had disregarded.

5. EASEMENTS  $\S$ 51—USE OF RIGHT OF WAY FOR OTHER LAND THAN AGREED.

A landowner has a right, as owner of an undivided interest in two tracts, served by a right of way over the premises of another, to use of the way in going to and from both of his tracts; but he cannot go out of the limits of the way, nor use it as an easement for the benefit of any other place than that for which it was originally established.

6. EASEMENTS  $\S$ 31 — ABUSE OF RIGHT OF WAY DOES NOT EXTINGUISH IT.

That the owners of right of way over private premises have abused the easement, by driving out of the limits of the way and trespassing on the servient land, does not extinguish the easement; the injured owner of the servient land having an adequate remedy by action for damages or suit for injunction.

Appeal from Circuit Court, Washington County.

Suit by Mrs. Martha Clark and another against Johnson Reynolds. From a decree for defendant, complainants appeal. Decree reversed, and decree entered for complainants.

L. P. Summers, of Abingdon, for appellants.  
Jno. J. Stuart, of Abingdon, for appellee.

KELLY, J. This suit in equity was brought by Mrs. Martha Clark and her son, William Clark, against Johnson Reynolds, to enjoin and restrain him from interfering

with their use of a private road or right of way through his premises. The relief prayed for was denied them by the circuit court, and the Clarks brought this appeal.

There is some marked conflict of testimony, but a careful consideration satisfies us that the weight of the evidence supports the following statement:

Shortly prior to November 13, 1874, Traynor Sullins, who was the father of Martha Clark and the grandfather of William Clark, acquired a small tract of land from John Thompson, and on the last-named date conveyed a part thereof containing  $8\frac{1}{2}$  acres to Samuel Clark, his son-in-law, and the husband and father, respectively, of the complainants in this suit. Subsequently William Clark purchased (from Abel Clark, who in turn had purchased from Sullins) an additional 4 acres of the tract originally acquired by Sullins from Thompson. This 4 acres is adjacent to and immediately north of the  $8\frac{1}{2}$  acres. Samuel Clark is dead. His widow and children still own the  $8\frac{1}{2}$  acres, and William Clark still owns the 4 acres. Mrs. Clark resides upon the former tract, but William Clark resides upon a nearby piece of land acquired from another source.

The land bought by Sullins from Thompson lay within the exterior lines of a larger boundary, which was and is traversed by one of the public roads of the county. This larger boundary was owned by one A. R. Mallicote, and Thompson acquired from him a part thereof, which embraced the Sullins land. The Thompson land, including the part conveyed to Sullins, all lay north of the county road, but did not extend to or touch it at any point.

When Sullins purchased from Thompson, Mallicote still owned the land between that purchase and the public road, and there was a private road leading from the Thompson land to the public road on the south. At that time Thompson and Mallicote pointed out the road to Sullins, and told him that was his road. This fact is shown by the testimony of Mrs. Clark and of Joseph Sullins, a son of Traynor Sullins, both of whom were familiar with the transaction and testified with convincing clearness and definiteness upon the subject.

[1] Some of the statements of Mrs. Clark appeared to be based upon what her father and husband repeated to her as having been said to them by Thompson and Mallicote; but this portion of her testimony was elicited from her upon cross-examination, and was not made the subject of objection or exception, either in this court or in the court below. Hearsay testimony not objected to is good. *Newberry v. Watts*, 116 Va. 730, 736, 82 S. E. 703. The testimony of Sullins was a direct account of what he heard Thompson and Mallicote say. There was objection to his testimony on the ground that Mallicote was dead, but the objection was manifestly

not well taken. Joseph Sullins was no party to the transaction, and had no pecuniary interest therein.

Soon after the purchase of the  $8\frac{1}{2}$ -acre tract of land by Traynor Sullins, he and his son-in-law, Samuel Clark, each built homes thereon and moved into the place over the road which led to it, and which had been previously pointed out to them as theirs by Thompson and Mallicote. The road thus pointed out to and traveled by them is the road in controversy here, and from that time on for 40 years they used the same without question from anybody, and to all substantial intent and purposes it was not used by any other persons except those owning or subsequently acquiring parts of the original Mallicote lands. There was more or less occasional use of the road by strangers, but no general use by the public in any such sense as rendered the use by the Clarks dependent upon or in common with its use by others. For many years after the purchase by Sullins, Mallicote remained the owner of the land lying to the south and extending to the public road, and never once raised a question as to the use of the right of way by Sullins or the Clarks. Phillip Reynolds, the father of Johnson Reynolds, the defendant here, succeeded Mallicote as the owner of this intervening land, and continued to own the same for about 20 years, during all of which time he likewise acquiesced in its use by the Clarks without complaint or question. There are some expressions in the testimony for the complainants to the effect that they used the road with the consent or permission of Mallicote and Reynolds, but it is abundantly clear from the testimony as a whole that the meaning of the witnesses was that this so-called consent and permission was merely such an acquiescence and recognition of a right as would be expected from and obligatory upon the owner of lands through which other persons were lawfully using an established right of way. There is no just foundation in the evidence for any contention that the use of the way was in a legal sense by permission or under a license.

About 3 years before this suit was brought Johnson Reynolds, the defendant, became the owner of the land over which the right of way passes. Shortly thereafter unpleasantness arose between him and some of the Clarks, with the result that he finally put a lock on the gate opening from the county road into the private way, and denied, as he now denies in his answer, that complainants had any legal right to the way through his place.

Pending the difficulties which had arisen between Johnson Reynolds and the Clarks, Reynolds and Davis Clark, one of Mrs. Martha Clark's sons, agreed upon a settlement, and Reynolds signed a contract evidencing the same, which was introduced in evidence over his objection, but upon which he now

seems to rely to some extent as sustaining his position in this case. This contract will be adverted to again, but is not in our view very material to a decision of the controversy.

[2] Upon the foregoing facts, we have no difficulty in holding that the complainants have shown themselves entitled to a right of way by prescription. The roadway was in existence when Traynor Sullins bought from Thompson. Its origin was not shown. It may have been actually granted by Mallicote to Thompson, the grantor of Traynor Sullins. It is true that James H. Thompson, a son of John Thompson, testified that he did not remember that his father ever claimed a right of way over the road in question, but the testimony of this witness, taken as a whole, is altogether too vague, uncertain, and non-committal to be entitled to much weight.

The case, so far as concerns the right of complainants to the road in question as a means of ingress and egress to and from the Sullins' land, is controlled by well-settled and familiar principles which are fully discussed in a number of comparatively recent cases decided by this court. *Reid v. Garnett*, 101 Va. 47, 43 S. E. 182; *Williams v. Green*, 111 Va. 205, 68 S. E. 253; *Kent v. Dobyens*, 112 Va. 586, 72 S. E. 139; *Witt v. Creasey*, 117 Va. 873, 86 S. E. 128; *Muncy v. Updyke*, 119 Va. 636, 89 S. E. 884.

[3] There was evidence tending to show that there had formerly been and was still probably available to the Clarks a right of way leading through what is now and has for many years been an abandoned lane to an open private, but uncontested, roadway extending down to the county road at the opposite side of the Clark land from that at which the controverted road enters the premises; and it is contended that this latter road is the route the Clarks ought to use to the exclusion of the other way. There are several very satisfactory answers to this contention. The Clarks clearly have a right to go the other way. This is a prescriptive right, which implies an original grant in no way dependent upon or affected by the fact that there may be other ways of reaching the land. Furthermore, the right of way suggested as a substitute for the one in controversy so far as it involves the use of the old abandoned lane, is one to which it is not shown that the complainants have any established legal right. The lane has been closed for many years, and could only be opened again as a matter of grace on the part of the owners of the land through which it passes. Still further, although the suggested substitute is a somewhat shorter way of going from the Clark land to the public road, parts of it are practically impassable for wagons and teams.

Coming now to deal briefly with the contract mentioned above, David Clark, in an effort to settle the controversy with Johnson

Reynolds, met with him in Abingdon, and the two agreed upon the following paper, which was signed, acknowledged, and recorded, to wit:

"March 16, 1914.

"This is to certify that Johnson Reynolds this day has agreed that Mrs. Martha Clark, the widow of the late Samuel Clark, shall have a right of way on the old road that has been used by her and her heirs *airs* and the said David Clark and heirs of the said Martha Clark, has this day paid the said Johnson Reynolds \$5.00 on gates on said road, and also the said David Clark is to help the said Johnson Reynolds to make the gates on said road and the said Johnson Reynolds that any one looking after the interest of the said Martha Clark shall have the same *privilege* to the said road.

"Witness the following:

"Johnson Reynolds. [Seal.]"

[4] As already indicated, this contract was introduced in evidence, not by Reynolds, but by the complainants themselves, and its introduction was strenuously opposed by Reynolds. There seems to be some contention now on the part of Reynolds that this contract can be construed as a recognition on the part of Mrs. Clark and William H. Clark of the right of Reynolds to stop their use of the way. We do not take this view of the contract. While it is true that David Clark paid Reynolds \$5 for the contract, the paper on its face shows a recognition of the old road, and although it does not purport to accord the Clarks the full rights to which they are entitled under their prescriptive right of way, it does give them very much wider rights than those which Reynolds is now willing to allow them. As a matter of fact, he has, according to the record, plainly violated the terms of this contract, and it is very certain that he cannot be allowed to defend his position in this suit by the terms of a contract which he himself has disregarded.

We are of opinion that the complainants are entitled to the relief prayed for in their bill, which is the establishment and protection of the right of way in question from the 8½ acres to the public road.

[5] It appears, however, from the evidence that William Clark, who, as shown above does not live on the 8½-acre tract, has at times been using the private road in question for the purpose of hauling to and from the land upon which he now resides, and that he proposes to continue such use of the private road when it may suit him. He has no legal right to do this. He has a right, as the owner of an undivided interest in the 8½-acre tract and as the sole owner of the 4 acres subsequently acquired by him from Sullins, to the use of the way in going to and from both of the last-named parcels of land (*Lankenhooker v. Graybill*, 80 Va. 839; 14 Cyc. 1190, 1191); but he cannot go out of the limits of the way, nor use it as an easement for the benefit of any other place than that

for which it was originally established (Springer v. McIntire, 9 W. Va. 196; Shaver v. Edgell, 48 W. Va. 502, 37 S. E. 664).

[6] There is some evidence in the record tending to show that at times the use of the right of way in question has been abused by the complainants by driving out of the limits of the way and trespassing on the adjoining land. There is not, as we understand counsel, any contention that such misuse has amounted to an extinguishment of the way, and if there were such contention it could not be upheld. The defendant has an adequate remedy by action for damages, or, if occasion should demand by a suit for injunction, to correct abuses in the exercise of the complainants' rights.

It follows, from what has been said, that the decree complained of must be reversed, and this court, proceeding to enter the decree which the lower court should have entered, will decree the establishment of the way, but will limit the same to its use as a passageway between the Sullins land and the road, and will enjoin and restrain William Clark from using it for any purposes in connection with his home place.

Reversed.

(125 Va. 730)

### HAYNES et al. v. PETERSON.

(Supreme Court of Appeals of Virginia.  
Sept. 17, 1919.)

#### 1. DEEDS ⇨196(2) — BURDEN ON PLAINTIFF TO PROVE FRAUD AS BASIS FOR CANCELLATION.

In suits for cancellation of deeds on the ground of fraud, the burden of proof rests on plaintiff to prove the allegations on which he seeks relief by satisfactory proof.

#### 2. CONVICTS ⇨3, 4—POWER TO CONTRACT OR CONVEY NOT PROHIBITED BY STATUTE.

There is no statute in Virginia depriving a convict of the power to make contracts or conveyances of his real estate; corruption of blood and forfeiture of estate on conviction of felony as at common law having been abolished by Code 1904, § 3883.

#### 3. CONVICTS ⇨3—RIGHT TO TAKE AND DISPOSE OF PROPERTY NOT AFFECTED BY ATTAINDER OF FELONY.

In Virginia, the right of a person to take, hold, and dispose of his property, real and personal, is not affected by his attainder of felony.

#### 4. CONVICTS ⇨3—APPOINTMENT OF COMMITTEE, WHERE CONVICT HAS DISPOSED OF ESTATE, UNNECESSARY.

The procedure of Code 1904, §§ 4110-4173c, authorizing the appointment of a committee for the estate of a convict to administer his estate and to sue and be sued in respect to it, does not apply where the convict has exercised the right to dedicate his property to the payment

of debts and support of his family before the appointment of a committee.

#### Appeal from Circuit Court, Wise County.

Suit by A. T. Peterson against J. K. Haynes and others. From decree for plaintiff, defendants appeal. Reversed, and bill dismissed.

Coleman & Carter, W. S. Cox, and S. H. Bond, all of Gate City, for appellants.

Bond & Bruce, of Wise, for appellee.

WHITTLE, P. The material facts of this case are these: Appellee, A. T. Peterson, was convicted on two indictments for forgery at the June term, 1910, of the circuit court of Scott county, and on July 9th following was sentenced to confinement in the penitentiary for six years. At the time of his conviction Peterson was heavily indebted, and at the suit of some of his creditors his lands had been rented to pay liens, and other creditors were threatening to bring suit to subject his entire real estate to sale to satisfy their liens by judgments and deeds of trust. In that emergency, on July 8, 1910 (after verdict but before sentence), Peterson executed a power of attorney, appointing his brother, W. P. Peterson, his attorney in fact to sell such of his lands as might be necessary to discharge his debts, and to execute and deliver deeds of conveyance to purchasers. He furthermore authorized and directed his attorney in fact to apply the purchase money as follows: (1) To the payment of all his just debts; (2) to meet the necessary expenses of his family; and (3) the remainder, if any, to be placed in some safe bank to his credit. Then followed a general grant of power to the attorney in fact to do and transact any and all such business for and in behalf of his principal as the latter could do, if present and acting for himself. The instrument was signed, sealed, and acknowledged, and admitted to record.

The attorney in fact subsequently sold the 179 acres of land in controversy to appellants, J. K. Haynes and his wife, B. V. Haynes, for \$2,000, and on January 21, 1911, conveyed the property to them by deed in which the wife of A. T. Peterson united. Several years later Haynes and wife sold and conveyed the land, together with certain live stock, to their coappellant, J. A. Jessee, Jr., for \$3,000. In May, 1914, A. T. Peterson was pardoned and discharged from the penitentiary, and shortly thereafter filed the bill in this case, alleging that at the time of the execution of the power of attorney he had been convicted of felony and was civilly dead and incompetent to contract or transact business of any character, and therefore the power of attorney executed by him was void and of no effect and conferred



no authority upon W. P. Peterson to sell or convey his real estate. The bill also charged that before W. P. Peterson sold the land to Haynes and wife complainant had revoked the power of attorney, and that W. P. Peterson and his grantees and J. A. Jessee, Jr., had notice of the revocation at the dates of their respective purchases; that the sale to Haynes and wife was for a grossly inadequate price; that the parties knew there was no necessity to sell the land for the purposes set forth in the power of attorney, and that only \$1,250 of the purchase money was applied to the purchase mentioned therein; and that Haynes and wife conspired with W. P. Peterson wrongfully and fraudulently to deprive complainant of his property.

After the execution of the power of attorney, and the sale and conveyance of the land to the purchasers and application of the purchase money as directed by the power, W. P. Peterson qualified as committee for A. T. Peterson.

So far as the case involved in this appeal is concerned, the bill prays that the deeds from the attorney in fact to the Hayneses and from the latter to Jessee be canceled and the land restored to complainant. The defendants demurred to the bill, and, their demurrer having been overruled, answered, denying all the material allegations of the bill affecting their good faith, or the validity of their title to the land, and insisting that they were purchasers for valuable and adequate consideration, without notice of any rights or equities in any way impairing their title. The circuit court, by the decree appealed from, set aside both deeds, but made provision for the return of the purchase money in each instance, with interest and the actual cost of permanent improvements put upon the land, subject to a rebate for its use and occupation and any damage that might have been done to the same while in the possession of the purchasers, and that each of the parties pay his own costs, and that no attorney's fee be taxed.

[1] The law is settled that in suits for the cancellation of a deed on the ground of fraud the burden of proof rests upon the plaintiff to prove the allegations upon which he seeks relief by satisfactory proof; the cases generally even holding that fraud must be proved beyond a reasonable doubt.

In this instance, the evidence upon all material allegations is conflicting and, to say the most for it, falls far short of proving bad faith on the part of appellants. It utterly fails to prove a conspiracy between the attorney in fact and appellant J. K. Haynes wrongfully and fraudulently to deprive A. T. Peterson of the land in controversy. To the contrary the evidence preponderates in favor of the view that Haynes and wife were bona fide purchasers of the land at a fair price and without notice of any circumstance

affecting the validity of their title. The same may be affirmed of appellant J. A. Jessee, Jr., who, as stated, subsequently purchased the land from the Hayneses. It is true the decree of the circuit court is silent as to the grounds on which cancellation was granted; yet it bears internal evidence of the fact that it was not decreed on the theory that the defendants had been proved to be guilty of bad faith or fraud, since it restores as far as practicable the status quo of the litigants, and directs that no attorney's fee be taxed, and that each party pay his own costs.

[2, 3] We shall notice briefly the remaining contentions of appellee in support of the decree. The point is stressed that the conviction of A. T. Peterson of a felony and his sentence to the penitentiary rendered him civiliter mortuus and incapable of executing a valid power of attorney. There is no statute in Virginia that deprives a convict of the power to make contracts or conveyances of his real estate, and corruption of blood and forfeiture of estate on conviction of felony as at common law has been expressly abolished by statute. Code, § 3883. So, in Virginia, the right of a person to take, hold, and dispose of his property, real and personal, is not affected by his attainder of felony. 2 Min. Inst. (4th Ed.) pp. 655, 659; 2 Minor on Real Property, § 1096. The above is the prevailing doctrine on the subject in this country in the absence of statutory inhibition. Clark on Contracts (2d Ed.) § 89; Elliott on Contracts, § 266; note to *Harmon v. Bower*, 17 L. R. A. (N. S.) 502.

It is also contended that while A. T. Peterson was confined in the penitentiary he expressly revoked the power of attorney to W. P. Peterson by a letter written to his wife, of which letter his attorney in fact and the purchasers of the land from him had notice before the sale was made. It is denied that the power of attorney in question was a mere naked power, revocable at the will of the principal, because it not only empowered the attorney in fact to sell and convey the land, but moreover dedicated the proceeds of sale to the payment of debts and support of the family, and imposed upon the attorney a trust relation to effectuate those objects, and to deposit the remainder in bank to the credit of the principal. 2 Kent's Com. p. 1057, § 644; *Hunt v. Rousmanier's Adm'r*, 8 Wheat. 174, 5 L. Ed. 589; *Sulphur Mines v. Thompson*, 93 Va. 293, 25 S. E. 232.

It is not necessary, however, to decide that question, since we do not think the evidence sustains the contention that A. T. Peterson wrote such a letter to his wife. He did not testify on the subject, and the evidence of his wife with respect to the letter is weakened by the fact that after the alleged receipt of it she voluntarily united with the attorney in fact in conveying the land to the

purchasers and acknowledged the deed for record.

The remaining contention is that the provisions found in chapter 202 of the Code, authorizing the appointment of a committee for the estate of a convict sentenced to confinement in the penitentiary for more than one year, to administer his estate, and to sue and be sued in respect to it, afforded the only remedy by which his estate could be subjected to the payment of debts.

[4] There is no statute or decision in this state that denies to a convict the right to contract, acquire, hold, and dispose of property, and obviously the procedure provided by chapter 202 does not apply where the convict has exercised the right to dedicate his property to the payment of debts and support of his family before the appointment of a committee.

Upon the whole case, we are of opinion that the decree of the circuit court is erroneous and must be reversed, and this court will enter such decree as the trial court ought to have entered, and dismiss the bill, with costs. Reversed.

(125 Va. 530)

# ADAMS EXPRESS CO. v. ALLEN.

(Supreme Court of Appeals of Virginia.  
Sept. 17, 1919.)

## 1. CARRIERS $\S$ 105(2) — CHARGEABLE WITH NOTICE OF INTENDED IMMEDIATE USE OF HOG CHOLERA SERUM.

Express company, by which the department of agriculture of Virginia made a shipment of hog cholera serum, informed that it was such serum, and of the importance of prompt dispatch, while the words "Please rush" appeared on the face of the express receipt, *held* chargeable with notice that the serum was intended by the consignee for preventive treatment of hogs.

## 2. DAMAGES $\S$ 5—RECOVERED BY CONSIGNEE FROM CARRIER FOR DELAY IN SHIPMENT GENERAL AND NOT SPECIAL.

Damages recovered by the consignee of hog cholera serum from the express company which carried the shipment, and which was chargeable with knowledge of its intended use as a preventive, being for the loss of hogs through disease which might have been prevented but for delay in delivery, *held* "general" and not "special" damages, having been such as arose naturally from the breach of the contract itself and such as may reasonably be supposed to have been in the contemplation of both parties.

## 3. CARRIERS $\S$ 153—PROVISIONS IN EXPRESS RECEIPT NOT LIMITATION OF LIABILITY BY DECLARATION OF VALUE.

Provisions in the face and on the back of an express receipt for hog cholera serum shipped *held* not to have limited the liability of the express company to the sum of \$50, there hav-

ing been no value declared by the shipper, but merely the C. O. D. charge stated.

## 4. CARRIERS $\S$ 150—LIMITATION OF LIABILITY FOR NEGLIGENCE IS VOID.

Under Code 1904,  $\S$  1294c, subsec. 24, an attempted limitation of the liability of a common carrier is void where the injury or loss is occasioned by the negligence or misconduct of the carrier.

## 5. APPEAL AND ERROR $\S$ 861(2), 757(3)—ASSIGNMENT COMPLAINING OF ADMISSION OF EVIDENCE NOT POINTED OUT NOT CONSIDERED.

Where neither in the petition for writ of error nor in the brief is the evidence pointed out which plaintiff in error charges was illegally admitted over objection, under the rule the assignment of error will not be considered.

## Error to Circuit Court, Lee County.

Action by W. P. Allen against the Adams Express Company. To review judgment for plaintiff, defendant brings error. Affirmed.

This is an action at law by notice of motion instituted in the court below by the defendant in error against the plaintiff in error to recover \$1,500 damages for the loss of 52 hogs by death from hog cholera alleged to have resulted from the deprivation of the plaintiff of the use of certain hog cholera serum as a preventive treatment of the hogs for that disease by reason of the unreasonable delay in the transportation of such serum.

The parties will be hereinafter referred to in accordance with their positions in the court below.

There was a trial by jury; a verdict and judgment for the plaintiff.

The following are the material facts bearing upon the assignments of error of the defendant:

On October 6, 1917, between 2 and 3 o'clock p. m., the department of agriculture of the state of Virginia, through its chief clerk, delivered to the defendant at its receiving office in Richmond, Va., a package, containing sufficient hog cholera serum for treatment of 100 hogs, to be transported "C. O. D." to the plaintiff, W. P. Allen, at Wheeler, Va., and such chief clerk of the department of agriculture at the time "personally urged upon the receiving clerk" (of the defendant) "the importance of the prompt dispatch of the package on the Norfolk & Western train leaving \* \* \* (Richmond) at 9:35 p. m." of that day. The package was accepted by defendant and an express receipt (the draft of which was prepared by the department of agriculture by using a printed form therefor and filling in the words underscored in the copy given below) was given by the defendant therefor, which, so far as material, was as follows:

*"Please Rush.*

**"Uniform Express Receipt.**

"The company will not pay over \$50 in case of loss or 50 cents per pound, actual weight, for any shipment in excess of 100 pounds, unless a greater value is declared and charges for such greater value paid.

"Adams Express Co.

"Nonnegotiable Receipt. 10-6-1917.

"Received from *Dept. of Agriculture*, subject to the Classifications and Tariffs in effect on the date hereof, *1 box hog cholera serum*. Value herein declared by shipper to be *C. O. D. fifty-six and 75/100 dollars*.

"Consigned to *W. P. Allen, at Wheeler, Va.*

"Which the company agrees to carry upon the terms and conditions printed on the back hereof, to which the shipper agrees and as evidence thereof accepts and signs this receipt.

"NOTE.— \* \* \* If the shipper desires to release the value to \$50.00 for any shipment of 100 pounds or less, or not exceeding fifty cents per pound actual weight for any shipment in excess of 100 pounds, the value may be released by inserting 'not exceeding \$50' or 'not-exceeding fifty cents per pound,' in which case the company's liability is limited to an amount not exceeding the value so declared or released.

"3 P. M."

There are the following material provisions on the back of the receipt:

"1. The provisions of this receipt shall inure to the benefit of and be binding upon the consignor, the consignee, and all carriers handling this shipment. \* \* \*

"2. In consideration of the rate charged for carrying said property, which is dependent upon the value thereof and is based upon an agreed valuation of not exceeding fifty dollars for any shipment of 100 pounds or less, and not exceeding fifty cents per pound, actual weight, for any shipment in excess of 100 pounds, unless a greater value is declared at the time of shipment, the shipper agrees that the company shall not be liable in any event for more than fifty dollars for any shipment of 100 pounds or less, or for more than fifty cents per pound, actual weight, for any shipment weighing more than 100 pounds, unless a greater value is stated herein. Unless a greater value is declared and stated herein the shipper agrees that the value of the shipment is as last above set out and that the liability of the company shall in no event exceed that value."

The foregoing was all that is material which transpired between the shipper of the serum, or any one else, and the defendant at the time of the contract of shipment.

The further material facts shown in evidence in the case are as follows:

That hog cholera serum is used but for one purpose, namely, for treatment of hogs as a preventive of the disease of hog cholera. That at the time of the shipment aforesaid such serum could not ordinarily be obtained in Virginia elsewhere than from the department of agriculture aforesaid. That the chief clerk of that department did not know "of

any other person or firm that handles this serum outside of (his) office." That the plaintiff knew of no other source in Virginia from which it could be obtained. And that according to the laws of the adjoining states of Tennessee and Kentucky it could not be obtained from the agricultural department of those states by a citizen of Virginia and those departments alone handled the serum in those states. That it is recognized to be effective in preventing cholera in 90 per cent. of cases treated. That the plaintiff being apprehensive of cholera among his hogs (which were 69 in number), and "knowing that Richmond was the place to order this serum from," on October 5, 1917, wired an order to Mr. Kolner, the commissioner of agriculture, to send to him at Wheeler, Va., his express office, serum for 100 hogs. This order was received at the office of said department the next day, and the shipment was delivered to the defendant for transportation that afternoon as aforesaid.

Instead of being shipped from Richmond on October 6th by the 9 p. m. train as urged by the said department, as above stated, the shipment was not started from Richmond by the defendant until October 13th, seven days later; and there is no evidence in the case tending to justify or explain this delay.

The jury found, upon ample evidence to support the verdict, that the 52 hogs were lost by death from hog cholera by reason of said delay in the transportation of the serum aforesaid, and that the value of the hogs so lost was \$1,000; that being the amount of the verdict of the jury in favor of the plaintiff.

Coleman & Carter, of Gate City, for plaintiff in error.

J. C. Noel, of Pennington Gap, for defendant in error.

SIMS, J. (after stating the facts as above). The assignments of error by the defendant raise but three questions for our consideration, which we will pass upon in their order as stated below.

[1] 1. Will it be considered that the defendant, at the time of its acceptance of the hog cholera serum for transportation to the plaintiff, knew of the purpose for which the plaintiff had ordered the serum, namely, for use by him as a preventive treatment of his hogs for the disease of hog cholera, merely from the information given defendant at the time by the shipper, namely: That it was hog cholera serum; that the words "Please rush" appear on the face of the express receipt asked of and given by defendant; and that the shipper at the time urged upon the defendant the "Importance of the prompt dispatch of the package on the Norfolk & Western train leaving \* \* \* at 9:35 p. m." of that day? or was express notice, in so many words, of the use for which the article ship-

ped was intended necessary to be given the defendant at the time of its acceptance thereof, before the defendant can be considered as having had knowledge at such time of such intended use?

The first portion of the question must be answered in the affirmative, and the latter portion in the negative.

As shown in evidence, as set forth in the statement preceding this opinion, hog cholera serum is used but for one purpose only, and that is the purpose in question. In the absence in the record of any evidence showing that the defendant may have had some other understanding of what was the use to which the serum might be put, it must be assumed that, when defendant was informed that it was hog cholera serum which it was asked to transport, that information also conveyed to it the further information that its intended use was for preventive treatment of hogs for the disease of hog cholera. That was the ordinary, the usual, and the only use to which such article could be put. It is well settled that special information does not have to be given to a carrier of the ordinary and usual use to which an article shipped is to be put in order to render the carrier liable for damages resulting from the loss of such ordinary and usual use, by reason of unreasonable delay in the transportation of the article. Indeed, such rule has never been questioned since the leading case of *Hadley v. Baxendale*. Actual notice to the carrier of the precise use to which the article shipped is to be put has never been held by the authorities on the subject as requisite, except when damages are claimed for loss of some special use to which the article was intended to be put, different from its usual and ordinary use. And, even in such cases, information given the carrier of peculiar features of an article having a special as well as an ordinary use, or that information as given by the name of the consignee and the appearance of the article itself, may often be sufficient to charge the carrier with knowledge of the special use to which the consignee of the goods intends to put them. *Story Lumber Co. v. So. Ry. Co.*, 151 N. C. 23, 65 S. E. 460, and cases therein cited; 8 R. C. L. § 28, p. 462.

The only source from which we feel that any uncertainty could have arisen in the mind of the defendant in the instant case as to the intended use by the consignee of the hog cholera serum would have been over some uncertainty as to whether the consignee was a merchant or dealer in serum, rather than the intended user of it. But the evidence in the instant case excludes all probability of such an uncertainty having arisen, for there is nothing in the name of the plaintiff, the consignee, as it appears on the express receipt, or waybill, in evidence, to suggest that he was a merchant or dealer in the serum; and the other evidence in the case,

noted in the statement preceding this opinion, negatives the idea that there was any merchant or dealer in the serum in the state other than the shipper, the department of agriculture of the state. It was easily in the power of the defendant to have shown that it had transported or expected to be called upon to transport shipments of such serum to others than intended users of it, if such had been the fact. In the absence of such proof, in accordance with the well-known rule on the subject of the inference to be drawn under such circumstances from evidence not in itself conclusive, the conclusion is irresistible that such was not the fact, and that there was no uncertainty on the subject in the mind of the defendant at the time of the contract of carriage, and that it knew that it was to transport the serum to the plaintiff for his use and for the ordinary and only use aforesaid to which it was expected to be put.

[2] 2. The purpose for which the serum was intended to be used, being the ordinary (and indeed only) purpose for which it is used, and that purpose being actually or constructively known to the defendant at the time of the contract of carriage, are the damages which the plaintiff recovered by the verdict and judgment under review general or special damages?

In such case it is obvious that the damages in question are general and not special damages.

The damages in the case before us arose, not out of any special circumstances not likely to have been in contemplation of the parties at the time they made the contract, but they arose "naturally—that is, according to the usual course of things—from the breach of the contract itself," and were such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. *Hadley v. Baxendale*, supra (9 Exch. 341, 23 L. J. Exch. 179, 18 Jur. 358, 5 Eng. Cas. 502). They fall directly under the definition of general damages in the leading case just cited and quoted. Such rule is in force in this state as well as generally elsewhere. *Kendall Bank Note Co. v. Commonwealth Saving Fund*, 79 Va. 573; 8 R. C. L. § 25, p. 455.

As said in 3 *Sutherland on Damages* (3d Ed.) § 913:

"Damages are given against a carrier with reference to a particular use for which property is delivered for transportation when such use is brought to his notice at the time of contracting. In a late English case the principle is stated, and said to be settled, that whenever either the object of the sender is specially brought to the notice of the carrier, or circumstances are known to him from which the object ought in reason to be inferred, so that it may be taken to have been within the contemplation of the parties, damages may be recovered for the natural consequences of the failure of that object."

As pointed out above, the property delivered for transportation in the case before us had but one use; and that was also its particular, and ordinary, as well as its only possible, use. Hence the statement of the law by the learned author last quoted is directly applicable to the case before us.

The case is the same in principle as those involving delay in transportation of traveling theatrical companies or their properties, in which the authorities are generally in accord in holding the carrier liable for damages occasioned the consignee by the loss of the peculiar use to which the theatrical company and their properties would have been put but for the unreasonable delay in their transportation. As held in these cases, in substance, while the use in question is peculiar and the resultant damages for the loss of such use are peculiar, as compared with such cases involving delay in delivery of a different character of shipments, the damages are not for that reason special damages. The damages are different from the ordinary damages in cases of delay in the transportation of ordinary merchandise, but they are nevertheless but the ordinary damages from delay in transportation of such peculiar kind of freight. *Weston v. Boston, etc., R. Co.*, 190 Mass. 298, 76 N. E. 1050, 4 L. R. A. (N. S.) 569, 112 Am. St. Rep. 330, 5 Ann. Cas. 825; *Illinois Cent. R. R. Co. v. Byrne*, 205 Ill. 9, 68 N. E. 720. See, also, 1 *Sutherland on Damages*, § 50, and cases of *Hammer v. Schoenfelder*, 47 Wis. 455, 2 N. W. 1129, and *Jones v. George*, 61 Tex. 345, 48 Am. Rep. 280, cited in such section and in the note thereto at page 150, for the same principle involved in the determination of what are special and what are general damages in cases of breach of contract other than contracts of carriage.

The defendant especially relies on the case of *Chapman v. Fargo*, 223 N. Y. 32, 119 N. E. 76, L. R. A. 1918F, 1049, Ann. Cas. 1918E, 1054, as sustaining a contrary view of the law. But an examination of that case discloses that it sustains, in principle, the view above expressed. That case involved the shipment of a moving picture film, and the court held that it did not fall within the principle under consideration, because, while the carrier was held to have had notice at the time of the contract of carriage that the films were to be exhibited by some one, yet, in view of the fact that such films are sent out originally by a central company and are shipped from one place of exhibition to another and finally back to the original sender, it was held that the carrier had no notice that the plaintiff and consignee was to be the exhibitor; or that he owned a theater for which exhibition of the films on an important holiday like Christmas had been specially advertised; or that such films possessed such particular attractiveness for the public that they could not be readily re-

placed; or that on failure to deliver them on a certain day it would be necessary to close the theater or supply their place with films less attractive and less profitable. And the court refers to the theatrical company or scenery cases above cited with approval, distinguishing the case before it from them on account of the features of the facts to which we have above adverted. In this connection, the court in the *Fargo Case* has this to say, concerning the theatrical company or scenery cases aforesaid:

"But the decisions in these cases are entirely in accordance with the general rules which have been stated. As was pointed out in the *Weston Case*, the ordinary result of failure to transport a traveling theatrical company or its properties would be prevention of a performance, and the loss of expected returns from such entertainment would not be special profits or damages but ordinary damages such as were to be anticipated."

And the same is true in the case before us of the loss of the expected benefit from the use of the hog cholera serum.

A great number of other cases are cited and relied on by the defendant. But all of them are either cases involving the transportation of parts of mill machinery, as to which the rule has been settled, since the *Hadley and Baxendale Case*, that loss of profits resulting from the shutting down of the mill cannot be recovered as general damages; or they involve transportation of articles of which the intended use was unusual, being different from their ordinary use; or the damages claimed were unusual, being different from those which would ordinarily arise from the loss of the ordinary use of the article. These cases involve the transportation of articles and claims of special damages for loss of special uses of them, of the character which may be briefly alluded to as follows: *Harper Furniture Co. v. So. Express Co.*, 148 N. C. 87, 82 S. E. 145, 30 L. R. A. (N. S.) 483, 128 Am. St. Rep. 588, shaft for mill machinery; *So. R. R. Co. v. Langley*, 184 Ala. 524, 68 South. 545, empty bottles (unusual use and damages); *So. R. R. Co. v. Moody*, 169 Ala. 292, 53 South. 1016, stoves (unusual use and damages); *Plicher v. Central of Georgia Ry. Co.*, 155 Ala. 316, 46 South. 765, material for making boxes (unusual use and damages); *Murrell v. Pacific Ex. Co.*, 54 Ark. 22, 14 S. W. 1098, 26 Am. St. Rep. 17, fruit trees (loss of special contract of sale); *Williams v. Atlantic Coast Line*, 56 Fla. 735, 48 South. 209, 24 L. R. A. (N. S.) 134, 131 Am. St. Rep. 169, orange boxes (loss due to ensuing illness of men employed to pick the oranges); *Produce Reporter Co. v. Adams Ex. Co.*, 176 Ill. App. 74, 77, credit book shipped in part performance of special contract (loss of the special contract); *Stone v. Adams Ex. Co. (Ky.)*, 122 S. W. 200, shaft for machinery in electric plant; *Franklin v. L. & N. R. R. Co. (Ky.)*, 116 S. W. 765, trunk

of goods intended to be followed and sold by plaintiff (loss of time and expenses of latter); *Mather v. Am. Ex. Co.*, 138 Mass. 55, 52 Am. Rep. 258, architect's plan for house, but contents of package undisclosed in any way to defendant; *U. S. E. Co. v. Root*, 47 Mich. 231, 10 N. W. 351, printed posters advertising time, place, etc., of a concert to be given by plaintiff, but contents of package undisclosed in any way to defendant; *Am. Ex. Co. v. Burke*, 104 Miss. 275, 61 So. 312, broken part of printing press shipped as model for duplication of the part (same in principle as mill machinery shipment); *Dunne v. St. Louis*, etc., 166 Mo. App. 372, 148 S. W. 997, wagons and buggies to be sold during a certain session of court (no notice to defendant of special purpose of shipment); *Higgins v. U. S. Ex. Co.*, 83 N. J. Law, 398, 85 Atl. 450, castings for mill machinery; *Harris v. Fargo* (Sup.) 113 N. Y. Supp. 577, camping outfit (notice to defendant that early delivery was "urgent," but none that a camping party would be at the expense of staying at a hotel awaiting arrival of outfit); *Lichenstein v. Fargo*, 66 Misc. Rep. 149, 121 N. Y. Supp. 327, millinery goods of which acceptance refused by consignee (delay in notice of return, loss due to change of style, of the likelihood of which the defendant had no notice); *Cent. R. R. Co. v. Johnson*, 116 Tenn. 624, 94 S. W. 600, piping (unusual use, notice that the piping was "needed very badly," but not for what use, loss that of a special contract of pumping oil); *Pacific Ex. Co. v. Darnell*, 62 Tex. 639, a part of mill machinery.

As to details of fact concerning the quantum of damages, such as, in the instant case, the number of hogs the plaintiff might lose because of unreasonable delay in the transportation of the serum for their treatment and the value of such hogs, the law never requires notice of such details as a basis for recovery of general damages. The sole requisite as to the general damages recoverable is that they must arise "naturally—that is, according to the usual course of things—from the breach of the contract itself," as aforesaid, for then they are "such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it," as aforesaid. *Hadley v. Baxendale*, supra. It is not required that the parties should have then actually considered such damages. The law in such case itself draws the conclusion that they were so considered on the ground that it may be fairly supposed they were so considered. 8 R. C. L. §§ 25, 26, pp. 458, 459.

[3. 4] 3. Do the provisions on the face and on the back of the express receipt set forth in the statement preceding this opinion limit the liability of the defendant to the sum of \$50?

This question must be answered in the negative.

This is not a case in which there was a

declared or released valuation of the article shipped. The amount of "fifty-six and 75/100 dollars" is entered in the express receipt as the "C. O. D." charges which the carrier was to collect; and there is no "inserting" of the words "not exceeding \$50," as the value by which the rate of charge for transportation was to be fixed, and "in which case the company's liability is limited to an amount not exceeding the value so declared or released," as stipulated in the "Note" on the face of the receipt. In view of such express provisions, those on the back of the receipt set forth in the statement preceding this opinion are ambiguous, and it is not clear therefrom or from the other provisions on the subject on the face of the receipt that there was in fact any actual reduction of rate of charge in view of an actually agreed valuation of the article shipped—I. e., it is not entirely clear that this particular contract attempted to limit the liability of the carrier.

But if it were conceded that the contract of carriage attempted to limit the liability of the defendant to the sum of \$50, in consideration of the rate of charge for the transportation of the property, notwithstanding some differences of opinion on the question when it arose under another statute (see *Richmond & Danville R. R. Co. v. Payne*, 86 Va. 481, 10 S. E. 749, 6 L. R. A. 849, and *C. & O. Ry. Co. v. Beasley*, 104 Va. 788, 52 S. E. 566, 3 L. R. A. [N. S.] 183), the rule in this state is now firmly settled that under our statute (subsection 24 of section 1294c, 1 Pollard's Code 1904, which was enacted subsequently to the decisions last cited and in addition to and different in its phraseology from the statute in this state on the subject previously existing, section 1296, Code 1887; subsection 25, § 1294c, 1 Pollard's Code 1904), as to intrastate shipments, such attempted limitation of liability is void where the injury or loss is occasioned by the negligence or misconduct of the carrier. *C. & O. R. Co. v. Pew*, 109 Va. 288, 64 S. E. 35; *So. Ex. Co. v. Keeler*, 109 Va. 459, 64 S. E. 38. We cannot be governed therefore by a contrary rule in other jurisdictions, which is unaffected by such a statute as we have in Virginia, and hence a discussion of authorities from such jurisdictions relied on by defendant would be fruitless and will not be here entered upon.

[5] 4. What is said above disposes of all of the assignments of error save one, which, as stated in the petition, is that the court below erred, "in admitting, over defendant's objections, certain illegal evidence offered by the plaintiff." Neither in the petition nor in brief for defendant is such evidence pointed out. Therefore, under our rule on the subject, such assignment of error will not be considered.

On the whole, therefore, we find no error in the judgment complained of, and it will be Affirmed.

(125 Va. 558)

**W. L. BECKER & CO. v. NORFOLK & W. RY. CO.**

(Supreme Court of Appeals of Virginia. Sept. 17, 1919.)

**1. LIMITATION OF ACTIONS §46(11) — ACTION FOR FREIGHT ACCRUED TO RAILROAD ON DELIVERY OF CAR.**

A railroad's cause of action against the consignee of goods for the freight arose on the date when the railroad delivered the car to the consignee, for the purpose of initiating the running of the statute against the railroad's demand.

**2. LIMITATION OF ACTIONS §28(1)—CAUSE OF ACTION FOR FREIGHT AGAINST CONSIGNEE BARRED IN THREE YEARS.**

Under Code 1904, § 2920, a railroad's cause of action for the recovery of freight from the consignee, despite provisions of the bill of lading, *held* barred in three years from the date when the cause of action, based on an implied or express parcel promise, and not on an express promise in writing in the bill of lading, accrued.

**Error to Corporation Court of Roanoke.**

Action by the Norfolk & Western Railway Company against W. L. Becker & Co. To review judgment for plaintiff, defendant brings error. Reversed, and judgment entered for defendant.

Jackson & Henson, of Roanoke, for plaintiff in error.

Boy B. Smith, of Roanoke, for defendant in error.

**PRENTIS, J.** These are the facts out of which this controversy arises: W. L. Becker, trading as W. L. Becker & Co., bought of the Griffin-Skelley Company, of Fresno, Cal., a carload of dried fruit and raisins, which on October 27, 1908, was shipped by the vendor to the vendee at Roanoke. The bill of lading shows that the car was "consigned to the order of Griffin-Skelley Company, notify W. L. Becker & Co., Roanoke, Va." The vendor assigned this bill of lading to the vendee, and the company delivered the car on the 17th day of November, 1908. It was promptly unloaded, the empty car was sent out by the company on November 22d, and on November 24th the vendee paid the amount of the freight demanded by the company, shown by the freight bill, \$406.05. The proper rate was \$1 per 100 pounds. By some unexplained error in the calculation of the gross weight, the freight bill only charged as for 40,605 pounds, whereas the true weight of the shipment was 69,465 pounds. Although the company should have collected \$694.65, it collected only \$406.05, which left a balance of \$288.60 due. The error was apparently not discovered for some time, though the detailed weights of the packages which disclose the error was then known and this action by the company against the vendee was instituted November 23, 1911.

The defendant pleaded the statute of limitations, claiming that the action was barred within three years from the date on which the right of action accrued, and, the case being submitted to the judge of the trial court, there was a judgment in favor of the company, of which the defendant is here complaining. The only question submitted for determination is whether or not the action is barred.

It is necessary, then, to determine when the cause of action arose, and the limitation which is applicable thereto.

The freight bill was paid on November 24, 1908, and it is claimed for the company that this is the date upon which the cause of action accrued. The learned judge of the trial court appears to have taken this view, and cites *Grove v. Lemley*, 114 Va. 202, 76 S. E. 305, as authority for the proposition that "in a court of law the limitation runs from the date of settlement and payment." That case, however, was an action to recover an overpayment, and there can be no doubt that, when one erroneously pays money to another which he does not owe, his cause of action for the recovery of such overpayment arises on the date when payment is made. That rule, however, has no application whatever to such a case as this. This payment was made in settlement of a debt for which the company already had a cause of action which had arisen previous to such payment. By no course of reasoning could the payment of less than the amount originally due be construed to change the date when the original cause of action for the whole amount arose. Under the Virginia statute of limitations, the partial payment of debts already due does not affect the running of the statute or operate to create a new cause of action.

[1, 2] We have no doubt that this cause of action against the vendee of the goods arose on the date when the company delivered the car to him—that is, on November 17, 1908. The company had a lien upon the goods for the sum due it for freight, hence could have refused to deliver the car until the freight was paid, and under the circumstances of this case the defendant must be presumed to have promised to pay the freight when he accepted and unloaded the car. The question raised is whether this cause of action is based upon an implied or express parcel promise, or whether, as claimed by the company, its cause of action is based upon an express promise in writing contained in the bill of lading, which was signed by the Griffin-Skelley Company in California when the shipment was made. It is contended that, in signing this bill of lading, the vendors acted as agents for the vendee, and that, therefore, the limitation is five years, as upon such express promise in writing.

This contention is based upon these provisions in the bill of lading:

☞ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(a) "It is further stipulated that the service to be performed hereunder shall be subject to the conditions, whether printed or written, herein contained, and said conditions are hereby agreed to by the shipper and by him accepted for himself and his assigns as just and reasonable."

(b) "Charges.—The owner or consignee to pay freight charges as per specified rates upon the goods as they arrive."

Such a clause as to payment of freight charges by the owner or consignee is an ancient one in bills of lading. It was construed by Lord Ellenborough, C. J., in the case of *Shepard v. De Bernales*, 13 East, 565. He says this:

"The first is the chief and most material question; and it depends upon the effect of this clause in the bill of lading, 'he or they paying freight for the said goods.' If this clause were introduced with a view to the defendant's security, and made it incumbent upon the plaintiff, at his peril, to look to the consignee under the bill of lading for payment of the freight, the plaintiff had no right to deliver to the defendant's agent, without first receiving such payment; and his delivery, without payment, was in that case not 'a right and true delivery.' But if this clause were introduced for the plaintiff's (the master's) benefit only, and merely to give him the option, if he thought fit, to insist upon his receiving freight abroad before he should make delivery of the goods, he had a right to waive the benefit of that provision in his favor, and to deliver without first receiving payment, and is not precluded by such delivery from afterwards maintaining this action. And the latter seems to us the true construction of this contract."

See *Grant v. Wood*, 21 N. J. Law, 292, 47 Am. Dec. 163; *Holt v. Westcott*, 43 Me. 445, 60 Am. Dec. 75.

This is said in *Wooster v. Tarr*, 8 Allen (Mass.) 270, 85 Am. Dec. 707:

"The usual clause in bills of lading, that the cargo is to be delivered to the person named or his assignees, 'he or they paying freight,' is only inserted as a recognition or assertion of the right of the master to retain the goods carried until his lien is satisfied by payment of the freight, but it imposes no obligation on him to insist on payment before delivery of the cargo. If he sees fit to waive his right of lien and to deliver the goods without payment of the freight, his right to resort to the shipper for compensation still remains. *Shepard v. De Bernales*, 13 East, 565; *Domett v. Beckford*, 5 Barn. & Adol. 521, 525; *Christy v. Row*, 1 Taunt. 300."

The carrier has a lien upon the consignment and can refuse delivery thereof until the freight is paid. From this there has grown up a custom of business whereby the carrier waives his lien, delivers the consignment and relies upon the promise of the consignee to pay the freight. So that in the case in judgment, when the company delivered and the defendant received the shipment, there was either an express or implied

promise by the defendant to pay the carrier's charges. This cause of action arises out of this promise alone. This is well supported by the cases. *Union Pacific R. Co. v. American Smelting & Ref. Co.*, 202 Fed. 722, 121 C. C. A. 182; *N. Y., N. H. & H. R. Co. v. York & Whitney Co.*, 215 Mass. 36, 102 N. E. 366; *Coal & Coke Ry. Co. v. Buckhannon River Coal & Coke Co.*, 77 W. Va. 309, 87 S. E. 376, L. R. A. 1917A, 663; *Hatch v. Tucker*, 12 R. I. 501, 34 Am. Rep. 707; *Old Colony R. Co. v. Wilder*, 137 Mass. 536; *Central R. Co. of N. J. v. MacCartney*, 68 N. J. Law, 165, 52 Atl. 575; 4 R. C. L. 858.

We find no ground whatever to support the contention that the vendor in California was the agent of the vendee in signing the bill of lading. He was acting in his own interest in the performance of his own contract to deliver the goods to the carrier, which he had sold to the vendee, to be transported to Roanoke. The defendant had the right to examine the goods and the power to reject them. If he had rejected the goods, it is clear that the company would have had no claim upon him for the freight, but could only have asserted its lien therefor against the goods, or collected it of the consignor. This demonstrates that the company's claim against the defendant for the freight bill does not arise out of the original contract which the consignor made with the company. It arises only out of the defendant's own express or implied agreement with the company upon the acceptance of the shipment in Roanoke.

We are referred to *Seaboard Air Line Ry. v. Luke*, 19 Ga. App. 100, 90 S. E. 1041, in which it is held that by accepting the freight the consignee became liable under the written contract of the consignor, as his assignee or transferee. We think that the weight of authority is against the rule which is established in Georgia. Certainly, in Virginia it is otherwise, as has been determined by this court in the recent case of *Atlantic Coast Line R. Co. v. Virginia Manufacturing Co.*, 119 Va. 5, 89 S. E. 103, in which the three-year limitation was applied in an action against a consignee for freight.

The same rule is applied to bills of lading as is applied to deeds. In Virginia it is held that if the grantee of a deed assumes the payment of bonds given by his grantor for purchase money, and does not sign the deed, that this creates a simple contract debt which is barred within three years from the time when it is assumed. *Taylor v. Forbes*, 101 Va. 658, 44 S. E. 888; *Harris v. Shields*, 111 Va. 646, 69 S. E. 933.

We conclude, therefore, that the trial court erred in not sustaining the defendant's plea of the statute of limitations. In our opinion, the debt due to the company upon the promise of the defendant to pay the freight was barred on the 17th day of November, 1911—



that is, within three years from the date when the cause of action accrued. Code, § 2920. This court will, therefore, enter judgment in favor of the defendant.

Reversed.

(84 W. Va. 526)

**CLARK v. NORFOLK & W. RY. CO.**

(Supreme Court of Appeals of West Virginia.  
Sept. 23, 1919.)

*(Syllabus by the Court.)*

**1. CARRIERS §284(1, 2) — SHOULD NOT PROTECT PASSENGER AGAINST PUBLIC OFFICER.**

Although a carrier is obliged to use reasonable diligence to protect its passengers against unlawful assaults by other passengers, its own servants, and third persons, its servants are under no duty to resist or interfere with a known officer in making an arrest of a passenger, unless they know or by reasonable diligence ought to know that the arrest is unlawful; neither are they bound to make inquiry into such known officer's authority.

**2. CARRIERS §381(2)—INTOXICATING LIQUORS §249—WHEN SEARCH WARRANT INVALID AND NO PROTECTION TO CARRIER EXPELLING PASSENGER.**

A warrant issued by a justice of the peace, commanding search to be made of a certain passenger train, to ascertain if intoxicating liquors are being carried thereon contrary to law, is not proper evidence to be considered by the jury against the plaintiff in the trial of an action by him against the carrier for his unlawful expulsion from the car. Such warrant is void.

*(Additional Syllabus by Editorial Staff.)*

**3. CARRIERS §352—NOT LIABLE FOR EXPULSION OF PASSENGER BY ONE NOT ITS AGENT.**

Where one was not acting as agent of a carrier, but was deputized by prohibition officers to assist them in searching a train, he was acting outside of his duty to the carrier, even if a special agent of carrier, and his assistance in expelling plaintiff was no ground of carrier's liability therefor.

Error to Circuit Court, McDowell County.

Action by A. F. Clark against the Norfolk & Western Railway Company. Verdict for plaintiff was set aside on defendant's motion, and plaintiff brings error. Affirmed, and remanded for new trial.

Froe & Capehart, of Welch, for plaintiff in error.

Sale & Tucker, of Welch, for defendant in error.

**WILLIAMS, J.** In an action of trespass on the case plaintiff recovered a verdict against defendant for \$500, which, on motion of defendant, the court set aside, and plaintiff brings error, asking that the judgment be

reversed, and judgment entered here on the verdict.

[1] Plaintiff purchased a ticket from Iron-ton, Ohio, to Iaeger, W. Va., and boarded one of defendant's trains as a passenger on December 16, 1916. He and a number of others had gone to Iron-ton on the day previous to purchase liquor. It was not then unlawful for a person to carry more than 2 quarts of liquor into the state for personal use, provided the container thereof was properly labeled, showing the kind and quantity thereof. A coach was attached to the rear of the train just behind a Pullman car at Iron-ton for the accommodation of those passengers who were carrying liquor, and plaintiff was told to get in that coach and did so. In fact, that coach seems to have been filled with such passengers. Plaintiff admits he had 16 quarts of whisky and one quart of alcohol in a suit case, but swears it was properly labeled, and the jury evidently believed him, which they had a right to do, although his testimony on this point is contradicted by other witnesses for defendant. When the train arrived and stopped at Williamson, W. Va., which is the end of one of defendant's divisions, where a change of crews is made, and which is a long distance west of Iaeger, the prohibition officer and his deputies, four or five in number, armed with pistols, entered the coach and forced a number of the passengers, including plaintiff, to alight. Three or four of them, but not the plaintiff, were arrested for not having labels on their packages of whisky. Plaintiff did not attempt to reboard the train, but spent the night at a hotel and took another train the next morning for Iaeger. Plaintiff swears the train stopped some distance before it reached the depot at Williamson, and, quoting his language, says:

"Some men came in and told us to get off that train, and drewed their guns, and some of them unloaded, and I didn't have time to get off until after the train had done started out. I went on into Williamson, and they made us get off."

He was asked:

"Who made you get off? A. Well, there was the brakeman and these here officers."

And, being asked if he was frightened, he replied:

"Yes, sir; I was scared not to get off the train, after I didn't know what they were going to do to me."

He was further asked what the brakeman did to him, and replied:

"The brakeman didn't do anything; just asked me to go ahead off."

And, the question being repeated, he added, "To further any more trouble," meaning,

of course, to avoid any further trouble. Some of plaintiff's answers are hardly intelligible; but it fairly appears from his testimony that, when the officers entered the car, it caused a great deal of commotion among the passengers, some of whom got off immediately, and others a little later, after the train had pulled up to the depot, and that none of the train crew protested, or did anything to protect plaintiff from being ejected. Plaintiff's counsel rely on the cases of *Gillingham v. Ohio River R. R. Co.*, 35 W. Va. 588, 14 S. E. 243, 14 L. R. A. 798, 29 Am. St. Rep. 827, and *Anania v. Norfolk & Western Ry. Co.*, 77 W. Va. 105, 87 S. E. 167, L. R. A. 1916C, 439, in support of their contention that, under the state of facts established by plaintiff's evidence, the defendant is liable; that a carrier is under obligation to protect its passengers from unlawful arrest or ejection from its train.

In the *Gillingham* Case the conductor of the train actually caused plaintiff's arrest for an offense committed in his presence, and which, by the exercise of proper diligence, he was bound to know plaintiff was innocent of. After sending for the officer to make the arrest, the conductor pointed out *Gillingham* to him as the guilty person; whereas the guilty party was shown to be another passenger occupying a seat behind him. The assault for which the arrest was made was committed on the conductor, and he pointed out to the officer the wrong man as the one who had committed it.

In the *Anania* Case, the officer, who happened to be on the train at the time, arrested *Anania* and some other passengers for disorderly conduct, which occurred in the presence of the conductor and the officer. *Anania* had been guilty of no misconduct. The opinion in that case states that the conductor knew, or if reasonably diligent ought to have known, that fact. It was clearly the duty of the conductor in that instance to have protested, at least, against *Anania's* arrest.

But here the facts are quite different. It is a fact, proven and not disputed, that the conductor and brakeman in charge of the train all knew that the men who forced plaintiff to alight were officers, and in such case the law imposes no duty upon the carrier or its servants or agents to inquire into the officer's authority, or substitute their opinions for his, or to protest against his arresting a passenger. A passenger train is not intended as a place of refuge for criminals, and unless a passenger is arrested for an offense of which the carrier's agent knew, or by proper diligence ought to have known, he is not guilty, he is not obliged to interfere or protest against the arrest. The rule, however, is different where the carrier's servants know, or by the exercise of proper diligence ought to know, that the arrest of the passen-

ger is unlawful, as was the case in *Anania v. Norfolk & Western Ry. Co.*, supra.

In *Bowden v. Atlantic Coast Line Ry. Co.*, 144 N. C. 28, 56 S. E. 558, 12 Ann. Cas. 783, it appears that plaintiff ran away with a 16 year old girl for the purpose of marrying her. They were passengers on defendant's train. In response to a telegram from a brother of the girl to the chief of police of Jacksonville, N. C., notifying him that the parties had eloped, the moment the train arrived at Jacksonville he boarded the train to make the arrest. Apprehending his arrest, plaintiff, without the knowledge of the conductor, took refuge in the water closet and bolted the door on the inside. The officer demanded the key of the conductor, and he instructed the porter to deliver it to the officer. Finding he could not open the door with the key, the officer presented his pistol through the window of the closet, and compelled plaintiff to unbolt the door and surrender. He then took the couple from the train. The court held the carrier not liable, and in its opinion says that plaintiff having concealed himself in the closet without the knowledge of the conductor, the fact that the conductor surrendered the key is no evidence of a purpose to aid and abet the officer, nor is the fact that the train remained at the station a few minutes longer than usual any evidence of the conductor's intent to aid the officer in making the arrest. Says the court:

"The most that can be said is that the conductor did not resist the officers in executing their purpose to arrest plaintiff. It is not the duty of a conductor to resist a known officer of the law in making an arrest."

In this case the brakeman's advice to plaintiff to "go ahead off," if he said it, which the brakemen all deny, and plaintiff was not able to identify the person who, he says, told him, is not evidence of any intent to aid the officers. According to plaintiff's testimony, the request was made simply to avoid further trouble. There is no evidence whether or not defendant's servants knew that plaintiff's suit case was properly labeled as containing whisky, or that they knew why the officers ejected him from the car. Knowing that they were officers, the defendant's agents were under no duty to inquire into the legality of their acts. The following authorities are in point and support the principles announced in this opinion: 4 R. C. L. 1194; 10 C. J. 908; *Nashville, C. & St. L. R. Co. v. Crosby*, 183 Ala. 237, 62 South. 889; *Louisville & Nashville R. Co. v. Byrley*, 152 Ky. 35, 153 S. W. 36, Ann. Cas. 1915B, 240; *Brunswick & Western R. Co. v. Ponder*, 117 Ga. 63, 43 S. E. 430, 60 L. R. A. 713, 97 Am. St. Rep. 152; and *Thompkins v. M., K. & T. Ry. Co.*, 211 Fed. 391, 128 C. C. A. 1, 52 L. R. A. (N. S.) 791.

[3] Counsel for plaintiff insist that I. W.

Clark, although appointed by the Governor of the state, was a special agent of the railway company, and assisted the officers in ejecting plaintiff and other passengers from the train. Said Clark was not acting as agent of the railway company on this occasion. He swears he was deputized by Mr. Keadle and Mr. Slater the prohibition officers, to assist them, and his testimony is not denied. He was acting outside of his duty to the railway company and as a deputized officer, and his assistance in expelling plaintiff constitutes no ground of liability on defendant.

[2] The justice's warrant, under which the prohibition officers acted in searching the car, was introduced and read as evidence over the objection of plaintiff. This was error. The law does not authorize a justice of the peace to issue his warrant commanding search to be made of the coaches of a passenger train in transit, to ascertain if liquor is being carried therein in violation of the law. A passenger train in transit is not one of the places mentioned, or contemplated by section 9, chapter 32A, Barnes' Code 1918 (Code 1913, c. 32A, § 9 [Section 1288]) of which search may be made under the provisions of that section.

Under the state of evidence appearing from the record, defendant's peremptory instruction should have been given, and the court was justified in setting aside the verdict and ordering a new trial, and we therefore affirm the judgment and remand the cause for a new trial.

(84 W. Va. 575)

**CASWELL v. CASWELL et al.**

(Supreme Court of Appeals of West Virginia.  
Sept. 30, 1919.)

*(Syllabus by the Court.)*

**1. JUDGMENT §818(3)—JUDGMENT IN ANOTHER STATE SUBJECT TO COLLATERAL ATTACK FOR WANT OF JURISDICTION.**

A judgment or decree rendered in another state is liable to collateral attack for want of jurisdiction in the court that rendered it.

**2. DIVORCE §326—FOREIGN DECREE OF DIVORCE ENTITLED TO FULL FAITH AND CREDIT.**

In the absence of any showing of fraud upon the court, or lack of jurisdiction, a decree of divorce rendered by a court of competent jurisdiction in another state or territory of the United States, upon an order of publication duly executed pursuant to the laws of such state or territory, is entitled to the same faith and credit in the courts of this state as in the state or territory wherein rendered.

**3. DIVORCE §328—ORDER OF PUBLICATION NAMING DATE YEAR BEFORE SUIT NOT VOID.**

An order of publication, otherwise regular, defective only in that it names a date in a year

prior to the bringing of the suit, instead of the year in which the suit was brought, is not void, and a decree based thereon cannot be collaterally attacked for that reason. Such error is self-correcting, and does not affect the jurisdiction.

**4. EQUITY §249—EXCEPTIONS TO ANSWER ADMIT ALLEGATIONS OF NEW MATTER.**

Exceptions to an answer which sets up affirmative matter in bar, being analogous to a demurrer to a bill or plea, admit the truth of the allegations excepted to.

**5. PLEADING §310—EXHIBITS IN SUPPORT OF PLEADING A PART THEREOF—EFFECT.**

Exhibits filed in support of a pleading are considered parts thereof, and, if they contradict the matters alleged, will control.

**6. WILLS §782(5)—GIFT OF ANNUITY NOT IN LIEU OF DOWER REQUIRING RENUNCIATION OF WILL.**

Where a husband settles an annuity upon his wife, payable during her life, and thereafter dies testate, devising all his property to another, and provides in his will that his wife shall have no other part of his estate, except the annuity previously settled on her, such provision in the will is not a gift in lieu of dower, and she is not required to renounce the will in order to be entitled to claim dower.

**7. JUDGMENT §818(5)—RECITAL OF JURISDICTIONAL FACTS IN JUDGMENT OF FOREIGN COURT OF GENERAL JURISDICTION PRESUMED CORRECT.**

When it does not appear from a certified copy of the record of proceedings in a court of general jurisdiction of another state or territory that such court was without jurisdiction, a finding by it of jurisdictional facts recited in its decree is presumably correct.

**8. JUDGMENT §818(5)—OF COURT OF GENERAL JURISDICTION OF ANOTHER STATE—WHERE DEPOSITION DOES NOT SHOW JURISDICTION, PRESUMPTION OTHER EVIDENCE DID.**

Where a court of another state or territory may hear and receive evidence ore tenus as well as by depositions, a certified copy of the record, in a proceeding showing only one deposition to have been filed, which fails to prove all the jurisdictional facts, it will not be presumed that such deposition is all the evidence taken or heard, when the court in its decree recites a finding of all jurisdictional facts.

**9. DIVORCE §327—AVERMENTS OF BILL AS TO RESIDENCE CONCLUSIVE IN ABSENCE OF EVIDENCE TO CONTRADICT.**

The allegation, in a sworn petition or bill in a divorce proceeding in another state or territory, that plaintiff is, and for more than 90 days prior thereto has been, a resident of such state or territory, such residence being essential to jurisdiction, proves the fact averred, in the absence of anything in the record to contradict it.

Certified to Circuit Court, Wood County.

Suit by Mattie R. Caswell against Cora C. Caswell, executrix of W. S. Caswell, de-

ceased, and others, to establish dower and for an accounting. Plaintiff's motions to strike out certain parts of the answers overruled, and the rulings certified. Reversed in part and affirmed in part, and decision ordered certified back to circuit court.

W. M. Straus and Geo. W. Johnson, both of Parkersburg, for plaintiff.

McCluer & McCluer and Smith D. Turner, all of Parkersburg, for defendants.

**WILLIAMS, J.** W. S. Caswell departed this life testate in July, 1910, devising his property, real and personal, to Cora C. Caswell, his second wife, and appointed her his executrix without bond. Mattie R. Caswell, claiming to be the lawful wife of said W. S. Caswell at the time of his death, brought this suit praying to have her dower assigned in the real estate of which said W. S. Caswell was seized during coverture, and also for her distributive share in his personal estate. Plaintiff alleges that by writing dated 26th of October, 1891, said W. S. Caswell settled upon her the sum of \$750 per year, payable at the rate of \$62.50 each month during her life; that the personal property which passed into the hands of the aforesaid executrix is liable to the payment of the same, and that said executrix is in possession of, using, and converting the same to her own uses to such an extent that there will be none of it left to pay her the aforesaid annuity. She prays for an accounting of the personal fund by said executrix, including the rents, issues, and profits derived from the real estate since her said husband's death, and for an assignment of dower in the real estate.

W. S. Caswell, after his marriage to plaintiff, conveyed to third parties certain portions of his real estate, and his grantees, and those claiming under them, are made parties to the bill. Cora C. Caswell and the other defendants demurred to the bill, which demurrers were overruled. They then filed their answers, averring that W. S. Caswell was married to plaintiff May 2, 1877; that he died June 15, 1916, testate, and by his will dated March 31, 1909, probated in Wood county, July 3, 1916, devised and bequeathed all his property, both real and personal, to his wife, Cora C. Caswell, except the annuity of \$750, to be paid in monthly installments of \$62.50 each to the plaintiff during her lifetime, but that she should have no other share in his estate; that Cora C. Caswell was appointed his executrix; that the will was duly probated in Wood county, and the probate order of the county court of said county is now in full force and effect; that said executrix has paid to plaintiff, since the death of the testator, the aforesaid monthly installments, and the same have been accepted by the plaintiff; that whether or not Mattie R. Caswell was the wife and is now the widow

of said testator, she is, nevertheless, barred of any other interest in his estate.

The answer further avers that a suit was instituted in the district court of Logan county, Okl., then a territory, but now the state of Oklahoma, in which W. S. Caswell was the plaintiff and Mattie R. Caswell was the defendant, and that on the 29th of July, 1893, a decree was rendered therein granting said W. S. Caswell an absolute divorce from Mattie R. Caswell; that said decree became absolute on the 29th of January, 1896, and has not been reversed, and is now in full force and effect. The answer exhibits a transcript of the record of the proceedings and decree rendered in said Oklahoma suit, and further avers that in July, 1893, this plaintiff left her then husband, the said W. S. Caswell, without such cause as would entitle her to a divorce either from the bonds of matrimony or from bed and board, and, without just cause and of her own free will, lived separate and apart from him, and was so living at the time of his death; wherefore it is alleged that, under the provisions of section 7 of chapter 65 (sec. 3655) Code, she is barred of dower, and of all right to claim a distributive share in his personal estate. It also avers that W. S. Caswell was not seized, at any time during the existence of his marriage to Mattie R. Caswell, of an estate of inheritance in any of the parcels of real estate mentioned and described in the bill, except a lot on Avery street conveyed to him by Mrs. C. L. Caswell by deed dated September 3, 1888. The answer admits that W. S. Caswell, previous to obtaining the divorce in the district court of Logan county, Okl., settled upon the plaintiff an annuity of \$750, payable at the rate of \$62.50 per month during her life, and secured the same by a deed of trust on a lot situated in Parkersburg at the corner of Market and Eleventh streets, which property it avers rents for at least \$94 per month, and that said annuity constitutes the first lien upon said property. The executrix also admits that, under the terms of the will, she has received the personal property devised to her by the testator, but denies that she has made no provision for the payment of the monthly installments, and denies that she is converting and making such use of the personal property as to deplete it to the injury of plaintiff, and denies that plaintiff is entitled to any relief.

The other defendants also answered averring substantially the same matters set up in the answer of the executrix.

Plaintiff filed written exceptions to, and moved to strike out certain portions of, the answers, for the alleged reason that they constituted no defense. These motions were overruled, and the court on its own motion has certified its rulings thereon to this court.

The first exception and motion to strike relates to that part of the answers setting up, as a bar to plaintiff's claim, the decrees

of divorce and proceedings in the Oklahoma court, evidenced by a certified copy of the record of said proceedings made a part of the answer as Exhibit "No. 2A." The next exception was taken to that part of the answer setting up the annuity as a provision made for plaintiff in testator's will in lieu of her dower, and therefore a bar to the present suit.

As grounds for the first exception, it is claimed that the certified copy of the record from the district court of Logan county, Okl., shows want of jurisdiction; that this plaintiff was not a resident of Oklahoma, was proceeded against by order of publication, and made no appearance to the suit; and, second, because it appears from the order of publication therein that the defendant was summoned to appear at an impossible date, the date being prior to the order of publication; and, third, because it does not appear that the defendant received any notice of the pendency of the suit.

[1-3] This is a collateral attack upon the decree of the Oklahoma court, but the judgment or decree of a foreign court may be assailed collaterally for want of jurisdiction, as in such case the judgment is void, not simply voidable. If the certified record from the Oklahoma court shows want of jurisdiction, the first exception to the answer should have been sustained. *Roberts v. Hickory Camp Coal Co.*, 58 W. Va. 276, 52 S. E. 182.

Under the statutes of Oklahoma existing at the time the divorce decree was rendered, a party who had been an actual bona fide resident of the territory for 90 days could bring a suit for divorce. The plaintiff averred in his petition or bill that he was then, and had been for more than 90 days, such resident; that he was married to defendant in Parkersburg, W. Va., May 1, 1877; that plaintiff and defendant lived together as man and wife until September, 1889, when defendant abandoned plaintiff without any cause therefor, and lived separate and apart from him until March, 1893, at which time she returned to him and resided with him until July, 1893, when she again abandoned him without any cause therefor, and since then has continued to live separate and apart from him; that thereafter she has continuously lived separate and apart from him, which was a period of more than one year prior to the filing of his petition; that plaintiff had always supported defendant in a reasonable manner, and conducted himself toward her in a kind and generous manner, and had never abused her in any way, or given her any cause or occasion to abandon and desert him; wherefore he prays judgment that the bond of matrimony between defendant and petitioner be dissolved, and that petitioner be granted an absolute divorce from her. Petitioner made affidavit to the foregoing facts in compliance with the Oklahoma law, and those facts show that the

court had jurisdiction to entertain such suit.

Plaintiff made another affidavit that he is plaintiff in the suit of W. S. Caswell against Mattie R. Caswell, brought for the purpose of obtaining a divorce from the defendant therein; that the defendant resided out of the territory of Oklahoma, and service of summons could not be made upon her in said territory, and that plaintiff, with due diligence, is unable to make service within said territory. On this affidavit an order of publication was had, the sufficiency of which is attacked. It styles the cause, names the county and territory of Oklahoma wherein the suit was pending, and notifies the defendant that the plaintiff had filed his petition in the district court of Logan county in said territory, praying judgment against her for an absolute divorce, and concludes as follows:

"You are hereby notified that you must answer the said petition on or before the 25th day of April, 1893, or the said petition will be taken as true and judgment rendered divorcing the said plaintiff from you.

"[Signed] William S. Caswell."

This was published in the Oklahoma Leader, a newspaper printed and published in Logan county, Okl. T., and F. B. Lucas, acting manager of said newspaper, made affidavit that the notice was published in the regular issue of each number of said Oklahoma Leader for four consecutive weeks, "the first publication, as aforesaid, being made on the 14th day of March, A. D. 1895, and the last on the 25th day of April, A. D. 1895." A discrepancy appears between the date named in the publisher's affidavit and the date stated in the published notice, whereon the defendant was required to appear and answer plaintiff's petition, the year stated in the notice being 1893, whereas it should have been 1895. It is contended this mistake is fatal to the notice, and renders the decree based thereon void. But we do not think so, because the mistake could not have misled the defendant. The publication appearing in a newspaper issued in March, 1895, being for the purpose of notifying defendant to appear at a future date and defend a pending suit, could not possibly have misled an intelligent person by stating a year for such appearance, which had then passed. This notice must be read in connection with the Oklahoma statute, authorizing the summoning of nonresidents by order of publication, and, so reading it, any one must know that the year 1895, and not a year which had passed before the suit was brought, was intended. The Oklahoma statute requires that the date to which a defendant is notified by an order of publication to appear should not be less than 41 days from the date of the first publication, and, reading the date 1893 as if it were 1895, the notice gave the defendant 42 days from the date of the first

issue of the newspaper containing the notice within which to appear. The publication is defective only in that it states the wrong year in which the defendant was required to appear. It is not thereby rendered absolutely void, because the error relates only to the year, and not to the day or month, and is self-correcting, and therefore in no wise misleading, and the default decree of divorce rendered thereon against the defendant is not void for any fatal defect in the order of publication. *Ambler v. Leach*, 15 W. Va. 677; *Town of Pt. Pleasant v. Greenlee & Harden*, 63 W. Va. 207, 60 S. E. 601, 129 Am. St. Rep. 971; *Miller v. White*, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791; *Land Co. v. Koontz*, 77 W. Va. 583, 87 S. E. 930; and *Core v. Smith*, 23 Okl. 909, 102 Pac. 114.

The law of Oklahoma also requires that a copy of the petition, with a copy of the publication of notice attached thereto, should, within three days after the first publication is made, be inclosed in an envelope, addressed to defendant at his or her place of residence, postage paid, and deposited in the nearest post office, unless the plaintiff shall make and file an affidavit that such residence is unknown to plaintiff, and cannot be ascertained with any means within plaintiff's control.

It appears from a registered return receipt signed by Mrs. M. R. Caswell, sent from the post office at Guthrie, Okl., March 16, 1895, that she received a registered letter sent to her from Guthrie, Okl., on said date; and the court found as a matter of fact, and so states in its decree entered on the 29th day of July, 1895, that the defendant Mattie R. Caswell had received a copy of the complaint, and that said copy was delivered to her more than 15 days before the cause was set down for trial. The court also found, and likewise states in the decree respecting the published notice, as follows:

"Which notice was in due and proper form, and which notice was published for four consecutive weeks in the *Oklahoma Leader*, a weekly newspaper printed and published in the city of Guthrie, in the territory of Oklahoma, the last of which publication was made more than thirty days before this cause was set down for trial on the docket of this court."

The district court of Logan county, Okl., has therefore passed upon these jurisdictional facts, and has found them to exist in favor of its jurisdiction. That court being a court of general jurisdiction, with authority to entertain suits for divorce, a presumption exists in favor of the correctness of its finding on the jurisdictional facts.

[8.] A copy of the deposition of one John J. Cain, taken in Parkersburg on behalf of the plaintiff, and filed in the suit in Oklahoma, is all the evidence appearing in the record on which the court based its decree, and it is contended by plaintiff's counsel in this suit that said deposition falls to prove

certain jurisdictional facts; that it does not prove W. S. Caswell was then, nor how long prior to the time he brought his suit for divorce he had been a resident of Oklahoma. The deposition is silent as to where said Caswell then resided. But said Caswell himself made affidavit to his petition, or bill, which stated that he was then, and had been for more than 90 days prior thereto, a resident of the territory of Oklahoma, and the record does not contradict this fact. The deponent does prove that Mattie R. Caswell then resided in Parkersburg, W. Va.; that she left W. S. Caswell 15 or 16 months prior to the time he gave his testimony; and that they had been living separate and apart for 15 months or more. Abandonment for a year is cause for divorce under the laws of Oklahoma. Moreover, it does not appear that this deposition is all the evidence the court heard; other evidence, *ore tenus*, may have been taken by the court, according to the laws of Oklahoma.

[4] Counsel insists that W. S. Caswell practiced a fraud upon the Oklahoma court by claiming to be a bona fide resident of that territory, when, as a matter of fact, he was all the time a resident of Parkersburg, W. Va. A sufficient answer to this contention is that it does not so appear from the certified copy of the proceedings of the Oklahoma court. Exceptions to an answer, being somewhat analogous to a demurrer to a bill, admits the truth of the averments in the answer. The exception is tantamount to saying that the averment in the answer, if true, constitutes no defense to the bill. *Blair v. Core*, 20 W. Va. 265, and *Keys Planing Mill Co. v. Kirkbridge*, 114 Va. 58, 75 S. E. 778.

[5] If, however, the exhibits filed to support the averments of the answer in fact contradict them, the former will generally be taken as true. *Board of Education of Flatwoods Dist. v. Berry*, 62 W. Va. 433, 59 S. E. 169, 125 Am. St. Rep. 1975; *Richardson v. Ebert*, 61 W. Va. 523, 56 S. E. 887; *Atlantic Terra Cotta Co. v. Moore Construction Co.*, 73 W. Va. 449, 80 S. E. 924; and *Freeman v. Carnegie Natural Gas Co.*, 74 W. Va. 83, 81 S. E. 572.

[7] The copy of the proceedings from the district court of Logan county, Okl., being duly and properly certified, and it not appearing therefrom that the court was without jurisdiction, and the decree being such as is entitled to full faith and credit in the courts of that territory, now the state of Oklahoma, the policy of our law, as declared in section 19 of chapter 130 (sec. 4875) Code, entitles it to the same faith and credit in the courts of this state. *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1, on which plaintiff relies, does not determine the law of this state. That was a case, which went up from the Court of Appeals of the state of New York, and the decision therein turned upon the policy of that state,

which was not to recognize as binding upon one of its citizens a decree of divorce obtained in a court of a sister state, upon a service of process by order of publication, when it appeared that the parties had never cohabited as man and wife in the state wherein the divorce was decreed. It was held in that case, by a divided court, that section 1 of article 4 of the Constitution, requiring the courts of each state to give full faith and credit to the public acts, records, and judicial proceedings of every other state, did not compel a state court, in violation of the state's own policy, to give full faith and credit to a default decree of divorce, based upon an order of publication, when it appeared there had been no matrimonial residence of the parties in the state wherein the divorce was obtained. But the policy of our state, as shown by the statute above referred to, differs from the policy of the state of New York. No lack of jurisdiction in the Oklahoma court appearing, our conclusion is that the lower court properly overruled the first exception to defendant's answer. *Beach v. Beach*, decided by the Oklahoma Supreme Court, reported in 4 Okl. 359, 46 Pac. 514, on which plaintiff also relies, has no application to the points arising on this certificate. That was a direct appeal from the lower court, and the defendant therein had appeared and answered the petition. A collateral attack of the decree is not there involved.

[8] The second exception to the answer, however, should have been sustained. Because it appears from the averments of the answer, and a copy of W. S. Caswell's will exhibited therewith, that the testator made no provision whatever for Mattie R. Caswell in his will. He made no gift to her in lieu of dower. The will simply expressed testator's intention not to give her anything more than he had previously given her. The \$750 annuity mentioned in his will is a settlement which he had made upon her in his lifetime, for which his estate was already bound. We therefore reverse in part and affirm in part the rulings of the lower court, and will order our decision certified back to the circuit court of Wood county.

(94 W. Va. 532)

JOHNSTON et al. v. BEE et al.

(Supreme Court of Appeals of West Virginia.  
Sept. 23, 1919.)

(Syllabus by the Court.)

1. WITNESSES §164(3) — WHEN WITNESS COMPETENT AS TO HANDWRITING OF DECEDENT.

The handwriting of a deceased person is not necessarily nor always a personal transaction

or communication between such person and another living and claiming rights under or against a document purporting to have been signed by the former; and if the latter knows the handwriting of the former, and has obtained his knowledge thereof otherwise than by observation of the deceased person's act of writing, or some other personal transaction, he is competent to express his opinion as to the genuineness of the signature in question.

2. EVIDENCE §474(14)—WHEN GRANDCHILDREN COMPETENT AS TO HANDWRITING OF GRANDMOTHER.

Grandchildren, who have obtained their knowledge of their grandmother's handwriting only by inspection and repeated readings of letters from the grandmother to their mother, preserved by the family for a long period of time for sentimental reasons, are qualified to testify to their opinions as to the genuineness of the grandmother's signature.

3. EVIDENCE §474(14), 568(3)—WHEN OPINION EVIDENCE ADMISSIBLE THOUGH OF LITTLE VALUE.

The opinion of a witness as to the genuineness of a signature, based upon limited opportunities for knowledge of the handwriting of the person whose signature is in question, may have but little probative value, but it is admissible.

4. EVIDENCE §561 — ONLY EXPERTS CAN TESTIFY AS TO GENUINENESS OF SIGNATURE.

As the opinions of nonexpert witnesses testifying merely from comparison of signatures, as to the genuineness of a particular signature, are entitled to no greater weight than the opinions of the jurors or the judge, only experts can so testify.

5. EVIDENCE §563 — WHAT CONSTITUTES HANDWRITING EXPERT STATED.

To be competent for such purpose, however, a witness need not be a professional handwriting student, critic, or expert. It suffices that in some way he has acquired peculiar knowledge and skill respecting the determination of the genuineness of written instruments and signatures—more of such skill and knowledge than men ordinarily have. Bank cashiers are handwriting experts within the meaning of the rule.

6. EVIDENCE §564(2) — ANCIENT WRITINGS ADMISSIBLE FOR COMPARISON AS TO GENUINENESS OF SIGNATURE.

Ancient letters, shown by the testimony of members of a family to have been written by the person whose signature is in question to her daughter, and preserved, for sentimental reasons, long after the daughter's death, and ancient deeds purporting to have been signed by such person and found in a public office in which they were lodged for recordation, may be used as standards of comparison on the issue as to the genuineness of the signature.

7. TRUSTS §372(3) — WHEN EVIDENCE INSUFFICIENT TO SHOW INVESTMENT OF TRUST FUND.

A written and sealed, but unacknowledged, declaration by a married woman of her intention to invest a trust fund in her hands in a

certain tract of land then owned by her and her husband jointly, reciting the source of the fund, the previous conveyance of the land, and intent thereafter so to invest the fund, is not sufficient to prove actual investment of the fund in the land.

**8. HUSBAND AND WIFE** ⇨152, 193 — **WIFE CANNOT COVENANT TO STAND SEISED OF LAND TO ANOTHER'S USE.**

Being unable to dispose of or incumber her real estate, without the joinder of her husband in a deed or other contract respecting it, in the manner prescribed by law, a married woman cannot alone covenant to stand seized of her land to the use of another, nor declare a trust in it. Though she may bind her equitable separate estate by her sole contract so as to make it liable in equity, her separate statutory estate stands upon a different footing, and cannot be so bound.

**9. DEEDS** ⇨22, 24 — **HUSBAND AND WIFE** ⇨179—**WIFE CANNOT COVENANT TO STAND SEISED OF HER STATUTORY REAL ESTATE.**

While a declaration of intent to create a trust in property, made by a feme sole or other person having unlimited power of disposition of his property, may be binding upon him as a covenant to stand seized, or as a bargain and sale of the property, if founded upon a valuable consideration, a married woman is incapable of binding her separate statutory real estate in such manner.

**10. TRUSTS** ⇨354—**DECLARATION OF INTENT TO INVEST TRUST FUND DOES NOT CREATE TRUST.**

A mere declaration of intention to invest a trust fund in certain property does not create a trust therein. Impression of a trust upon the property requires actual investment of the fund in it.

**11. APPEAL AND ERROR** ⇨1121 — **EQUITY** ⇨427(3)—**UNDER PRAYER FOR GENERAL RELIEF THERE MAY BE DECREE FOR TRUST FUND.**

Under the prayer for general relief in a bill seeking enforcement of an alleged trust in land, praying specially therefor, disclosing prima facie liability for a sum of money on the part of the alleged trustee, but failing as to the trust in the land, for lack of proof of investment of the fund in the land, there may be a decree for the trust fund, upon a prayer therefor at the bar of the court. But if the bill has been dismissed without the interposition of such a prayer in the court below or the award of such relief, the decree will be reversed in so far only as it dismissed the bill, and the cause remanded, with leave to the plaintiff to ask a decree for the amount of the trust fund.

**12. COSTS** ⇨230 — **ALLOWANCE ON APPEAL TO THE PARTY SUBSTANTIALLY PREVAILING.**

In such case, costs in the appellate court will be awarded to the appellants, as the parties substantially prevailing.

Williams, J., dissenting in part.

Appeal from Circuit Court, Mercer County.

Suit by Pearl McCreery Johnston and others against I. E. Bee and others. From a decree dismissing the bill on final hearing,

plaintiffs appeal. Decree, so far as dismissing the bill, reversed, and cause remanded.

P. H. M. Patterson, of Beckly, R. D. Bailey, of Balleysville, and French & Easley, of Bluefield, for appellants.

Hugh G. Woods and John M. McGrath, both of Princeton, for appellees.

**POFFENBARGER, J.** The decree complained of dismisses, on final hearing, a bill filed for enforcement of an alleged express executed trust in real estate, founded upon a valuable consideration.

The relationship of the parties is unquestioned. If there is such a trust as is set up and claimed in the bill, the plaintiffs are entitled to the benefit thereof. They are the heirs at law of M. H. Lacey, who departed this life intestate prior to the year 1865, and at the date of his death owned a tract of land in Loudoun county, Va., containing 160 acres. On his death the title to this land vested by descent in his two children, Mollie K. McCreery, who died in 1887, leaving several children, and her brother, Andrew J. Lacey, who died intestate in 1906, subject to the dower right of Mary L. Lacey, the widow, who afterwards married Dr. Isalah Bee, of Mercer county, and became a resident of Princeton, W. Va. She died in 1907, leaving as her survivors her second husband and a son by him. The former died in November, 1912. The plaintiffs are the children of Mrs. McCreery and Andrew J. Lacey, claiming under the alleged declaration of trust made by their grandmother, Mrs. Mary L. Bee, in 1875, and the defendants are the representatives of the estate of Dr. Isalah Bee, and the devisees under his wife's will. Before his death, Dr. Bee conveyed to his son, I. E. Bee, and his daughter-in-law valuable real estate and gave them the balance of his estate by will. Mrs. Bee gave all of her estate to her husband, in trust for a little girl reared by the family, and known in this record as Nellie Bee Campbell.

The bill proceeds upon the theory of a substitution of certain real estate at or near Princeton, in Mercer county, for one-third of the Loudoun county land, to the rents and profits of which the widow was entitled for the period of her natural life. By a deed dated January 11, 1875, Andrew J. Lacey, Mrs. McCreery, and her husband, and Mrs. Bee and her husband, conveyed the Loudoun county tract of land to John Ritcor for a cash consideration of \$1,600. Of this sum two thirds belonged to the heirs absolutely, and they owned the other third, subject to the right of the widow to have the interest on it for and during her natural life. The bill charges that this one third, less its pro rata share of the expenses of sale, was invested by Mrs. Bee in a tract of 130 acres of



land, situated at or near Princeton, in Mercer county, and conveyed to her and her husband by a deed dated March 3, 1875, and executed by William A. Wiley and Rhoda V. Wiley, his wife. The deed conveying the Loudoun county tract of land was admitted to record March 8, 1875, and the one conveying the Mercer county land March 10, 1875. The former was acknowledged on the day of its date, and the latter on the day after that of its date. After an unavailing effort to set aside the will of Mary L. Bee, and after the death of the late Senator John W. McCreery, the plaintiffs found among his papers, between June 1 and June 15, 1917, a paper relied upon as a written declaration of the trust claimed by the bill. Senator McCreery had been a lawyer, a business man, and no doubt the legal adviser of Mrs. Bee in the sale of the Loudoun county land. The paper in question reads as follows:

"\$523.00. Recd of John W. McCreery the sum of Five hundred & twenty three dollars, one-third of the amount realized from the sale of Laceyville, (a tract of 160 acres of land lying in the County of Loudoun, in the State of Virginia, which belonging to the estate of my late husband Dr. M. H. Lacey Deed.) after deducting costs and expenses for selling said land, total sum \$1569.00, which said sum of five hundred and twenty three 00/100 Dollars, one third of the \$1569.00, I am going to invest in a tract of land, lately bought of Wm. Wiley & wife, lying near Princeton & containing 130 acres & receive the rents and profits of said land, during my life time in lieu of interest on said sum (said land was conveyed by said Wiley & Wife to Dr. I. Bee & myself March 3rd /75, & recorded in Deed Book No. 7.

"Witness my hand and seal, Mary L. Bee.  
[Seal].

"May 5th 1875."

The principal grounds of defense were:

(1) Nonexecution by Mary L. Bee of the paper relied upon as a declaration of trust; (2) lack of actual investment of the said sum of \$523 in the Mercer county land; and (3) legal inability or incapacity of the alleged declarant to carry the trust into execution, her right and title in the land having been irrevocably fixed, it is claimed, by the deed from Wiley and wife before the date of the declaration of trust. On the trial the court below found for the plaintiffs on the first issue thus tendered, and for the defendants upon the second. This result rendered it unnecessary, in the opinion of the court, to enter upon any inquiry as to the soundness of the third position taken by the defendant. A contention of the plaintiffs is that the instrument relied upon creates an executed trust, since a court of equity regards what a party has agreed to do as having been done.

[1-3] The objection interposed to the evidence of some of the plaintiffs as to the handwriting of the signature to the declara-

tion of trust on the ground of incompetence by reason of interest is not well founded, if we are to be governed by the weight of authority. Of course, none of these parties would be competent as witnesses to prove the actual signing of the paper by Mrs. Bee, nor to qualify themselves by observation of her act of signing any paper; for that would have been a personal transaction within the meaning of the law. *State ex rel. v. Maxwell*, 64 N. C. 313; *Rush v. Steed*, 91 N. C. 226; *Wilber v. Gillespie*, 127 App. Div. 604, 112 N. Y. Supp. 20. A decided weight of authority affirms the right of an interested person or party to testify to the handwriting of a signature purporting to be that of a deceased person, if he is otherwise qualified, even though he would be an incompetent witness to testify to the act of signing. In Iowa, Massachusetts, New York, North Carolina, Texas, and Wisconsin the courts hold that such testimony involves no more than a matter of opinion, and does not relate to a personal transaction or communication between the witness and the decedent. 40 Cyc. 2327; *Ware v. Burch*, 148 Ala. 529, 42 South. 562, 12 Ann. Cas. 669, note 671; 25 Am. & Eng. Ency. L. 261. On the other hand, the contrary has been held in Alabama, Georgia, Kentucky, Missouri, and Pennsylvania, as will be seen by reference to the books already cited. The intermediate court of appeals of Indiana has apparently held both ways as to such testimony. *Merritt v. Straw*, 6 Ind. App. 360, 33 N. E. 657; *Shirts v. Rooker*, 21 Ind. App. 420, 52 N. E. 629. The decisions adopting the minority rule take the view that, inasmuch as proof of the signature authenticates or validates the document constituting the basis of the action, it virtually covers the whole case, and impliedly proves the entire transaction represented by the document. If, however, the ultimate effect of evidence admitted against the estate of a deceased person were the sole test of admissibility, much evidence not relating to personal transactions or communications would be inadmissible. Much authority and the terms of the statute deny that it is the true test. As to facts not amounting to or involving such transactions or communications, interested witnesses are competent. This is an unqualified and unlimited implication arising from the very words of the statute. There is no proviso saying they are competent only in the event that the fact has only limited probative force respecting the right involved or none at all. The statutory test is whether the fact in question is a personal transaction or communication or involves one. *Davidson v. Browning*, 73 W. Va. 276, 80 S. E. 363, L. R. A. 1915C, 976. The chief purpose of the statute is to prevent the living party to a transaction from testifying because the other, being dead, cannot be produced to contradict

him, in case of false swearing. Denial of right to the former to testify puts them on an equality. *Faulkner v. Thomas*, 48 W. Va. 148, 35 S. E. 915. If so, its reason does not apply here. One party cannot very well contradict another's mere opinion. Whether the witnesses in question were competent depends upon the means by which they obtained the knowledge of the handwriting of the decedent, constituting the basis of their opinions. They are not disqualified by reason of the nature of the fact to which their testimony relates.

The witnesses now under consideration, parties plaintiff, derived their knowledge of the handwriting of Mrs. Bee from letters written by her to their mother, in their early childhood, preserved by their mother until her death, and by them afterwards, for sentimental reasons, and frequently read and perused. These letters were not communications between them and Mrs. Bee, and they make no claim to any other source of knowledge of her handwriting.

Their inspection of these letters also qualified them to express opinions as to the genuineness of the signature in question. There could scarcely be a better index to the genuineness of the letters than their preservation as heirlooms, tender remembrances, or sacred relics for more than 40 years. Besides, it is clearly revealed by their contents—messages of solicitude, advice, and love from mother to daughter. What is better calculated to make an impression on the minds of grandchildren than the written messages of their living grandmother to their dead mother? An administrator, having examined the papers of his intestate, may testify to his signature. *Sharp v. Sharp*, 2 Leigh (Va.) 249; *Tucker v. Kellogg*, 8 Utah, 11, 28 Pac. 870. A clerk through whose hands the correspondence of a deceased person with his employer has passed may testify as to the signature of the decedent. *Rex v. Slaney*, 5 C. & P. 213; *Reid v. Hodgson*, 1 Cranch C. C. 491, Fed. Cas. No. 11,667; *Reyburn v. Belotti*, 10 Mo. 597; *Titford v. Knott*, 2 Johns. Cas. (N. Y.) 211. A member of a family is qualified by reason of his knowledge of family correspondence in which he had no part. *Tuttle v. Rainey*, 98 N. C. 513, 4 S. E. 475.

Disqualification for lack of knowledge is charged against *S. F. Cleghon* and *E. M. Senter*, the former having had business transactions with Mrs. Bee in 1886, 1887, and 1888, and the latter having received two letters from her in 1890 or 1891. On the question of admissibility, the extent of the knowledge of the witness is not controlling. However limited it may be, he is entitled to express his opinion. Meagerness of knowledge or limitation of opportunity goes only to the weight of the evidence. *Flowers v. Fletcher*, 40 W. Va. 103, 20 S. E. 870; *Pepper v. Bar-*

*nett*, 22 Grat. (Va.) 405; *Cody v. Conly*, 27 Grat. (Va.) 313; *Rogers v. Ritter*, 12 Wall. 322, 20 L. Ed. 417; 25 Am. & Eng. Ency. L. 259, 262.

[4, 5] The clerk of the county court of Mercer county, after having produced and filed five deeds dated in the years 1882, 1883, 1892, and 1893, and purporting to have been executed by Mary L. Bee, was permitted to testify, from his comparison of the signature in question with those found on the deeds, that said signature was, in his opinion, genuine. He did not claim to know the signature of Mrs. Bee, nor did it appear that he had had any extensive experience in any business requiring particular attention to signatures. Ten witnesses, holding positions in banks, most, if not all, of whom were cashiers, though admitting themselves not to be experts, were permitted to give their opinions, based upon comparison, that the signature was genuine. Their business involved and required close attention to signatures, but they did not deem themselves to be experts. Our statute permitting comparison of writings (section 21a, c. 130, Code [sec. 4877]), does not in terms require witnesses testifying from comparison to be experts. It provides that genuine writings may be used with or without the testimony of witnesses, for the purpose of comparison. In some jurisdictions it is held, under similar statutes, that only experts can testify from comparison. Nonexperts are excluded because the members of the jury or the judge is as capable of making the test in that way as they are. *Griffin v. State*, 90 Ala. 506, 8 South. 670; *Spottiswood v. Weir*, 80 Cal. 448, 22 Pac. 289; *Wimblish v. State*, 89 Ga. 294, 15 S. E. 325; *Woodman v. Dana*, 52 Me. 9; *Bank v. Lierman*, 5 Neb. 247; *McKay v. Lasher*, 42 Hun (N. Y.) 270; 25 Am. & Eng. Ency. L. 276; *Wigmore, Ev. § 1997*; *Greenleaf, Ev. §§ 576, 578*; *Lawson, Ex. & Op. Ev. p. 445*. But such experts need not follow the profession of determining the genuineness of handwritings, nor possess anything more than peculiar or exceptional skill and knowledge of the subject of handwriting. It suffices that they are better qualified to express opinions on that subject than men usually are. *Lawson, Ex. & Op. Ev. p. 453*; *State v. Webb*, 18 Utah, 441, 56 Pac. 159; *Com. v. Nefus*, 135 Mass. 533; *Fairbank v. Hughson*, 58 Cal. 314; *State v. David*, 131 Mo. 380, 33 S. W. 28; *Sweetser v. Lowell*, 33 Me. 446; *Tower v. Whip*, 53 W. Va. 158, 44 S. E. 179, 63 L. R. A. 937; *Clay v. Alderson's Adm'r*, 10 W. Va. 53. The bank officials, testifying as witnesses, come within this definition. It is a part of their daily business to pay out money on their belief in the genuineness of signatures, wherefore they devote more attention to handwriting than laborers, farmers, merchants, or men engaged in the ordinary professions, and ob-

tain more knowledge and skill respecting signatures. They were competent witnesses, but the clerk of the county court, not having shown any evidence of more than ordinary knowledge of signatures, was not competent.

[6] The objection that the deeds used as standards of comparison are not sufficiently authenticated is not well taken. They are solemn instruments, carefully prepared and executed, and taken from the files of a public office in which they were lodged as muniments of title, some of them more than 30 years before this controversy arose, and when Mrs. Bee still possessed the health and strength incident to middle age. Similar standards were admitted for comparison in *Luco v. United States*, 23 How. 515, 541, 16 L. Ed. 545. A deed more than 30 years old, and recorded is presumed to be genuine. *Geer v. Lumber & Mining Co.*, 134 Mo. 85, 34 S. W. 1099, 56 Am. St. Rep. 489; *Webb v. Ritter*, 60 W. Va. 193, 233, 54 S. E. 484.

The evidence thus produced by the plaintiffs, tending to prove the genuineness of the signature, is as full, complete, and satisfactory as they could be expected to make it under the circumstances, and is equally as reliable as that adduced by the defendants. The trial court's finding on this issue must, therefore, be permitted to stand.

[7-10] The record discloses no direct or positive evidence of actual investment of the money received by Mrs. Bee from her first husband's estate in the Mercer county land. And the alleged declaration of trust says, by implication, that she did not pay that money for the land at or before the conveyance of one-half thereof to her. The two land transactions were completed in March, 1875, and the paper declaring her intention to invest trust money in it and make it a trust subject was not executed until May 5, 1875, almost two months later. That declaration was prospective in its terms. Her language was, "I am going to invest in a tract of land lately bought," etc. This implies that she had not then invested it, and says the land had been bought. The paper adds, agreeably to the fact, that it had been conveyed to herself and her husband. The title had already vested in her without any qualification or limitation of any kind, and, according to competent evidence, the cash payment of \$730 had been made by the husband alone, in live stock, and the deferred payments, amounting to \$470, had not been paid as late as 1878 or 1879. It may be that the two land transactions were intended to be one, and to effect a substitution of the Mercer county land for the other; but this is indicated only by some of the circumstances, the ownership of the Loudoun county land, Mrs. Bee's right and duty, and the relation of the two transactions in point of time. On the other hand, the money re-

ceived from the estate does not seem actually to have been invested. It was not equal in amount to half of the purchase money of the land, and two months after the land had been conveyed and the cash payment made Mrs. Bee declared it to be her intention to invest the money in that land. If resort could be had to surmise and conjecture, it might be said Dr. Bee made her a present of a half interest in the tract, or that he made the cash payment in live stock, expecting her to reimburse him to the extent of one-half of the payment. But such guesses are altogether uncertain, and for that reason cannot be indulged in the disposition of a controversy of this kind.

Besides, there is an insuperable legal obstruction to the view that she could, by this declaration, impress a trust upon land the title to which had previously vested in her. She could neither convey nor incumber such land otherwise than by an instrument executed in the manner prescribed by law. She could only do so by means of a deed or contract signed, sealed and acknowledged by herself and her husband. *Graham v. Long*, 65 Pa. 383. This was not a separate estate which she might have bound in equity by her contract. It was her absolute property, which she could not charge, either at law or in equity, except by the joint action of herself and her husband and in the prescribed manner. *Pickens' Ex'rs v. Kniseley*, 36 W. Va. 794, 15 S. E. 997.

The argument submitted under the invocation of the maxim that equity regards what ought to be done, or what parties have agreed to do, as having been done, accords a scope to that doctrine much wider than any text-writer or reported decision indicates or warrants. If Mrs. Bee had actually bought the land in question with the trust fund she had in her hands, declaring her intention to take and hold it in trust, but had in fact taken an absolute conveyance to herself, equity would treat her as if she had done what she had declared it to be her intention to do. It would make her a trustee, and compel her to perform the trust in disregard of the terms of the deed. But her failure to invest the money in the land left her only a trustee of the money. She could become a trustee of the land only by actual investment of the money in it. Mr. Pomeroy states the doctrine clearly in his work on *Equity Jurisprudence* (4th Ed.) § 587, as follows:

"Whenever a trustee or other person standing in fiduciary relations, acting apparently within the scope of his powers, has trust funds in his hands, which he ought, in pursuance of his fiduciary duty, to employ in the purchase of property for the purposes of the trust, and he does purchase property with such funds, but takes the title thereto in his own name, without any declaration of trust, then a trust with respect to such property at once arises in favor of the original cestui que trust or other beneficiary.

Equity imputes an intention to fulfill the obligation resting upon the trustee; and, independently of any element of fraud, it regards the trustee as intending to perform the obligation—as intending to act in accordance with his fiduciary duty, and not in violation thereof. It therefore treats the purchase as made for the benefit of the person beneficially interested. This doctrine is one of wide operation, of great efficiency, and is applied to every variety of persons occupying fiduciary relations."

In section 422 of the same work emphasis is laid upon actual investment as an essential element of creation of the trust. It says:

"Whenever a trustee or other person in a fiduciary position, acting apparently within the scope of his powers—that is, having authority, by virtue of his trust or other fiduciary relation, to do what he does do—purchases land or personal property with trust funds, or funds in his hands impressed with the fiduciary character, and takes the title to such property in his own name, without any declaration of a trust, a trust with respect to such property at once results in favor of the original cestui que trust or other beneficiary; the purchaser becomes, with respect to such property, a trustee. Equity regards such a purchase as made in trust for the person beneficially interested, independently of any imputation of fraud or fraudulent design, because it assumes that the purchaser intended to act, and was acting, in pursuance of his fiduciary duty, and not in violation thereof. This doctrine is one of wide operation, and is used by courts of equity with great efficiency in maintaining and protecting the beneficial rights of property. It has been applied to trustees proper, to executors, and administrators, directors, and managers of corporations, guardians of infant wards, guardians or committees of lunatics, agents using moneys of their principals, partners using partnership funds, husbands purchasing property with funds belonging to the separate estate of their wives, and to all persons who stand in fiduciary relations towards others. In order that this rule may apply, however, it must be made to appear with reasonable certainty that trust or other fiduciary funds were actually used in making the purchase. A court of equity, in order to raise a resulting trust, will not assume, from the mere fact that the purchaser had or might have had trust moneys in his hands, that he used them in paying for the property purchased, in the absence of evidence clearly showing such use by him."

The effort to make a distinction here on the ground of the character of the declaration fails, because it was one of unexecuted intention only. If the instrument had actually created a trust, the rights of the parties would have been governed strictly by the terms of the declaration. It would have defined the trust. But it admits no more than a trust in the money received. It shows on its face the title to the land had vested in Mrs. Bee while she still held the money. No trust in the land had been created, and it was legally impossible for her to impress a trust upon it, without prescribed co-opera-

tion of her husband. The argument erroneously assumes the existence of an express trust in the land.

Our concurrence in the view of the trial court that actual investment of the money in the land is essential to the establishment of the trust claimed, and that there is a total lack of proof of such investment, renders it unnecessary to enter upon an inquiry as to the admissibility of evidence of declarations of Mrs. Bee, admitted as matter of explanation of her possession, and as tending to prove she had spent all of the money she received from her husband's estate in the education of her son and payment of his expenses. The defendants prevail without the aid of that testimony. It is manifestly not admissible merely to prove payment of the money to the heirs.

[11, 12] Under the prayer of the bill for general relief, there might have been a decree for the money Mrs. Bee received as shown by her receipt and declaration of trust, but without interest for any time prior to her death. But the plaintiffs did not ask for such a decree and their right to the fund was in no way litigated. If demanded, it might be paid, or defenses of some kind might be set up against such demand. For this reason there can be no decree here for the money, though prima facie right to it is disclosed by the record. To decree it here might work surprise and injury. Under such circumstances, the practice is to remand the cause for the award of such relief, upon a proper application and successful resistance of any defense that may be set up. *Furbee v. Furbee*, 49 W. Va. 191, 38 S. E. 511; 3 Ency. Pl. & Pr. 349.

Failure of the trial court to award such relief or afford the plaintiffs an opportunity to claim it constitutes an error for which the decree, in so far only as it dismisses the bill, must be reversed. Costs will be awarded to the appellants as the parties substantially prevailing.

WILLIAMS, J. (dissenting in part). I concur in all of the foregoing opinion except so much of it as remands the cause for entry of a decree by the lower court. The case is one which, in my opinion, calls for entry by this court of such decree as the lower court should have entered. Having reached the conclusion that plaintiffs had failed to establish a trust in the land in the hands of Mrs. Bee for their use, and seeing that they had proven a clear case entitling them to a decree against her separate estate for the money, the court should have given them such a decree, with interest thereon from the time of her death, and made it a lien upon her lands in the hands of her devisees. Her interest in the Princeton land, having been conveyed to her since the creation by statute of separate estates of married women,

was her separate estate, and is liable, in equity, for her just obligations. Such decree is consistent with the special relief prayed for, and is such relief as ought to be accorded under the prayer for general relief, and I would enter such decree here.

(84 W. Va. 697)

**BURGER et al. v. MCCARTHY et al.**

(Supreme Court of Appeals of West Virginia.  
Oct. 7, 1919.)

*(Syllabus by the Court.)*

**1. TRADE UNIONS §3—REGULATION OF BROTHERHOOD OF RAILROAD TRAINMEN, NOT AGAINST PUBLIC POLICY NOT REVIEWABLE BY COURTS.**

A new regulation adopted by a general grievance committee, the constituted authority of the Brotherhood of Railroad Trainmen to make regulations for the benefit of the members of said order, and to contract with the railroad on behalf of its members respecting those regulations, and thereby to modify or destroy the right of preference to man trains making runs over certain sections of the railroad, acquired by some members of the order under a former regulation basing such preference on seniority of service, having been adopted in the manner provided by the constitution and by-laws of the order, which is not in conflict with any rule of public policy, nor destructive of vested property rights, is not reviewable by the courts.

**2. TRADE UNIONS §3—RIGHT OF PREFERENCE IN SELECTION OF TRAINMEN SUBJECT TO MODIFICATION BY SUBSEQUENT REGULATION OF BROTHERHOOD.**

The right of preference in the selection of trainmen to man certain trains, acquired under an existing regulation by certain trainmen by virtue of their seniority, is not such a vested right as cannot be denied or modified by a subsequent regulation or rule, adopted in the manner and by the authorities provided by the constitution and by-laws of the Brotherhood of Railroad Trainmen, of which complainants are members.

**Appeal from Circuit Court, Summers County.**

Suit for injunction by W. F. Burger and others against T. J. McCarthy and others. Temporary injunction dissolved on final hearing, and bill dismissed, and plaintiffs appeal. Affirmed.

E. C. Eagle, of Hinton, for appellants.

R. L. Blackwood and Geo. I. Neal, both of Hinton, for appellees.

**WILLIAMS, J.** This suit was brought in the circuit court of Summers county by W. F. Burger, E. T. Miles, and R. F. Beasley, railroad conductors residing in the city of Hinton, W. Va., and employed by the Chesapeake & Ohio Railway Company, against T.

J. McCarthy and 13 others, constituting the general grievance committee of the Brotherhood of Railroad Trainmen of the said Chesapeake & Ohio Railway, for the purpose of enjoining said general grievance committee from putting into operation by agreement with said railway company a new regulation affecting the right of preference acquired by plaintiffs under an old regulation respecting the same matter which had existed for a number of years, thus taking away from them a preference in making runs of passenger trains over certain districts or divisions of the railroad, acquired by them under the former regulation based on seniority of service.

The general grievance committee is the legislative body for the organization known as the Brotherhood of Railroad Trainmen, and its jurisdiction extends throughout the length of the Chesapeake & Ohio Railway Company's lines. It is made up from one member selected from the local committees of the several Brotherhood lodges, located at different places along the lines of the railroad, and is given power and authority by the constitution and by-laws of the Brotherhood to make rules and regulations governing the members of the Brotherhood, and to contract with the railway company in respect thereto. A temporary injunction was awarded, but on final hearing on the 14th of October, 1918, was dissolved, and plaintiffs' bill dismissed, and from that decree plaintiffs have taken this appeal.

[1, 2] The new rule, modifying the old one, the operation of which the bill seeks to enjoin, reads as follows:

"Paragraph 7. *In Passenger Service.*—All passenger trains that run over more than one freight district will be manned by the oldest man from either district over which the train runs; passenger trains that are confined to one freight district, or run over a part or all of only one district, shall be manned by men of that district; branch lines will be manned by men from the freight district with which they intersect, except Piney Creek, Loup Creek, Hawks Nest, Powelton, Paint Creek, Cabin Creek, Laurel Creek, Keeney's Creek, and South Side branches, which will be manned from New River & Kanawha Coal District crews; this to mean all service performed on these branches. The foregoing not to be operated west of Huntington. Crews, baggagemen, brakemen and flagmen will not be run from one passenger division to another; nor will they be run through terminals, where it is now being done. This agreement provides for future vacancies. Men now assigned to passenger runs not to be disturbed."

The old rule on the same subject reads as follows:

"Paragraph 7. Trainmen who have served the longest on any division or district of the road shall, if other things are equal, be given preference."

erence to runs on that division or district, except that men assigned to any division prior to July 1, 1892, shall not be affected."

The bill avers that plaintiffs have been in the railroad service from 15 to 18 years, having commenced as brakemen and worked up to the position of conductors, and have been members of the Brotherhood of Railroad Trainmen for 13 years or more, and have thereby acquired property rights under the old rule or regulation, a right growing out of contract between themselves and their employer, and therefore a sacred property right, which the new rule, if put into operation, would destroy. It is seriously contended in brief of counsel that this right of seniority is a thing of value; that it is one of the cherished rights of railroad men, gained only by long and arduous years of service.

It is established by the evidence that the new regulation was adopted in the manner and by the body of representatives provided for by the constitution and by-laws of the Brotherhood of Railroad Trainmen. It was adopted by the general grievance committee at a meeting held in Cincinnati in September, 1917, by a vote of 7 for to 6 against it, after it had been submitted to and approved by a vote of the members of a majority of the local lodges of which, at the time the rule was submitted to them, to wit, in 1914, there were 10; 7 of said lodges voting for, and 2 of them against, said rule—one lodge not voting. Ten local lodges existed in 1917, and were represented on the general grievance committee, which then consisted of 13 members. After it had been adopted by the general grievance committee, Lodge No. 232, at Hinton, W. Va., of which plaintiffs are members, and Lodge No. 389, at Richmond, Va., applied to the board of directors of the grand lodge, located at Cleveland, Ohio, for an appeal from the action of the general grievance committee, according to the provisions of the constitution and by-laws of the order. After hearing and considering the complaint of said local lodges, the board of directors denied the appeal, and notified the lodges of its action. The constitution and by-laws of the order also provide for a further appeal to the grand lodge of the order, but no further appeal was taken. It appears that the action of any subordinate committee or board in the organization, upon a matter over which it has jurisdiction, is conclusive upon all members of the Brotherhood until it is reversed by some higher authority within the order having appellate jurisdiction. Plaintiffs have not, therefore, pursued their remedies within the order to the full extent provided by its constitution and by-laws. They had a right to appeal from the board of directors to the grand lodge but failed to do so. Plaintiffs should have exhausted the remedies provided in the constitution and

by-laws of the Brotherhood before applying to a court for relief. *Robinson v. Brotherhood of Railroad Trainmen*, 80 W. Va. 567, 92 S. E. 730, L. R. A. 1917E, 995; and *Simpson v. Grand International Brotherhood of Railroad Engineers*, 98 S. E. 580, 83 W. Va. 355.

Presumably the action of the general grievance committee was for the general good of the Brotherhood; nothing appears to the contrary. We are furthermore of the opinion that the old rule, giving preference in making runs of trains according to seniority, did not create a property right in plaintiffs such as to justify the interference by a court of equity to prevent the operation of the rule.

We affirm the decree of the circuit court.

(84 W. Va. 687)

STATE ex rel. BOSWELL v. HAYMOND,  
Circuit Judge. (No. 3940.)

(Supreme Court of Appeals of West Virginia,  
Oct. 7, 1919.)

(Syllabus by the Court.)

MANDAMUS  $\Leftrightarrow$  176—SUPREME COURT OF APPEALS WILL CONSTRUER AND CORRECT MISTAKE OF LOWER COURT IN CONSTRUING MANDATE.

It is proper for this court, on application for a writ of mandamus, to construe its own mandate in connection with its opinion; and if it finds that the circuit court has erred, or acted beyond its province, in construing the mandate and opinion, to correct the mistake now and here, and to do so by writ of mandamus.

Mandamus by the State, on the relation of Thomas T. Boswell, against Hon. Wm. S. Haymond, Judge, etc. Peremptory writ awarded.

Martin & Seibert, of Martinsburg, and Sperry & Sperry, of Clarksburg, for relator.

John J. Coniff, of Wheeling, H. S. Lively, of Fairmont, and Austin V. Wood, of Wheeling, for respondent.

LYNCH, J. In the chancery cause of Howard A. Oberman, trustee, against Red Rock Fuel Company and others, brought to this court by Thomas T. Boswell, a defendant therein, upon appeal from a decree of the circuit court of Marion county, decided here March 4, 1919 (99 S. E. 66), there was involved the inquiry whether Boswell was entitled to demand and have executed to him by Red Rock Fuel Company a coal-mining lease upon certain parcels of its coal properties, possession of which he took with the acquiescence, knowledge, and consent of the company, but which subsequently was taken from him by an interlocutory order entered in the cause and delivered to George De Bolt, receiver, about January 22, 1918, where such possession remained at the date of the

decision rendered by this court upon the appeal.

This right to demand the execution of a coal-mining lease Boswell introduced into the cause for the first time by his answer to the bill filed by Oberman, trustee, in the nature of a cross-bill, setting up new matter and predicated his right to a lease thereon. The right so asserted by him grew out of negotiations conducted between himself and the officers and agents of the Red Rock Fuel Company in the city of Baltimore on or about the 1st day of October, 1915, and as a result of which negotiations, as he contends, a provisional agreement was arrived at by the parties then so assembled, whereby the company granted him the right to enter upon the land at once and begin operations thereon, and bound itself to execute to him upon certain terms and conditions a coal-mining lease upon that portion of the company's properties which was the subject-matter of the agreement, one of the terms of which was that the contract was to be effective as of the date last mentioned, and he was to pay for the coal mined and removed therefrom at the rate of 11.2 cents per ton during the life of the contract, with the usual provision concerning payment of an annual minimum royalty.

Upon the hearing of the cause this court found for Boswell, and by its order required Red Rock Fuel Company, through its officers and agents, to execute such a contract, to become effective as of the date aforesaid, and required De Bolt, the receiver, to account to Boswell for the coal mined during the receivership upon the royalty basis of 11.2 cents per gross ton, but without liability on the part of Boswell for any portion of the compensation usually allowable to receivers in such cases.

Upon the remand of the cause the circuit court, instead of limiting the settlement of the special receiver's receipts and disbursements, as so prescribed, in effect required the commissioner, to whom the cause was referred for the purpose of settlement, to ascertain the amount of the royalties paid, due, and unpaid by the defendant Thomas T. Boswell to the Red Rock Fuel Company, with the further and additional provision that—

"If said 11.2 cents per ton, or the royalty at the rate agreed upon, shall be less than the minimum royalty provided in the contract specifically enforced under this decree, and to be effective as of October 1, 1915, then in the settlement of the accounts \* \* \* there shall be charged to Thomas T. Boswell the minimum royalty provided in the contract dated October 1, 1915, and specifically enforced under the terms of this decree."

To prevent the execution of the order of reference so authorized, and to compel the circuit court to observe the mandate of this court, read and construed in the light of the

opinion rendered in the cause March 4, 1919, Boswell applied for and obtained a preliminary alternative writ commanding Hon. William S. Haymond, judge of the circuit court of Marion county, to recall, rescind, or annul the order of reference so entered, or modify it so as to exclude the provision therein contained as to the payment of the minimum royalty, or show cause why he should not peremptorily be compelled to do so.

The return admits the variance between the method of accounting contended for by Boswell and that prescribed in the order of the circuit court, and the probability of a substantial difference in the final results between the two methods, but disclaims any intention of disregarding the order of this court, and defends the reference order on the theory that the opinion of this court of March 4, 1919, left open and undetermined all matters relating to the enforcement of the coal-mining contract which the Red Rock Fuel Company was required to execute to Boswell. In other words, the reference order proceeds upon the assumption that it was the duty of the circuit court to enforce specifically the contract, the execution and delivery of which was required by this court. The specific performance of the mining contract was not an issue before this court upon the appeal in the original cause, because, as we have said, the issue was whether the parties had come to an agreement as to the form, effect, and substance of such a lease at the Baltimore meeting. That issue was resolved in favor of Boswell and the Red Rock Fuel Company was required to execute and deliver such a lease, and in addition to that relief De Bolt was required to settle with Boswell for the money collected by De Bolt during the receivership, less the cost of mining and marketing the coal, but without diminution by way of compensation to the receiver in that regard. Stated differently, the object of the settlement contemplated by this court, and as sufficiently appears from the opinion itself, as we think, was an ascertainment of the balance remaining in the hands of De Bolt on March 4, 1919, after the payment of all charges for mining and marketing the coal during the receivership, except the compensation usually allowed for the services of the receiver; but from this balance was to be deducted for the benefit of the company, and according to the terms of the contract, 11.2 cents per ton royalty on the coal actually mined by De Bolt while the property remained in his custody. Beyond that our order did not, and no order of this or any other court can now, go. To the extent the order of reference entered by the circuit court of Marion county exceeds the bounds of our holding, it is without warrant of law. As between the parties to the suit the adjudication is irrevocable. No court can now alter that result.

Under the authority of *Koonce v. Doolittle*, 48 W. Va. 592, 37 S. E. 644, *King v. Mason*, 60 W. Va. 607, 56 S. E. 377, and *Gaines v. Rugg*, 148 U. S. 228, 13 Sup. Ct. 611, 37 L. Ed. 432, *Boswell* is entitled to the peremptory writ, and we allow and direct its issuance in conformity with the prayer of his petition.

(84 W. Va. 713)

STATE ex rel. HENSLEY v. DAMRON,  
Judge. (No. 3880.)

(Supreme Court of Appeals of West Virginia.  
Oct. 7, 1919.)

(Syllabus by the Court.)

1. CRIMINAL LAW §991(1/2)—SENTENCE FOR FINE AND IMPRISONMENT SHOULD DIRECT WORK ON PUBLIC HIGHWAYS.

Section 109, chapter 43, *Barnes' Code* 1918 (*Code Supp.* 1918, c. 43, § 108 [sec. 1940—108]), makes it the mandatory duty of the court or justice, where any male person over sixteen years of age is convicted of an offense punishable by fine and imprisonment in the county jail, to also sentence the prisoner to labor on the public roads of the county, and the fact that such court or justice may not have orally included such sentence in pronouncing the judgment of fine and imprisonment, will not affect the judgment and sentence entered of record which does include sentence to work on the public roads.

2. MANDAMUS §164(4) — RETURN CONCLUSIVE AS TO WHETHER BILL OF EXCEPTIONS DIRECTED TO BE SIGNED IS TRUE.

Upon a writ of mandamus to compel a trial judge to sign a bill of exceptions, his return is conclusive on the fact whether or not such a bill of exceptions as presented is true.

3. CRIMINAL LAW §996(2)—DURING TERM COURT ON CONVICTION OF MISDEMEANOR MAY CORRECT JUDGMENT.

In the case of one convicted of a misdemeanor the trial court may during the same term of court in the absence of the defendant amend or correct its judgment so as to make it record the judgment actually pronounced and which the law requires the court to pronounce.

Original mandamus by the State, on the relation of Rufus Hensley, against Hon. James Damron, Judge, etc. Writ denied.

S. B. Avis, of Charleston, for relator.

W. H. Bronson, of Williamson, and John T. Simms, of Charleston, for respondent.

MILLER, P. By mandamus petitioner seeks to compel respondent to settle and sign his bill of exceptions No. 2, presented on May 26, 1919, within thirty days after adjournment of the term at which petitioner was tried and convicted and judgment pronounced against him for the offense of hav-

ing brought into the State within the period of thirty days more than one quart of intoxicating liquors prohibited by law.

The averments of the petition and the alternative writ are that upon conviction by the verdict of the jury on April 19, 1919, the court proceeded to pronounce judgment and sentence upon petitioner as recited in its order, in accordance with said verdict and in accordance with law, and assessed against him a fine of one hundred dollars and imprisonment in the county jail for the period of sixty days, and finally the consideration and judgment of the court was that the State of West Virginia do recover of and from petitioner said sum of one hundred dollars, the fine assessed as aforesaid, together with its costs in that behalf expended, including an attorney's fee of ten dollars as allowed by law, omitting, as it is averred in the petition and alternative writ, thereby further to adjudge against him the fine and imprisonment according to the sentence aforesaid, or any other punishment that might be lawfully imposed.

It is further averred that afterwards, on the 7th day of May, 1919, on the last day of the term at which the judgment was so entered against petitioner, respondent, in the absence of petitioner and without any notice or capias ad audiendum served upon him, caused said final judgment to be amended by inserting after the final words "as according to law," the following:

"And that the defendant be imprisoned and confined in the county jail of this county, and that he be worked upon the county roads of this county under the direction of the county road engineer."

It is further averred that petitioner did not know of said alteration of the record until after the adjournment of the term, and that the record was so altered after he had given notice in the previous order of his purpose to prosecute a writ of error to this court.

By the said bill of exceptions No. 2, it was proposed to have the record show the fact of the amendment of the judgment as alleged in the petition and alternative writ, but the averment is that respondent declined to sign and make the same a part of the record.

The return of respondent is that the judgment originally ordered was in accordance with the judgment as finally amended on the 7th day of May, 1919, and that all respondent did on May 7, before the adjournment of the term, on discovery of the omission, was to have the clerk in the clerk's office correct the judgment to correspond with the fact, and that it was not true as averred, that in addition to judgment of imprisonment defendant was not also adjudged to be worked on the public roads.



Petitioner undertakes to support his petition and alternative writ by his own and the evidence of two or three persons present at the time judgment was originally pronounced against him. They all say that the judgment was that petitioner be fined one hundred dollars and imprisoned in the county jail sixty days. But the return of respondent shows that in addition to the judgment of fine and imprisonment the order as directed was that defendant be also worked on the public roads of the county.

[1] But conceding the fact to be as petitioner contends, that respondent did not at the time of the judgment orally announce the labor sentence, we do not think this omission would invalidate the judgment as corrected. The statute, section 109, chapter 43, Barnes' Code 1918 (Code Supp. 1918, c. 43, § 108 [sec. 1940—108]), provides that:

"Whenever, hereafter, any male person over the age of sixteen years shall be convicted of an offense, the punishment of which by law is confinement in the county jail, before any court or justice of the peace, and sentenced by such court or justice of the peace to imprisonment in the county jail and to pay a fine and costs, he shall be sentenced by such court or justice of the peace to labor on the public roads of the county under the direction of the county road engineer or other representative of the county court having such work in charge, during the time of such imprisonment and until said fine and costs are satisfied," etc.

So that whether originally announced as a part of the judgment of the court, the law imposes this as a part of every punishment of fine and imprisonment in the county jail and makes it the mandatory duty of the court to include it in its judgment.

[2] But we have the return of respondent saying that as a matter of fact he did at the time pronounce the judgment found in the record as amended, and our decisions say that on an application for a writ of mandamus to compel a trial judge to sign a bill of exceptions, his return is conclusive of the fact whether or not the bill of exceptions as presented is true. *Douglass v. Loomis*, Judge, 5 W. Va. 542, point 6 of the syllabus; *Poteet v. County Commissioners*, 30 W. Va. 58, 3 S. E. 97; *State v. Cunningham*, 33 W. Va. 607, 11 S. E. 76; *Cummings v. Armstrong*, Judge, 34 W. Va. 1, 11 S. E. 742.

[3] But it is contended that the court could not lawfully so amend its judgment in the absence of the accused. This proposition is negated by *Price v. Commonwealth*, 33 Grat. (Va.) 819, 36 Am. Rep. 797. During the same term the orders of the court are always in the breast of the court to make corrections according to the fact.

Our conclusion is to deny the writ.

(84 W. Va. 604)

VINTROUX v. CHILTON et al. (No. 3793.)

(Supreme Court of Appeals of West Virginia.  
Sept. 30, 1919.)

(Syllabus by the Court.)

1. CORPORATIONS §116—RATABLE CONTRIBUTION BY STOCKHOLDERS UNNECESSARY TO SALE BY CORPORATION OF PART OF STOCK.

Though ordinarily a contract by which a corporation and some of its stockholders, for a valuable consideration moving to the corporation, bind themselves to a sale of a portion of its capital stock to a stranger, all of which has been issued and is owned by its stockholders, might require ratable contribution by all of the stockholders of a sufficient number of shares to make up the amount of stock sold, a sale of stock so made for a consideration moving in part to the contracting stockholders, and evidenced by a contract indicative of purpose to bind them to a sale or transfer of the required amount of stock from their own holdings, does not, as matter of law or equity, require such ratable contribution.

2. CORPORATIONS §116—NONCONTRACTING STOCKHOLDERS NOT BOUND TO CONTRIBUTE ON CONTRACT OF CORPORATION TO SELL PART OF STOCK.

In such case, participation of a noncontracting stockholder in a stockholders' meeting authorizing negotiation of the contract, by a resolution which is silent as to the sources from which the stock is to be obtained, and a meeting of the board of directors at which the contract was ratified, and his joinder in a contract pooling practically all of the stock, including his, creating a voting trust, required by the contract of sale, and declaring the deposit of the stock to have been made for the uses, objects, and purposes set forth in the contract, do not conclusively bind such stockholder to contribute, nor make out a clear case of contract on his part so to do.

3. CORPORATIONS §116—IN CONSTRUCTION OF AMBIGUOUS CONTRACT CONDUCT OF PARTIES CONSIDERED.

As to the sources of contribution, a contract so made and evidenced is ambiguous and indefinite, and, on the interpretation thereof, the acts and conduct of the parties in the application of its terms and carrying them into effect, amounting to contemporaneous or practical construction, are entitled to great weight.

4. CORPORATIONS §116—EVIDENCE SHOWING STOCKHOLDER NOT BOUND TO CONTRIBUTE TO SALE OF STOCK BY CORPORATION.

The issuance of trustee's certificates to such noncontracting stockholder, representing all the shares originally owned by him and deposited with the trustee, and acquiescence therein for a period of more than three years, is practically conclusive in his favor, under the circumstances above indicated.

Appeal from Circuit Court, McDowell County.

Bill by L. T. Vintroux, revived after his death by J. A. Vintroux, administrator, etc.,

against the Holley Oil & Development Company, Joseph E. Chilton, trustee, etc., and James A. Holley and Samuel Stephenson, as directors, with cross-bill answer by Holley and Stephenson, and answer by Joseph E. Chilton, in his own right and as trustee, to the bill and cross-bill answer, and separate demurrer and answer to the bill by the United Fuel & Gas Company, a former stockholder, with replication to answer of defendants Holley and Stephenson. Bill and cross-bill dismissed, and complainant appeals. Decree entered against the Holley Oil & Development Company, and cause remanded for such further relief as plaintiff may show himself entitled to.

McClintic, Mathews & Campbell, of Charleston, for appellant.

Davis, Davis & Hall and Koontz & Hurlbutt, all of Charleston, for appellees.

POFFENBARGER, J. The controversy brought up for determination by this appeal arose out of a distribution of assets of a corporation, the Holley Oil & Development Company, among its stockholders, in the form of a dividend; the corporation having converted all of its assets into cash and terminated its operations. At that time L. T. Vintroux claimed to be the owner of 30 shares of the capital stock of the corporation, and his title to 15 shares thereof was admitted by the board of directors and the trustee, in whose hands the certificates of all of the shares were deposited, but they denied his right to the other 15 shares. They paid him what was estimated to be his dividend on 15 shares, and they say that, in view of the dispute as to his right to the dividend on the others, the money applicable to them, as estimated, was deposited in a bank, the Union Trust Company of Charleston, W. Va. At that time there seems to have been no controversy as to the amount of the dividend. At August rules, 1914, Vintroux filed his bill, praying for a decree against the corporation, the trustee, and the members of the board of directors for the amount of money in dispute, \$14,000. At September rules, 1914, James A. Holley and Samuel Stephenson, two members of the board of directors and large stockholders of the corporation, filed their answer to the bill, in which they set up new matter and prayed for affirmative relief against Vintroux. On May 17, 1917, Joseph E. Chilton, who had no beneficial interest in the company, but was a trustee holding practically all of the stock and a director, filed his answer in his own right and as trustee, to both the bill and the cross-bill answer. On September 16, 1914, the United Fuel Gas Company, a corporation which had been a large stockholder in the Holley Oil & Development Company, just prior to the sale of its assets, filed its separate demurrer and answer to the bill.

Vintroux having died, the cause was revived in the name of his administrator, J. A. Vintroux, by an order entered January 3, 1918, and he filed an amended and supplemental bill and bill of revivor, containing a special replication to the matters set up in the answer of Holley and Stephenson as grounds of their prayer for cross-relief, May 15, 1918. On the motion of Holley and Stephenson it was ordered that their answer to the original bill should stand and be treated as their answer to the amended and supplemental bill. By the decree appealed from, both bills were dismissed.

The transaction involved began some time prior to the year 1905, with the organization of the Holley Oil & Development Company, having a subscribed capital stock of \$7,500. Before its organization, James A. Holley, Samuel Stephenson, and L. T. Vintroux, the last-named party acting for and on behalf of the other two, had obtained leases upon various tracts and parcels of land in the counties of Putman, Lincoln, and Kanawha for oil and gas development. The leases were assigned to the corporation, and, on April 10, 1905, the former owners thereof entered into what was termed an agreement of settlement, by which Vintroux was to have 30 shares of the capital stock of the company, and Holley and Stephenson 300 shares each. It was further agreed that Holley and Stephenson should contribute for development and expenses the sum of \$35,000, or such portion of that amount as they had not already expended. It was recited that Vintroux's \$3,000 had been paid into the company, by cash and services rendered. At a meeting of the stockholders of the company, held on the same day, the provisions of this agreement were ratified, and it was provided that an additional 675 shares of stock should be issued, making a total of 750 shares, or \$75,000; the shares being \$100 each. Of the original stock, 36 shares were issued to Holley, 36 to Stephenson, 1 to Ira P. Champe, 1 to A. J. Guill, and 1 to Ira G. Sayre. Of the 675 new shares, representing the purchase price of the leases, 30 were issued to Vintroux, 321 to Holley, 321 to Stephenson, 2 to Champe, and 1 to W. E. R. Byrne. All of the shares were issued as being fully paid up and nonassessable.

At a meeting of the board of directors, held a little more than 2 months later, June 26, 1905, and attended by Holley, Stephenson, Vintroux, and Byrne, a resolution was adopted, reciting a proposition of the United States Natural Gas Company, a corporation, for acquisition by it of one-half of the stock of the Holley Oil & Development Company, upon terms to be agreed upon by the holders of the stock of the company, and upon condition that the former company should pay over to the president of the Holley Company a sum not less than \$25,000, to be used

and expended in further development of certain territory held under lease by the Holley Company, and authorizing and empowering the president, J. A. Holley, to accept the proposition, for and on behalf of the corporation, and to impose such other and further conditions, favorable to the corporation, as in his judgment might be proper and expedient, and to execute, acknowledge, and deliver on its behalf all apt and proper writings necessary to the carrying of such agreement into effect. This resolution set forth several of the material provisions of the contract afterwards made between Holley, Stephenson, and the Holley Oil & Development Company, of the one part, and the United States Natural Gas Company, of the other.

By that contract, dated July 6, 1905, the United States Natural Gas Company agreed to pay to the Holley Oil & Development Company \$25,000, within 15 days from the date thereof, to be used in the work of testing and developing the territory, under the general direction of James A. Holley. It provided for a reorganization of the board of directors of the Holley Company in such manner as to make it consist of Stephenson, Holley, and Joseph E. Chilton, and for deposit of all of the shares of stock of that company, except 3 used for qualifying directors, and the 30 shares not then owned by Holley and Stephenson, in the hands of Joseph E. Chilton, to be held by him in trust for the purposes of the agreement, and, further, for like deposit of the 30 shares they did not then own, the Vintroux shares, if Holley and Stephenson should acquire them. Another provision of the contract, the one most vitally and directly involved here, gave the United States Natural Gas Company, upon certain conditions, the full one-half of the capital stock of the corporation, 375 shares, and obligated it to pay, as and for the purchase price thereof, to Stephenson and Holley, a sum equal to the amount of money actually expended prior to the date of the contract in procurement of the leases and development of the property, which is shown to have been \$43,354.51. The condition precedent to this transfer of stock and obligation to pay was production from existing wells, and others to be drilled, of a daily open flow of 25,000,000 cubic feet of gas. The shares of stock to be transferred to Joseph E. Chilton, trustee, were to remain in his hands until the expiration of the trust created by the contract. To secure payment of the amount to become due Stephenson and Holley, the United States Natural Gas Company bound itself to deposit with the trustee \$50,000 of its bonds, the coupons from which he was to detach from time to time and return to the company. Holley guaranteed that, at the date of the deposit of the shares, his company should be free from indebtedness, should not become indebted, except for ex-

penses of usual and ordinary development of its property, and should not, during the period of deposit, distribute, declare, or pay a dividend upon any shares of its stock, or divide or apportion any of its property among its stockholders. About 5,000 acres of the company's territory was expressly excepted from the operation of the contract.

In case of the failure to produce an open flow of 25,000,000 cubic feet of gas per day, by the expenditure of the \$25,000 advanced, the United States Natural Gas Company was to be under no obligation to purchase the 375 shares, or to pay Stephenson and Holley the purchase price thereof; but it should, nevertheless, have right of election to take and acquire the stock at and for the purchase price thereof, as defined by the contract, and, in the event of its failure to take such 375 shares, they were to be returned by the trustee to Stephenson and Holley, and the bonds deposited by the United States Natural Gas Company were to be returned to it, and the \$25,000 advanced by that company to become a debt against the Holley Oil & Development Company and constitute a lien upon its property. The United States Natural Gas Company also bound itself within a reasonable time, to construct a pipe line from the territory of the Holley Company to connect with one then owned or subsequently to be constructed by itself, and also to take and receive through such pipe line 5,000,000 cubic feet of gas per day, at the price of 4 cents per 1,000 cubic feet. The stock deposited with the trustee was to remain in his hands for a period of 10 years, unless the United States Natural Gas Company should elect not to acquire one-half thereof, and during that period the trustee was to vote the stock in such manner as should be agreed upon between the parties. In the event of any dispute or disagreement that might arise in the execution of the contract, the trustee was constituted an arbitrator for settlement thereof. The United States Natural Gas Company was given an option to purchase the other stock of Holley and Stephenson, if they should desire to sell, and Stephenson and Holley were given a like option on the stock of the United States Natural Gas Company.

At a meeting of the board of directors held on July 6, 1905, the date of the contract, and attended by Vintroux, the contract was approved, ratified, and confirmed, and on the same day all of the stockholders entered into an agreement with Joseph E. Chilton, trustee, referring to the contract of the United States Natural Gas Company, reciting its provision that, upon certain terms and conditions to be performed by that company, "the said Holley and Stephenson will sell and transfer to the said United States Natural Gas Company 375 shares, or 50 per cent., of the stock of the said Holley Oil & Development Company,"

and the provision for deposit of the stock with the said trustee, and granting, conveying, assigning, and transferring to the trustee 747 shares, contributed as follows: Holley, 356; Stephenson, 356; Vintroux, 30; Champe, 3; Guill, 1; and Byrne, 1. This agreement provided that the shares so transferred should be held "for the uses, objects, and purposes as set forth and stipulated in the said writing of the 6th day of July, 1903, for the period of 10 years from said date, unless sooner terminated by the limitations in said writing provided." In the event of the acquisition of one-half of the shares by the United States Natural Gas Company, the trustee was to hold those shares for the benefit of itself and its assigns. Plenary authority was conferred upon the trustee to vote the stock held by him during the period of the trust. It was further agreed that, if the United States Natural Gas Company should buy the 375 shares, the trustee should execute and deliver to any person holding any shares, if required, a trustee's certificate, "showing the interest which such person may have in such stock and his right to participate in dividends declared thereon."

The condition precedent to vesting of title to 375 shares of stock of the Holley Oil & Development Company in the United States Natural Gas Company, production of sufficient gas to make a daily open flow of 25,000,000 cubic feet, was accomplished on a date not clearly disclosed by the record. It seems to have occurred prior to June 23, 1910, for on that day the trustee issued to Vintroux his certificates, representing 30 shares. The agreement pooling the stock and constituting the voting trust did not contemplate nor provide for issuance of such certificates, except in the event of the acquisition of one-half of the stock by the United States Natural Gas Company. The happening of that event was essential to determination of the ultimate rights of the parties as to the stock and the number of shares they should have, for the 375 shares going to the United States Natural Gas Company had to be contributed from the shares deposited with the trustee as the stock of Holley, Stephenson, Vintroux, Champe, Guill, and Byrne. That company seems to have acquired the 375 shares prior to September 4, 1909, for on that date it executed a deed by which it conveyed, assigned, and set over to the United Fuel Gas Company said 375 shares of stock together with other property.

On April 24, 1914, the property of the Holley Oil & Development Company was sold directly or indirectly to the Wayland Oil & Gas Company, apparently for the sum of \$740,000, out of which a commission of \$30,000 was paid for effectuation of the sale. A payment of \$10,000 to the United Fuel Gas Company, in connection with the transaction, introduces an element of uncertainty as to the exact amount of the purchase price. If it

is to be included, the property sold for \$750,000; otherwise, for \$740,000. As it was the owner of one-half of the stock, its assent to the sale of the property to the Wayland Oil & Gas Company was essential, and it seems to have been unwilling to give its assent. At least, its unwillingness is suggested in an argument founded upon facts and circumstances disclosed by the record, and averred by the trustee's answer. Its answer avers that, on March 24, 1914, it gave Stephenson an option until the 24th day of April, 1914, to purchase its 375 shares at the price of \$370,000, of which sum \$10,000 was then paid, and the balance of which was to be paid on or before April 24, 1914, by deposit thereof to its credit in the Charleston National Bank. It further avers that, prior to April 24, 1914, Stephenson did deposit or cause to be deposited to its credit the said sum of \$360,000, and thereby became the owner of said stock. The trustee avers in his answer that the Wayland Oil & Gas Company paid the \$10,000 to the United Fuel Gas Company, in order to obtain its consent to an option for the purchase of the Holley Oil & Development Company's property. Nor does the case seem to be fully developed as to the amount of commissions properly chargeable. The propriety of one payment, \$30,000, is not questioned; but there are two other items, one of \$5,000 and the other of \$2,500, which, according to the answer of the trustee, were paid by stockholders out of their dividends, the \$5,000 item by Holley, Stephenson, and Champe, and the \$2,500 item, by Stephenson. The board of directors seem to have disbursed \$691,000 to the stockholders and deposited \$14,000 in the bank; the latter item being in dispute, making \$705,000, leaving undistributed \$35,000, an amount equal to the aggregate of two of the commission items. These uncertainties constitute the occasion of the claim set up in the amended and supplemental bill for an accounting and a decree going beyond the \$14,000 admittedly applicable as a dividend to the 15 shares, the title to which is in dispute.

[1-3] The sources from which the 375 shares obtained by the United States Natural Gas Company were to be made up constitute the subject-matter of the basic inquiry in the cause. The theory of the bill and amended and supplemental bill is that Holley and Stephenson obligated themselves to furnish the 375 shares out of their holdings, and that they did so. On the contrary, it is insisted by the respondents that all of the holders of stock, including Vintroux, were to contribute ratably to the shares disposed of to the United States Natural Gas Company, and that one-half of his stock was included in the sale. In support of his position, the plaintiff relies largely upon the recital of the contract of April 10, 1905, saying Vintroux's stock had been paid for in cash and services, and the provision thereof

obligating Holley and Stephenson to furnish at least \$35,000 for development purposes and expenses; the provision of the contract of July 6, 1905, obligating the United States Natural Gas Company conditionally to pay to Holley and Stephenson, as and for the purchase price of the stock it was to obtain, a sum of money equal to the amount of cash actually expended by or on behalf of the company prior to that date, \$43,354.51; the provision of the contract of July 6, 1905, between the stockholders and Joseph E. Chilton, trustee, reciting that Holley and Stephenson had conditionally agreed to sell and transfer one-half of the stock of the company to the United States Natural Gas Company; the issuance to Vintroux, presumably after the performance of the condition vesting title to one-half the stock in the United States Natural Gas Company, of trustee's certificates for 30 shares; and the fact that the certificates were issued by the trustee, upon the demand of Vintroux, after the former had communicated with Gen. Holley by telephone, and had been informed by Holley that Vintroux was entitled to 30 shares. In support of their position, the defendants strongly invoke the fact that the contract with the United States Natural Gas Company was made largely for the benefit of the Holley Oil & Development Company; the actual use of the \$25,000 procured by that contract, in the development of the latter company's property; the provision of the contract of April 10, 1905, saying, "The profits and losses, if any may arise, from the said Holley Oil & Development Company in the future, to be shared by the parties holding the stock therein, in proportion to their respective interests;" the participation of Vintroux in the meeting of the board of directors of July 6, 1905, at which the contract for the sale of the shares was ratified and confirmed; the transfer of the shares of Vintroux to the trustee; and the recital of the trust agreement that the deposit was made for the uses, objects, and purposes set forth in the contract with the United States Natural Gas Company.

The inferences arising from Vintroux's participation in the meeting of the board of directors of June 26, 1905, authorizing and empowering Holley to enter upon the proposed negotiation with the United States Natural Gas Company, and that of July 6, 1905, at which the contract was ratified, his joinder in the contract of July 6, 1905, creating the trust and declaring the deposit of the stock to have been made for the uses, objects, and purposes of the contract, and his knowledge of the use to which the \$25,000 advanced was devoted, are by no means conclusive, when viewed in the light of all the conditions and the express terms of some of the documents, indicating the contrary thereof. By the agreement of April 10, 1905, Holley and Stephenson, presumptively on ac-

count of the large amount of the stock assigned to them, bound themselves to expend for the benefit of the company at least \$35,000, and there was no provision in that contract for reimbursement of that amount from the treasury of the company or otherwise. The context of this provision indicates that this money was to be expended on account of stock, by way of equalization. Vintroux was relieved from any such payment, on the ground of his having paid for his stock in cash and services. If this is the true interpretation of that contract respecting the advancement of the \$35,000, the benefit derived from expenditure thereof belonged to the company and had been paid for, in so far as Vintroux or the company had any interest therein. Holley and Stephenson could not claim reimbursement of that money, in whole or in part, either from Vintroux or the corporation. It constituted the bulk of what had been expended on the property at the date of the execution of the contract of July 6, 1905. By the terms of that contract, provision was made for return of that sum of money to Holley and Stephenson. It was to come from the United States Natural Gas Company. No doubt it was sought in that direction and from that source, because it could not be claimed from the Holley Oil & Development Company or any of its stockholders. It may be that what was expended by them in excess of \$35,000 might have constituted an indebtedness of the corporation, but it does not appear ever to have been asserted or claimed as such. The \$25,000 advanced by the United States Natural Gas Company was not treated as purchase money of the stock to be obtained.

The status of that fund is not exactly defined by the contract. Under certain possible conditions foreseen, it was to become a debt of the Holley Oil & Development Company. The inference that it was to be considered as a part of the purchase money of the stock is clearly negated by that provision of the contract, which required the United States Natural Gas Company to pay to Holley and Stephenson "a sum equal to the amount of cash money actually expended prior to the date of the contract, by or on behalf of the Holley Company, in acquiring and developing the territory, as and for the purchase money" of such 375 shares of stock. Tested by its letter, therefore, the contract seems to have been intended to secure, conditionally, reimbursement of Holley and Stephenson for the money they had expended in the development of the property, and enhancement of the stock to be retained by them and all other stock in the company, by the increased development to be effected by the expenditure of the \$25,000 advanced by the United States Natural Gas Company, connection of the leased territory with that company's pipe line, and its purchase of gas produced at 4 cents

per 1000 cubic feet. For such reimbursement they had no just or equitable right to sell the stock of anybody but themselves. By the sale of 375 shares out of their 620 shares, they obtained the return of the \$43,000 they had expended, and effected an arrangement by which the remaining 245 shares were greatly enhanced in value. Hence it does not appear that they necessarily contemplated a contribution of stock on the part of Vintroux. There was no provision in the contract for payment to him of any part of the \$35,000 or \$43,000 paid to Holley and Stephenson, on account of the money they had expended for the company. Inasmuch as at least \$35,000 of that money had been invested in the company by them and was not to be returned, they had no right to take it to themselves in part consideration of the sale of the stock of Vintroux. In other words, they could neither sell any interest in the company, nor any stock of Vintroux, as a means of procuring payment of any part of \$35,000, for there was no obligation upon the company or Vintroux to repay any part of it.

While it would be equitable and just to require Vintroux to contribute, if a contract had been made purely and solely for the benefit of the corporation and he had accepted the benefit thereof, it would be manifestly unjust to require him to contribute one-half of his stock in a sale that would involve large repayment of money to Holley and Stephenson, which they had no right to exact either from the company or from him. If, under the circumstances of this case, he should be required to contribute at all, his contribution should be determined with reference to the disposition of the proceeds of the sale of the stock. As neither he nor the company got any part of the \$43,000, there is no reason for requiring him to exchange his stock for it. If he had received part of that money, he might be required to contribute pro rata to the stock. Omission to provide any such basis of contribution in the contract, any resolution of the directors, or by any other means, argues very strongly that no contribution from him was contemplated or expected. The recital in the trust agreement of July 6, 1905, saying it had been stipulated and agreed in the contract with the United States Natural Gas Company that, upon certain terms and conditions to be performed, Holley and Stephenson would sell and transfer to that company 375 shares of stock, amounted to an interpretation of that contract, in a contract signed by Vintroux, as well as by Holley and Stephenson, and weighs very strongly against any inference of intent on the part of Vintroux to contribute, arising from his having signed that contract, and, on the same day, ratified the other contract by his participation in the meeting of the board of directors.

Moreover, the declaration of the purpose of the deposit, made in the contract of July 6, 1905, creating the trust, must be read and considered in the light of this recital. It must be read, also, in the light of those provisions of the contract which show the uses and purposes for which the deposit of the stock was made. It was not made for the purpose of determining the basis of contribution to the shares to be taken by the United States Natural Gas Company, for that contract is entirely silent as to that matter. Some of the principal purposes of that deposit were to effect and maintain a particular organization of the board of directors; to secure the United States Natural Gas Company its 375 shares, if it should elect to take them; to shield the Holley Oil & Development Company from indebtedness, except such as should be necessary for preservation of its properties and development in the usual and ordinary way; to prevent declarations or payments of any dividends and division of any of its property among its stockholders, pending the election of the United States Natural Gas Company to take or reject the stock; and to guarantee the voting of the stock in accordance with the mutual agreement of the parties to the contract, or in such manner as the trustee should determine, in the event of a disagreement. Finally, the contract declares it to be the intent of the parties to vest the title to the stock in the trustee for voting purposes. These are the direct and declared uses, objects, and purposes of the deposit of the stock.

Of course, all of the stipulations and undertakings of the contract were in some measure dependent upon the deposit of the stock. In other words, the deposit of the stock was a means by which the parties undertook to safeguard or guarantee performance of all the stipulations of the agreement. But the performance of those stipulations, agreements, and conditions was not the objects of the trust, as refined by the contract. The clause under consideration has reference to the uses, objects, and purposes of the trust, set forth and stipulated in the contract, not to all the stipulations, objects, and purposes of the contract. The scope of the trust was much narrower than the scope of the contract. It related to the stock only, while the contract embraced a great many other things. The former did not touch the subject of contribution. As to division of shares, it had only one purpose, the holding of 375 shares for the United States Natural Gas Company, without reference to the sources from which they came.

[4] As to the sources of contributions to make up the 375 shares, the contract evidenced by the resolutions and contracts disclosed by the record is, to say the least, thoroughly ambiguous. If, construed in the light

of all the facts and circumstances, it does not clearly absolve Vintroux from liability to contribute. It is uncertain and indefinite as to imposition of such liability. In the interpretation of such contracts, the definition or construction put upon them by the parties, in carrying them into execution, is allowed very great weight. The trite expression of Lord Chancellor Sugden, with reference to the rule, will bear repeating again:

"Tell me what you have done under such a deed, and I will tell you what that deed means." *Chapman v. Coal & Coke Co.*, 54 W. Va. 193, 200, 46 S. E. 262, 264; *Caperton v. Caperton*, 36 W. Va. 486, 15 S. E. 257.

Nearly four years before any question arose as to the manner in which the 375 shares of the United States Natural Gas Company were to be made up, the trustee, who was also a member of the board of directors, issued to Vintroux trustee's certificates representing 30 shares of stock. Before that time the condition upon which the title to the 375 shares was to vest in the United States Natural Gas Company had been performed, and it had taken the stock under the terms of the contract. After that had occurred, the trustee was at liberty to issue trustee's certificates representing stock, but not before. Prior to the happening of that event nobody could say whether the United States Natural Gas Company owned any of the stock, for its contract of purchase was conditional. Mr. Chilton swears that, according to his recollection, he called up Gen. Holley and asked him how many shares Vintroux was entitled to, before he issued the certificates to him, and was informed that he was entitled to 30 shares. Gen. Holley and Maj. Chilton were two of the directors, and, evidently, managing directors. They were no doubt more familiar with the contract and understood its terms and provisions better than anybody else connected with the Holley Oil & Development Company. The company and all of the other stockholders acquiesced in the issuance of these certificates and their possession by Vintroux from June, 1910, until April, 1914. Hence it may well be said that the corporation and its directors and stockholders construed the contract evidenced by the resolutions and agreements referred to as not requiring any contribution on the part of Vintroux.

Our conclusion is that Vintroux did not part with his title to any of his shares, nor bind himself to do so. He is therefore entitled to a decree against the Holley Oil & Development Company for the sum of \$14,000, the amount admitted to be due by way of dividend upon 15 shares of his stock. If the fund has been wrongfully paid out or misappropriated, he is entitled to a decree against the directors responsible for such in-

vasion of his right. He is also entitled to interest on said sum of \$14,000 from April 24, 1914, until paid. *Cresap v. Brown*, 96 S. E. 66. Inasmuch as the record does not fully develop the facts relating to the exact amount of the purchase money and the commissions and expenses chargeable against it, nor show necessity for a personal decree against any director, a decree will be entered here against the Holley Oil & Development Company for said sum of \$14,000 and interest thereon as aforesaid, and the cause will be remanded for such further relief as the plaintiff may show himself to be entitled to.

(84 W. Va. 709)

**CARDER et al. v. JOHNSON et al.**

(Supreme Court of Appeals of West Virginia.  
Oct. 7, 1919.)

*(Syllabus by the Court.)*

**1. EXECUTORS AND ADMINISTRATORS ↔439—  
PERSONAL REPRESENTATIVES OF VENDORS  
NECESSARY PARTIES TO SUIT FOR SPECIFIC  
PERFORMANCE.**

In a suit by the vendee to compel specific performance of a contract of sale of land made by two vendors, both of whom are dead, the personal representative of the one who survived his covendor is a necessary party, and omission to make him a party is not excused by the joinder of the personal representative of the other.

**2. EXECUTORS AND ADMINISTRATORS ↔439—  
NONJOINDER NOT EXCUSED BY LAPSE OF  
TIME, RAISING PRESUMPTION OF PAYMENT.**

Nor does lapse of time excuse such omission; the presumption of payment being a rebuttable one, and not conclusive.

**3. APPEAL AND ERROR ↔1178(7)—ON WANT  
OF NECESSARY PARTIES COURT WILL REVERSE  
AND REMAND.**

On an appeal from a decree entered in a cause in which the record discloses on its face omission of a necessary party defendant, the appellate court will reverse the decree, decline to pass upon the merits of the cause, and remand it, with leave to the plaintiff to amend by bringing in the omitted party.

**4. SPECIFIC PERFORMANCE ↔106(1)—IN AC-  
TION BY PURCHASER, CLAIMANTS OF EASE-  
MENT NECESSARY PARTIES.**

Claimants of an easement on land which has been sold by an executory contract of sale, purporting to have been granted by the vendor, his heirs or assigns, while the vendee was in possession of the land, are proper parties to a bill seeking specific performance of the contract.

**5. COSTS ↔236—ON REVERSAL FOR WANT OF  
NECESSARY PARTY COSTS IN APPELLATE COURT  
AWARDED APPELLANT.**

When the trial court has improperly overruled a demurrer to a bill and dismissed it as upon the merits, and the decree is reversed for

want of a necessary party, costs in the appellate court are awarded to the appellant.

Appeal from Circuit Court, Doddridge County.

Suit for specific performance by Otto Carder and others against Aaron Johnson and others. Demurrer to bill sustained as to certain defendants, and as respects the named defendant, overruled, and bill dismissed on final hearing, and plaintiffs appeal. Reversed, demurrer sustained, in so far as not sustained below, and cause remanded, with leave to plaintiffs to amend.

G. W. Farr, of West Union, and F. O. Sutton, of Clarksburg, for appellants.

J. Ramsey, of West Union, for appellee.

**POFFENBARGER, J.** The decree under review dismissed, on final hearing, a bill filed for specific performance of an alleged written contract of sale of a 70-acre tract of land purporting to have been executed for and on behalf of the owners or vendors, by an agent, after the overruling of a demurrer thereto. The contract, a title bond, is dated July 8, 1875, and the plaintiffs and their predecessors in title have been in possession of the land since a date near that of the paper relied upon as a contract.

The alleged vendee was Manley Carder, great-grandfather of the plaintiffs; Daniel Sherwood and Robert Johnson were the vendors; and E. O. Sperry was the agent. The purchase price, as set forth in the bond, was \$280, of which \$50 was paid on delivery of the bond, \$50 to be paid on the 1st day of September, 1875, and the residue in two equal annual installments with interest. Manley Carder seems never to have occupied the land. The theory of the bill is that he put his son, Jacob H. Carder, in possession thereof, and delivered to him the bond. That instrument bears a written assignment by J. H. Carder to R. A. Carder and D. F. Carder dated December 20, 1876. According to the testimony of D. F. Carder, the only living party to the transaction, he sold his interest, so acquired, to R. A. Carder, in consideration of the amount of money he had paid to Jacob H. Carder. The sale by J. H. Carder to R. A. and D. F. Carder seems to have been further represented by a title bond executed by the vendor and three notes executed by the vendees, two for \$60 each, and one for \$105. The remainder of the purchase price, \$75, seems to have been paid in cash. Rufus Carder resided on the land until the date of his death, October, 1910, and died intestate, leaving ten children, seven of whom, together with the widow, conveyed their interests in the land to Otto Carder, one of the sons, and he and the other two, as well as an infant sister, brought this suit; the infant joining merely to validate her deed, the bill says.

Robert Johnson, one of the vendors, died a great many years ago, and Daniel Sherwood, the other alleged vendor, died about the year 1900. Aaron Johnson, a son of Robert Johnson, purchased the interests of all of his coheirs, and, at a judicial sale made under a decree settling the estate of Daniel Sherwood, he purchased all of the Sherwood interests in the land. By a deed dated June 26, 1906, he conveyed the coal in the land to W. F. Baird. He leased the land for oil and gas purposes to John B. Hoffmiller, by an agreement dated November 30, 1910. This lease seems to have been passed by assignment to the Pocahontas Oil & Gas Company, a corporation. By a deed dated June 28, 1905, he granted a pipe line right of way to the Philadelphia Company of West Virginia, a corporation, which company, by deed dated July 31, 1914, leased it to the Pittsburgh & West Virginia Gas Company, a corporation.

[1] The parties defendant to the suit are Aaron Johnson, Henry Ash, administrator of the estate of Robert Johnson, deceased, and the above-named grantees of Aaron Johnson and their assigns. Though Daniel Sherwood survived Robert Johnson, the personal representative of his estate is not made a party. The administrator or executor of a deceased vendor of real estate is a necessary party to a bill filed for specific performance of the contract. *Richmond v. Richmond*, 62 W. Va. 206, 219, 57 S. E. 736; *Hill v. Proctor*, 10 W. Va. 59. Similarly, the personal representative of the vendor is the proper party to sue for the purchase money. *Steenrod's Adm'r v. Railroad Co.*, 27 W. Va. 1. Another line of cases asserting the same principle are suits to compel releases of vendor's liens reserved by vendors who have died. The personal representative of the vendor is, in such case, an indispensable party. *Thompson v. Hern*, 62 W. Va. 497, 59 S. E. 504. So the personal representative of the creditor in a deed of trust is a necessary party to a bill to remove a cloud and enforce the lien of the deed of trust. *Bryan, Trustee, v. McCann*, 55 W. Va. 372, 47 S. E. 143.

On the assumption that Johnson and Sherwood were joint obligees, the latter alone could have sued for the purchase money at law, after the death of the former. In other words, the right of action for the debt survived to Sherwood, and, on his death, went to his personal representative. 1 Chitty Pl. 19. If it be conceded that payment might have been made by Manley Carder or his assignees to Robert Johnson or his personal representative, and it manifestly could have been made to Johnson himself, it is clear that it might have been made to Sherwood or the personal representative of his estate, after the death of Johnson, assuming it not to have been previously paid. Hence, for the purposes of this case, it is unnecessary to enter upon any inquiry as to whether payment



might rightfully have been made to any person other than Sherwood, or his administrator, after Johnson's death. As the bill proceeds upon the theory of payment of the purchase money and alleges payment thereof, the personal representative of Sherwood's estate is a necessary party. The allegation of payment is made against him, as well as against the administrator of Johnson.

[2] The long lapse of time, raising a presumption of payment, does not excuse the omission to make the personal representative a party, for the presumption is a rebuttable one. *Mong v. Roush*, 29 W. Va. 119, 129, 11 S. E. 906; *Criss v. Criss*, 28 W. Va. 388; *Hale v. Pack's Ex'rs*, 10 W. Va. 145. In *Thompson v. Hern*, 62 W. Va. 497, 59 S. E. 504, the debt was much more than 20 years old, and in *Hill v. Proctor*, 10 W. Va. 59, it seems to have been more than 30 years old.

[3] There is no formal assignment of error to the overruling of the demurrer, but the defect of parties is apparent and it is the practice of this court to decline to decide in any case any matter affecting a person who is not a party to the cause; and it will reverse a decree or judgment, entered in the absence of a necessary party, on its own motion. *Hitchcox v. Hitchcox*, 39 W. Va. 607, 20 S. E. 595; *Morgan v. Blatchley*, 33 W. Va. 155, 10 S. E. 282; *Snaveley v. Pickle*, 29 Grat. (Va.) 27.

[4] As to the Philadelphia Company and the Pittsburgh & West Virginia Gas Company, the demurrer was sustained, and the bill dismissed, without prejudice to the rights of the plaintiffs. Inasmuch as the plaintiffs, according to the allegations of their bill, were the beneficial owners of the land, and Johnson a mere trustee of the legal title, the former are clearly entitled to have an adjudication of their beneficial or equitable title, if any, against said companies, even though they may have obtained such right, under the power of eminent domain, as precludes their ouster from the right of way. *Given v. United Fuel Gas Co.*, 99 S. E. 476. To what extent the relief against them might go it is not necessary to inquire, for the plaintiffs may not be able to show themselves entitled to any on final hearing.

On the ground of defect of parties, the demurrer was properly sustained as to said companies; but, if and when this defect shall have been cured by an amendment, they will be proper parties to the bill. As to all of the other defendants, the demurrer should have been sustained, and the plaintiffs permitted to amend by making the personal representative of Daniel Sherwood a party.

For the errors aforesaid, the decree complained of will be reversed, the demurrer sustained in so far as the court below did not sustain it, and the cause remanded, with leave to the plaintiffs to amend.

[5] As to costs in this court, this cause is governed by the decision in *Rowan v. Tracy*, Ex'r, 74 W. Va. 649, 82 S. E. 478, and they will be decreed to the appellants.

(84 W. Va. 714)

### KNIGHT v. SMITH et al.

(Supreme Court of Appeals of West Virginia.  
Oct. 7, 1919.)

(Syllabus by the Court.)

LOGS AND LOGGING §3(11) — PURCHASER SEVERING STANDING TIMBER HAS REASONABLE TIME FOR REMOVAL.

Where by deed or contract one purchases standing timber for a sum paid or stipulated to be paid therefor, and within the time stipulated for removing it actually severs the trees from the ground, he may of right, unless restrained by the terms of the deed or contract, enter or continue on the land a reasonable length of time, to remove from the premises the timber so severed.

Appeal from Circuit Court, Doddridge County.

Suit for injunction by Z. W. Knight against W. Frank Smith and others. From a final decree in favor of named defendant, dissolving the preliminary injunction and dismissing the bill, plaintiff appeals. Affirmed.

J. V. Blair, of West Union, for appellant.  
J. Ramsey, of West Union, and Hoffheimer & Templeman, of Clarksburg, for appellee.

MILLER, P. This is an appeal by plaintiff from a final decree of the circuit court of Doddridge County, pronounced on the 28th day of August, 1917, dissolving the preliminary injunction theretofore awarded, and dismissing the bill.

By the preliminary injunction defendants W. Frank Smith, Charles E. Jones and others were enjoined and restrained from entering or trespassing upon a tract of one hundred and thirty-three acres of land belonging to plaintiff and from cutting any trees and timber thereon standing or severed from the land, and from hauling and removing any logs or the boards and lumber manufactured therefrom, and from operating the saw mill on the premises, and from claiming title to said logs, lumber and timber.

The rights of the parties depend upon the proper construction of the following contract and what was done under it by the parties or their privies:

"Canton, W. Va., Jan. 12, 1915.

"Article of Agreement.

"This the 12th day of Jan., 1915, I agree to pay to Z. W. Knight the amount of Seven Hun-

dred Dollars, \$700.00, for all timber on his farm with the exception of the walnut in cleared ground and the chestnut under ten inches in diameter, \$350 to be paid down and the residue to be paid in 8 mo. Limited time for taking timber off of ground is two years with the privilege of setting mill and logging timber the most convenient way with as little damage to cleared land as possible.

"Z. W. Knight.  
"L. L. Shinn."

The defendant W. Frank Smith acquired his rights from said Shinn by assignment as follows:

"For value received, I hereby sell to W. F. Smith the timber mentioned and described in the within contract and sale. And I do hereby assign to the said W. F. Smith all my right and interest in said timber and my rights under this contract.

"This the 5th day of May, 1916.

"L. L. Shinn."

The position of plaintiff, as disclosed by his bill and his evidence, is that his contract with Shinn was not a deed conveying the timber, but a mere license to go upon the land and to cut, manufacture and remove the timber within the two years prescribed for taking it off the ground, and that all lumber and timber, whether severed or not, remaining on the land after January 12, 1917, became or remained his property, and though fully paid for by the purchaser, the latter acquired no right of removal after that time.

The contract of the plaintiff is not a deed, but it is signed by him and is at least a contract calling for a deed if one was necessary to carry the contract into effect. This contract by its plain terms is for "all timber on his [the seller's] farm with the exception of the walnut in cleared ground and the chestnut under ten inches in diameter" without condition or limitation as to time and without terms of reservation or defeasance. True, there is a limit "for taking timber off of ground." But is this not in the nature of a covenant rather than a condition or limitation on the title of the purchaser? It seems to us it should be so construed, for in cases like this where the sale is absolute for a full consideration paid or to be paid, unless there is something in the very terms of the contract or deed to defeat the title of the purchaser, forfeiture of those rights, not favored in law, ought not to be read into the contract. In *Adkins v. Huff*, 58 W. Va. 645, 648, 52 S. E. 773, 3 L. R. A. (N. S.) 649, 6 Ann. Cas. 246, it is said there ought to be no distinction between rights conferred by deeds and those acquired by contracts which have not the form nor all the requisites of a deed. Numerous cases are cited, only a few of which involved deeds, the others involved mere contracts, some wholly executory, others passing an equitable title, and

where as here the purchase money had all been paid.

Our decisions, following the decisions of many other courts, make a distinction between these cases where the contract, wholly executory, gives right to enter on land and cut and remove timber, within a certain limit, and to be paid for as removed at a certain rate per thousand feet or other rate, and cases where the contract amounts to a sale or conveyance of the timber in place for a stipulated price paid down. In the first class the right and title passes only as the timber is removed and paid for, and after the time has expired within which the right to remove is given, the right is gone, and the contract is at an end. Such contracts amount to mere licenses. In recent Virginia cases, cited and relied on by counsel for appellant, it seems that all deeds and contracts containing term limits for cutting and removing the timber are put upon the same basis. *McCorkle v. Kincaid*, 121 Va. 546, 555, 93 S. E. 642, and cases cited. But our rule is different. Our cases hold that although proper consideration must be given to the limitation as to time, so as to effectuate the intention of the parties, nevertheless, when the deed or contract grants or gives right to the timber for a consideration fully paid, and where the purchaser within the time limit has actually cut and severed the timber and thereby converted it from real estate into personalty, he has the continuing right thereafter within a reasonable time to enter or remain upon the land to remove the timber so severed. Our cases in which this rule has been recognized, approved or applied are *Null v. Elliott*, 52 W. Va. 229, 232, 43 S. E. 173; *Adkins v. Huff*, 58 W. Va. 645, 650, 52 S. E. 773, 3 L. R. A. (N. S.) 649, 6 Ann. Cas. 246; *Keystone Lumber Co. v. Brooks*, 65 W. Va. 512, 516, 64 S. E. 614; *Buskirk Bros. v. Peck*, 57 W. Va. 360, 367, 50 S. E. 432; *Buskirk v. Sanders*, 70 W. Va. 363, 369, 73 S. E. 937; *Hardman v. Brown*, 77 W. Va. 478, 484, 88 S. E. 1016. Among the cases from other states in which the same rule has been laid down and applied are *Mahan v. Clark*, 219 Pa. 229, 68 Atl. 667, 12 Ann. Cas. 729; *Alexander v. Bauer*, 94 Minn. 174, 102 N. W. 387; *Golden v. Glock*, 57 Wis. 118, 15 N. W. 12, 46 Am. Rep. 32. It is quite unnecessary to discuss further the principles underlying these decisions. That has been sufficiently done in the cases cited. This rule is recognized in the more recent case of *Williams v. McCarty*, 82 W. Va. 158, 160, 95 S. E. 638.

The bill alleges and the answer denies that defendants were undertaking to cut and remove timber not severed prior to January 12, 1917. There is no appreciable evidence showing or tending to show that defendants had cut or were attempting to sever any timber after that date. All that was pro-

posed or attempted prior to the injunction was to cut into logs and manufacture into lumber the trees felled prior to January 12, 1917, at the mill on the land, which the contract provided for. Defendants claim no other rights. According to our decisions they have this right.

The conclusion reached on the main question renders it unnecessary to discuss the other question presented, namely, whether prior to January 12, 1917, plaintiff had agreed with defendant Smith to extend the time for cutting and removing the timber. There is a good deal of testimony tending to support Smith that there was such an agreement and that it was to have been reduced to writing, but that at the last plaintiff refused to do so. Whereupon Smith put a large force to work and succeeded in severing practically all the standing timber contracted for, and which by the injunction plaintiff sought to prevent him from removing from the premises.

We, therefore, affirm the decree.

(84 W. Va. 654)

**FURROW v. BAIR et al. (No. 3752.)**

(Supreme Court of Appeals of West Virginia.  
Oct. 7, 1919.)

*(Syllabus by the Court.)*

**1. SALES §199—TIME OF PASSING OF TITLE QUESTION OF INTENT.**

The time at which title passes under the terms of a contract of sale is a question of intent, to be gathered from the terms of the contract, the nature of the property, its condition and situation, and the purposes sought to be accomplished thereby.

**2. LOGS AND LOGGING §3(7)—UNDER EXECUTORY CONTRACT FOR SALE OF TIMBER TITLE DOES NOT PASS UNTIL SEVERANCE FROM LAND.**

A writing purporting to convey the standing timber on a tract of land for a consideration of \$4.50 per 1,000 feet, to be ascertained by measuring the logs after severance, and to be paid for as the same is shipped, and reserving a lien upon the manufactured product for any unpaid purchase money, but reserving no lien upon the standing timber for the purchase price, and giving the purchaser 12 months within which to cut such timber, after which all timber remaining standing shall revert to and become the property of the landowner, properly construed, is an executory contract for the sale of such timber, and the title thereto does not pass until the same is severed from the real estate.

**3. LOGS AND LOGGING §3(14)—ON BREACH OF CONTRACT TO CUT STANDING TIMBER SELLER CAN RECOVER DAMAGES.**

The provision that the purchaser shall have 12 months within which to cut such timber is a covenant to perform the contract within that time, and in the event of his failure in that

regard the seller, if he is injured thereby, will have his action to recover damages therefor.

**4. LOGS AND LOGGING §3(15)—MEASURE OF DAMAGES ON BREACH OF COVENANT TO REMOVE STANDING TIMBER DETERMINED.**

The measure of damages for the breach of such a covenant is the excess of the purchase price over and above the value of the timber not removed at the time of the breach.

**5. SALES §358(5)—METHOD FOR DETERMINATION OF PRICE OF STANDING TIMBER NOT REMOVED AS AGREED.**

Where, in a contract for the sale of personal property, the price to be paid is to be determined by applying an agreed unit price to the number of such units, to be ascertained by measurements to be made at a certain time, and the purchaser, by removing or disposing of the property before such measurements are made, puts it beyond the power of the parties to fix such purchase price in the manner agreed upon, the seller will be allowed to resort to other evidence to determine the quantity delivered.

Error from Circuit Court, Raleigh County.

Action by J. L. Furrow against John T. Bair and others. Verdict and judgment for plaintiff, and defendants bring error. Reversed, verdict set aside, and cause remanded for a new trial.

John M. Anderson, of Beckley, for plaintiffs in error.

A. P. Farley, C. M. Ward, and Kyle D. Harper, all of Beckley, for defendant in error.

**RITZ, J.** The plaintiff, J. L. Furrow, and his brother, C. S. Furrow being joint owners of a tract of land containing 147½ acres upon which there was some standing timber, the said J. L. Furrow, acting for himself and as agent for his brother, on the 5th day of May, 1914, entered into a contract with the defendants for the sale of this timber. Shortly after the making of the contract the defendants moved their mill upon the land and began cutting and removing the timber. It appears that only a small part of the 147½ acres was timbered, and that the timber which was standing thereon was divided by cleared land into two tracts. Because of the fact that the determination of the questions arising in this case involve the construction of the contract, we set the same out in *hæc verba*. It is as follows:

"This contract of sale, made and entered into this the 5th day of May, 1914, by and between J. L. Furrow in his own behalf and right, and the said J. L. Furrow for and in behalf of C. S. Furrow, for whom the said J. L. Furrow is the duly authorized agent for the purposes of this contract, party of the first part, and J. T. Bair and L. B. Phillips, parties of the second part, all of Raleigh county, West Virginia, witnesseth: That for and in consideration of the sum of \$1.00 and of the further stipulations and agreements hereinafter contained, the said

party of the first part for himself and for the said C. S. Furrow, whose duly authorized agent he is for the purposes of making this sale, does hereby grant, sell and convey unto the parties of the second part, with general warranty of title, all the merchantable timber of every kind, on the tract of land known as the 'Albert Furrow tract, of 147½ acres of land,' lying in Shady Springs district, in the said county of Raleigh, and adjoining the C. H. Prince tract of land, and land owned by the Beaver Coal Company, with the right to remove said timber and to manufacture the same on said tract of land. The said parties of the second part, as part consideration for the said timber and rights of way above mentioned, hereby assign to the party of the first part a certain note now belonging to them, dated March 30, 1914, given for the sum of five hundred and twenty (\$520.00) dollars, signed by C. P. Phillips, made to the order of George Gadd, payable in six months, with interest from April 7, 1914, until paid, and indorsed by G. W. Gadd.

"The parties of the second part further agree to pay for said timber the sum of \$4.50 per thousand feet, the number of thousand feet to be ascertained by log measure, to be determined by Doyle's rule. It is further agreed that after the value of the said amount of five hundred and twenty (\$520.00) dollars is obtained by the said second parties of the said timber, at the said price of \$4.50 per thousand feet, that the payments shall be made to the said first party at the said rate of \$4.50 per thousand feet as the said second parties shall ship the said timber. It is further agreed between the parties hereto that the said second parties shall be given twelve months in which to cut the said timber, after the expiration of which twelve months all timber remaining standing on the said land shall revert to and become the property of the said J. L. Furrow and C. S. Furrow. The said first party further grants to the said second parties the right to use the said tract of land for the cutting and removal of the said timber and lumber manufactured therefrom. The parties of the second part further agree that they will use due care in the cutting of said timber, so as to secure as much lumber as possible, consistent with good management. It is further agreed that all manufactured lumber of every kind shall stand good for any money due under this contract, and the party of the first part reserves the first lien on said manufactured lumber, for the recovery of any money due thereon."

It will be noticed that the contract provides that the timber is to be cut and removed within 12 months from its date, and that any timber standing after that time shall revert to the owners of the land. It appears that the defendants cut all of the timber off of one of the segregated boundaries, but that the other small area covered with timber, known as the "Parker Hollow lot," was not cut at the time the contract expired. Subsequent to the making of this contract C. S. Furrow assigned all of his interest therein to the plaintiff, J. L. Furrow. The defendants were not allowed to cut the timber which was standing at the expiration of the contract. This suit was then brought by J. L. Furrow to recover

the price of the timber. His theory is that the contract above referred to is a deed, which vested the title in the timber in the defendants at the time of its delivery, and that he was entitled to recover the purchase money, regardless of whether the timber was cut or not, and if his construction of the contract is correct this would be the case. His contention was that not only had the defendants not cut all of the timber on the land, but that they had not paid for all that they had cut. Upon the trial it seems from one of the bills of exception that the jury found that payment had been made for all timber cut and removed, but under the instructions of the court the jury found for the plaintiff for the price of the Parker Hollow timber, basing their verdict upon the estimated amount thereof at the price fixed in the contract. The only substantial question for solution is the proper construction of the contract above set out. If it was a deed which vested in the defendants the title to the timber upon its delivery, then the theory upon which the trial proceeded was correct. If, on the other hand, it was an executory contract for the sale of this timber, under which the title did not vest in the defendants until the same was cut, the judgment complained of is wrong.

[1-3] This paper, it is true, contains words which are ordinarily used in a deed. It attempts to grant and convey the timber with general warranty of title; but is this sufficient of itself to carry the title to the timber with the delivery of the paper? The purpose, of course, of all construction, is to arrive at the intention of the parties, and this must be done from the paper itself, where there is no ambiguity upon the face of it, and it can hardly be said that there is ambiguity upon the face of this paper. Ordinarily it is necessary to a completed contract of sale that the property intended to be sold be ascertained and designated, so that there may be no uncertainty as to its identity, its quantity, quality, and its price. As long as anything remains to be done by the vendor, or the joint action of both parties, for the purpose of ascertaining any of these facts, the title does not pass. Of course this does not mean that all of these elements must be absolutely certain, but they must be so determined as that all that remains is some calculation or measurement in order to determine the agreed price, or the quantity of the article sold. It has been repeatedly held that where personal property is the subject of the sale, and it has been delivered, the fact that the amount thereof must be ascertained by measurement or weight does not prevent the title from passing at delivery; but those exceptions, which are referred to in the case of *Buskirk Bros. v. Peck*, 57 W. Va. 360-368, 50 S. E. 432, have no application to the case here. Taking this paper altogether, the ques-

tion is: What was the intention of the parties as to the passing of the title to the subject-matter of the contract? In the first place, while it is in some respects in the form of a deed, it is made by one joint owner on behalf of himself and his co-owner, without exhibiting any authority under seal clothing him with the power to convey the title of his co-owner. The purchase price is not ascertained, nor can it be ascertained from any calculation or measurement which could be made at the time. Under the terms of the contract it could only be ascertained after the timber is severed and measured in the log. If the determination of the purchase price depended simply on counting the trees, or some similar operation, then it might be said that it was not indefinite; but such is not the case here. The ascertainment thereof depends upon something to be done with the subject-matter of the contract. It must be changed in its form before it is known how much is to be paid. Further than this the time of payment is not at all certain, depending entirely upon when the timber is cut and ready to ship; it being provided under the contract that the same shall be paid for when it is shipped. This it might be assumed would be within the 12 months, provided the parties carried out their contract, and cut all the timber within that time; but even assuming that they severed all of the timber from the tract of land within the 12 months, and the title to it had vested in the defendants, still the purchase money would not be payable until the timber had been shipped, which might be long after the 12-month period, for under our decisions it is held that, where a limited time is given within which to remove timber, the purchaser, if he has severed the same from the land within the time provided in the contract, may take the same off after the expiration of that period.

Again, it will be seen from an examination of the contract that a lien is reserved upon the manufactured lumber of every kind for any unpaid purchase money therefor. It would be strange, if the owner of the land intended to grant the timber as it stood upon the tract of land, that he reserved no lien thereon for the purchase money, but did reserve in the contract a lien upon the manufactured product for purchase money. This, it seems to us, makes it clear that there was no intention to pass title until after the timber was cut. In all of the cases cited by the defendant in error in support of the judgment below, the amount of the purchase money was a definite, fixed sum at the time the contract was entered into. There was nothing left to be done, except for the purchaser to pay it, and it was accordingly held in those cases that the title to the timber passed with the delivery of the deed. This case is more like the case of *Buskirk Bros. v. Peck*, 57 W. Va. 360, 50 S. E. 432, where, because of

the uncertainty as to the amount of the purchase money, it was held that the title did not pass until the timber was severed, for until that time the contract was simply an executory one. In the case of *Wilson v. Buffalo Collieries Co.*, 79 W. Va. 279, 91 S. E. 449, we had under consideration a contract for the sale of standing timber. In that case all of the elements were certain, definite, and fixed at the time of the execution of the paper, and it was held that it passed the title on its delivery; but it was likewise held in that case, referring to a second contract involved, that:

"A sealed contract, reciting a sale and conveyance of timber, for a nominal consideration, but not formally granting or conveying the same, and containing covenants on the part of the party of the second part to sever, manufacture, and remove the timber, and pay for it at certain prices, as they manufacture it into lumber, is not a deed, and does not pass the legal title to the timber."

That is the case here. While this paper in some of its aspects is in the form of a deed, when all of its parts are read together, we are forced to the conclusion that it was not the intention of the parties to pass title to any of the timber until it was severed from the land. The time fixed for the determining the purchase price was after the severance of the timber, and the fact that the sellers reserved a lien upon the manufactured product, and no lien upon the standing timber, for the purchase money, is practically conclusive that the intention was to pass the title after the timber was cut from the land. This being the case, the provision in the contract for removing the timber within 12 months is a covenant to perform the executory contract within that time. It is an agreement upon the part of the defendants that they will cut all of the timber within 12 months. If they fail to perform their covenant in this regard, they are, of course, liable in an action for such damages as result to the owners of the land.

[4] The measure of damages for the breach of this covenant would be the difference in the value of the timber standing upon the land at the expiration of the 12 months and the price agreed to be paid for the said timber as it was severed, provided, always, that the timber so standing was worth less than the price agreed to be paid. *McCorkle & Son v. Kincaid*, 121 Va. 546, 93 S. E. 642.

There is some criticism by the plaintiff in error of the declaration in this case. It consists of the common counts, stated in several different forms, and of a special count. Upon the theory of the plaintiff, no special count was necessary. If the paper was a deed passing the title to the standing timber by its delivery, the recovery of the purchase price could be had upon the common counts. Upon the theory, however, that this paper consti-

tutes an executory contract for the sale of the timber, plaintiff may recover for such timber as has been cut, or so much thereof as remains unpaid, upon the common counts; but to recover damages for the failure to perform the covenant to remove the timber within the time provided in the contract it would be necessary to declare specially, and if the plaintiff is advised to do so he can, upon the cause being remanded, file an amended count presenting his claim for damages for this breach.

[5] Criticism is also made of some rulings of the court upon the admission of evidence of estimates of the amount of timber which had been cut and removed by the defendants. The plaintiff's contention was that the defendants had not measured all of the timber which they cut and removed from the land, and had not accounted therefor. The logs were gone, and it was impossible to measure them. To establish his contention he introduced the testimony of some witnesses to the effect that some logs were sawed which had not been measured, and also the testimony of witnesses who estimated the timber cut from the tract of land by measuring the stumps and the supposed length of the logs. He also introduced an estimate of a party who went over the timber and inspected it prior to the time it was cut, and made an estimate of the amount thereof. Of course, this was not the method provided in the contract for determining the amount to be paid; but, if the plaintiff's contention is true that the defendants cut and removed timber that they did not measure and account for, it is evident that the method provided in the contract for ascertaining the amount of such timber is no longer available, and the only thing which the plaintiff can do is to resort to the best evidence obtainable for the purpose. The probative force of such evidence is, of course, for the jury. It is largely speculative in its nature, and could not be resorted to upon any other theory than that the alleged fraudulent acts of the defendants have put it beyond the power of any one to secure the measurements in the manner provided for in the contract.

It follows from what we have said that the judgment of the circuit court will be reversed, the verdict set aside, and the case remanded for a new trial.

(84 W. Va. 679)

### MINNER v. MINNER et al.

(Supreme Court of Appeals of West Virginia.  
Oct. 7, 1919.)

#### (Syllabus by the Court.)

#### 1. DOWER §107 — RIGHTS BEFORE ASSIGNMENT IN OIL ROYALTIES.

Where a husband and wife unite in a lease for oil and gas, though no production is had

thereunder till after his death, the widow is entitled, until assignment of her dower, to one-third of the royalty oil and gas well rentals payable under the lease, and not to the interest only on such one-third.

#### 2. DOWER §107—ROYALTIES AND RENTALS OF OPEN OIL WELL PROFITS OF LAND AND NOT CORPUS OF ESTATE.

In such case the well is deemed an "open well" as of the date of the husband's death, and the royalty and rental therefrom part of the issues and profits of the land, and not a portion of the corpus of the estate, to be preserved intact for those entitled in remainder or reversion.

#### 3. DOWER §107—WHAT ARE PROFITS OR CORPUS OF ESTATE DETERMINED AT TIME OF DEATH.

In a contest between the widow and heirs, for the purpose of determining what portion of the yield from the real estate of the deceased husband shall be termed issues and profits, in which she may share, and what shall be deemed part of the corpus of the estate, it is customary to employ as a basis for such determination the date of the death of the deceased.

#### 4. DOWER §107—PRODUCTION OF MINES IS "ISSUES AND PROFITS" OF ESTATE.

The term "issues and profits," in law, as applied to real estate, comprehends every available return therefrom, whether it arise above or below the surface, and includes the produce of mines as well as the yield from the surface, provided the mines were opened or authorized to be opened by the owner of the preceding estate of inheritance.

#### (Additional Syllabus by Editorial Staff.)

#### 5. DOWER §29—INCHOATE UNTIL DEATH OF HUSBAND.

Until the death of her husband, the widow's dower is inchoate; but immediately upon his death it becomes consummate.

#### 6. DOWER §55—UNTIL ASSIGNMENT WIDOW HAS VESTED RIGHT, BUT NO ESTATE.

Until assignment of her dower, a widow has merely a vested right, not an estate, to sue for and compel the setting aside to her as her dower interest of one-third of the real estate of which her husband died seized, and it is only upon such assignment that she desires a vested estate for life in the assigned portion of his lands.

#### 7. DOWER §114(1) — AFTER ASSIGNMENT WIDOW ENTITLED TO PROFITS OF REALTY ASSIGNED.

After assignment of her dower, the widow, as life tenant, may take to her own use the issues and profits of real estate assigned to her, but must not destroy or remove the corpus thereof, which belongs, not to her, but to next vested estate in remainder or reversion.

Appeal from Circuit Court, Clay County.

Suit by Ellen Minner against G. W. Minner and others. Decree for plaintiff in part, and she appeals. Reversed in part, and otherwise affirmed, and cause remanded.

J. E. Springston, of Charleston, for appellant.

O. L. Hall and B. C. Eakle, both of Clay, for appellees.

LYNCH, J. The questions presented for decision upon this appeal arose in the prosecution of a suit instituted in the circuit court of Clay county by the widow of J. L. Minner against the administrator of his estate, his heirs at law, and several other defendants, for the purpose of causing to be laid out and set apart as and for her dower interest a one-third part of a tract of land containing about 72 acres, of which her husband died seized, and for the further purpose of ascertaining the extent of her dower interest in the delay rentals, oil royalties, and gas well rentals which had theretofore been paid and are to be paid pursuant to the provisions of an oil and gas lease executed by her husband and herself during his lifetime. The lease, dated January 11, 1907, granted to J. M. Geary for a term of 10 years, and as long thereafter as oil or gas is produced from the land leased and royalties and rentals paid therefor, the exclusive right to drill and operate for oil and gas upon said tract of 72 acres, upon the stipulated consideration of one-eighth oil royalty and an annual rental of \$150 for each gas well, with the usual provision for delay rentals. This lease Geary assigned to the United Fuel Gas Company, and the latter assigned the oil rights thereunder to the Ohio Fuel Oil Company. Neither Geary nor his assignees commenced operation under the lease within the lifetime of plaintiff's husband.

[1] The only question presented involves the extent of the dower rights of the plaintiff in the delay rentals, oil royalties, and gas well rentals paid and to be paid pursuant to the lease prior to the assignment of her dower in the land subject to the lease. We are not concerned at this time with any question respecting the assignment of dower in the land itself, or with the proper disposition of the royalties and rentals after such assignment. The court below in its decree found that plaintiff was entitled as dowress to—

"one-third part of all moneys paid as delay rentals under the oil and gas lease on said land up to the time of the completion of an oil or gas well on said land, and that thereafter she is entitled to the interest on the one-third of the one-eighth oil royalty reserved \* \* \* in said lease, and that she is likewise entitled to the interest on the one-third of all moneys paid \* \* \* as gas well rentals on producing gas wells drilled under said lease."

As to the first proposition contained in the decree there is no cause of complaint, but plaintiff, however, insists that, because the lease was executed during the lifetime of her husband, she is entitled to the full one-third of the royalty oil and gas well rentals, instead of the interest only on such third,

though no production was had within the lifetime of her husband.

[5, 6] Until the death of her husband a widow's dower is inchoate, but immediately upon his death becomes consummate. That, however, does not signify that she is vested with an estate in his lands. Until assignment of her dower the widow has merely a vested right, not an estate, to sue for and compel the setting aside to her, as her dower interest, of one-third of the real estate of which her husband died seized, and it is only upon such assignment that she acquires a vested estate in the assigned portion of his lands for the remainder of her life. *Haskell v. Sutton*, 53 W. Va. 206, 44 S. E. 533; *Darnell v. Flynn*, 69 W. Va. 146, 150, 71 S. E. 16; *Huddleston v. Miller*, 81 W. Va. 357, 94 S. E. 538.

[7] After assignment of her dower, the widow as life tenant enjoys the privileges and is subject to the duties incident to such estate. She may take and appropriate to her use the issues and profits of the real estate assigned to her, but must not destroy or remove the corpus thereof. That belongs, not to her, but to the next vested estate in remainder or reversion. In order that she might not be left destitute or be inconvenienced pending the assignment of her dower, the Legislature in section 8, c. 65 (sec. 3656), Code, provided that until such assignment is made—

"the widow shall be entitled to demand of the heirs or devisees, one-third part of the issues and profits of the other real estate which was devised or descended to them, of which she is dowable, and in the meantime may hold, occupy and enjoy the mansion house and curtilage, without charge."

Thus, until dower is assigned, the widow is entitled to demand one-third of the issues and profits of all the real estate subject to her dower, and may "hold, occupy and enjoy" the mansion house and surrounding inclosure. This right accorded by statute corresponds to and supplements her right as life tenant after assignment to all the issues and profits of the one-third of her husband's real estate set aside and allotted to her. Under that statute the question becomes one of defining what are the issues and profits which the widow may enjoy pending the assignment of her dower. When that question is determined, the statute is clear as to the proportion thereof to which she is entitled.

[2-4] For the purpose of determining what portion of the yield from real estate of the deceased shall be termed issues and profits, and what shall be deemed part of the corpus of the estate, it is usually the custom to employ as a starting point the date of the death of deceased. Take, for example, a contest between a tenant for life and a reversioner or remainderman. The former is entitled to the issues and profits during his life, but must

preserve intact the corpus of the estate. That is his only to enjoy, not to destroy. It is settled that gas and oil, like other minerals, until brought to the surface, constitute part of the real estate in which they are found. *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891; *Wilson v. Youst*, 43 W. Va. 826, 28 S. E. 781, 39 L. R. A. 292; *Preston v. White*, 57 W. Va. 278, 50 S. E. 236. The life tenant, therefore, must not open new mines or wells for the purpose of withdrawing the minerals beneath the surface, for to do so constitutes waste of the corpus of the estate, of which the reversioner or remainderman properly may complain. *Williamson v. Jones*, supra. But, though he is restricted as to new wells, he may work old wells or mines upon the tract to the complete exhaustion of the minerals therein found, if the wells were open at the date of the termination of the preceding estate of inheritance. The holder of the latter estate by opening them has authorized them to be worked, and has constituted the yield therefrom a part of the issues and profits of the land. Likewise, if the opening of a mine or well was authorized by the holder of the preceding estate of inheritance through a valid lease executed before his death, though the well was not in fact opened till after his death, nevertheless it will be deemed an "open well" as of the date of his death (*Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 664, 31 L. R. A. 128, 56 Am. St. Rep. 884; *Williamson v. Jones*, supra; *Alderson's Adm'r v. Alderson*, 46 W. Va. 242, 33 S. E. 228; *Bramer v. Bramer*, 99 S. E. 329), and the life tenant will be entitled to the yield therefrom as part of the issues and profits of the land (*Koen v. Bartlett*, supra; *Alderson's Adm'r v. Alderson*, supra). As said in *Koen v. Bartlett*, supra, at page 567 of 41 W. Va., at page 866 of 23 S. E. (31 L. R. A. 128, 56 Am. St. Rep. 884):

"The term 'profit' in law comprehends the produce of the soil, whether it arise above or below the surface, including product of mines as well as the herbage growing on the surface."

This is true, however, as we shall see later, only where, as in this case, the mine was opened, or the opening authorized by a valid lease, before the death of the holder of the preceding estate of inheritance.

Applying these well-settled rules to the facts involved in this appeal, we find that the opening of the well was authorized by a valid lease executed by plaintiff and her husband before his death. Though the well was not drilled till after his demise, the yield therefrom, according to the authorities just cited, is considered part of the issues and profits of the land, and not a portion of the corpus of the estate, which must be preserved for the remainderman or reversioner. Hence there seems no room for doubt that plaintiff was entitled to one-third of the royalty oil and gas rentals paid pursuant to the

terms of the lease. *Engle v. Engle*, 3 W. Va. 246; *Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 664, 31 L. R. A. 128, 56 Am. St. Rep. 884; *Alderson's Adm'r v. Alderson*, 46 W. Va. 242, 33 S. E. 228; *Thornton*, Law of Oil and Gas (3d Ed.) § 298.

Defendants, however, insist that plaintiff should receive only the interest on such one-third, and in support of their contention cite and rely on certain cases decided by this court which do restrict the widow or life tenant to interest on the one-third of the royalty oil and gas rentals. *Wilson v. Youst*, 43 W. Va. 826, 28 S. E. 781, 39 L. R. A. 292; *Ammons v. Ammons*, 50 W. Va. 390, 40 S. E. 490; *Eakin v. Hawkins*, 52 W. Va. 124, 43 S. E. 211; *Stewart v. Tennant*, 52 W. Va. 559, 44 S. E. 223; *Headley v. Colonial Oil Co.*, 67 W. Va. 628, 69 S. E. 296. Before proceeding to a discussion of these cases, and as preliminary thereto, certain further principles should be noted. As was above stated, the life tenant, while enjoying the privilege of working old wells on the land, has no right to drill or open new wells which were not authorized to be opened at the beginning of his estate. His authority to remove that which is considered part of the real estate is limited to those wells which were opened or authorized by the preceding owner of the fee; the yield from such wells being deemed part of the issues and profits of the land, because made so in effect by the action of the preceding owner. All else belongs to the corpus of the estate, and must be preserved intact. Hence it is waste for such tenant to open or authorize the opening of new wells. *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891. In case he does so, the yield therefrom is not part of the issues and profits, but a part of the corpus of the estate, and the proceeds or return derived from the sale of such product must be preserved and invested for delivery to the remainderman or reversioner upon the commencement of his estate. These proceeds now stand in the place of and represent that part of the corpus which has been removed.

This question is usually presented in the form of a joint lease by the life tenant and remainderman, reserving royalty or rent, and in such case the royalty or rental, being part of the corpus, is invested and preserved for the remainderman; but the interest thereon, being the yield therefrom, is paid to the life tenant, since the nature of his estate entitles him to the yield from the corpus of the realty. *Wilson v. Youst*, supra; *Ammons v. Ammons*, supra; *Eakin v. Hawkins*, supra; *Thornton*, Law of Oil & Gas (3d Ed.) § 311. This explains why, in the case of a mine or well open or authorized to be opened at the commencement of the life estate, the royalty or yield from such well goes to the life tenant, and why in the cases last cited he receives only the interest thereon. Parenthetically it may be remarked that, if the life ten-



ant had acted alone in attempting to open a new mine not authorized to be opened, without joining with the remainderman, he would have been deprived even of interest on the royalty. *Williamson v. Jones*, 43 W. Va. 562, pt. 15, Syl., 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891.

The case of *Stewart v. Tennant*, 52 W. Va. 559, 44 S. E. 223, is quite analogous to *Wilson v. Youst*, *Ammons v. Ammons*, and *Eakin v. Hawkins*, supra, but with this distinction: That whereas, in the last three cases the lease was executed by the life tenant and remaindermen, in the case first named the right to drill was conferred by the widow before assignment of her dower, and hence before she had received any definite or vested estate for life, and by 10 of the 12 reversioners. There, as in the case at bar, the widow's dower was consummate, but not assigned, and the court held that the vendee, as the owner of her dower, was entitled, under section 8, c. 65, Code, and pursuant to the authority of the three cases last cited, to the interest on one-third of the royalty from the wells. An attempt was there made to differentiate between a situation where dower had not been assigned, as in that case, and where the life estate was vested; but the court (52 W. Va. 576, 44 S. E. 223), definitely declined to recognize any such distinction as valid. The only difference between that case and this is that the well there involved was not drilled or authorized to be drilled before the death of the husband, while here it was so authorized. For that reason, in the former the issues and profits to which the widow or those holding her dower right were entitled consisted of the interest on one-third of the royalty, while in this case they should include the one-third of the royalty itself, for here it is not part of the corpus, but authorized to be removed by the preceding owner of the fee, and hence by him made an issue and profit of the land.

*Headley v. Colonial Oil Co.*, 67 W. Va. 628,

69 S. E. 296, also relied on by defendants, is quite similar to *Stewart v. Tennant*, supra, and again enunciates the principle that, where a widow and the heirs, after the death of the husband, but before assignment of the widow's dower, join in a lease for oil and gas purposes, reserving a royalty, the widow will receive as dower the interest on one-third of the royalty share; but because she had joined with her husband during his lifetime in a sale of one-half of the oil and gas in place, therefore her dower in that one-half was lost, and she could claim only one-half the interest on one-third of the royalty share then before the court.

These cases relied on by defendant all deal with leases made after the death of the holder of the preceding estate of inheritance by a life tenant, or by a widow before assignment of dower, who at the time had no authority or right to drill new wells, and could not by a lease convey a greater right than they had. Hence the royalty oil and gas rentals represented the corpus of the estate and belonged ultimately to the heirs; the life tenant or widow being entitled only to the interest therefrom. But in this case the well drilled after the husband's death pursuant to the terms of a lease made during his life is deemed an "open well" as of the date of his death, the royalty from which is part of the issues and profits of the land. *Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 664, 31 L. R. A. 128, 56 Am. St. Rep. 884; *Alderson's Adm'r v. Alderson*, 46 W. Va. 242, 33 S. E. 228; section 8, c. 65, Code. See, also, *Campbell v. Lynch*, 81 W. Va. 374, 384-386, 94 S. E. 739, L. R. A. 1918B, 1070.

For these reasons, our order will reverse the decree complained of, in so far as it fails to award to plaintiff the full one-third of the oil royalties and gas rentals, and otherwise affirm it, and remand the cause for further proceedings consistent with this opinion.

(178 N. C. 657)

COOPER v. HAIR. (No. 296.)

(Supreme Court of North Carolina. Oct. 22, 1919.)

SET-OFF AND COUNTERCLAIM  $\S$  22(1)—DEFENDANT ENTITLED TO VALUE OF COLLATERAL NOTES TAKEN IN REPLEVIN.

In an action on notes secured by collateral notes, the defendant is entitled to be credited with the value of the collateral notes seized under claim and delivery by plaintiff while they were in the hands of the defendant maker for collection.

Appeal from Superior Court, Bladen County; Calvert, Judge.

Action by W. B. Cooper against W. A. Hair. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

The notes deposited as collateral were sent to defendant for collection by plaintiff, and later plaintiff took them under claim and delivery.

This is an action on two notes, one for \$1,254 secured by an agricultural lien, and the other for \$287.78 secured by notes deposited as collateral, and an account for fertilizers also secured in said lien.

The plaintiff sued out claim and delivery papers in the action under which 25 bushels of corn and the collateral notes were seized and delivered to the plaintiff in January, 1916.

The issues joined between the parties were referred by consent, and the referee has made a full report, except that he does not find the value of the notes delivered to the plaintiff, and the defendant has received no credit therefor, although in his answer he demanded that the plaintiff be charged with the value of the notes, and he made the same demands in his exceptions to the report of the referee and at the time the judgment was signed.

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

E. F. McCulloch, Jr., of Elizabethtown, for appellant.

Bayard Clark, of Elizabethtown, McLean, Varser, McLean & Stacy, of Lumberton, and Sinclair & Dye, of Fayetteville, for appellee.

PER CURIAM. The defendant is entitled to be credited with the value of the notes seized in this action and delivered to the plaintiff under the authority of Smith v. French, 141 N. C. 1, 53 S. E. 435, and the execution upon the judgment is suspended until this amount can be ascertained by reference or otherwise and due credit be given.

We have examined the other exceptions relied on by the defendant and find no error.

Modified and affirmed.

(178 N. C. 337)

COMMISSIONERS OF HOKE COUNTY v. TOWN OF RAEFORD. (No. 293.)

(Supreme Court of North Carolina. Oct. 22, 1919.)

1. MUNICIPAL CORPORATIONS  $\S$  269(1) — RIGHT TO OPEN PUBLIC STREETS.

Municipal corporations have the right to open public streets to locate and construct necessary bridges over them, and such corporations are the sole judges of the necessity or expediency of exercising that right.

2. BRIDGES  $\S$  10(1)—RECOVERY FROM CITY BY COUNTY FOR REBUILDING OF BRIDGES.

Where a county without any request or authority from the city rebuilt bridges on two roads running through the town which were public roads of the county, but over which the municipal authorities had never assumed control or jurisdiction, held that under the circumstances the county could not recover from the municipality the cost of rebuilding such bridges.

Walker and Hoke, JJ., dissenting.

Appeal from Superior Court, Hoke County; Bond, Judge.

Action by the Commissioners of the County of Hoke against the Town of Raeford. From a judgment for defendant, plaintiffs appeal. Affirmed.

J. W. Currie, of Raeford, for appellants.  
Smith & McQueen, of Raeford, for appellee.

BROWN, J. This action is brought by the commissioners of Hoke county to recover from the town of Raeford the cost of rebuilding certain bridges on two public highways within the town. A jury trial was waived, and the court found the following facts:

That the places at which the bridges in question were constructed are inside the corporate limits of the town of Raeford; that they are on roads, laid out after the town of Raeford was incorporated, said roads running through the town and being public roads of the county. The court finds that the places at which the bridges were constructed are not on any one of the public streets of the town of Raeford, and that the authorities of said town have never assumed control in any way of the two roads at the place where the bridges were constructed.

The court further finds that the roads upon which said bridges were constructed are used by large numbers of people in going into and going away from the town of Raeford, and that it is important to the town and also to the county that the roads shall be in proper condition, as one of them is a part of the Atlanta and Washington Highway.

Upon consideration of the facts admitted in the pleadings, coupled with the findings of fact which appear in this judgment, the court is of opinion that the town of Raeford is not liable to plaintiff.

The question presented here is not whether plaintiff could have been made to have constructed the bridges referred to. The fact is they did it, and, so far as the findings of the court show, without any request or authority from the defendant.

[1] It is well settled that municipal corporations have the right to open public streets and to locate and construct necessary bridges over them, and such corporations are the sole judges of the necessity or expediency of exercising this right. *Stratford v. Greensboro*, 124 N. C. 127, 32 S. E. 394; *Waynesville v. Satterthwait*, 136 N. C. 227, 48 S. E. 681.

[2] The court finds that the places at which the bridges were constructed are not any part of the public streets of the town of Raeford, and that the authorities of such town have never assumed any control or jurisdiction in any way over the two roads at the place where the bridges were constructed. These crossings appear to be on private property of individuals. Inasmuch as it has been found as a fact that these bridges do not constitute any part of the public streets of the town over which its corporate authorities have assumed jurisdiction, we fail to see why the town should be charged with the expense of rebuilding them. The question presented here is not whether it was the duty of the county commissioners to rebuild these bridges, but whether, having done so, without any request or authority from the defendant, they can recover the cost from it. It appears that these bridges were across public roads of the county before the incorporation of the defendant, and constitute a part of the public roads of the county. In the face of the finding that the commissioners of the town had never assumed jurisdiction over these roads, and had never undertaken to keep in repair these bridges, we are of opinion that the plaintiff cannot recover. It is true it is alleged in the complaint that this work was done at the request of the defendant's commissioners by the road force of the county, but this allegation of the complaint is specifically denied, and in the absence of a finding of fact supporting it, it is valueless and constitutes no ground for a recovery.

Affirmed.

WALKER and HOKE, JJ., dissenting.

(178 N. C. 328)

RALEIGH IMPROVEMENT CO. v. ANDREWS et al. (No. 252.)

(Supreme Court of North Carolina. Oct. 22, 1919.)

Appeal from Superior Court, Wake County; Stacy, Judge.

On petition for rehearing. Petition dismissed.

For former opinion, see 176 N. C. 281, 96 S. E. 1032.

J. C. Biggs, of Raleigh, and Willis Smith, of Carrollton, for appellant.

J. S. Manning and A. B. Andrews, Jr., both of Raleigh, for appellees.

BROWN, J. This is a petition to rehear this cause decided at fall term, 1918, and reported in 176 N. C. 281, 96 S. E. 1032. Upon careful consideration of the case, we adhere to all that is said in our former opinion, except to the extent that on the next trial the defendants may offer all evidence of abandonment which they may have, irrespective of what is said in paragraph No. 2 of our former opinion. We will not undertake to say that there is no evidence of an abandonment of the purpose to erect an apartment house. At the time the subscription to the stock was made on February 17, 1914, it is not contended that the purpose to erect the apartment house had been abandoned. It is claimed that it was abandoned later on in the year 1915. We leave this as an open question, to be determined at the coming trial. In our former opinion we said:

"It is true that, on being satisfied that stockholders have paid in an amount equal to their engagements, so as to make the burden equal amongst them all, a court of equity will sometimes interfere, in case of an abandonment of the undertaking, to prevent further calls upon such stockholders; but no such conditions appear to be presented upon this record, and no such equitable relief is asked."

This question of abandonment becomes important in case the defendants desire to ask equitable relief upon the grounds set out in the opinion, and, if so, they will be allowed to file additional pleadings setting it up, in which case proper issues may be submitted to the jury.

Petition to rehear dismissed.

(178 N. C. 259)

HAYDEN et al. v. HAYDEN et al. (No. 290.)

(Supreme Court of North Carolina. Oct. 15, 1919.)

**1. BOUNDARIES**  $\S$  8—CORRECTION OF PATENT CLERICAL ERROR IN DESCRIPTION IN DEED.

On petition by a commissioner to sell land to compel the purchaser to accept deed and pay the price, the court properly held that the word "eastern" in the description in a deed in the chain of title should read "western"; the error being patent.

**2. BOUNDARIES**  $\S$  3(8)—ON CONFLICT IN DESCRIPTION BY METES AND BOUNDS AND BY LOT AND BLOCK, THE PLAT GOVERNS.

Where deed contains two descriptions, one by metes and bounds, and the other by lot and block according to a certain plot or map, the controlling description is the lot according to the plan rather than the one by metes and bounds.

**3. TRUSTS**  $\S$  169(1)—POWERS OF SUBSTITUTED TRUSTEE UNDER DECREE AS BROAD AS THOSE OF ORIGINAL TRUSTEE.

Under decree unappealed from, in an action by beneficiaries under a will against the executor and heirs, wherein there was a substitution of trustees, *held*, that the trust in the hands of the substituted trustee was coextensive with and as effective as if he had been named in the will originally as trustee.

**4. ADVERSE POSSESSION**  $\S$  71(2) — DEED OF SUBSTITUTED TRUSTEE AS COLOR OF TITLE.

Deed of substituted trustee *held* color of title, and, under the statutes of 7, 20, and 30 years' possession (Revisal 1905, §§ 382, 384, 380), a good and marketable title by operation of law; the "color of title" not being impaired by fact that the word "eastern" in the deed should have read "western."

**5. LIMITATION OF ACTIONS**  $\S$  174(2)—BENEFICIARIES EQUALLY BARRED WITH TRUSTEE BY ADVERSE POSSESSION.

A trustee being barred by 7, 20, and 30 years' adverse possession, the cestui que trustant are equally barred.

**6. TRUSTS**  $\S$  131—CONVERSION OF FEE TAIL SPECIAL INTO FEE SIMPLE.

If a will gave a fee tail special to one person on the death of another, the statute executed the use by converting the estate into a fee simple.

**7. REMAINDERS**  $\S$  16—BARRING POSSIBLE OR CONTINGENT INTERESTS UNDER TORRENS SYSTEM.

Where, in suit under Revisal 1905, § 1590, to sell land freed and discharged of all contingent remainders, the suit complying in every particular with the requirements of the Torrens system, an attorney was appointed by the court to represent possible or contingent interests, the title deed by the commissioner cuts off the

rights of any other person in being or hereafter to come into being.

Appeal from Superior Court, New Hanover County; Calvert, Judge.

Action by Mathilda A. Hayden and others against John Henry Hayden and others, wherein E. K. Bryan was appointed commissioner to sell land, who, after sale, petitions for judgment directing the purchaser, Joseph W. Little, to accept deed and pay the purchase money. From judgment that the title was good and ordering the purchaser to pay, he appeals. *Affirmed*.

P. H. Hayden died in 1903, testate, leaving besides other property the real estate which is the subject of this action.

An action was brought in the superior court of New Hanover for the purpose of selling said land by judicial sale, freed and discharged of all contingent remainders, or other interests, in said property. In that action, an order was made at October term, 1918, appointing E. K. Bryan commissioner, with the direction to sell said land. At this sale, the respondent Joseph W. Little was the last and highest bidder, and at April term, 1919, the said bid was confirmed and the commissioner ordered to execute a conveyance for the property.

After this was done, the petitioner Joseph W. Little, not being actually aware of the motion for confirmation, had the title to the property examined by counsel, who found certain irregularities, which, in his opinion, rendered the title to the property doubtful.

A petition was filed at May term, 1919, by E. K. Bryan, commissioner, in which it was sought to have the title adjudicated to be good and a judgment directing the purchaser, Joseph W. Little, to accept the deed and pay the purchase money. To this petition, the respondent filed answer, in which the objections to the title were set up.

A jury trial was waived, and the case was heard orally by Calvert, J., who rendered judgment that the title to the said property was good, and the respondent Joseph W. Little was ordered to pay the purchase price and accept the deed, to which he excepted and appealed.

Rountree & Davis and Geo. H. Howell, all of Wilmington, for appellant Little.

E. K. Bryan, of Wilmington, for appellees.

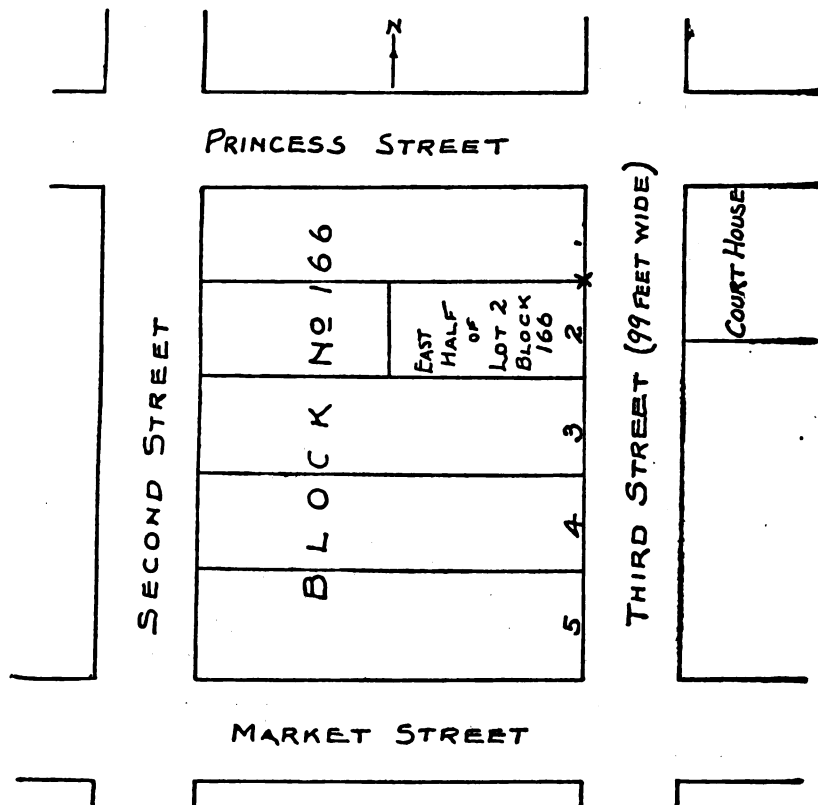
CLARK, C. J. This appeal is intended to raise the single question whether the title to the property is good and marketable. The respondent is desirous to complete the purchase; but, intending to expend large sums, he is unwilling to do so without an adjudication.

cation that the title is good. It seems that all persons who can, in any contingency, have an interest in the property, have been made parties. It is admitted that the procedure authorized in *Shields v. Allen*, 77 N. C. 375, has been followed in raising the question of the title for adjudication.

[1] The first exception is that the court held that the word "eastern" in the description in the deed from McRee, trustee, to Hayden, should be read "western." The locus in quo lies on the west side of Third street in Wilmington, opposite the courthouse; but the deed makes the beginning point "in the eastern line of Third street 66 feet southwardly from its intersection of Princess street," instead of "in the western line of

properly held that the word "eastern," when speaking of the beginning on Third street, should read "western line of Third street." Such correction, when there is a patent error as here, has often been upheld by this court. *Fowler v. Coble*, 162 N. C. 500, 77 S. E. 993; *Ipock v. Gaskins*, 161 N. C. 673, 77 S. E. 843; *Brown v. Myers*, 150 N. C. 441, 64 S. E. 374; *Wiseman v. Green*, 127 N. C. 288, 37 S. E. 272; *Mizell v. Simmons*, 79 N. C. 190.

[2] Where the deed contains two descriptions, one by metes and bounds, and the other by lot and block according to a certain plot or map, the controlling description is the lot according to the plan, rather than the one by metes and bounds. *Nash v. R. R.*,



Third street," etc.; thence "westwardly and parallel with Princess street 165 feet." Third street being 99 feet wide, the language used would put 99 feet of the lot in the street which is no part of "lot No. 2, in block 166, according to the plan of Wilmington." The deed in describing the property says:

"The same being the eastern half of lot No. 2 in block 166, according to the plan of said city."

Changing "eastern" to "western," the description fits the locus in quo in every respect. It is apparent that the draftsman, in writing the beginning as being "in the eastern line of Third street," meant the eastern line of the lot on Third street. The court

67 N. C. 413. It appears from the records entirely certain upon the face of the deed that the parties intended to convey the eastern half of lot No. 2 in block 166.

[3] The second assignment of error is because the court held that Joseph H. McRee, the trustee appointed in the place of Robert H. Cowan, could convey a good title to Hayden, and that therefore the purchaser would get a good title. It appears from the will of Dr. J. F. McRee that—

He devised this property to "Robert H. Cowan and his heirs in trust for the separate use of my daughter-in-law, Sarah J. McRee, wife of my son James, during her life and at her death in trust for her children, by my said son James

and I do hereby empower the said Robert Cowan whenever he may deem it necessary, or advantageous, to sell the said lot and reinvest the money in other property, real or personal, to be held on the same trusts as are herein expressed in relation to said land."

Col. Robert H. Cowan, the said trustee, died without having sold this property, and at April term, 1873, of New Hanover, in an action brought by the beneficiaries under said item of the will against the executor and heirs at law of Cowan, J. H. McRee was substituted as trustee, and it was decreed that—

He should "hold and possess all the property, real and personal, which was devised and bequeathed by the said James F. McRee in trust, upon the like trusts in every respect that the same were held and possessed by Robert H. Cowan, late trustee."

Under the authority of such decree, said McRee, trustee, sold the property to J. H. Hayden. The contention of the respondent is that the power of sale given to Robert H. Cowan, trustee, being in the nature of a personal discretion, did not pass to the substituted trustee, citing *Young v. Young*, 97 N. C. 132, 2 S. E. 78.

Without impeaching in any respect the entire correctness of that decision, the decree made in this case conferred upon Joseph H. McRee the property "upon the like trusts in every respect that the same were held and possessed by Robert H. Cowan, late trustee." The terms of this decree are very broad and vested in the substituted trustee, in every respect, every power possessed by Robert H. Cowan. This decree was not appealed from, and is therefore valid and binding in every respect.

Besides, the beneficiaries of the trust who would be entitled to object to the sale are cut off by the decree, as they were made parties under the following language:

"And all persons unknown to the plaintiffs who may have an interest in the lands and premises described in the complaint, or may possibly come into being, or may possibly have an interest in the same." Rev. § 1590; *Ryder v. Oates*, 173 N. C. 572, 92 S. E. 508.

By virtue of the decree unappealed from, the trust in the hands of Joseph H. McRee, trustee, was coextensive with and as effective as if he had been named in the will of James F. McRee originally as trustee instead of Cowan. *Baugert v. Blades*, 117 N. C. 228, 23 S. E. 179; *Ferebee v. Sawyer*, 167 N. C. 199, 83 S. E. 17, L. R. A. 1915B, 640; *Clothing Co. v. Hay*, 163 N. C. 495, 79 S. E. 955; *Bank v. Dew*, 175 N. C. 79, 94 S. E. 708.

The whole subject is fully discussed and clearly stated, with great wealth of authorities, by Hoke, J., in *Ferebee v. Sawyer*, 167 N. C. at page 203, 83 S. E. at page 19, L. R.

A. 1915B, 640, quoting and approving the following from *Coltrane v. Laughlin*, 157 N. C. 282, 72 S. E. 961:

"It is well recognized here and elsewhere that, when a court having jurisdiction of a cause and the parties renders judgment therein, it estops the parties and their privies as to all issuable matter contained in the pleadings, and, though not issuable in the technical sense, it concludes, among other things, as to all matters within the scope of the pleadings which are material and relevant and were in fact investigated and determined on the hearing."

[4, 5] Besides, the deed of the substituted trustee to Hayden was color of title, and under our statutes of 7 (Rev. § 382), 20 (Rev. § 384), and 30 (Rev. § 380) years' possession, is a good and marketable title by operation of law under the facts shown in this case. The lot was in front of the courthouse in the city of Wilmington, and possession of the same was fully established. The "color of title" is not impaired by the fact that the word "eastern" in the deed should have read "western." It is in evidence that Hayden went into possession of the property in 1878, which was 40 years before the bringing of this action, and there cannot possibly be any infant, and the suspension of the statute as to married women was repealed by the act of 1890 (Pub. Laws 1890, c. 78). The trustee being barred, the cestuis que trustent are equally barred. *Barden v. Stickney*, 132 N. C. 417, 43 S. E. 912; *Kirkman v. Holland*, 139 N. C. 189, 51 S. E. 856; *Webb v. Borden*, 145 N. C. 197, 58 S. E. 1083.

[6] If it were open to serious debate whether the will of J. F. McRee gave a fee tail to Sarah J. McRee, special, upon the death of Cowan, the statute executed the use by converting the estate into a fee simple. *Cameron v. Hicks*, 141 N. C. 21, 53 S. E. 728, 7 L. R. A. (N. S.) 407. She and all her children were parties to the proceeding in which Joseph H. McRee was appointed substituted trustee with the same rights as those possessed by Robert H. Cowan, and the purchaser under him received by his deed the legal and equitable title.

[7] Finally, the suit brought to sell this property complies in every particular with the requirements of the Torrens system, and the title deed by the commissioner would cut off the rights of any other person in being or hereafter to come into being, as an attorney was appointed by the court to represent such possible or contingent interests. *Ryder v. Oates*, 173 N. C. 572, 92 S. E. 508; Rev. § 1590.

Upon the entire record, the title was a good and indefeasible title.

Affirmed.

WALKER, J., did not sit in this case.

(178 N. C. 334)

BLUE et al. v. BROWN et al. (No. 292.)

(Supreme Court of North Carolina. Oct. 22, 1919.)

## 1. ADVERSE POSSESSION §114(2) — BOUNDARIES §37(3)—EVIDENCE SHOWING MARKED LINES AND POSSESSION.

In a proceeding to establish boundary lines, evidence showing a fence maintained by plaintiffs for many years, a hedgerow, and marked lines to which plaintiffs claimed and possessed for 30 or 40 years, held to justify verdict for plaintiffs, either on the ground the lines were the true boundaries, or that title by adverse possession was shown.

## 2. APPEAL AND ERROR §692(1)—EXCEPTION TO EXCLUSION MUST SHOW EVIDENCE EXPECTED.

Where it is not made to appear what answer would have been made to a question by a witness, the exception that objection to the question was sustained cannot be considered.

Appeal from Superior Court, Columbus County; Calvert, Judge.

Proceeding by Mrs. M. E. Blue and others against Joe E. Brown and wife and others. From judgment for plaintiffs, defendants appeal. No error.

This is a proceeding to establish the boundary line between plaintiffs and defendants, begun before the clerk and transferred to the superior court upon issue joined, and tried upon an issue of title.

The plaintiffs claim title by possession and under a deed from Anne K. Blue to D. M. Blue, dated January 24, 1870, which conveys the northern half of two tracts of land.

The defendants claim the southern half of these tracts, and both parties derive their title from the same source.

A survey was made, and the black lines on the map show the contentions of the plaintiffs, and the red lines those of the defendants.

The land in controversy between the black and red lines is about a half acre wide, and a railroad runs across the northern half of the land, with a right of way 130 feet wide. One-half the land, nothing else being considered, would place the boundary on the red lines; but, if the land covered by the railroad right of way is eliminated, the boundary of the northern half would be substantially on the black line.

Both parties introduced evidence in support of their contention. At the conclusion of all of the evidence the defendants moved for judgment of nonsuit, which was overruled. There was a verdict in favor of the plaintiff finding that they were the owners of the land in controversy, and judgment was rendered thereon against the defendants, who appealed.

MacRackan & Greer, of Whiteville, and S. Brown Shepherd, of Raleigh, for appellants.

Irvin B. Tucker and H. L. Lyon, both of Whiteville, for appellees.

ALLEN, J. There is ample evidence to establish the contention of the plaintiffs that the black lines are the true boundaries between the plaintiffs and defendants, and also to show title by adverse possession, and we must assume that this evidence was fairly submitted to the jury, as there is no exception to the charge.

The surveyor testified:

"The description in the deed from Ann K. Blue to Dougald M. Blue covers the land in controversy, and the description in the complaint (which was read to the witness) covers the land in controversy."

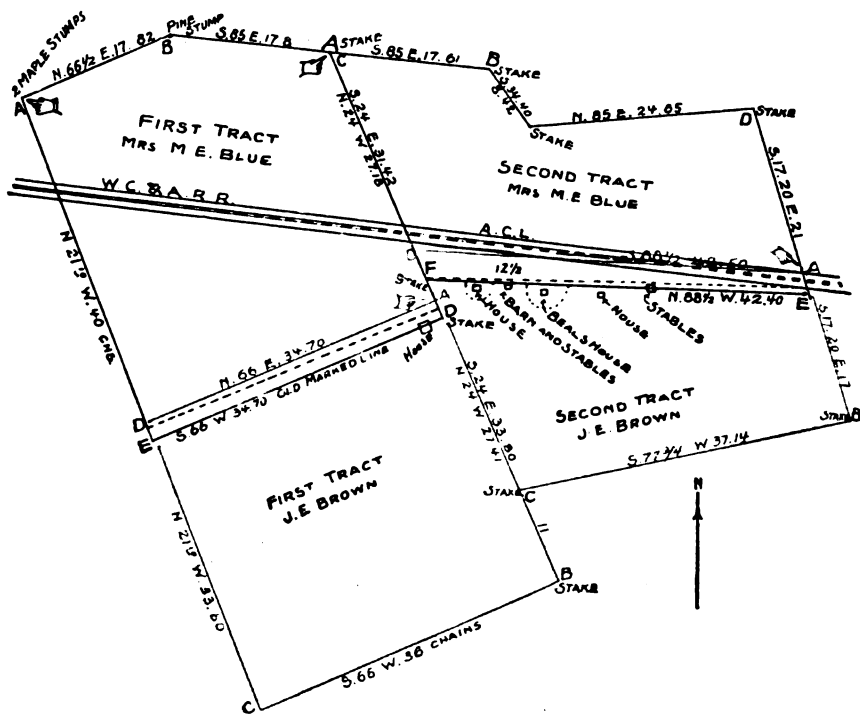
Mrs. A. D. Boal, who said she had known the land for 40 years:

"I have lived on the land described in my mother's deed all my life. I know the corner in dispute. My mother claims black E to be the true beginning corner of one tract of the land, and Mr. Brown claims red A to be the beginning corner. I don't understand the map. Mr. Smith's fence was directly on the line when Mr. Brown bought the land. That is where the surveys run. The fence was built from the time I was a child until after I was grown. I do not know when the Browns begin to claim that black E was not the right corner."

W. A. Smith:

"I know the land in dispute in this action. I owned the land at one time claimed by the Browns. I am the grantor in the deed to Crandel Brown. I know the land of Jacob Webb beginning at a stake Mrs. M. E. Blue's corner containing 53 acres. I know where the corner is on the map at black D. I know the line from black D running to black E. I was there when it was run. It was a marked line. That was the line between Mrs. Blue and myself. I know where the corner of the 41 acres in the second tract. A. F. J. Council ran that line. I know where the corner is at black F. That is the southeast corner of the 41-acre tract. Red B. It is side of the railroad. There was a line running from black E at the time I owned the land. It was a marked line from E to F. I was acquainted with the corners black E and F. On part of the line there was no trees. There was an old field. My fence is on that line in front of the house I sold Mr. Brown. I showed him the land I sold him. I told him the line was where the fence was. It is the black line on the map. I never set up any claim to the land between the black line and the railroad.

"The black line was on the south side of the railroad, the only line, and was run there first in '76 by Lovett Malpass and in 1890 by J. W. Council. I was present when Malpass ran the line. It was run for me. My father and uncle had it run. It was the dividing line between me and my uncle. I don't remember whether the line was visibly fixed in 1876 or not.



First tract, beginning at two maples, and the black lines and black A,B,C,D,E, represents the contention of the plaintiff Mrs. M. E. Blue.

First tract, beginning at red A, the red lines and red A,B,C,D, represents the contention of the defendant J. E. Brown and others.

Second tract, beginning at a stake, and the black lines and black A,B,C,D,E,F, represents the contention of the plaintiff Mrs. M. E. Blue.

The second tract, beginning at red A, and the red lines and red A,B,C,D, represents the contention of the defendant J. E. Brown and others.





But in 1890 Mr. Council ran the line and he made a plain line.

"Q. Who was in possession of the land in dispute in 1890? A. My uncle, as long as he lived, and after his death my aunt, Mrs. M. E. Blue. At the time I sold Mr. Crandel Brown the land, I told him the fence was on the line. That is the same land Mrs. Blue now claims."

I. C. Duncan:

"I am county surveyor. At black F there was a corner then along the line is a kind of hedgerow, an old hedgerow. The corner at black F looks as if it had been there several years. From black D to black E, in the first tract, there was a marked line all the way through. I saw a tree in Joe Brown's field marked on both sides, three chops and a blaze. The chops looked as if they were 25 or 30 years old. The tree corresponded, or is in line, with an old line coming out of the green swamp from black E. There is no marked line from red A to red D of either tract."

[1] This evidence, which was accepted by the jury shows a fence, maintained for many years, a hedgerow, and marked lines along the black lines, and possession for 30 or 40 years, which fully justifies the verdict of the jury.

The controversy has doubtless arisen because the land covered by the railroad right of way was considered in locating the boundary of the northern half of the two tracts.

[2] This exception to the refusal to nonsuit is the only one relied on in the brief, although one other, sustaining an objection to a question asked a witness, is referred to; but it is not made to appear what answer would have been made and it cannot therefore be considered.

We find no error in the trial.

No error.

(178 N. C. 264)

BARNES v. SEABOARD AIR LINE R. CO.  
et al. (No. 295.)

(Supreme Court of North Carolina. Oct. 15, 1919.)

1. MASTER AND SERVANT ⇨272—EVIDENCE SHOWING EXPRESS AGENT VICE PRINCIPAL AUTHORIZED TO HIRE EMPLOYEES.

Where a bystander employed by the agent of an express company to load a shafting was killed when the shafting fell, evidence that the clerk was employed by the agent to load and unload express was admissible to show that the clerk was a vice principal for whose negligence the company was liable.

2. MASTER AND SERVANT ⇨272—EVIDENCE THAT VICE PRINCIPAL WAS SUPERINTENDING WHEN SERVANT INJURED ADMISSIBLE.

Where a bystander engaged by the agent of an express company to assist its clerk in loading shafting was killed when shafting fell, evidence that the agent was present superin-

tending the loading was admissible on the issue of the company's negligence.

3. EVIDENCE ⇨471(24)—OF CAUSE OF FALL OF SHAFTING BEING LOADED ADMISSIBLE.

Where one engaged by the agent of an express company to assist in loading a heavy shafting on a train was killed as a result of a fall of the same, an experienced lumberman familiar with similar loading problems should have been allowed to answer a question as to his observation of the cause of the fall of the shafting, notwithstanding objections that the question called for the conclusion of the witnesses.

4. EVIDENCE ⇨471(24)—AS TO CAUSE OF ACCIDENT NOT INADMISSIBLE AS A CONCLUSION.

Where one employed to assist in loading a heavy shafting into an express car was killed when one end of the shafting rolled off of the truck on which it was resting, *held*, that an experienced lumberman who witnessed the accident should have been allowed to answer a question as to the effect the moving of the train had on the loading operation; it appearing that the shafting in the first instance was placed at right angles to the door of the car in which it was to be loaded, and that after the train was moved forward there was an attempt to load, though shafting was at an acute angle to the door.

5. MASTER AND SERVANT ⇨285(1)—QUESTION OF CONCURRENT NEGLIGENCE FOR THE JURY.

In an action for the death of one casually employed by the agent of an express company to assist in loading a heavy shafting which rolled from the truck when the train moved, *held*, that the question whether the death was caused by the concurrent negligence of the express company and the railroad company was under the evidence for the jury.

Walker and Allen, JJ., dissenting in part.

Appeal from Superior Court, Robeson County; Stacy, Judge.

Action by Rowland Barnes, administrator against the Seaboard Air Line Railroad Company and the American Railroad Express Company. From a nonsuit, plaintiff appeals. Reversed.

Johnson & Johnson, of Lumberton, for appellant.

McIntyre, Lawrence & Proctor, of Lumberton, for appellee Seaboard Air Line Ry. Co.

McLean, Varner, McLean & Stacy, of Lumberton, for appellee American R. Express Co.

CLARK, C. J. This was an action for the wrongful death of plaintiff's intestate, a farmer about 21 years of age, who had come to Lumberton on some business. While at the station of the defendant railroad company, the agent of the express company engaged him to help load a heavy iron shafting on the express car in the defendant railroad east-bound train. The shafting was 20 to 30

feet long, about 8 inches in diameter, in a box about 12 inches square, and estimated to weigh about 2,000 pounds. The loading was done under the supervision of the agent of the express company who hired three bystanders to assist the clerk of the express office. The agent was a lady and rendered no assistance beyond her supervision. The shafting was placed on two trucks at right angles to the door of the express car. The deceased was one of those who had hold of the end of the shafting nearest the express car, and the others were on either side of the box behind him. While the men were in the act of placing the front end of the shafting in the car door, the defendant railroad company suddenly, without warning, started the train, moving it up about 30 feet, which made it necessary to change the direction of the shafting. Express packages had been piled on the ground, and on that account the truck farthest from the train could not be moved up so as to be at right angles to the door again. The truck nearest the train was moved forward to the express car door in its new position, and it was then removed, leaving the front end of the shafting on the shoulders of the four or five men while the other end rested on the extreme corner of the rear truck, where the men bearing the front end and looking towards the car door could not see it. In the attempt to shove the boxed shafting into the car, in this diagonal manner, there was nothing to prevent it rolling off the truck, as there would have been if the shafting had been shoved in at right angles. All of the men were near the car door, as it naturally required their united strength to lift the front end of the 2,000-pound package. The rear end of the shafting twisted off the rear truck as the change to a diagonal had moved it to the corner of that truck from which it tumbled, falling to the ground with great violence. The end nearest to the train bounded upward with such violence that it was forcibly wrested from the shoulders of the men who were carrying it, and the deceased, who was in the acute angle nearest the train, was caught between the shafting and the train and his skull smashed, caused his death.

The witness Holloway who was a lumberman with 30 years' experience in doing similar work to loading this shafting, testified that the method pursued in attempting to put on the shafting after the moving forward of the car looked so dangerous to him that he was tempted to protest, but refrained from doing so for fear he might seem officious. He further testified that when the shafting was first placed for loading at right angles to the train it was squarely on the truck and would not have fallen off, but that, in moving the end next to the train after the train had pulled up, the further end of the shafting was turned diagonally on the extreme edge of the truck, and no one was

there, nor any effort made, to keep the shafting from falling off. This witness also testified that, if the shafting could have again been placed at right angles to the car, it could have been loaded with safety because it would not have rolled off the truck. The evidence showed, however, that the express had been piled on the ground in such manner that it was impossible to move the truck around in a suitable position; that is, at right angles to the train. The train was not moved back, 30 feet to the original position, thus avoiding the danger of attempting to put the shafting on in this diagonal manner. The agent of the express company was standing there, and also a clerk in the express office who had hold of the truck handles and could see the position of the rear end of the shafting, but no effort was made to adjust the shafting or place some one there to hold it, which it is doubtful if one man could have done when the movement of the four or five men at the front end would necessarily constantly change the position of the shafting on the rear truck.

[1, 2] The plaintiff also offered to show that the witness Davis, who was clerk of the express company at the time deceased was killed, was employed for the company by Mrs. Thomas, its agent at that station to assist her. It was error to exclude this, as it tended to show that he was a vice principal, and as such had charge of loading the shafting, and his conduct in failing to place some one at the rear truck to prevent the falling of the shafting, if found to be negligent, was the negligence of the company, and not that of a fellow servant of the intestate, who was a bystander picked up for the occasion. It was also error to exclude the testimony that Mrs. Thomas, the agent of the express company, was present, superintending the loading of the shafting, for her negligence, if any, in supervising the loading, was that of the company.

[3] It is not denied that the falling of the shafting from the truck was the immediate cause of the death of the deceased. The witness Holloway, who was present and described very intelligently the whole occurrence, was asked:

"From what you observed of it, what caused the shafting to drop from the truck, and fall to the ground in the manner you have described?"

This was excluded as opinion evidence, which was error, for he was asked to state what he saw. It may be that he would have said that the moving of the train forward causing the diagonal position of the shafting in order to put it on the car caused the falling of the rear end from the truck, or he may have given some other reason. We do not know exactly what he would have said; but the plaintiff was entitled to have the facts laid before the jury, that they might have

drawn their own inferences as to the cause of the injury. This, therefore, was error as to both the defendants.

[4] He was also asked, "State what effect the pulling of this train up some 30 feet, as you describe, had upon the ability of these men to load it upon the car." He answered, "It put the shafting in a very much more unsafe position than it was at first." On motion of the defendant railroad company, this answer was stricken out, which was a very material error. This witness without objection had stated that he had had experience for 30 years as a sawmill man in loading timber, and that in his opinion a sufficient number of men were provided to properly load the shaft into the train when the shaft was in the original position; but, in the new position where the thing actually happened, it looked pretty dangerous to him. This was evidence sufficient to go to the jury tending to show negligence of the defendant railroad in suddenly moving the train 30 feet forward and in not moving it back to the original position where the shafting had been properly placed for loading at right angles to the train. The authorities in charge of the train saw the position of the shafting and stopped the car at that point, where this witness stated that it could have been safely loaded. The defendant railroad has given no evidence or explanation why the car was suddenly moved forward, nor why it did not move the train back to the original position, though the witness stated that the change of position made the loading very much more unsafe.

There was evidence that the express car was something like 8 feet wide on the inside and the doors were about 5 feet wide. It is a matter of common observation, hardly needing evidence, that four or five men could not lift a piece of shafting 2,000 pounds in weight; but, if it was placed at right angles to the car, and shoved forward 8 feet into the car so as to relieve that much weight, the four or five men could then take hold of the rear end and by "slewing" it around shove it forward into the car. The witness Holloway testified that the loading could have been done in that manner; that is, by the shafting being put in at right angles, by four or five men. It would be a reasonable inference from the evidence, and from the knowledge of the jurors themselves, that, if the weight of the front end was not thus reduced by being put in the car, it would have taken double the number of men or more to lift up the shafting and put it in.

The witness testified that to attempt this work in the way which became necessary after the car was moved forward was very much more dangerous.

The court has held in many cases that the testimony of the witness from his own observation as to the cause of the accident was competent. *Britt v. R. R.*, 148 N. C. 37, 61 S.

E. 601; *Arrowood v. R. R.*, 126 N. C. 632, 36 S. E. 151; *Raper v. R. R.*, 128 N. C. 565, 36 S. E. 115; *Burney v. Allen*, 127 N. C. 476, 37 S. E. 501.

In *Britt v. R. R.*, supra, it was held competent to ask the witness:

"State whether or not, in your opinion, you could have straightened the log on the skid before it fell and hurt you, by the use of your cant hook, if the team had not started."

It was therefore competent for the witness in this case to state that the shafting could have been safely loaded on the car when it first stopped where the shafting was at right angles to the door, but that the moving of the car forward by causing the attempt to load the shafting diagonally caused the injury. This was evidence to go to the jury of the negligence of the railroad in moving the car suddenly forward and in not moving it back.

In *Britt v. R. R.*, supra, the court stated the principle as follows:

"The exception to the general rule that witnesses cannot give opinions is not confined to the evidence of experts testifying on subjects requiring special knowledge, skill, or learning, but it includes the evidence of common observers testifying the results of their observations made at the time in regard to common appearances, facts, and conditions which cannot be reproduced and made palpable to a jury."

Among many other cases than those just cited to this purport are: *State v. Edwards*, 112 N. C. 901, 17 S. E. 521; *Taylor v. Security Co.*, 145 N. C. 389, 59 S. E. 139, 15 L. R. A. (N. S.) 583, 13 Ann. Cas. 248; *Ives v. Lumber Co.*, 147 N. C. 308, 61 S. E. 70; *Bennett v. Mfg. Co.*, 147 N. C. 621, 61 S. E. 463; *Murdock v. R. R.*, 159 N. C. 132, 74 S. E. 887.

[8] There was evidence in this case tending to show that plaintiff's intestate was killed, without any fault of his, while engaged in the proper performance of the duty for which he was employed under the personal supervision of the agent, and also of the clerk or assistant agent of the express company; and tending to show that there was negligence in the loading of the shafting due in part to the railroad company moving the car and in not moving it back when it saw the situation in which this had placed those who were loading the shafting. Whether the conduct of the loading, if negligent, was the negligence of both defendants, or of one only, was a matter for ascertainment by the jury. The manner of loading called forth exclamations from bystanders. There was evidence which tended to show that the deceased came to his death, not as a result of an unavoidable accident, but as the direct and proximate result of the negligent acts of the defendants.

The shafting was of enormous weight, some 20 or 30 feet long, and three inexperienced men picked up from the bystanders at

the station with the assistance of the driver and clerk were used to put it on the car.

Without repeating the evidence, it is sufficient to say there was evidence sufficient to go to the jury tending to show:

(1) That the express company failed to furnish plaintiff's intestate with a sufficient number of competent, experienced fellow servants.

(2) That both defendants failed to use reasonable care and precaution for the safety of plaintiff's intestate.

(3) That the defendant railroad company, in suddenly pulling up its train while plaintiff's intestate and his fellow servants were in the act of loading the shafting in a safe manner, contributed to the death of the deceased, and this, concurrently with the negligence of the express company, was the proximate cause of the death of plaintiff's intestate.

To recapitulate the testimony more fully and cite apposite precedents might prejudice the cause of the defendants on another trial. It is sufficient to say, and we intend to say no more than that, that there was evidence sufficient to go to the jury tending to show that the death of the intestate was caused by the concurrent negligence of both defendants. It may be that on fuller development of the case it may appear that neither, or only one, of the defendants was guilty of negligence that contributed to the death of the plaintiff's intestate.

It is proper to say that in preparing this opinion we have been very much aided by the very intelligent and fair statement of the facts and of the law set out in the brief of the learned counsel for the plaintiff.

The nonsuit must be set aside as to both defendants.

Reversed.

**WALKER, J. (dissenting).** I cannot agree with the conclusion of the court in respect to the liability of the defendant Seaboard Air Line Railroad Company, because I am convinced, after a careful perusal of the evidence and a deliberate consideration of it, that there is none which implicates the railroad company as a negligent or delinquent defendant, and if there was negligence on the part of its codefendant, the express company, the railroad company did not participate therein, by co-operation or otherwise, nor was it in any way to blame, in law or in fact, for the accident whereby the plaintiff's intestate was killed. My opinion, therefore, is that the nonsuit, as to the railroad company, was properly entered by the superior court, and that its ruling in that regard should be sustained.

**ALLEN, J., concurs in this dissenting opinion.**

(178 N. C. 329)

**R. M. GRANT & CO. v. COUNTY BOARD OF EDUCATION OF WAKE COUNTY.**  
(No. 254.)

(Supreme Court of North Carolina. Oct. 22, 1919.)

**1. SCHOOLS AND SCHOOL DISTRICTS —97(5) —CONSTRUCTION OF BID FOR BONDS OF SCHOOL DISTRICT.**

Where a bid for bond issue, which a county board of education was authorized to issue, was conditioned on the ground that the bond issue should be approved by specified attorney, the bidder may recover a conditional deposit, where the attorney in good faith, and not capriciously, disapproved the bond issue.

**2. SCHOOLS AND SCHOOL DISTRICTS —97(5) —RECOVERY OF CONDITIONAL DEPOSITS ON BID FOR SCHOOL BONDS.**

Where conditional bid for bond issue, which a county board of education was authorized by Priv. Laws 1913, c. 457, to issue, was conditioned on the approval of the bond issue by the bidder's attorney, *held*, that objections to the issue made by the attorney were in good faith, and not capricious, and hence the bidder might recover conditional deposit.

Appeal from Superior Court, Wake County; O. H. Allen, Judge.

Civil action by R. M. Grant & Co. against the County Board of Education of Wake County. From a judgment for plaintiff, defendant appeals. Affirmed.

The action is to recover \$500 deposited on condition in a negotiation for purchase of bonds to be issued for defendant, same to be used as part payment on bonds, if they were approved and accepted by plaintiff, and otherwise to be returned. On denial of liability and issue submitted, his honor, being of opinion that on all the evidence, if believed, plaintiffs were entitled to recover, so instructed the jury. Verdict and judgment for plaintiff, and defendant having duly excepted, appealed.

N. Y. Gulley, of Wake Forest, Percy J. Olive, of Apex, and J. C. Little, of Raleigh, for appellant.

R. W. Winston and J. Crawford Biggs, both of Raleigh, for appellee.

**HOKE, J.** Chapter 457, Private Laws 1913, authorized defendant board to issue coupon bonds in the sum of \$25,000, payable not exceeding 130 years from date of issue, on approval of the voters of the said school district, and also a tax levy not to exceed 20 cents on the \$100 of property and 60 cents on the poll to meet the interest on the same as it accrued and to create a sinking fund to pay off the principal of said bonds at maturity. An election having been held and the measure approved by the voters, bonds to the amount specified and payable 30 years

from date, January 1, 1917, were prepared, and plaintiffs, dealing in purchase and sale of municipal bonds, made a bid therefor, accompanied by the following stipulations:

"This bid is made for prompt acceptance, and is subject to the legality and regularity of the issue being approved by our attorneys, you agreeing to furnish certified copies of all papers which may be necessary, in their opinion, to establish such legality and regularity in all respects. You further agree to pass any additional, reasonable resolutions which may be necessary, in the opinion of our attorneys, to complete the record of proceedings.

"As an evidence of good faith, we attach hereto certified check for five hundred no/100 dollars (\$500.00) drawn on the American Exchange Bank of New York and made payable to the order of Board of Education, Wake County, N. C., which is to be held by you, pending compliance with the conditions of this bid, and is only to be used as part payment for said bonds when approved and delivered to us; otherwise, said check is to be returned to us or our representative at once."

On January 3, 1917, this bid was accepted by defendants in terms as offered and receipt of the \$500 was acknowledged. The bid, stipulation, and acceptance, also the resolutions of the board touching the proposed bond issue, and the action of the voters on the proposition, together with the notices concerning the election, were properly submitted by plaintiff to the attorney, Charles B. Wood, of the firm of Wood & Oakley, Chicago, Ill., with the following letter accompanying same:

"Gentlemen: We hand you herewith certified copy of the proceedings had in connection with an issue of \$25,000 Wake Forest graded school district, Wake county, North Carolina, 5 per cent. bonds. Kindly let us have your opinion as to the legality of this issue, based on the inclosed record, at your convenience."

On January 30th said attorney in reply wrote plaintiffs as follows:

"Gentlemen: I will approve \$25,000 school bonds of Wake Forest graded school district, North Carolina, dated January 1, 1917, provided the county board passes a new order making the bonds payable serially in such a way that the same can be taken care of, both principal and interest, by the twenty-cent tax which the Legislature has authorized. This tax will not carry the bonds running straight thirty years. In passing the resolution, care must be taken to fix the place of payment of the principal and interest, and to provide one single date as the date of the bonds, and that date, of course, should be January 1, 1917, and no other date should appear. It must also be shown that the election notice was posted thirty days prior to the election."

After some further correspondence between plaintiff and defendants, in which defendants insisted that plaintiffs admitted the validity of the bonds and that the tax levy allowed by the law was amply sufficient to pay the current interest and create the sink-

ing fund required by the statute, defendants declined to issue the bonds serially or otherwise than as tendered, a straight 30-year bond. On these facts being communicated to the attorney on April 5, 1917, he wrote, declining to approve the bonds, as follows:

"Messrs. R. M. Grant & Co., Chicago, Ill.—Gentlemen: I decline to approve \$25,000 school bonds of Wake Forest graded school district, North Carolina, dated January 1, 1917, because the twenty-cent tax levy provided in the act of the Legislature is not sufficient to pay these bonds, and for the further reason that it is not shown that the election notice was posted thirty days prior to the election.

"Yours truly, Charles B. Wood."

[1, 2] There was evidence offered to the high character and reputation of plaintiff firm, and of the attorney to whom the question of the bond issue was submitted, and by the defendant that the preliminary notices for the election required by section 2967, and affecting the election, had been properly given; that is, that the same had been published 30 days preceding in a newspaper, and by advertisement posted at the courthouse door and four other public places in the county. etc.; also that the assessed property in the school district and the polls therein were sufficient to supply the amount of taxes required by the law for the proposed bond issue, both current interest and a proper sinking fund, etc.

On these, the pertinent facts of the controversy, the question chiefly presented was fully considered by us in *Webb v. Trustees*, 143 N. C. 299, 55 S. E. 719, and it was there held in effect that when the designated attorney, acting in good faith, has given an adverse opinion as to the validity of the bonds, the bidder was justified in refusing to proceed further, and in such case the conditional deposit is recoverable by the express terms of the agreement; and the position is not affected by the fact that the opinion of the attorney may have been erroneous, unless so arbitrary and capricious as to permit the inference of bad faith. Speaking to the subject in his well-sustained opinion, Associate Justice Connor said:

"It is uniformly held by the courts that, in the absence of any allegation or proof of bad faith or arbitrary conduct on the part of the person selected to pass upon the validity of the bonds or performance of the contract on the part of the person seeking its enforcement, his approval is a condition precedent, and is essential to the right to demand performance. It is usually held that, when it appears from the pleadings that such provision is a part of the contract, the failure to aver compliance is demurrable."

A like ruling has been made in other jurisdictions and is the principle very generally approved in the decisions on the subject. *Kinnicutt v. Joint School Committee*, 163 Wis. 654, 163 N. W. 167; *United States*

Trust Co. v. Inc. Town of Guthrie, 181 Iowa, 992, 165 N. W. 188; City of San Antonio v. Rollins & Sons (Tex. Civ. App.) 127 S. W. 1166. In the Iowa case, *supra*, the court held:

"The actual rendition by an attorney of an honest, but erroneous, opinion that a bond issue is illegal, furnished complete protection to a prospective purchaser in his refusal to buy, under his contract of purchase, provided the bonds be legal 'to the satisfaction of our counsel.'"

And in the Texas case (127 S. W. 1166) it was likewise held as follows:

"Where a bid for municipal bonds provided that prior to delivery the city should furnish procedure satisfactorily evidencing the legality of the bonds to the bidder's attorneys, and that the deposit should be promptly surrendered in case the bidder's attorneys were unable to approve the legality of the bonds, such approval constituted a condition precedent to the city's right to forfeit the deposit, in the absence of a showing that the attorneys' disapproval was fraudulent, capricious, and in bad faith."

In the present case there is no claim or suggestion that there has been any bad faith in fact, either on the part of the bidders or their attorneys. Both are shown to be of high reputation and character, and while we do not pass ultimately upon the correctness of the attorneys' opinion or the grounds upon which it is made to rest, we may say that his objections are sufficiently serious to challenge inquiry, and assuredly they are not so devoid of merit as to show that he acted capriciously or so as to permit an inference of bad faith as a matter of law. We do not understand that the defendant seeks to question the correctness of this general principle as approved and illustrated in the authorities cited, but it is very earnestly insisted that on perusal of the correspondence and other evidence pertinent to the inquiry it will appear that the attorney has not given an opinion on either the legality or regularity of the bonds as contemplated in the agreement between the parties, but, departing from its purpose and meaning, he has disapproved the bonds only because he considers them an undesirable investment.

On the facts in evidence we do not think such a position can be at all sustained. The bonds were submitted to the attorney, with a request for his opinion as to their "legality." His reply formally disapproved the bonds, and in addition his deposition is put in evidence, in which he repels the insinuation of bad faith, reaffirms his opinion against the validity of the bonds, stating more fully the grounds upon which such opinion is based, and raising what he assuredly regarded as sound objections to their "legality," and on the record we concur in his honor's view that, if the testimony is believed, it shows that the attorney gave his opinion in good

faith, and that he acted throughout within the scope of his mission and in the proper performance of the duties intrusted to him.

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

No error.

CLARK, C. J. (concurring in result). When the General Assembly authorizes the issue of bonds by the state or a county, township, municipality, or board, the duties of the commissioners or boards authorized to issue such bonds are restricted to issuing the bonds to the amount and in the manner prescribed by the statute. When the bonds are offered for sale, this must be done in compliance with the terms prescribed by the statute. If the highest bidder afterwards declines to take the bonds, the only question which can be presented is whether or not the bonds are a valid indebtedness, and regularly issued in accordance with the terms of the statute.

There is no authority conferred upon the commissioners of a county, or any board, to make private contracts with bidders containing stipulations as to matters not set forth in the statute. If such stipulations, as that they shall meet the approval of the lawyers for the bidders, were valid, that would raise simply the question whether such lawyer is of that opinion, and if he rejects the bonds that ends the controversy. There is nothing for the courts to pass upon. To permit the commissioners, or boards, to make outside agreements that bonds shall meet the views of the bidders in matters not prescribed by the statute, would be to recognize in them ultra vires powers, and it would give to the counsel of the bidders power to raise any moot question which their fancy or whim may suggest.

This court has been very slow to answer inquiries of the Legislature on hypothetical questions, and it will only do so in grave matters requiring such action. We certainly should not recognize the unrestricted power of counsel for bidders to raise any question they see fit, and, by taking an adverse view to the officers authorized to sell the bonds, present to the courts for decision any whimsical or fanciful moot question which they may desire. We have always refused requests for instruction by sheriffs, executors, and administrators, or for the construction of wills, when no direct judgment was required.

It would seem that the proper course to pursue in such cases is to treat the attempted contract as null and void, because not authorized by the statute, and to dismiss the proceeding. The sole question which can legally be presented to the courts, in my judgment, is whether the bonds are a valid indebtedness and issued in conformity with the provisions of the statute in every respect. Beyond that we have no authority to

go, and should not gratify the curiosity, or discuss the theories, of those who wish to raise other questions.

The bidder in this case knew the amount of the levy authorized. Whether it will, or will not, raise sufficient revenue in the future to meet the indebtedness, and whether or not serial bonds would be a better investment, were matters for the consideration of the bidder before bidding, but in no wise affect the validity or regularity of the bonds, which are the only questions the courts are authorized to decide.

(178 N. C. 344)

PENDERGRAPH et al. v. AMERICAN RY. EXPRESS CO. (No. 823.)

(Supreme Court of North Carolina. Oct. 22, 1919.)

**1. JUSTICES OF THE PEACE ⇐174(6)—SUPERIOR COURT ON APPEAL MAY ALLOW AMENDMENT.**

Under Revisal 1905, § 1476, on appeal from a justice of the peace, the superior court had plenary power to allow any necessary amendment in an action against a carrier for failure to transport and deliver, where, before trial, the goods were found and delivered.

**2. JUSTICES OF THE PEACE ⇐188(3)—RECOVERY ON APPEAL NOT GOVERNED BY JUDGMENT OF JUSTICE.**

Where plaintiffs sued defendant express company before a justice for failure to transport and deliver certain tools, and recovered judgment, and before the case was tried on appeal in the superior court the tools were found and delivered, the amount of the recovery in the superior court was not governed by the judgment rendered by the justice, which may have been based on the value of the tools, plus loss of time, while in the superior court the jury might deduct the value of the tools found.

**3. CARRIERS ⇐105(1)—DAMAGES FROM FAILURE TO TRANSPORT.**

Plaintiffs, who shipped tools by express, were entitled to recover as damages from failure to transport and deliver the loss which proximately accrued from violation of the company's contract of prompt and safe carriage, and which could have been reasonably presumed to have been in contemplation of the parties when the contract was made, and to have resulted from failure to perform.

**4. CARRIERS ⇐105(2)—DAMAGES FROM DELAY ON NOTICE OF PURPOSE OF SHIPMENT.**

Where an express company, receiving tools for shipment from carpenters, was told through its agent that the carpenters wanted them shipped to a point where there were other government construction camps, the express company, by the exercise of ordinary care, would have known for what purpose the tools were to be shipped, and is responsible for any loss proximately caused by its negligence in failing to transport.

**5. CARRIERS ⇐105(1) — MATTERS FOR JURY IN ESTIMATING LOSS FROM FAILURE TO TRANSPORT.**

In an action by carpenters against an express company for delay in transporting tools, the expense and loss of time in returning home to get new sets of tools, and for the loss in having a double set each, were not items of loss, but for consideration by the jury in estimating plaintiff's loss.

**6. DAMAGES ⇐62(1)—DUTY TO LESSEN LOSS FROM FAILURE OF CARRIER TO TRANSPORT.**

It was incumbent upon plaintiff shippers to lessen the loss accruing from negligence of express company which engaged to transport plaintiffs' carpenters' tools.

**7. COURTS ⇐472(7)—ELECTION TO SUE FOR DIFFERENT AMOUNTS IN TORT OR ON CONTRACT.**

Carpenters injured by an express company's failure to transport their tools as agreed could elect to bring an action in tort in the superior court for over \$200, or on contract for \$200 in justice's court.

**8. PARTIES ⇐86 — UNNECESSARY PARTY PLAINTIFF MATTER OF SURPLUSAGE.**

Where bill of lading for a shipment of tools was issued by an express company in name of one of the shippers alone, the agent knowing the tools belonged to both, so that the bill of lading was to one for himself and as agent for the other, and both brought action for failure to transport the tools, if one of them was an unnecessary party plaintiff, his being so was a mere matter of surplusage.

**9. CARRIERS ⇐150—INVALIDITY OF STIPULATION AGAINST LOSS THROUGH NEGLIGENCE.**

A common carrier cannot stipulate against loss by its own negligence, and a note on an express company's bill of lading that if the goods were hidden from view the recovery for loss should not exceed \$50 was not valid.

Appeal from Superior Court, Durham County; Lyon, Judge.

Action by J. W. Pendergraph and another against the American Railway Express Company. From judgment for plaintiffs, defendant appeals. No error.

On August 31, 1918, the plaintiffs delivered to the defendant company two boxes of carpenters' tools at Lee Hall, Va., for shipment to Norfolk, Va. The defendant failed to transport and deliver said tools according to contract, and plaintiffs brought this action in December, 1918, before a justice of the peace, who rendered judgment in favor of the plaintiffs for \$200, and defendant appealed. In February, 1919, before the case was tried in the superior court the two boxes of tools were found and delivered to plaintiffs. Though the record states that the judge said that he would allow the plaintiffs to amend, it does not appear that any amendment was made. The jury rendered a verdict for \$150, damages for breach of contract and defendant appealed.



Bryant, Brogden & Bryant, of Durham, for appellant.

J. W. Barbee and Brawley & Gantt, all of Durham, for appellees.

CLARK, C. J. [1, 2] The superior court had plenary power (Revisal, § 1476) if amendment had been necessary. The amount of the recovery in the superior court was not governed by the judgment rendered by the magistrate. Before the magistrate the judgment for \$200 may have been based upon the value of the tools, plus the loss of time directly caused by their nondelivery. On the trial in the superior court it may well be that the jury deducted the amount of the value of the tools which had then been found. At any rate their verdict was based upon the value of the time lost by the plaintiff until they could find opportunity to purchase new tools after reasonable delay in waiting for them.

[3] The object in sending the tools by express was to secure their prompt and safe delivery. The plaintiffs were entitled to recover as damages for breach of the contract such loss which proximately accrued from the violation of the contract of prompt and safe carriage of the tools, and which could have been reasonably presumed to have been in contemplation of the parties when the contract was made, and as a result of the failure to perform the defendant's part thereof.

[4] The jury trying the case after the tools had been found estimated plaintiffs' damages in the loss of time and expenses at \$150, and there was evidence to authorize such finding. When the plaintiffs delivered the two boxes of tools to the defendant at Lee Hall for transportation (where there was a government camp), they told the agent of the company they wanted them shipped to Norfolk, Va., where there were other camps, and it issued to them a receipt for the two boxes of tools, and told the plaintiffs that they would arrive in Norfolk by Monday. The company had all the notice that they could have had had they examined the tools in the boxes. By the exercise of ordinary care the defendant would have known for what purpose these tools were to be used, and are therefore responsible for any loss proximately caused by their negligence and delay. *Neal v. Hardware Co.*, 122 N. C. 105, 29 S. E. 96, 65 Am. St. Rep. 397. *Lewark v. Railroad*, 137 N. C. 383, 49 S. E. 882; *Lumber Co. v. Railroad*, 151 N. C. 25, 65 S. E. 460, and cases there cited; *Rawls v. Railroad*, 173 N. C. 8, 91 S. E. 367.

[5] There was evidence that the plaintiffs stayed in Norfolk ten days waiting for their tools to come, and that the government required carpenters to furnish their own tools.

There was evidence that they were paid by the government when they obtained their tools \$8.25 per day, which they lost, and besides they had to pay their board during their enforced idleness. It was in evidence that they were at the expense of a trip home to buy a new set of tools and return. It would seem from this that the jury must have allowed them compensation for about six days' loss of time, each, as a reasonable wait for the tools to arrive, and their board, and something possibly for the expense and loss of time returning home to get a new set of tools, and for the loss in having a double set each. These were not items of loss, but for consideration by the jury in estimating the loss.

[6] It is true that it was incumbent upon the plaintiffs to lessen the loss accruing from the negligence of the defendant, and this the jury seems to have considered, and the court so charged.

[7] The plaintiffs could have elected to have brought an action in tort in the superior court for a larger amount, or on contract for \$200 in the justice's court. *Bowers v. Railroad*, 107 N. C. 722, 12 S. E. 452. They elected to bring an action before a justice of the peace for breach of contract. *Froelich v. Express Co.*, 67 N. C. 1.

The amount claimed before the justice was solely for the value of the tools and for loss of compensation for labor which they would have received had the tools been delivered, and for expenses incurred while waiting a reasonable time for the tools before obtaining others.

The tools having been delivered when the trial came on in the superior court, the value of the lost tools was omitted in the verdict by the jury, who found \$150 a reasonable compensation for the damages sustained by the breach of contract.

[8] It is true that the bill of lading was issued in the name of one of the plaintiffs. But there is evidence that the agent knew that the tools belonged to both the plaintiffs, and the bill of lading was therefore to one for himself and as agent for the other. Both are made plaintiffs, and if one of the plaintiffs had been unnecessary this is merely surplusage.

[9] The note on the bill of lading that if the goods were hidden from view the recovery for loss thereof should not exceed \$50 is not valid, for a common carrier cannot stipulate against loss by its own negligence. Moreover, such limitation applied only to the value of the tools, and for them no recovery is embraced in this verdict. The verdict covers only the loss of time and expenses, not exceeding the loss sustained while waiting a reasonable time for the arrival of the tools.

No error.

(178 N. O. 364)

SPRUILL v. DAVENPORT et al. (No. 67.)

(Supreme Court of North Carolina. Oct. 22, 1919.)

**1. SCHOOLS AND SCHOOL DISTRICTS  $\S$  62—COMMITTEEMAN NOT PERSONALLY LIABLE FOR ACT IN LINE OF DUTY.**

A public officer, as a school committeeman, is not personally liable in damages for an act done in the line of his duty, though if the act is wrongful and malicious an action will lie against the officer personally to recover damages for his wrong; the law not inquiring into the wisdom or expediency of an official act.

**2. TRIAL  $\S$  352(1)—SCHOOL COMMITTEE LIABLE FOR REMOVAL OF TEACHER FOR MALICE OR CORRUPTION.**

In a teacher's action against school committeemen to recover salary for the full term during which she was dismissed, special issue, whether defendants wrongfully removed plaintiff and prevented her from teaching, was insufficient in form to sustain judgment for plaintiff, on account of its omission of the element of malice or corruption in the action of defendants.

**3. TRIAL  $\S$  352(1)—ISSUES MUST BE FRAMED AND ANSWERED TO WARRANT JUDGMENT.**

While issues are sufficient if they present the material matters in dispute and afford each of the parties a fair and reasonable opportunity to develop his case, they must always be so framed and answered as to warrant the judgment.

**4. SCHOOLS AND SCHOOL DISTRICTS  $\S$  62—RIGHT OF ACTION BY TEACHER NOT LEGALLY APPOINTED FOR DISMISSAL.**

A school teacher not legally appointed or elected has no right of action against the school committeemen for damages accruing to her from her dismissal by them, whether or not authorized.

**5. STATUTES  $\S$  227—CONSTRUCTION AS MANDATORY.**

When fair interpretation of statute directing acts to be done in a certain way shows the Legislature intended compliance to be essential to validity, or when some antecedent conditions must exist prior to the exercise of power, or must be performed before other powers can be exercised, the statute must be regarded as mandatory, or when the provision relates to acts or proceedings immaterial in themselves, but contains negative or exclusive terms, the statute becomes imperative, and requires strict performance.

**6. STATUTES  $\S$  227—CONSTRUCTION AS MANDATORY OR DIRECTORY.**

There is no absolute formal test for determining whether a statutory provision is to be considered mandatory or directory, but the meaning and intention of the Legislature must govern, being ascertained not only from the phraseology, but from consideration of the nature of the provision, its design, and the consequences of different constructions.

**7. SCHOOLS AND SCHOOL DISTRICTS  $\S$  62—STATUTE REGULATING APPOINTMENT OF TEACHERS MANDATORY.**

A teacher not appointed or elected in compliance with Revisal Supp.  $\S$  4161, cannot recover damages from the school committeemen as for a wrongful dismissal; the statute being mandatory and requiring a strict compliance for a valid appointment.

**8. SCHOOLS AND SCHOOL DISTRICTS  $\S$  62—FILING CONTRACT AND EVIDENCE OF ELECTION NECESSARY TO COMPENSATION OF TEACHER.**

Where Revisal Supp.  $\S$  4161, forbidding payment of any part of a school teacher's salary unless a copy of her contract has been filed with the superintendent accompanied by evidence that the person so applying for a voucher has been duly and regularly elected, was not strictly complied with, the teacher was not entitled to compensation, and suffered no damages through dismissal by school committeemen.

**9. EVIDENCE  $\S$  65—PRESUMPTION OF KNOWLEDGE OF LAW.**

A school teacher suing committeemen for damages through loss of salary after her dismissal is presumed to have known the law relative to matters necessary to the legality of her election or appointment.

Appeal from Superior Court, Washington County; Devin, Judge.

Action by Sallie Spruill against J. F. Davenport and others, members of School Committee. Judgment for plaintiff against defendants individually, and the latter appeal. Reversed.

Civil action, tried before Devin, J., and a jury, at July term, 1919, of Washington superior court.

The plaintiff sued for damages, alleging that she had been employed as a teacher in Cherry school district, and that, after she had served for less than a month, she was dismissed by the defendants, members of the school committee. She asks judgment for \$360, her salary for the full term of nine months at \$40 per month. It being discovered that the complaint stated no cause of action, there being no allegation of fraud or malice, the plaintiff, by leave of the court, amended her pleadings, and further alleged that she was willfully and maliciously dismissed by the defendants, as school committeemen. The court submitted the following issues:

"(1) Did the defendants wrongfully remove the plaintiff and prevent her from teaching the school at Cherry?

"(2) If so, what damage, if any, is the plaintiff entitled to recover therefor?"

The jury answered the first issue, "Yes," and the second issue, "\$280.00 with interest." Upon this verdict, the court rendered a personal judgment against the defendants, and

not a judgment against them as school committeemen in their corporate capacity.

Defendants appealed.

Ward & Grimes, of Washington, N. C., for appellants.

Zeb Vance Norman, of Plymouth, for appellee.

**WALKER, J.** [1-3] The first issue was not in proper form. A public officer is not personally liable in damages for an act done in the line of his duty. *Robinson v. Howard*, 84 N. C. 152. There it was held that a school committeeman was not liable personally on a contract by which he employed a teacher, and that the remedy was by mandamus to compel the payment of the money by the proper officer in the way provided by law. Though the act is wrongful and malicious, an action will lie against the officer in his personal capacity to recover damages for the wrong committed by him.

"It is a principle well established that when a person, corporation, or individual is doing a lawful thing in a lawful way, his conduct is not actionable, though it may result in damage to another; for, though the damage done is undoubted, no legal right of another is invaded, and hence it is said to be *damnum absque injuria*. *Dewey v. R. R.*, 142 N. C. 392 [55 S. E. 292]; *Thomason v. R. R.* (Plaintiff's appeal), 142 N. C. 318 [55 S. E. 205]; *Oglesby v. Attrill*, 105 U. S. 605 [26 L. Ed. 1186]. In such cases the motive prompting the act, however reprehensible or malicious, is not, as a rule, relevant to the inquiry." *White v. Kincaid*, 149 N. C. 416, 419, 63 S. E. 109, 111 (23 L. R. A. [N. S.] 1177, 128 Am. St. Rep. 663).

It was said in *Hipp v. Ferrall*, 173 N. C. 167, 169, 91 S. E. 831, 832, to be the law of this state:

"That public officers, in the performance of their official and governmental duties involving the exercise of judgment and discretion, may not be held liable as individuals for breach of such duty unless they act corruptly or with malice"—citing *Templeton v. Beard*, 159 N. C. 63, 74 S. E. 735, and *Baker v. State*, 27 Ind. 485.

See, also, *Scott v. Fishplate*, 117 N. C. 265, 23 S. E. 436, 30 L. R. A. 696; *Burton v. Fulton*, 49 Pa. 151; *Stewart v. Southard*, 17 Ohio, 402, 49 Am. Dec. 463; *Reed v. Conway*, 20 Mo. 22; *Donahoe v. Richards*, 38 Me. 379, 61 Am. Dec. 256; *Jenkins v. Waldron*, 11 Johns. (N. Y.) 114, 6 Am. Dec. 359; *Harmon v. Tappenden*, 1 East, 563; *Cullen v. Morris*, 2 Stark. 577.

The law does not inquire into the wisdom or expediency of the official act. *Oglesby v. Attrill*, *supra*. That is committed to the sound judgment and discretion of the officer, and it is only when he goes outside of his line of duty and acts, as is said in *Hipp v. Ferrall*, *supra*, "corruptly or with malice,"

that he becomes liable for the consequent damages.

The defendants contend, on this ground, that the issue is not sufficient in form to sustain the judgment, as it does not appear therefrom that the dismissal was caused by either corruption or malice. It might have been "wrongful," if there was a mere breach of contract; but this would confine liability to the school district or to the board in its corporate character, and it would not extend to the individual members. More must appear to make them liable. *Morrison v. McFarland*, 51 Ind. 206; *Adams v. Thomas*, 12 S. W. 940, 11 Ky. Law Rep. 701. The case of *Robinson v. Howard*, *supra*, is of a like kind. The issue, as framed, was not, therefore, sufficient as a basis for the judgment, as it should have included the element of malice or corruption. *Ruffin v. Garrett*, 174 N. C. 134, 93 S. E. 449. The passage quoted by plaintiff's counsel from 35 Cyc. 1095, does not sustain the position that the members of the board are liable individually. It says:

"Where a school teacher is wrongfully removed or dismissed before the expiration of his term of employment, he is entitled to recover from the school district, or the school board, the damage he has sustained by reason of the breach of his contract, as where he is dismissed without a sufficient cause, or without the cause of his dismissal being ascertained and shown in the manner prescribed, by statute, as without a hearing."

It is apparent what is meant, and that the author is referring to corporate liability. This is made perfectly clear by this statement of the law, almost immediately following the other one in the same paragraph:

"Where the violation of a contract is by the school officers in their official capacity they are not personally and individually liable therefor, unless they act maliciously," citing *Morrison v. McFarland*, *supra*; *Gregory v. Small*, 39 Ohio St. 346; *Burton v. Fulton*, 49 Pa. 151; *Adams v. Thomas*, *supra*—and these cases fully support the text.

It is well settled that while issues are sufficient, if they present the material matters in dispute and afford each of the parties a fair and reasonable opportunity to develop his case to the jury, they must always be so framed and answered as to warrant the judgment. *Hatcher v. Dabbs*, 133 N. C. 239, 45 S. E. 562; *Strauss v. Wilmington*, 129 N. C. 90, 39 S. E. 772. The defect in the issue would involve a new trial, as no malice or corruption is found. The charge of the court is not in the record.

[4-7] But there is another obstacle in the plaintiff's way and fatal to her recovery. If she was not properly and legally appointed to the position of teacher in the Cherry school, it was not only the right, and within the power, of the committee to dismiss, but it was their official duty to do so, and, if they

were exercising a rightful power, their motive, even if a bad one, cannot be considered, as we have shown heretofore. It is then a correct position that, if she was not legally appointed, or "elected," it is a full answer to her action for damages against the individuals of the board, as the dismissal was not, in any sense, a wrongful one, but instead was a proper thing done "in the line of their duty." This very question was before the court in *Gregory v. Small*, 39 Ohio St. 346, 348, which we have already cited for another purpose. The court there held:

"If there was not a legal contract of employment, the teacher had no right to teach the public school, and the directors in their official capacity might dismiss him, and put a teacher duly employed in possession of the school-house. The common-law right of action for dismissal is founded on a valid contract of employment. When an officer acts within the scope of his authority, he is not responsible personally, unless he acts from a corrupt motive"—citing *Stewart v. Southard*, 17 Ohio 402, 49 Am. Dec. 463; *Ramsey v. Riley*, 13 Ohio, 157; *Morrison v. McFarland*, 51 Ind. 208.

We must now turn to the record in this case and to the statute of our state regulating such matters, and see whether the plaintiff was regularly and legally appointed as a teacher in the Cherry school. We will first consider the statute, as it will be convenient to do so. It will be found in *Gregory's Suppl. to Pell's Revisal*, vol. 3, pp. 665 and 666, § 4161. It confers authority to employ and dismiss teachers, and then provides as follows:

"The county board of education of each county shall fix annually a day and place in each township for the meeting of the township or district committeemen of said township, who shall, in conference with the county superintendent, with whom application must have previously been filed by all applicants, select the teachers for their respective schools, except for rural public high schools: Provided, that no election of any teacher or of any assistant teacher shall be deemed valid until such election has been approved by the county superintendent; and no voucher for the salary of a teacher of any school shall be signed by any county superintendent unless a copy of such teacher's contract has been filed with him as herein provided, and unless he shall have received satisfactory evidence that such teacher has been elected in strict accordance with this section."

We have quoted only the material portion of the law. It will be observed that it requires notice of the meeting, appointment of day and place by the county board of education for the meeting of the township or district committee, who shall in conference with the county superintendent select teachers for their respective schools from the

list of applications required to be previously filed with the county superintendent by "all" applicants. When we turn to the record, we find that, so far as appears, not one of these requirements has been complied with. The statute also declares that no election shall be deemed valid unless approved by the county superintendent. This approval was not given. It goes further, and directs that no voucher for salary shall be given to any teacher unless the superintendent is satisfied, by evidence, that such teacher has been elected in "strict" accordance with this section. It appears therefore very clearly that these provisions, so carefully and guardedly drawn, were not intended to be merely directory or optional, but mandatory, for the statute not only prescribes the procedure in no uncertain terms, but expressly declares that a departure from it shall render the election void and of no effect. A very good statement of the rule, as to what statutory provisions are mandatory and require strict obedience, and what are only directory and do not affect the validity of what is done, will be found in 36 Cyc. at pages 1158 and 1159. It is there said:

"When a fair interpretation of a statute, which directs acts or proceedings to be done in a certain way, shows that the Legislature intended a compliance with such provision to be essential to the validity of the act or proceeding, or when some antecedent and prerequisite conditions must exist prior to the exercise of power, or must be performed before certain other powers can be exercised, then the statute must be regarded as mandatory. When the statutory provision relates to acts or proceedings immaterial in themselves, but contains negative or exclusive terms, either expressed or implied, then such negative or exclusive terms clearly indicate a legislative intent to impose a limitation, and therefore the statute becomes imperative, and requires strict performance in the manner prescribed."

It is dangerous to attempt to be wiser than the law, and, when its requirements are plain and positive, the courts are not called upon to give reasons why it was enacted. Approving this view, a standard author has said:

"A judge should rarely take upon himself to say that what the Legislature have required is unnecessary. He may not see the necessity for it; still it is not safe to assume that the Legislature did not have a reason for it; perhaps it only aimed at certainty and uniformity. In that case, the judge cannot interfere to defeat that object, however puerile it may appear. It is admitted that there are cases where the requirements may be deemed directory. But it may safely be affirmed that it can never be where the act, or the omission of it, can by any possibility work advantage or injury, however slight, to any one affected by it. In such case, the requirement of the statute can never be dis-

pensed with." *Black's Interpretation of Laws* (1896) at pages 337, 338.

There is no absolute formal test for determining whether a statutory provision is to be considered mandatory or directory. The meaning and intention of the Legislature must govern; and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it in the one way or the other. *Black's Interpretation of Laws*, p. 338 (124). But in our case, the meaning and intention of the Legislature are expressed with perfect clearness. No provision, it would seem, could be more mandatory, in form or substance, than one which declares that noncompliance with it shall make void the act of the body required to observe its requirements.

[8] And too, it may be said, on the question of damage, that the plaintiff's claim is based upon the loss of her salary for the school term of seven months, and she actually recovered \$280 predicated upon that theory. But the statute expressly and positively forbids the payment of any part of the salary unless a copy of the contract with her has been filed with the superintendent, accompanied by evidence that the person so applying for a voucher has been duly and regularly elected—in strict accordance with the provisions of the statute. This was not done, and it is a condition precedent to the right of compensation. She has therefore shown no damage, as there was no loss of anything to which she was lawfully entitled.

[9] There is no allegation of fraud in this case, or any proof of the same. Plaintiff is presumed to know the law, and should have ascertained if her election was legal, and her evidence shows that she did know that the concurrence and approval of the superintendent was essential to a valid appointment of her as a teacher. Parties must keep within the law, when making their contracts. This view is sustained by *Wright v. Kinney*, 123 N. C. 619, 31 S. E. 874, though our case is stronger for defendant here. We mention this matter, though not strictly necessary to do so in order to decide the case.

We are therefore of the opinion that, as the plaintiff was not legally elected as a teacher of the Cherry school, it was proper for the committee to dismiss her or to refuse permission that she should longer teach in the school, and that consequently the defendants have committed no act or actionable wrong for which the plaintiff can sue. It is therefore ordered that the judgment be reversed and the action dismissed as upon nonsuit.

Reversed.

(178 N. C. 376)

HOLMES et al. v. BULLOCK et al. (No. 291.)

(Supreme Court of North Carolina. Oct. 22, 1919.)

1. PRIVATE ROADS ⇐2(2)—SUPERIOR COURT ON APPEAL CANNOT ALLOW AMENDMENT TO PETITION TO LAY OUT CARTWAY.

As the board of supervisors of a township, in view of Revisal 1905, § 2683, Consol. St. vol. 1, pp. 995, 1004, c. 69, §§ 131, 166, Const. art. 7, § 2, alone has original jurisdiction of a proceeding to lay out a cartway, neither the board of commissioners of the county nor the superior court have authority on appeal to amend a petition for a cartway to one for laying out of a public road; the jurisdiction being derivative.

2. APPEAL AND ERROR ⇐1178(1) — WHERE AMENDMENT WAS IMPROPERLY ALLOWED CASE WILL BE REMANDED, WITH DIRECTIONS.

In a proceeding before a township board of supervisors to lay out a cartway, where an appeal was taken to the county board of commissioners and from there to the superior court, and the superior court exceeded its jurisdiction and amended the petition to one for the laying out of a public road, the Supreme Court on appeal will not dismiss the case, but will direct the superior court to strike out the void order and proceedings thereunder and to proceed according to law.

Appeal from Superior Court, Cumberland County; Stacy, Judge.

Petition by O. L. Holmes and others to lay out a cartway. Judgment for petitioners, and Gray Bullock and other landowners appeal. Error.

This is a proceeding commenced by petitioners before the board of supervisors of Flea Hill township (Cumberland county), for a cartway starting at a point on the national highway and extending along the lines of lands of defendants to a place near the lands of O. L. Holmes, one of the petitioners. The petition was filed, alleging that it was a public necessity that such a cartway should exist, as the petitioners and others were in great need of a road on which to go to church, to mills, schools, etc. From an order by the board of supervisors to lay out a cartway, the defendants appealed to the board of commissioners of Cumberland county, and said commissioners sustained the action of the supervisors, and ordered the cartway to be laid out. From this order the respondents, on June 3, 1918, appealed to the superior court.

At September term, 1918, the superior court, Lyon, J., presiding, signed an order, granting petitioners leave to amend the petition so as to ask for a public road instead of a cartway, to which order respondents did not ask to enter an exception at the time. Petitioners filed an amended petition on Oc-

tober 5, 1918, and defendants filed an answer to same.

The case was tried at the March term, 1919, and at this term defendants, for the first time, asked to be allowed to enter an exception to the order signed by the judge at September term, 1918, and were allowed the exception as of March term, 1919. This being after they had answered the amended petition.

There was a verdict and a judgment for petitioners. Defendants appealed.

Broadfoot & Broadfoot and Bullard & Stringfield, all of Fayetteville, for appellants.

Neill A. Sinclair and H. L. Cook, both of Fayetteville, for appellees.

WALKER, J. (after stating the facts as above). [1] We need not consider the case upon its merits, as we are of the opinion that an error was committed in allowing an amendment, so as to convert the petition for a cartway into one for a public road or highway. The case came to the superior court, first, by appeal from the board of supervisors, which granted the cartway, to the board of commissioners of the county, and from a like decision of that board to the superior court. The board of commissioners acquired only the jurisdiction of the supervisors, before whom the proceeding was begun, and the superior court acquired the same jurisdiction. Neither of them had the power to amend the petition so as to change it to one of which the board of supervisors had no jurisdiction.

"The board of supervisors shall have the right to lay out and discontinue cartways, and the board of commissioners of the county only shall have the right to lay out and establish and discontinue public roads: Provided, that in laying out and establishing roads and cartways, and for the purpose of assessing damage to property by reason of the same, no greater number of jurors than five shall be summoned or be required: Provided further, that either party may appeal from the decision of the board of supervisors to the board of commissioners of the county." Revisal, § 2683; Consol. Statutes, vol. 1, pp. 995, 1004, c. 69, §§ 131, 166; Const. art. 7, § 2.

The jurisdiction of the superior court was entirely derivative. It acquired only the jurisdiction of the board of supervisors to determine whether a cartway should be established. *McLaurin v. McIntyre*, 167 N. C. 350, 83 S. E. 627; *Boyett v. Vaughan*, 85 N. C. 365; *James v. McClamroch*, 92 N. C. 365; *Robeson v. Hodges*, 105 N. C. 49, 11 S. E. 263; *State v. Wiseman*, 131 N. C. 797, 42 S. E. 826. The supervisors had no jurisdiction of proceedings for the laying out of a public road. The board of commissioners had no jurisdiction of proceedings for establishing cartways, and did not exercise any such jurisdiction but confined itself to deciding whether the prayer for a cartway should be

granted. The superior court had no original jurisdiction over cartways or public roads, and could only acquire such jurisdiction over such a matter by appeal from a body that did have such a jurisdiction. In this case, under all the pertinent authorities, it only acquired, by the appeal, jurisdiction to try and determine the proceeding for a cartway. By the appeal, the sole jurisdiction of the superior court was derived through the board of commissioners, from the board of supervisors, whose only jurisdiction was of the proceedings for the cartway. In order to ascertain the precise jurisdiction of the superior court, we must, in turn, find out what was the limit of the jurisdiction of the board of supervisors.

[2] The superior court was in error when it undertook to enlarge its own jurisdiction, and to enter upon the consideration of a proceeding which was not before it and which was *coram non jure*. Being without the power to extend its own jurisdiction by amendment, the order allowing it was void. But this does not dismiss the case, but merely strikes out the amendment, and leaves the proceeding in the condition it was when the order of amendment was made. It is not necessary to consider the other questions as to the time the exception was entered.

It will be therefore, certified to the superior court that there is error, with direction to strike out the order of amendment and reverse all proceedings thereunder, and then to proceed further in the cause, according to the law, to try the issue as to the cartway.

Error.

CLARK, C. J., concurs that the action should not be dismissed, but as the case goes back to the superior court to be tried by a judge and jury, sees no reason why the judgment and verdict already entered should not be affirmed.

This action was begun by petition before the township supervisors for the establishment "of a cartway" which allowed the petition, and on appeal to the county commissioners the action of the township supervisors was approved. On appeal from the county commissioners to the superior court the judge granted an amendment to ask for a public road instead of cartway, to which the defendants entered no exception, but filed an answer on the merits. The judge had full power to allow any amendment. Revisal, 1467. This did not change the nature of the action, but merely amended the scope of the petition, not by changing the cause of action but broadening the relief asked as to this administrative measure, whether it should be a public road or a cartway. At the next term of the superior court the defendants raised objection for the first time to the jurisdiction. They had filed an answer on the merits at the previous term.

The object of a trial is to ascertain the

facts and the law on the matter in controversy, and when that controversy has reached a court, such as the superior court, which has full jurisdiction of the matter, and the relief granted is of the same general nature as the action begun in the lower court, there can be no sufficient reason why that court should not proceed to determine the controversy.

When the justice of the peace wrongly takes jurisdiction of a criminal action on appeal to the superior court the case is not dismissed for want of jurisdiction in the magistrate, but a bill is sent and the case is tried *de novo*. *State v. Neal*, 120 N. C. 618, 27 S. E. 81, 58 Am. St. Rep. 810. When the clerk wrongly takes jurisdiction and the case by appeal or otherwise reaches the superior court that court has jurisdiction and Revisal, § 614, provides that the judge shall "hear and determine all matters in controversy, in such action, and shall make any amendments whatever," and this was held to be so, though the proceeding before the clerk was a nullity. In *re Anderson*, 132 N. C. 243, 43 S. E. 649, *Railroad v. Stroud*, 132 N. C. 416, 43 S. E. 913, and *Ewbank v. Turner*, 134 N. C. 81, 46 S. E. 508.

In *McMillan v. Reeves*, 102 N. C. 559, 9 S. E. 452, *Smith, C. J.*, applied to appeals in civil actions the same rule as in criminal proceedings and says:

"It is not material to inquire into the question of jurisdiction invoked in initiating the suit, since any objection on this account is obviated by the removal of the cause into the superior court, presided over by the judge"

—saying further:

"The court, assuming to exercise jurisdiction, did possess it fully over the subject-matter of the action and the parties to it, in which they were represented by counsel, and the cause was, in a strict sense, *coram iudice*, under the rulings in *West v. Kittrell*, 8 N. C. 493, and *Boing v. Railroad*, 87 N. C. 360, even without the aid of Laws 1887, c. 276 [now Revisal, § 614], which sustains the jurisdiction thus acquired."

The Chief Justice further said that the objection to the jurisdiction "has no force unless the proceeding, in its entirety, is a nullity, and it certainly cannot require argument to combat such contention. *Norwood v. Peoples*, 94 N. C. 167." In this last case the court held that where the parties were before the court it was sufficient though no summons was served.

In *Boing v. Railroad*, 87 N. C. 363, it was held that, where the subject-matter of the action is one of which the court of the justice of the peace and the superior court had concurrent jurisdiction, on appeal the latter court will retain jurisdiction, though the proceeding in the court of the justice of the peace was void for irregularity. The ground

given is that, the case having gotten into the superior court which has jurisdiction, the notice of appeal had the same efficacy as the service of a summons.

As far back as *West v. Kittrell*, 8 N. C. 493, it was held that where a cause was carried to the superior court from a lower court the former would retain jurisdiction, if it were a subject-matter of which the superior court would have had jurisdiction, if the action had been originally instituted in that court. In *State v. Neal*, 120 N. C. 618, 27 S. E. 84, 58 Am. St. Rep. 810, it is said:

"The case was tried before a justice of the peace, and the defendant appealed. In the superior court a bill of indictment was found by the grand jury, and the defendant was tried thereon. Therefore, in any aspect, there was jurisdiction. Whether the court acquired it by the appeal or had original jurisdiction by the indictment, it is immaterial to decide."

The above cases were cited in the concurring opinion in *State v. McAden*, 162 N. C. 578, 77 S. E. 300, and it was added:

"The sole object in serving a summons is to give the defendant notice to come into court. When he has had a trial, on a bona fide mistake of jurisdiction by the plaintiff, before a justice of the peace, and the case is tried on appeal in the superior court, the defendant has really had a more sufficient notice, and is better prepared to try, than if he had been originally served with summons to appear in the superior court. There can be no good end served by dismissing an action thus brought into the superior court by appeal and requiring the defendant to be again brought into the same court by the service of a summons, to try the same case."

There are decisions to the contrary of the above holding that as to appeals in civil cases from a justice that a different rule applies than on appeal from a justice in criminal cases, or from the clerk, in cases where those courts were without jurisdiction, in which cases the superior court proceeds to try. There can be no reason why the same rule should not apply in such case as in the other two. The only reason assigned is that the jurisdiction of the superior court on appeal from a justice in a civil action is "derivative," but it can be no more so than an appeal from a justice in a criminal action or on appeal from the clerk, in both of which no such objection obtains.

An examination of the Constitution will show no basis for the doctrine of "derivative jurisdiction" on appeals in civil cases to the superior court, but it is simply a survival of the former ideas obtaining by which so many objections were held jurisdictional. For instance, if an action was brought in the wrong county it was dismissed, and the plaintiff was put to the expense of bringing a new action in the other county because he had

guessed wrong as to the venue. In the search for efficiency and economy in the administration of justice, this was remedied by providing that if no objection was made before answering the trial would proceed but that if it was made in apt time the action was not dismissed, but simply removed to the proper county.

Formerly there were numerous forms of actions, indeed Blackstone says that no one knew their number," but if a party brought an action for debt when it should have been in covenant, or in detinue when it should have been replevin, or if the plaintiff guessed erroneously by using any other form of action than that which the court might deem the correct one, he was dismissed with costs, and had to bring the same action, in another form, in the same court, and if he guessed wrong again he went through the same process until he guessed right. Also there was another *pons asinorum* that if a man brought an action at law, when it should be a suit in equity, or a suit in equity when it should be an action at law, he was dismissed and had again to come into court to proceed before the same judge, after much loss of time and expense. All these matters have been remedied by simply holding that when the party is in a court which has jurisdiction of the cause the court will permit such amendments as it deems proper, and will proceed to try the cause of which it has jurisdiction.

As to appeals in criminal actions from the justice or in any case from the clerk the same common sense proceeding is followed of proceeding with the trial irrespective whether the court from which the appeal was taken had jurisdiction or not. There can be no reason for an exception from this general rule in appeals from the justice of the peace in civil actions, or from an administrative board as in this matter of "laying out a road," whether it was a cartway, or a public road, when the case got into the superior court it had full jurisdiction. The judge, as he had full power to do, made the amendment (Revisal, § 1467), and the defendant not only did not except, but waived the objection by filing an answer. The facts were found by the jury, and the law applied by the court without any error assigned as to either. Why go over again the same evidence, and apply the same law, in the same court, when it had full jurisdiction of the parties and the subject-matter of laying out public roads, and no error was committed in the trial?

It would seem that the spirit and the letter of the Constitution and the practice obtaining in all other cases would require that, the matter having been fully examined into and determined by a court having full jurisdiction and without any error assigned, the judgment should be affirmed.

(112 S. C. 555)

OLIVER et al. v. McWHIRTER et al.  
(No. 10280.)

(Supreme Court of South Carolina. Aug.-6, 1919.)

## 1. VENDOR AND PURCHASER ⇨229(2) — KNOWLEDGE OF POSSESSION SUFFICIENT TO PUT VENDEE ON INQUIRY.

Although Civ. Code 1912, § 3543, provides that possession under an unrecorded deed shall not operate as notice of such instrument, and requires actual notice of the instrument itself, or of its nature and purport, yet a purchaser of land, possession of which is held under an unrecorded deed, is not entitled to the protection of innocent purchaser, if he had notice of such circumstances as were sufficient to put him on inquiry, which, if pursued with due diligence, would have led to knowledge of the rights of those holding possession under the unrecorded deed.

## 2. MORTGAGES ⇨536—PURCHASER AT FORECLOSURE WITH KNOWLEDGE OF RIGHTS OF THIRD PARTY.

Evidence held to show that purchaser at mortgage foreclosure sale had actual knowledge of plaintiffs' rights in the property sold.

## 3. PRINCIPAL AND AGENT ⇨177(6)—KNOWLEDGE OF BOOKKEEPER OF FIRM OF UNRECORDED DEED KNOWLEDGE OF FIRM.

Knowledge of a bookkeeper of a partnership, taking a mortgage on property, of the existence of unrecorded deeds, is binding on the partnership.

## 4. VENDOR AND PURCHASER ⇨237—PAST INDEBTEDNESS INSUFFICIENT CONSIDERATION ON PLEA OF INNOCENT PURCHASER.

Consideration based upon past indebtedness is not sufficient to sustain a plea of innocent purchaser, under Civ. Code 1912, § 3542, requiring that conveyances of land be recorded, etc.

## 5. EVIDENCE ⇨60 — PRESUMPTION IN CIVIL ACTION OF INNOCENCE OF DECEASED.

There is a presumption in a civil action that a deceased person did not subject himself to a criminal prosecution and that he did not violate the law.

## 6. MORTGAGES ⇨186(5) — EVIDENCE CHARGING MORTGAGEE WITH NOTICE OF PRIOR UNRECORDED DEED.

In an action to recover real estate, evidence held to show that defendant mortgagee had actual notice of unrecorded deeds.

Hydrick and Fraser, JJ., dissenting.

Appeal from Common Pleas Circuit Court of Union County; Jas. E. Peurifoy, Judge.

Action by Mrs. N. C. Oliver and others against C. M. McWhirter and others. Judgment for defendants, and plaintiffs appeal. Reversed and remanded.

See, also, 109 S. C. 358, 96 S. E. 140.

The master's report, referred to in the opinion, was as follows:



The above-stated case having been referred to me, I beg leave to submit this as my report therein:

It is apparently agreed that there are only two issues for me to pass upon, namely:

(1) Did J. L. McWhirter have sufficient notice of unrecorded deeds from B. F. Pennington to the executors of Price, and from the executors of Price back to Pennington, to supply the place of the record of such deeds?

(2) Does the purchase by J. L. McWhirter, at the foreclosure sale under the mortgage given by Pennington to Pitchford Company, place McWhirter in a position where he can, even if he had notice of the alleged equities of the children of Pennington, make the claim of one who purchased from another who had no notice.

As to the first: I think it clear, from the testimony, that J. L. McWhirter had some notice that the children of Pennington should have had, or did have, some interest in this land. He evidently had heard something to this general effect. But there is nothing in the testimony that McWhirter had any actual knowledge that the money of those children had really been invested in this property. Nor is there anywhere in the record any evidence to show that McWhirter had any knowledge whatever of the fact that a deed had been made, nor that he knew of the contents of such deed. The statute law of this state expressly provides that "actual notice shall be deemed and held sufficient to supply the place of registration only when such notice is of the instrument itself, or of the nature and purport." Section 3543, vol. 1, Code of Laws 1912.

It has been argued before me that the rules of equity must, when there is a conflict, prevail over the rules of law. I apprehend that this argument is unsound, in so far as it applies to the statute law of the state. When the rules of the common law and of equity conflict, the former gives way to the latter, but not, I think, when the statute law is concerned. I find, therefore, as a matter of fact, that J. L. McWhirter had no notice of any unrecorded deed conveying this land out of Pennington, and find, further, that said McWhirter had no notice of the nature and purport of such deed or deeds.

As to the second issue: The evidence fails to satisfy me that Pitchford Company ever had any notice of any defect in B. F. Pennington's title to this property. Pitchford testifies, positively, that he did not, and there is no testimony in contradiction. The receipt, which is relied on by plaintiffs, uses the plural, to be sure; but that does not necessarily mean, by any means, that more than one deed was deposited with him. As one of the attorneys said in the argument, it is a common saying among people (laymen) that "here are my titles," or "my titles are good," meaning only one conveyance. In face of Pitchford's unequivocal statement that he knew nothing of any unrecorded deed, I do not think it possible to conclude that, from the wording of this receipt, more than one muniment of title was deposited with him. I find, therefore, that Pitchford Company had no knowledge or notice of either of the unrecorded deeds set up by the plaintiffs herein.

I therefore conclude as matter of law: First. That J. L. McWhirter had no knowledge or notice of any rights or equities of the plaintiffs

in the said property in question sufficient to defeat the claim of purchase for value without notice; and, second, that the purchase by J. L. McWhirter of said property at the foreclosure sale under the said Pitchford mortgage placed McWhirter in the position of a purchaser from one without notice—his rights being measured by those of Pitchford Company, who was a creditor without notice of any rights or equities of the plaintiffs in said premises.

The foregoing findings and conclusions render unnecessary consideration of the question of betterments, which was also argued before me. In reaching these conclusions of law and fact, I have not considered the testimony of L. G. Southard, to which plaintiffs objected, and which I myself, on reflection, think incompetent.

I therefore recommend that the complaint herein be dismissed, with the costs of the action.

L. L. Rice, of Anderson, A. C. Mann, of Greenville, and John K. Hamblin, of Union, for appellants.

Wallace & Barron and J. A. Sawyer, all of Union, for respondents.

GARY, C. J. This is an action to recover possession of a house and lot, and for partition. William Price died in 1886, leaving of force his last will and testament, which was probated in Richland county, containing this provision:

"I will and bequeath to Wm. C. Pennington, Benjamin F. Pennington, Mary E. Anderson and Isabella C. Hair, to each \$1,000.00 worth of real estate in value, during their natural lives, and after their decease to revert to their children."

In 1887 Joseph R. Price, as executor, and Isabella M. Burns, as executrix, of William Price's estate, commenced an action in the court of common pleas for Lexington county, to which B. F. Pennington and his children were made parties defendant, alleging that Wm. Price owned a large tract of land in Lexington county, and that the purpose of said action was to determine whether it was his intention for the legatees to take this specific land under the will, or whether the land should be sold, and the sum of \$1,000 invested in land, under the same condition. The special referee in that case made his report, with the following recommendation:

"For the defendant B. F. Pennington and his children, a lot of land with the dwelling thereon, in the town of Jonesville, Union county, in which he has been living for a term of years, has been purchased at a price of \$1,000, and the plaintiffs now hold title for the same, and are ready to convey the property for the use of the said B. F. Pennington, in accordance with the terms of the will."

The referee's report was confirmed, and it was ordered:

"That plaintiffs J. R. Price and Isabella M. Burns do convey to the several defendants above named the several parcels of real estate purchased for them; said conveyances to be settled in accordance with the terms of the trust

created by the will of the testator, William Price, deceased."

On the 21st of February, 1887, Charles R. Long executed a deed in the usual form, purporting to convey the house and lot to B. F. Pennington in fee, which was duly recorded. On the 10th of February, 1888, B. F. Pennington executed a deed regular in form in all respects, except there was only one subscribing witness, purporting to convey the fee to Joseph R. Price and Isabella M. Burns, which was not recorded. On the 7th of March, 1888, Joseph R. Price and Isabella M. Burns executed a deed, wherein they recited the fact that they made the deed—

"in pursuance of the judgment of the court of common pleas in and for the county of Lexington, entitled 'Joseph R. Price, Executor, and Isabella M. Burns, Executrix, of the Will of Wm. Price, Deceased, against Wm. C. Pennington and Others,' purporting to convey the land to B. F. Pennington, to have and to hold all and singular the premises before mentioned unto the said B. F. Pennington, his heirs and assigns, for and during his natural life, and after his decease to revert and go to his lawful children."

This conveyance was not recorded. It will thus be seen that the legal title was in B. F. Pennington, that he had a beneficial interest "for and during his natural life," and that he was trustee for his children, who were equitable remaindermen. B. F. Pennington died in 1915.

The defendants denied the material allegations of the complaint and set up the following defense:

"That J. L. McWhirter, their father, acquired title to the land described in the complaint by conveyance made by the master of this court, under a decree for the sale thereof, under foreclosure of a mortgage given by B. F. Pennington, which carries the fee-simple title. The defendants' said ancestor took all the rights, privileges, immunities, interest, and estate of the mortgagor in said mortgage, and acquired the absolute fee-simple title to said land against the plaintiffs and all the world, as purchasers, from one who purchased without notice of plaintiffs' alleged rights under the deed set out; and defendants plead the same in bar of this action."

The defendants also set up a claim for betterments in case it should be decided that they were not entitled to the land.

At the close of the testimony, the defendants' attorneys made a motion for the direction of a verdict, which was granted, and the plaintiffs appealed. Whereupon the judgment of the circuit court was reversed. 109 S. C. 358, 96 S. E. 140. The following reasons for reversal were assigned by this court:

"In the first place, the testimony as to notice of the plaintiffs' equitable rights by J. L. McWhirter was conflicting, and subject to more than one reasonable inference; and, in the second place, there was error on the part of

his honor, the presiding judge, in undertaking to decide the plea of purchaser for valuable consideration without notice, which is equitable in its nature, in connection with the action to recover the possession of the land, which must be tried by a jury, unless a decision of the equitable issues renders unnecessary the trial of the legal issues."

The master, to whom the case was referred, after it was remanded, sustained the said defense, and his report (which will be set out) was confirmed by his honor, the presiding judge, for the reasons therein stated by the master, and the plaintiffs again appealed.

1. The first question that will be considered is whether there was error on the part of his honor, the circuit judge, in sustaining the ruling of the master that the provisions of section 3543 of the Code of Laws of 1912 were conclusive of the rights of the plaintiffs, for the reason that J. L. McWhirter did not have actual notice of the unrecorded deeds themselves, nor of their nature and purport. On the 24th of December, 1888, an act was approved with the following provisions:

"That from and after the passage of this act no possession of real property described in any instrument of writing required by law to be recorded shall operate as notice of such instrument; and actual notice shall be deemed and held sufficient to supply the place of registration only when such notice is of the instrument itself or of its nature and purport."

This act was incorporated in the Code of Laws of 1912 as section 3543. The deed from Long to Pennington was executed on the 21st of February, 1887, and the act was not approved until the 24th of December, 1888. The children, together with their father, B. F. Pennington, immediately entered into possession of the house and lot, and there remained for several years. Therefore section 3543 is not applicable to this case. *Foster v. Bailey*, 82 S. C. 378, 64 S. E. 423. In that case the court used this language:

"This statute changed the rule declared in *Sheorn v. Robinson*, 22 S. C. 32, *Daniel v. Hester*, 29 S. C. 147, 7 S. E. 65, and like cases, that possession is notice of an unrecorded deed. The cases of *Harman v. Southern Ry.*, 72 S. C. 235, 51 S. E. 689, and *Southern Ry. v. Howell*, 79 S. C. 286, 60 S. E. 677, are not conclusive for appellant, as the possession under an unrecorded deed in each of those cases arose at a time when the rule in *Daniel v. Hester* was in force, and was a continuing possession at the time the subsequent deed was made."

[1] 2. But even if section 3543 was applicable to this case, and it appeared from the testimony that J. L. McWhirter had notice of such circumstances as were sufficient to put him on inquiry, which, if pursued with due diligence, would have led to knowledge of the plaintiffs' rights, he is not entitled to

the protection of a purchaser for value without notice. *Beck v. Railroad*, 99 S. C. 310, 83 S. E. 335.

3. Furthermore, that section is not applicable when the party in possession claims under an equitable title, as in the present case.

"One in possession under an equitable title has nothing that he can record; and possession, open and unconcealed, is the only mode by which he can give notice to the world of his rights; and when this notice is given, in the only way in which it could be given, he should be protected." *Sheorn v. Robinson*, 22 S. C. 32; *Sweatman v. Edmunds*, 28 S. C. 58, 5 S. E. 165; *Folk v. Brooks*, 91 S. C. 7, 74 S. E. 46; *Manigault v. Lofton*, 78 S. C. 499, 59 S. E. 534.

As the children could not assert their rights until the termination of their father's life estate, he could do no act destructive of their estate.

"If, as we have held, Regina Gadsden took only a life estate, with remainder to the plaintiffs as her issue living at the time of her death, nothing that she did in her lifetime could affect the legal rights of the remaindermen, and no order made by the court in the proceedings for partition, to which these plaintiffs were not parties, although they were then susceptible of being made parties, can be allowed to impair their rights." *Gadsden v. Desportes*, 39 S. C. 131, 17 S. E. 706; *Sullivan v. Latimer*, 35 S. C. 422, 14 S. E. 933; *Folk v. Hughes*, 100 S. C. 220, 84 S. E. 713.

[2] 4. We proceed to show that J. L. McWhirter, not only had a sufficient notice to put him on inquiry, but that he had actual knowledge of the plaintiffs' rights. It appears from the testimony that the executors of William Price's estate, through their attorney, wrote to a party in Jonesville, requesting him to send a certificate from three disinterested persons that the Long house and lot would be a good investment for the \$1,000 bequeathed to B. F. Pennington and his children by Price, and J. L. McWhirter signed the certificate. J. L. McWhirter made an affidavit that he served a copy of the summons, in the case of the executors of Price against Pennington and his children, on Lillian M. Pennington, Ida M. Pennington, and Carrie S. Pennington, by delivering to them personally a copy thereof, and to B. F. Pennington, their father *with whom they reside*, and that he knows the persons named to be those spoken of in the summons. J. L. McWhirter purchased a lot adjoining the one in question, and this appears in the description of it: "Bounded by lands of the children of B. F. Pennington."

W. H. Anderson testified:

"That he knew J. L. McWhirter; lived on opposite side of railroad from him; knew B. F. Pennington; the relationship between Pennington and McWhirter was very close; had a conversation with McWhirter in regard to this property; he remarked to me that he thought so much of Pennington that he was very much

surprised that the estate was left like it was, knowing that Pennington had only a lifetime interest in the estate; said he knew, or thought, that Pennington was fully capable of taking care of the property, and it wasn't necessary to secure it that way, by giving him only a life interest in it, and at his death to his children. These conversations were in 1887, at the time I was living in Jonesville."

John Whitlock testified:

"Was deputy sheriff eight or nine years; raised near Jonesville; knew J. L. McWhirter very well; we went to school together; was on very intimate terms with him. After Mr. McWhirter had bought this land, I offered him \$100 for his bid, provided he could give me a good title; he just said he couldn't take it. He said he hadn't got a title in himself. \* \* \* He said he didn't know whether he could get a good title for himself. He said he hoped to keep the property long enough to get his money back out of it."

John Long testified:

"Lives about 2½ miles from Jonesville; knew J. L. McWhirter. Q. What conversation did you have with J. L. McWhirter, in regard to this being entailed property? A. He said he thought that it was entailed property. Q. When was that? A. I can't exactly tell you when. Q. How long ago was it? A. I don't know exactly. It was since Pennington left there."

J. B. Foster testified:

"Have lived at Jonesville 35 years. \* \* \* The relations between Pennington and McWhirter were very pleasant, I think. They were closely associated together, especially on Sundays. The town was small, and we all went to Sunday school together on Sundays, and preaching together."

In reply to questions as to the Penningtons investing in property there, and McWhirter's knowledge of same, the witness said:

"Just general talk. Mr. McWhirter didn't say anything about his real knowledge of it, how the money came. As well as I remember about it, we were just together as men ordinarily get together, and the Penningtons going to invest in property somewhere, and Mr. McWhirter says: 'We will be glad to have you invest here in town.' I said: 'Of course we would. We would be glad to have you.' And just in that way we tried to use our influence to get them to invest in Jonesville."

To the question, "Where was the money coming from?" witness said:

"They said an uncle, I believe it was, had given it to them. Q. Were there any conditions or limitations attached to the way the money was to be invested? A. Mr. Pennington said repeatedly that he had given it to the children. Q. Was there anything said in the conversation where Mr. McWhirter spoke of them holding it for life? A. They said something about holding it in trust for the children. Q. How often have you heard Mr. McWhirter discuss or talk about that? A. I couldn't say."

J. W. Nance testified:

"I am a farmer and deal in stock. I knew J. L. McWhirter in his lifetime, and was on intimate terms with him. He called me 'Old Pard.' I talked with him once about buying the Pennington property, and he advised me not to buy, as I could get no titles to it. This was a year or two before he bought the land. I afterwards saw him at Jonesville, and laughed at him for buying it, after advising me not to do so, because the titles were not good. He never explained to me why I could not get a good title."

Only one reasonable inference can be drawn from the foregoing testimony.

5. We next proceed to show, that the C. W. Pitchford Company not only had actual notice of the unrecorded deeds, but of such facts as were sufficient to put them on inquiry. C. W. Pitchford testified in behalf of the defendants:

"Live at Walhalla, a merchant there; am president of the C. W. Pitchford Company. I don't know whether I took the mortgage from Mr. B. F. Pennington to C. W. Pitchford Company or my bookkeeper; that was in 1898; I had it sold. At the time that we took this mortgage Mr. B. F. Pennington was dealing with my company. I traveled; was selling him goods. (Record of mortgage of B. F. Pennington to C. W. Pitchford Company, bearing date the 14th day of April, 1898, and recorded, put in evidence.) Mr. Pennington was residing at Walhalla at the time, where I was doing business. At the time of taking this mortgage, I had parted with something of value, and did thereafter, for this mortgage. I had no notice of any kind of any defect in the title; I thought he had a good title. I had no notice at any time of any unrecorded deed. I turned the paper over to my lawyer to be foreclosed, and I didn't know anything about the transaction, until I received my money back. I had no notice of any defect in the title or of any unrecorded deed."

On cross-examination:

"Recognizes his handwriting, and acknowledges he wrote certificate introduced in evidence:

"Walhalla, S. C., Oct. 14, 1896.

"This is to certify that B. F. Pennington has deposited with me his titles on his storehouse and lot in Jonesville, S. C., and also his contract with D. B. Free, as collateral for twenty-five dollars, payable on the 31st of Dec., '96. "C. W. Pitchford."

[3, 4] It will be observed that the witness did not even know whether he or his bookkeeper took the mortgage. Conceding that he himself did not have notice of the unrecorded deed, it by no means follows that his bookkeeper did not have such notice, which, of course, would be binding on the company. The testimony shows that at least a part of the consideration was based upon past indebtedness, which is not sufficient to sustain the plea of innocent purchaser; nor did he explain what the present consideration

was. How, then, can it be successfully contended that the consideration was sufficient to sustain the plea?

[5, 6] The certificate throws far more light upon the question of notice than the testimony of Pitchford. The certificate shows that Pennington deposited with Pitchford his titles, which, as has been shown, consisted of three deeds; and it was necessary to refer to the three, in order to give notice of Pennington's and his children's interest thereunder. The presumption is that more than one deed was deposited; and square dealing and honesty demanded that Pennington should state his and their interests correctly, especially when his children were the equitable remaindermen. If Pennington had induced Pitchford to make the loan, under the belief that he was the owner of the land in fee (as appeared upon the face of the deed executed by Long), he would have subjected himself to a criminal prosecution, for obtaining money or goods under false pretenses, and at the expense of his own children. The presumption is that he did not intend to violate the law. There is not a particle of testimony that there was a mistake in using the word "titles" instead of "title." The contents of the deeds were therefore notice to Pitchford of the children's rights as equitable remaindermen.

The judgment of the circuit court is reversed, and the case remanded for the purpose of determining the question of betterments.

WATTS, J., concurs.

GAGE, J. (concurring). In my judgment B. F. Pennington owns the life estate and his children were remaindermen; both held legal estates; B. F. was not trustee for children. I think, therefore, the third postulate of the opinion is not relevant.

The occupancy of B. F. was not notice to McWhirter that the children had a right, and therefore the first postulate is not relevant. I agree, though, that B. F. had actual notice of the children's right, and that Pitchford had notice of circumstances which, had he followed up, would have led him to know the interest of the children.

I therefore agree to postulates 4 and 5, and vote for reversal.

HYDRICK, J. (dissenting). I realize that it would be a hard case to deny the plaintiffs relief, and, for that reason, I regret that I feel constrained to dissent. But I am reminded that hard cases make bad precedents.

The mind of the court evidently has been too much impressed by the fact that McWhirter had notice of plaintiffs' rights when he bought. Otherwise, there is no apparent reason for the elaboration of the evidence to

show that he had notice—a fact found by the master and concurred in by the circuit judge. But that fact is really irrelevant in the consideration of the question which became the real issue in the case, as soon as it was established that McWhirter had notice, to wit: Did Pitchford have notice? For it must be conceded that, if he purchased without notice, McWhirter got a good title.

With due respect to my Brethren, it seems to me that the inference of notice to Pitchford, which has been drawn from the evidence, is strained and unwarranted, and that the reasoning upon which that inference is based is too technical. I think undue importance has been given to the use of the word "titles" in the certificate which Pitchford signed in 1896, two years before the mortgage was given. It is a matter of common knowledge—and the master and circuit judge so find—that laymen frequently use the word "titles" inaccurately to refer to a single deed.

It is said that we must presume that Pennington did the square and correct thing, and delivered to Pitchford all three of the deeds, and especially because, if he did not do that, he laid himself liable to a criminal prosecution for obtaining goods under false pretenses, and we must presume that he was innocent of that crime. Can we fairly indulge that presumption in the face of the undisputed fact in the record evidence that he gave a mortgage of the fee, when he knew that he had only a life estate? And the further fact that he never put on record the deeds by which his estate in fee had been cut down to a life estate? As an honest man, clearly it was his duty to have put those deeds on record.

But must we not also indulge the presumption that Pitchford did not commit perjury when he swore that he did not have notice of the deeds? His character is unimpeached, and this is what he swore:

"I had no notice of any kind of any defect in the title. I thought he had a good title. I had no notice at any time of any unrecorded deed."

If the inference drawn by the court from the use of the word "titles" in the certificate is correct, it follows that he swore falsely, for, if the three deeds were delivered to him, he must have seen and known that two of them had not been recorded, and he must have known from the unrecorded deeds that Pennington had only a life estate.

An inference of constructive notice is also drawn from the fact that Pitchford testified that he did not remember whether he or his bookkeeper took the mortgage. Is it reasonable to infer from that statement that the transaction was between Pennington and the bookkeeper, and that the latter may have

had notice, which the law would impute to Pitchford? I think not, for the testimony shows too clearly to admit of doubt that the negotiation and agreement was had between Pennington and Pitchford, and what Pitchford meant was merely that he did not remember whether he himself or his bookkeeper performed the clerical work of preparing the mortgage.

I think the clear preponderance of the evidence is in favor of the finding of the master, concurred in by the circuit judge, that Pitchford had not had notice. It is often hard to prove a negative; but, if it has not been shown in this case that Pitchford took his mortgage without notice of plaintiffs' rights, I do not see how that defense can be established in any case.

FRASER, J., concurs.

(125 Va. 595.)

### BLANKENSHIP v. BLANKENSHIP.

(Supreme Court of Appeals of Virginia. Sept. 17, 1919.)

#### 1. DIVORCE $\S$ 1—PROCEEDING PURELY STATUTORY.

Neither courts of law nor equity have inherent power to dissolve marriage; the power to decree a divorce being purely statutory.

#### 2. DIVORCE $\S$ 91—JURISDICTIONAL FACTS AS TO RESIDENCE MUST BE PLEADED.

A bill should allege the jurisdictional fact with reference to the residence of the parties, in view of Code 1904, § 2259.

#### 3. DIVORCE $\S$ 103—BILL NOT ALLEGING RESIDENCE OF PLAINTIFF DEMURRABLE.

A bill for divorce, which does not allege that one of the parties has been a resident of the state for a year, is demurrable for that reason; Code 1904, § 3260, relating to pleas in abatement, not applying.

#### 4. PLEADING $\S$ 400—FAILURE TO PLEAD RESIDENCE IN DIVORCE CANNOT BE WAIVED.

A suit for divorce is not such a cause that a court of the state would have general jurisdiction under Code 1904, § 9058, and is not a case which involves merely the venue of the suit within the state, in which the right to particular place of trial is a privilege merely, which may be waived by defendant, and hence defect of bill in not alleging the jurisdictional fact of residence cannot be waived.

#### 5. COURTS $\S$ 36—TERRITORIAL JURISDICTION NOT PRESUMED AS TO COURT EXERCISING STATUTORY AUTHORITY.

Where the court is acting in the exercise of a special statutory authority, the rule as to courts of general jurisdiction, that territorial jurisdiction will be presumed if court has jurisdiction otherwise, is not applicable.

**6. DIVORCE ~~62~~(1)—EVIDENCE OF RESIDENCE IN STATE STATUTORY PERIOD NECESSARY.**

In view of Code 1904, § 2259, a court has not jurisdiction to enter a decree of divorce, unless there is evidence in the record showing that one of the parties was domiciled in the state for as long as one year next preceding the commencement of the suit.

Appeal from Circuit Court, Giles County.

Action by Mr. Blankenship against Mrs. Blankenship. Decree for plaintiff, and defendant appeals. Reversed.

This is a suit for divorce, in which there is an original and an amended bill, neither of which contains any allegation that one of the parties had been domiciled in the state for at least one year preceding the commencement of the suit.

The defendant—the wife—was brought personally before the court by process duly served upon her to answer the original bill. She did not plead in abatement to the jurisdiction of the court, but at term demurred to the original bill, and also filed her answer thereto. Subsequently, also at term, on the filing of the amended bill by leave of court, the defendant did not plead in abatement, but entered an appearance and demurred to and answered the amended bill.

The decrees under review are silent as to the demurrer to the original bill, but the demurrer to the amended bill is expressly overruled by one of such decrees.

There was evidence introduced in the cause both for plaintiff and defendant, but there is no proof in the record that either the plaintiff or the defendant had "been domiciled in the state for at least one year preceding the commencement of the suit."

The final decree in the case which is under review granted an absolute divorce to the plaintiff, with leave to either party to marry again and awarded costs against the defendant.

Further facts in reference to the allegations of the original and amended bills will appear in the opinion of the court.

W. B. Snidow, of Pearisburg, for appellant.  
Williams & Farrier, of Pearisburg, for appellee.

SIMS, J. (after stating the facts as above). The assignments of error raise a number of questions, but since, in our view of the case, the court below had no jurisdiction to enter any decree in the cause, it will be unnecessary for us to pass upon any other questions than those concerning the jurisdiction of the court, save one, which will be adverted to below.

1. Section 2259 of the Code, so far as material in the cause before us, provides as follows:

"No suit for annulling a marriage or for divorce shall be maintainable, unless one of the

parties has been domiciled in this state for at least one year preceding the commencement of the suit. \* \* \*

In view of this statutory provision, neither the court below nor any other court in the state had any jurisdiction of the cause before us, unless one of the parties had been domiciled in this state for at least one year preceding the commencement of the suit.

As said in the opinion of the court in the case of *Rumping v. Rumping*, 36 Mont. 39, 91 Pac. 1057, 12 L. R. A. (N. S.) 1197, at page 1260, 12 Ann. Cas. 1090, quoting with approval from the case of *Dutcher v. Dutcher*, 39 Wis. 651:

"It concerns the public welfare that the state should not be made a free mart of divorce for strangers, and that, amongst her own people, divorce should not become a matter of free will \* \* \* —a personal right independent of public right and inconsistent with public welfare. Divorces without the letter and spirit of the statute in fact, but made to look within it by design or mistake or accident, are frauds upon the statute and offenses against public policy. And it is the duty of the courts \* \* \* to look closely into actions for divorce. \* \* \*

[1] As further said in the opinion of the court in the case of *Rumping v. Rumping*, supra:

"It is elementary, of course, that neither courts of law or equity have any inherent power to dissolve marriage. The power to decree a divorce is purely statutory. *Irwin v. Irwin*, 3 Okl. 186, 41 Pac. 369. When, therefore, the Legislature, in conferring upon courts the jurisdiction to grant divorces, says, in the same statute, that a divorce must not be granted unless the plaintiff has been a resident of the state for one year next preceding the commencement of the action, we believe it meant just what it said. \* \* \* In *Gredler v. Gredler*, 36 Fla. 372, 18 South. 762, the court said: 'The complainant has wholly failed to allege in his bill, or to prove, that he had resided in this state for two years prior to the exhibition of his bill. \* \* \* The fact of the appellant's prior residence for two years in this state was necessary both to be alleged in the bill and established by proof, before the courts were authorized to grant a divorce under our statute.' \* \* \* Under a statute very similar in its phraseology to our own, the Supreme Court of Minnesota held, in *Thelen v. Thelen*, 75 Minn. 433, 78 N. W. 108, that the fact of the plaintiff's residence was jurisdictional and must be alleged in the complaint."

The statute of Montana (Civ. Code, § 176) involved in the case of *Rumping v. Rumping* is similar to the Virginia statute above quoted, and is as follows:

"A divorce must not be granted unless the plaintiff has been a resident of the state for one year next preceding the commencement of the action."

Many of the other states have similar statutes under which the holding is well-nigh

universal that it is essential to the jurisdiction of the court that the bill for a divorce should allege "the prerequisite jurisdictional facts as to residence required by the statute." See note to said case of *Rumping v. Rumping*, 12 L. R. A. (N. S.) 1197 to 1200.

[2] As said in Hogg's Eq. Principles, § 498, p. 666:

"The bill in a suit for divorce should allege the jurisdictional fact with reference to the residence of the parties.

"With us it should aver that the plaintiff and the defendant (or one of them) has resided in the state one year next preceding the time of bringing the suit. \* \* \* In short, enough must appear on the face of the bill to show a right to bring the suit. A decree will be withheld, even though no demurrer has been interposed, unless a right to exhibit the bill appears."

[3] No authority is cited for the defendant counter to the general proposition that a bill for divorce should contain the jurisdictional allegations aforesaid and that the proof in the record must show affirmatively that such jurisdictional fact exists. But it is contended in behalf of the defendant that in Virginia, under section 3260 of the Code, the objection before us can be made only by plea in abatement, and could not be made by demurrer or upon a hearing on the merits.

This raises a question which is unsettled in this state. It was mentioned in the case of *Johnston v. Johnston*, 116 Va. 678, 82 S. E. 694, but not involved or passed upon therein.

Section 3260 aforesaid, so far as material, is as follows:

"When the declaration or bill shows on its face proper matter for the jurisdiction of the court no exception for want of such jurisdiction shall be allowed unless taken by plea in abatement. \* \* \*

Does either the original or amended bill in the cause before us show "on its face proper matter for the jurisdiction of the court"?

As is said by this court in the case of *Moore v. N. & W. Ry. Co.*, 98 S. E. at page 637:

"The 'proper matter' for the jurisdiction of the court, mentioned in section 3260 aforesaid, has reference to subject-matter over which the court has territorial jurisdiction, and the 'jurisdiction' referred to is the territorial jurisdiction of the court over such subject-matter. \* \* \*

Now, since, as above stated, no court in the state had any jurisdiction of the cause before us, unless one of the parties had been domiciled in this state for at least one year next preceding the commencement of the suit, it is manifest that the bills, which do not even allege that one of the parties had been so domiciled (see statement preceding this opinion), do not show on their face "proper matter" for the "jurisdiction" of the court; and even if the bills had so alleged, that would not

have given the court jurisdiction unless the allegation was sustained by proof of the fact.

[4] This is not such a cause that the court below or some court of the state would have had general jurisdiction of it under section 3058 of the Code. It is not a case which involves merely the venue of the suit within the state, in which the right to a particular place of trial therein is a privilege merely which may be waived by the defendant. Doubtless for reasons of public policy, indicated in the quotations from the authorities above made, the state has not left any of its courts clothed with such jurisdiction of divorce suits that, if the bill should allege the existence of facts giving territorial jurisdiction, a failure of the defendant to object to the jurisdiction of the court by plea in abatement would have the effect of shutting off any inquiry in the cause on the subject of the court's jurisdiction. For if such was our procedure in divorce suits it is obvious that our statutory requirement as to antecedent domicile might, and in many cases would, be set at naught by the mere failure of the defendant to plead in abatement. And while we have no idea that there was in fact any attempted fraud upon the jurisdiction of the court in the cause before us, a holding that the failure of the defendant to plead in abatement in such cause would bar the latter from objecting to the jurisdiction of this court, and would bar the court from any inquiry and decision upon the question of jurisdiction, would set a precedent which would open wide the door to fraud upon the jurisdiction of the courts of the state, and would make it another resort for those who are impatient of delay in throwing off and eager to be rid of their marriage ties, which would bring about the very mischiefs which our statutory requirement as to domicile in cases of suits for divorce was meant to obviate. Thus would the statute itself be rendered nugatory in this important particular.

[5] The defense of the absence of the jurisdictional fact aforesaid is not a matter of abatement of the suit, but is in its nature a bar to the suit. Hence section 3260 aforesaid is inapplicable, so that such defense need not be pleaded in abatement, and may be pleaded in bar; and even if not pleaded in bar, the court may and should, for the reason of public policy above indicated, dismiss the suit at the hearing of the cause on the merits, unless the existence of such fact affirmatively appears from the proof in the record. Such is the power and duty of the court in such cases, because it does not therein exercise a general jurisdiction, but only a limited statutory jurisdiction. For while it is true that, where a court of general jurisdiction has before it the proper parties and the subject-matter is of such nature that it would have general jurisdiction of the cause, if it had territorial jurisdiction thereof, such territorial jurisdiction (along with the other matters essential to the general jurisdiction of a court) will, in

the absence of proper pleading and proof disclosing the contrary, be presumed to exist, although they do not affirmatively appear from the record; that is not true where the court is acting in the exercise of a special statutory authority. In such case the territorial jurisdiction will not be presumed, but must be made to affirmatively appear from the record; otherwise, as is well settled, any decree the court may enter will be void for lack of jurisdiction to enter it. *Pulaski County v. Stuart, Buchanan & Co.*, 69 Va. (28 Grat.) 872; *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959; *Coleman v. Va. Stave Co.*, 112 Va. 61, 75, 70 S. E. 545.

It follows, from what we have said above, that we are of opinion that the demurrer to the original and amended bills should have been sustained by the court below.

[6] 2. With respect to the action of the court below on the merits of the case: As set forth in the statement preceding this opinion, there is no evidence in the record showing that either the plaintiff or defendant were domiciled in this state for as long as one year next preceding the commencement of this suit. The court, therefore, had no jurisdiction of the cause, even if the bills had not been defective in allegation in this particular, and the court should have dismissed the case on the hearing upon the merits.

For the foregoing reasons the case must be reversed, and we will enter a decree dismissing this suit, with costs against the appellee, without prejudice, however, to his right, should he be so advised, to institute a new suit for divorce upon the same cause of action as that alleged in his amended bill aforesaid.

Reversed.

(125 Va. 681)

### DAVIS v. ALDERSON.

(Supreme Court of Appeals of Virginia. Sept. 17, 1919.)

#### 1. SPECIFIC PERFORMANCE ⇨16—UNPROFITABLE BARGAIN NO DEFENSE.

The mere fact that a party has made a bad trade or unprofitable bargain will not relieve him of specific performance.

#### 2. EVIDENCE ⇨505 — TESTIMONY OF PHYSICIAN OPINION EVIDENCE.

Testimony by physicians that, if defendant who sued for specific performance purchased the land with expectation of paying for it, he must have been irresponsible for his acts in some way, which did not go to the length of saying that defendant was insane, is not expert testimony, but mere opinion, and should have been excluded, though the defense was that defendant was temporarily insane when he made the contract.

#### 3. EVIDENCE ⇨474(4), 568(2)—WEIGHT OF TESTIMONY OF LAY WITNESS AS TO SANITY.

Testimony of lay witness as to sanity or insanity of a person is admissible in evidence, where it appears the witness had sufficient opportunity by observation to form an opinion worth considering, and usually such testimony, where general sanity is not involved, is not esteemed of much value except so far as the opinion of witness is justified by data observed.

#### 4. EVIDENCE ⇨14 — JUDICIAL NOTICE THAT MEN OLDER THAN 62 OCCUPY IMPORTANT POSITIONS.

The courts will take judicial notice that men of greater age than 62 occupy important governmental and judicial positions, so as to rebut the claim of defendant, who on being sued for specific performance claimed that he was temporarily insane when he made the contract and urged his advanced age of 62 in support of his contention.

#### 5. VENDOR AND PURCHASER ⇨44—EVIDENCE INSUFFICIENT TO SHOW TEMPORARY INSANITY OF VENDEE.

In a suit for specific performance of land sale contract where defendant claimed he was temporarily insane when he made the contract, evidence held insufficient to show any such insanity.

#### 6. EVIDENCE ⇨63—PRESUMPTION OF SANITY.

Every person is presumed to be sane until the contrary is made to appear.

#### 7. VENDOR AND PURCHASER ⇨85—EVIDENCE INSUFFICIENT TO SHOW RELEASE OF VENDEE.

In a suit to compel specific performance of defendant's contract to purchase land, evidence held insufficient to show any release by complainant.

#### 8. SPECIFIC PERFORMANCE ⇨116½—REFUSAL TO ALLOW FILING OF SUPPLEMENTAL ANSWER.

In suit for specific performance of a contract to purchase land where the land was sold on default of the defendant purchaser and bought in by the vendor for \$1 more than the agreed price, held that, where the vendor was awarded a balance for accruing interest, defendant was not on report of the sale entitled to file a supplemental answer setting up the vendor's possession of land from the time of contract to suit, for notwithstanding Act March 27, 1914 (Laws 1914, c. 331), giving the right of amendment at every stage of proceeding, parties cannot be allowed to try their case piecemeal.

#### 9. SPECIFIC PERFORMANCE ⇨130 — ALLOWANCE TO VENDEE OF VALUE OF USE OF LAND BY VENDOR.

Under the maxim he who seeks equity must do equity, a vendor, seeking specific performance of a contract of the sale of land, who remained in possession from the time of making of contract, etc., until it was judicially sold on default of the purchaser, etc., must account to the purchaser for any profit from occupation as against vendor's claims for interest on the purchase money.



Appeal from Circuit Court, Dickenson County.

Suit by Mrs. Alderson against one Davis. From a decree for complainant, defendant appeals. Amended and remanded.

Chase & McCoy, of Clintwood, and W. A. Daugherty, of Grundy, for appellant.

A. A. Skeen, of Clintwood, and C. C. Burns, of Lebanon, for appellee.

**BURKS, J.** The appellee sued the appellant for the specific performance of a contract for the sale of a tract of land in Russell county, and the circuit court, on the pleadings and proof, granted the relief prayed. The defendant interposed none of the defenses usually relied on in suits of this nature, but relied solely on the ground that, when the contract was entered into, the appellant (the purchaser) was temporarily insane, and that subsequently the appellee released him from the performance of the contract. The defense is not rested upon fraud, misrepresentation, mistake, accident, unfairness, excessive consideration, or any misconduct on the part of the vendor, but rather on the improvidence of the purchaser, his mental condition, and the supposed hardship that would result to him if he were compelled to perform his contract, and upon a release by the vendor of the obligation of the contract. It will be unnecessary, therefore, to enter into any discussion of the general subject of specific performance of the contracts for the sale of land, and this opinion will be confined to the specific defenses made. If the appellant was capable of making the contract, and has not been released from its performance, there is nothing in the doctrine of specific performance that would afford him relief.

[1] The mere fact that a party has made a bad trade or unprofitable bargain will not relieve him from specific performance. *Whitted v. Fuquay*, 127 N. C. 68, 37 S. E. 141.

"It would be a travesty upon justice, and the reputed sanctity of contracts would be of little avail, if parties could refuse the performance of contracts having some years to run, which were fairly entered into, and believed to be just and equal when made, merely because from contingencies, whose possibility might have been foreseen, they had turned out, in the course of execution, to be a losing instead of a profitable bargain." *Southern R. Co. v. Franklin, etc.*, R. Co., 96 Va. 693, 709, 32 S. E. 485, 490 (44 L. R. A. 297).

The contract sought to be enforced was for the sale of a tract of 400 acres of land in Russell county, and was entered into by the parties in person on January 1, 1916. Respondent says, in his answer, that he was at that time physically ill and being harassed by security debts amounting to several thousand dollars which were then being reduced to judgment, and that when these obligations had been discharged he would have left only

"some fifteen or twenty thousand dollars worth of real estate and no personal property." Further answering, respondent says:

"If it should be decreed that your respondent would have to undertake to carry out said attempted agreement aforesaid, it would mean nothing more than a complete sacrifice of every dollar's worth of property your respondent now owns, and a balance of indebtedness against him for said land amounting to some fifteen or twenty thousand dollars. And your respondent now being sixty-two years old, and in ill health, and with no other means with which to pay the balance of the purchase price of said farm, he charges and avers that it could result in nothing more than the sale of said farm from him for the payment of the balance of the purchase price for said farm, and thereby the whole of your respondent's property would be exhausted and your respondent would be financially ruined."

The appellant was a prosperous farmer, living in Dickenson county, and owned valuable real and personal property. Amongst other property, he owned a farm of over 400 acres from which he sold the timber just about the time the contract in suit was executed, for \$9,000, and another tract of what is called coal land, of about 200 acres, for which he said he had been offered \$10,000. About a year before the contract in suit was entered into, he went to Russell county and inspected the appellee's farm and was pleased with it, and inquired the price and was informed that appellee asked \$45,000 for it. This he regarded as "a little too big a proposition for him." During the ensuing year, the appellee placed her farm for sale in the hands of D. W. Lyttle, a real estate broker, and informed him that appellant had been there to look at the farm, and told him of others who were interested in the place. Some time about December, 1915, Lyttle wrote to the appellant about the farm, and, after some correspondence between them on the subject Lyttle went to Dickenson county to see the appellant about buying. While there Lyttle priced him the farm at \$36,000, and he agreed to go to Russell in about a week and look the farm over. He accordingly went to Russell and spent the night with Lyttle, and the next day they went over the farm together, and inspected it. The day after, or two days thereafter, appellant agreed to take the farm at \$35,750. This agreement was made directly between the appellant and the appellee, in the presence of Lyttle, who prepared a title bond which was executed by the appellee and a note for the first deferred payment which was executed by the appellant. According to the terms of sale, one dollar was paid in cash, one-third of the purchase money was to be paid October 1, 1916, when possession was to be given, and one-third of the balance was to be paid October 1, 1917, another third October 15, 1918, and the remaining one-third October 1, 1919; all of the three last-mentioned payments to bear interest from Octo-

ber 1, 1916. Two days after the purchase, to wit, on January 3, 1916, appellant contracted to purchase of J. B. Bransford his farm, also in Russell county, at the price of \$25,000. The latter contract was subsequently annulled by agreement between the parties, upon the payment of \$500 by the appellant. At the time of the two purchases aforesaid, the appellant had very little money with him, not sufficient to pay for the revenue stamps on the note given by him to the appellee.

Only three persons were present when the contract in suit was entered into, the appellant, the appellee, and Lyttle. The appellee and Lyttle testify that he seemed to be in possession of all his faculties, and that they observed nothing to the contrary. He went from the appellee's house to the house of E. K. Meade and spent the night. Meade testifies that he had known the appellant for four or five years, and that he did not observe anything to indicate that he was not in possession of all his faculties; that he found him "to be the same all the time as far as I know since I have had any acquaintance with him"; that he talked about the trade, seemed to be well pleased with it, and offered to let Meade read the contract which he had with him. He also spoke to Meade about looking out for a pair of heavy horses to put on the Alderson farm. Meade further testifies, "He was complaining some of being sick at my house that night and the next morning," but he did not observe that there was anything wrong with his mind.

Opposed to this is the testimony of the appellant, his wife and children, the sheriff of the county, and three physicians. The appellant testifies that he was not in any mental condition to enter into the contract on January 1, 1916; that he had been sick and was sick at that time, and was very much worried over security debts for his sons which were pressing him; that he would be half asleep and you might speak to him, and in a minute he would not know anything about it; and that he never discovered that his mind was wrong until about April 10th, when he began to sleep better. It is a little difficult to understand how the witness, when he became sane, could describe his mental operations while insane; but, in addition to this, although he did not recover his sanity till about April 10th, he states that about a month after the contract was entered into, which would be not later than February 1st, he went to see the appellee about his purchase, and, when asked by his counsel to give the substance of his conversation with her, he replies:

"Well, I told her that I had got wrong and went into something that I could not pay out and they had noticed me up on them security debts, and after I paid that, that I could not pay her, and I told her that I had come all the way there to tell her before she made any move that would damage her, and not to make any trade

nor nothing on my account that I could not come up to it, and I come to tell her."

We cannot attach any very great importance to testimony of this kind.

The testimony of the wife and children is of the vaguest and most unsatisfactory nature, giving no facts sufficient to support even their unsatisfactory conclusions as to appellant's mental capacity to contract. In addition to this, the sons were obtaining the father's indorsement of their paper during the very time they say his mental condition was not good, and one of them when asked if he regarded his father of sane mind on January 1, 1916, replied, "I don't know." The wife and one of the sons were also interested in the proceeds of the sale of the timber on appellant's land, which was made by him within less than a week from the date of the contract in suit. None of the physicians who testified had seen the appellant at any time near January 1, 1916, and were not called upon to testify from personal knowledge. All of them were examined as experts. The following is the question propounded to them, and their respective answers thereto:

"Q. Knowing, as you do, the real estate and personal property and other effects of the defendant, J. Wiley Davis, which he owned on January 1, 1916, and considering his age, and that he is over 60 and *menas* of support and income and taking into consideration that on January 1, 1916, that he was financially involved as security for the Davis Mercantile Co., and otherwise, to the extent of some seven thousand dollars, all of which was past due, and part of which was being reduced to judgments at that time, would you regard it as the acts of a sane man, for Mr. Davis on January 1, 1916, to purchase a farm in Russell county, Virginia, at the price of \$35,750.00 on which he only paid the sum of one dollar and obligated himself to pay the balance on the following installments, viz.: \$11,915.33½ to be paid October 1, 1916, \$7,844.66, to be paid October 1, 1917, \$7,944.66, to be paid October 1, 1918, all of the deferred payments to bear interest from the 1st day of October, 1916, and on the 3d day of January, 1916, to purchase another farm in Russell county, Virginia, at the price of \$25,000.00, on which he paid nothing but obligated himself to pay for same on the following installments, viz.: \$10,000.00 to be paid October 1, 1916, \$5,000.00 to be paid October 1, 1917, \$5,000.00 to be paid October 1, 1918, \$5,000.00 to be paid October 1, 1919, all of the said deferred payments to bear interest from October 1, 1916. Would you regard a man in the financial condition of Mr. Davis, making the two trades and purchases above, as a man whose mind was in a proper condition and a man sane at the time or not? Please explain how you would regard a man entering into the two transactions above mentioned from a point of sanity?"

Dr. Reed:

"A. I would regard the transaction referred to in your question the product of a man's brain who did not realize at the time the responsibility of the obligation he was entering

into and must have been the act of a man who was mentally defective or irresponsible for his acts in some way."

Dr. Sutherland:

"A. I don't know as regards his sanity, but I do know if he bought the farms with the expectation of paying for same that he had an exaggerated idea as to his own worth."

Dr. Phipps:

"A. Well, I would say in answer to this question that J. Wiley Davis could have been sane of sound mind, and still make these contracts, but knowing him as I do, it seems that there is something in some way influencing him outside of the ordinary things brought to bear in trading, to make a man make such indebtedness as this would seem to me, so far as his sanity, I would not make any statement as to his sanity at the time of this trade."

[2] While no one of them is willing to go so far as to say that the appellant was insane, their testimony is not expert testimony at all, but the mere inexpert opinions of these gentlemen, and should have been excluded, and doubtless would have been had it been brought to the attention of the trial court and a ruling thereon asked. It is too late now to ask for the exclusion. *Martin v. South Salem Land Co.*, 94 Va. 42, 26 S. E. 591, and cases cited. Their opinions, however, are of no aid to the court in arriving at a correct conclusion of the question involved.

[3] The sheriff of the county had known the appellant for many years. He testifies to certain peculiarities of conduct he had observed in the appellant during the previous two years and since he had become involved in debt, and says he had "told some of them he had gone crazy as a bedbug."

Testimony of lay witnesses as to the sanity or insanity of a person is admissible in evidence where it appears that the witness has had sufficient opportunity, by observation, to form an opinion worth considering; but the opinion of the witness should be preceded by a statement of his opportunity for observation, and of the facts observed. The value of such testimony is dependent very largely upon the character of the witness, his opportunities for observation, the facts observed, the interest, bias, or prejudice of the witness, his capacity and intelligence in making and relating his observations, and other circumstances which affect the weight to be given to oral testimony generally. Usually such testimony, where general and continuous insanity is not involved, is not esteemed of much value, except so far as the opinion of the witness is justified by the data observed. 1 *Greenleaf Ev.* (16th Ed.) § 430, p. 441f; *Young v. Barner*, 27 Gr. (68 Va.) 96, 103; *Cropp v. Cropp*, 88 Va. 753, 14 S. E. 529; *Howard v. Howard*, 112 Va. 566, 72 S. E. 123; *Wampler v. Harrell*, 112 Va.

635, 72 S. E. 135; *Conn. Mutual Life Ins. Co. v. Lathrop*, 111 U. S. 612, 4 Sup. Ct. 533, 28 L. Ed. 536, and cases cited.

[4, 5] It is conceded that the appellant was sane and entirely competent to contract shortly before January 1, 1916, and members of his family who testified in his behalf did not hesitate to contract with him, within five days of that time, for the timber on one tract of his land at the price of \$9,000. He speaks, both in his pleading and in his testimony, of being "enthralled" with surety debts for his sons to the amount of several thousand dollars, upon some of which judgments had been obtained and executions had issued and his property was about to be sold. No doubt the situation did worry him and make him nervous. It may have disturbed his rest at night and brought on the slight sickness to which some of the witnesses refer in their testimony, but this was far from rendering him incapable of entering into contracts. His own witnesses testify that he was better before he started on the trip to Russell. He took this trip, of 20 miles, alone on horseback, and after spending the night with Lyttle had to go on horseback an additional 15 or 20 miles to inspect the farm, and on the day of the purchase neither the appellee, nor Lyttle nor Meade could discover anything to indicate that he was not in full possession of all his faculties. He had just sold his timber for \$9,000, he had coal land for which he had been offered \$10,000, and other valuable real and personal estate, and there was offered to him, on long time, at \$35,750, a farm which a year previously had been priced to him at \$45,000. He closed the bargain and soon thereafter placed the farm in the hands of the same real estate agent at \$50,000. In his answer he states that "said land is well worth the price for which the complainant offered the same to your respondent," and, in his testimony, in answer to the question, "Do you think the farm is worth \$35,000.00?" he replied:

"Yes, sir; if a man could pay for it, it is worth every cent of it, I told Mrs. Alderson, if I had it \$50,000.00 would not buy it."

It is true that within the next three days he also bought the Bransford farm at \$25,000, and this may seem to have been a very unwise thing for him to have done, so unwise as to have led the physicians to have expressed the opinions hereinbefore quoted; but neither alone, nor in conjunction with the other evidence in the cause, does it show that the appellant did not have the mental capacity to enter into a contract. He states in his testimony that he expected to use the money from the timber and from his coal land, as far as it would go, in paying for the Alderson land, and to sell the Alderson land at a profit, and that was the reason he bought the Bransford land. If he had realized his expectations, his purchases could not

have been said to have been foolish. Certainly his reasoning on the subject cannot be said to indicate insanity. But whether his purchases were wise or foolish, if he had contractual capacity, is immaterial. If courts were permitted to pass on the wisdom or folly of contracts, or if that were a test of sanity or insanity, the business of the country would soon be involved in inextricable confusion. Allusion has also been made more than once to the fact that the appellant was of the great age of 62 years as affecting, in conjunction with other things, the validity of the contract, but the court will take judicial notice of the fact that men of greater age than that so far retain the confidence of the government in their mental capacity as to be placed in judicial positions where they have to pass on the validity of contracts made under identical circumstances with the case in judgment.

[8] Every one is presumed to be sane until the contrary is made to appear by him who alleges it, and, in the case in judgment, the trial court was of opinion that this presumption had not been overcome by the appellant, and in this opinion we concur.

[7] The appellant further made defense on the ground that he had been released from the obligation of his contract; but we do not think there is any merit in this defense. About a month after the contract was entered into, the appellant and his son visited the appellee for the avowed purpose of explaining to the appellee the circumstances under which appellant had entered into the contract, his inability to comply therewith, and of obtaining a release therefrom. Appellant and his son each testify to conversations with the appellee, but it is a significant fact that neither of them testify that she agreed to make any release. On the contrary, the son testifies that "she said she didn't care to take it back." Great reliance, however, is placed upon a subsequent correspondence between the parties, which was not produced, but the substance of which the appellant undertook to prove. Giving full weight to the testimony on this subject, it did not amount to a release. Some time after the above-mentioned interview, according to the testimony, the appellee wrote to the appellant "that there is some land here to sow in grass and I have got the seed already bought to sow and if you are not going to take the land, I want to know it, so I can sow it, I have got the seed ready," and the appellant replied telling her "to go ahead and sow the grass, and manage the farm to her own satisfaction just like she had been, for I could not take it and she need not depend on me." This was a plain refusal on the part of the appellant to comply with his contract, but is very far from a release by the appellee of its obligation on the appellant. She doubtless foresaw that the land would have to be resold in order to get her money, and she de-

sired to have it in as good condition as possible so as to attract bidders, and, as she had the grass seed on hand, already paid for, deemed it proper to make the inquiry. Whether or not the grass seed was sown we do not know, nor do we deem the inquiry material. The record does not disclose any intention on the part of the appellee to execute a release, and her declarations and conduct hereinbefore recited do not amount to such.

[8, 9] When the land was resold at the judicial sale, for the default of the appellant, it was purchased by the appellee at one dollar above the price the appellant had agreed to pay her for it. The balance of upwards of \$4,000 now due the appellee is in consequence of accrued interest on the original purchase price and costs. The appellant had answered fully at the March term, 1917; but when the report of sale was offered for confirmation at the September term, 1917, he asked to be allowed to file an amended and supplemental answer, which he prayed might be treated as a cross-bill. This answer set up nothing but the fact that the appellee had been in possession of the land from October 1, 1916, when possession was to have been delivered, till the date of sale—a period of eleven months and twelve days—and had used, occupied, and enjoyed the land as her own, and that for such use and occupation she was indebted to him in the sum of \$5,000, which he offered to set off and allow against the balance due by him to the appellee. The circuit court refused to allow the amended answer to be filed, and this action of the court is assigned as error. While courts are liberal in allowing amendments of pleadings, there must be an end of litigation at some time, and the litigation cannot end as long as the pleading continues. Litigants cannot be permitted to unnecessarily protract litigation by presenting their cases by piecemeal. After they have had fair and ample opportunity of presenting their cases in the pleadings, whether or not amendments shall be allowed must rest in the discretion of the court in view of the circumstances of the particular case, and regulated by the established and recognized rules of practice in such cases. *Bowe v. Scott*, 113 Va. 499, 75 S. E. 123, and cases cited. The appellant lays much stress on the Act of March 27, 1914 (Acts 1914, p. 641), as giving the right of amendment "at every stage of the proceeding." The object of the act, as its title imports, was to eliminate useless technicalities and to prevent vexatious delays. It was passed "in furtherance of justice," and was never intended to apply to a case where the effect of the amendment would be to encourage pleading by piecemeal and unnecessary delay in the termination of the litigation. Indeed, it may be well doubted if the statute is anything more than declaratory of the pre-existing law. We are of opinion that

no error was committed in refusing to allow the amended and supplemental answer to be filed. We are further of opinion, however, that an amended and supplemental answer was unnecessary to attain the end desired, and that the court had ample power, under the pleadings as they were, to give the appellant any relief to which he was entitled under the maxim that he who comes into equity must do equity. This maxim applies with full force to the complainant in a bill for specific performance. When the vendor of land gets the full purchase price, principal, interest, and costs, he has gotten all that he contracted for, or is entitled to. If he has derived profits from the land to which the vendee is entitled, he must account for them. But this does not mean that he is to be charged rent simply because he remained in possession pending a suit for specific performance. In the case in judgment, the vendor had contracted to deliver possession October 1, 1916. She was able, ready, and willing to do so, but the vendee declined to accept. In order to maintain her bill for specific performance, it was necessary for her to continue in that position, and she had to allege and prove those facts. The land in equity was the land of the vendee, and it was sold as his land, and she had no right to lease it. She might, with propriety, have vacated it, and the vendee could not have complained. But she remained on it, it may be to preserve it for the vendee or to protect it as a security for the purchase money. The vendee was and is of doubtful solvency. She may have remained at great inconvenience and loss, or it may have been at pleasure and profit. The record is silent on this subject. If she in fact derived a profit from this occupation, which was indeterminate in its duration, equity demands that she should account to her vendee for it. All she is entitled to is the complete fulfillment of her contract of sale. When she gets this she is made whole. What she is to be charged with, however, is the value of the actual benefit which was or should have been received, and not estimated rents or profits. As the decree appealed from does not provide for this, it will have to be amended and the case be remanded to the circuit court with directions to inquire and ascertain the value of the actual benefit, if any, derived by the appellee, or which should have been derived by her, from the possession of the farm from October 1, 1916, to September 12, 1917, and, if any such value be found, to credit the same on the decree heretofore rendered in favor of the appellee against the appellant. Costs will be awarded to the appellee as the party substantially prevailing.

Amended and remanded.

KELLY, J., absent.

(126 Va. 617)  
**BUCHANAN COUNTY et al. v. W. M. RITTER LUMBER CO.**

(Supreme Court of Appeals of Virginia. Sept. 17, 1919.)

**1. TAXATION — 378(3)—PROPERTY OF CORPORATION CONSTITUTING CAPITAL TAXABLE AS SUCH.**

Felled timber, railroad ties, and manufactured lumber, belonging to lumber manufacturing corporation, constitutes "capital" of the corporation, and is properly taxable as such.

**2. TAXATION — 378(3) — BAND SAW MILLS TAXABLE AS CAPITAL OF CORPORATION.**

Band saw mills not permanently attached to the land, but located thereon for the purpose and with the intention of being removed from place to place as the accessible timber should become exhausted was taxable as capital, and not as real estate, under Tax Bill, Schedule C, § 8, subd. 2, as amended by Acts 1916, c. 382, providing, in clause 6, for taxation as capital of "all machinery and tools not taxed as real estate."

**3. TAXATION — 338—WHEN MACHINERY TAXABLE AS REAL ESTATE.**

Machinery is taxable as real estate only when so attached to the freehold as to become part of it, and to become property of owner of the land in absence of stipulation to the contrary.

Error to Circuit Court, Buchanan County.

Action between Buchanan County and another and the W. M. Ritter Lumber Company. The circuit court entered two orders, relieving the latter from an alleged erroneous assessment of taxation, and the former bring error. Affirmed.

Jno. R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., E. Warren Wall, of Richmond, F. H. Coombs and Samuel A. Anderson, of Richmond, for plaintiffs in error.

Greever, Gillespie & Divine, of Tazewell, for defendant in error.

**WHITTLE, P.** This writ of error was granted on the petition of plaintiffs in error, Buchanan county and Rock Lick district of that county, to two orders of the circuit court entered on November 22, 1917, relieving the defendant in error, the W. M. Ritter Lumber Company (hereinafter called "the company"), from an alleged erroneous assessment of taxes for the year 1917.

The company is a foreign corporation engaged in the manufacture of lumber in Buchanan county, and in connection with its business owns and operates three band saw mills in the county as follows: (1) One known as Hurley mill; (2) one known as Blakey mill, both of which mills are located on land owned by the company; and (3) one known as Pawpaw mill, located on land

leased by the company. The first two mills were assessed and entered by the commissioner of the revenue on the land books as permanent improvements, while the Pawpaw mill was assessed as tangible personal property. The company also owned property consisting of felled timber, railroad ties and manufactured lumber of the estimated value of \$112,460, which was assessed by the commissioner as tangible personal property. The examiner of records assessed all these properties as capital of the company.

The circuit court was of opinion that the foregoing properties were erroneously assessed as improvements on land and tangible personal property by the commissioner of the revenue, but were properly assessed as capital of the company by the examiner of records, and ordered accordingly. The trial court certified that the three band saw mills were not permanent fixtures, but would be removed as the timber in the territory tributary to them should become exhausted.

[1] There is no doubt, we think, that the item of \$112,460, representing felled timber, railroad ties, and manufactured lumber, constitutes "capital" of the company, as defined in the tax bills as construed by this court, and is properly taxable as such. *Com. v. United C. M. Co.*, 119 Va. 447, 89 S. E. 935; *American Tobacco Co. v. City of Richmond*, etc., 125 Va. —, 99 S. E. 777.

[2, 3] We are also of opinion that under subsection 2 of section 8, Schedule C of the Tax Bill, as amended by Acts of 1916 (Acts 1916, p. 657), the band saw mills come within the definition of "capital" or "net assets," and are taxable as such under clause (6), "All machinery and tools not taxed as real estate." The three saw mills are "machinery and tools" within the meaning of clause (6), and cannot be taxed as real estate because not permanently attached to the freehold for the purpose of carrying on the manufacture of lumber at that point indefinitely. They are not permanent fixtures, but were located on the land for the purpose and with the intention of being removed from place to place as the accessible timber should become exhausted. In other words, they are portable saw mills, carried from place to place as the exigencies of the company may require. On the other hand, machinery, etc., taxable as real estate is so attached to the freehold as to become part of it, such annexations that if made on the soil of another in the absence of stipulation to the contrary become the property of the owner of the soil, as factory buildings and the like. The Legislature, by clause (6), did not mean to leave it to the option of the tax officials to tax some machinery and tools as real estate, and to tax other machinery and tools which were properly taxed as capital. What was meant is that machinery and tools which were properly taxed as real estate should not again be taxed as capital.

We are of opinion that the case was rightly decided by the circuit court, and its orders are affirmed.

**Affirmed.**

(125 Va. 613)

**BOATRIGHT v. LITZ et al.**

(Supreme Court of Appeals of Virginia. Sept. 17, 1919.)

**APPEAL AND ERROR §337(1), 1106(4)—IMPROVIDENT APPEAL FROM SUBJECTION OF LAND TO JUDGMENT.**

Appeal from decree dismissing suit to subject lands to satisfaction of judgment as to one of the defendants, but expressly reserving right to subject any other real estate that might be liable to the judgment, was prematurely allowed, where it did not appear that such defendant's land was primarily subject to the judgment under Code 1904, § 3575, since extent of liability of such land could not be ascertained until the land primarily liable had been sold to satisfy the judgment, and cause will be remanded, under section 3466, to determine what estate is liable and order of liability.

Appeal from Circuit Court, Wise County.

Suit by Boatright against J. L. Litz and others. From decree rendered, plaintiff appeals. Reversed and remanded.

Bond & Bruce and A. M. Vicars, all of Wise, for appellant.

E. M. Fulton, of Wise, for appellees.

WHITTLE, P. At the September term, 1884, of the circuit court of Wise county, Hurst Miller & Co. recovered a judgment against J. H. Powers for \$736.90, with interest and costs, subject to a credit of \$346.66. In 1902 this suit in equity was brought for the benefit of appellant (who had acquired the judgment) against J. H. Powers and his alienees to subject certain lands to its satisfaction. Among these tracts of land was one containing 72 acres known as the "J. R. Kilgore tract," formerly a part of the homestead exemption claimed by Powers, by deed dated January 2, 1880, admitted to record December 15, 1881. Title to this tract by successive alienations devolved upon appellee J. L. Litz. The bill as it appears in the record is not an accurate copy of the original bill in the case, which, it is admitted, sought to subject, among others, a tract containing 77 acres of land to the lien of the judgment. Powers acquired an equitable interest in that tract on April 2, 1883, by assignment of a title bond executed by Dale Carter to J. W. Powers, on April 23, 1877, and recorded April 28, 1881. This title bond was afterwards assigned by Powers to Robert R. Dickenson, but was not recorded until after the recovery and docketing of appellant's judgment.

The contentions on behalf of appellant are that the homestead deed of Powers is void

for insufficient description of the land claimed, and therefore that the 72 acres is liable to the judgment; and that the equitable interest of Powers in the 77 acres is also liable, since the title bond and assignment to him and from him to Dickenson were never recorded. While those on behalf of appellee J. L. Litz are that any ambiguity that may have existed in the description of the land included in the Powers homestead deed was removed by the evidence of witnesses, to whose testimony no timely objection was made. Moreover, it is insisted that the appeal was prematurely granted because, as shown by the amended and supplemental bill, Powers owns a life estate in 52 acres of land on Cove creek in Scott county; and, with respect to the 77 acres, the Dale Carter tract, that Powers did not part with his interest therein until after he had disposed of the 72 acres in controversy. It is also maintained that, even if the 72-acre tract were in any event liable, the Powers life estate in the 52 acres and his equitable interest in the 77 acres are primarily liable and must be first subjected in pursuance of section 3575 of the Code.

By the decree appealed from the circuit court dismissed the suit as to the appellee J. L. Litz, but expressly reserved to the plaintiffs the right to proceed to subject any other real estate that might be liable to the judgment.

The decree does not show upon what grounds the circuit court held the 72-acre tract exempt from liability. The record is incomplete, involved, and unsatisfactory; but, to say the least, it would seem that the land in controversy is not shown to be primarily subject to the judgment. If that be true, it must follow that the appeal was prematurely awarded. If the property first liable was sufficient to discharge the balance due on the judgment, then in no view of the case could the 72 acres be subjected, and its liability or nonliability would be wholly a moot question; and this court does not sit to decide such questions. It is evident from the reservation in the decree that the course indicated was in the mind of the court, yet the plaintiff elected to wait until a year, less one day, had expired and then presented her petition for appeal. The principle here involved, we think, is settled by the case of Ritter Lumber Co. v. Coal Mountain Mining Co., 115 Va. 370, 79 S. E. 322. In that case the decree fixed upon the defendant a personal liability for whatever balance of a debt might remain after crediting thereon the proceeds of sale of a tract of land decreed to be sold to pay the debt. It was held that the amount of the defendant's liability could not be ascertained until the land had been sold, and this court dismissed the appeal on that ground. So in this case, even if the ultimate liability

of the 72 acres of land (as to which we express no opinion) be assumed, the extent of the liability cannot be determined until after subjecting such other lands, if any, as may be primarily responsible, to sale to satisfy the judgment.

Upon these considerations, we are of opinion that the case should be remanded, in accordance with Va. Code 1904, § 3466, to be proceeded in further in the court below, with direction that a reference be made to a commissioner in chancery to ascertain what real estate is subject to the lien of appellant's judgment, and the order of liability.

And this appeal having been premature, the costs thereof will be decreed against appellant.

Remanded.

(84 W. Va. 691)

STATE ex rel. SINGLETON v. KANAWHA COUNTY COURT et al. (No. 3956.)

(Supreme Court of Appeals of West Virginia. Oct. 7, 1919.)

(Syllabus by the Court.)

1. REWARDS  $\S$ 4—PROSECUTING ATTORNEY MAY BE GIVEN GENERAL AUTHORITY TO OFFER REWARD NOT OVER FIXED SUM.

Pursuant to the authority conferred by section 21, c. 32a, Code 1916 (Code 1913, c. 32a, § 21 [sec. 1300]), upon the prosecuting attorney of a county, with the approval of one of the officers designated by the section, to offer rewards for the apprehension of persons charged with crime, and to expend money for the detection of crime, it is unnecessary for such approval to be given to each individual claim, but it may take the form of an authorization of a maximum sum for a stated period, beyond which the prosecuting attorney may not go, and subject to the limitation that all expenditures therefrom must be for services rendered in aid of the suppression of violations of that chapter.

2. DISTRICT AND PROSECUTING ATTORNEYS  $\S$ 7(2)—MAY EMPLOY ASSISTANCE FOR STATED PERIODS OR FOR PARTICULAR SERVICE.

Pursuant to the authority so conferred, the prosecuting attorney, within his sound discretion, may employ for stated periods or for a particular service.

3. COUNTIES  $\S$ 201—ON EMPLOYMENT OF ASSISTANCE ACCOUNT MUST SHOW SERVICES RENDERED AND NAMES OF ASSISTANTS.

When the employment is for a stated period or periods, an account for services rendered sufficiently complies with the provisions of section 1, c. 14, Acts 1919, if it shows, in addition to the approval of the prosecuting attorney, the kind of service rendered, the dates within which the same was performed, and the name of the person performing the service.

Mandamus by the State, on the relation of F. O. Singleton, against the County Court of Kanawha County and others. Writ awarded.

B. Kemp Littlepage, of Charleston, for relator.

Geo. W. McClintic, of Charleston, for respondents.

LYNCH, J. The preliminary writ awarded upon the petition of the relator commanded the county court of Kanawha county and the three commissioners constituting its membership, either to draw and deliver to him an order for the payment of \$208 out of the funds of the county in the hands of the sheriff for administration, or appear at the time and place therein designated and show cause for the failure so to do. This amount relator claims is due for services rendered by him for and on behalf of the county of Kanawha, the benefit of which it has received, and for which the county court should therefore pay.

The petition does not furnish an exact description of the account, or the form in which it was presented for payment; but the answer of respondents does, and states the form thereof to be as follows:

County of Kanawha, August 20, 1919.  
State of West Virginia,

to

F. O. Singleton.

To services in the detection of Yost law violations in Kanawha county, from July 1, 1919, to August 20, 1919, inclusive .....\$208.00

O. K. and approved. To be paid by Kanawha county, West Virginia, out of county funds in the same manner as other county expenses, and paid pursuant to the approval thereof on August 18, 1919, of the Governor of West Virginia for such expenditures under and by virtue of section 21 of chapter 32a, Code 1916.

Kemp Littlepage, Prosecuting Attorney.

The services for which the relator seeks compensation, as thus appears, were rendered by him in aid of an attempt to suppress violations of the prohibition laws of this state, sometimes spoken of as the Yost Law (Laws 1913, c. 13). The petition charges and the answer admits that since 1913 county courts of this state have possessed, and the county court of Kanawha county has exercised, the authority to issue orders payable out of the funds of the county for services rendered under the provision of section 21 of that law, being section 21, c. 32a, Code 1916 (Code 1913, c. 32a, § 21 [sec. 1300]) when authorized and approved in the manner therein required. That section is as follows:

"The prosecuting attorney of any county, with the approval of the Governor, or of the court of the county vested with authority to try criminal offenses, or of the judge thereof in vacation, may, within his discretion, offer rewards for the apprehension of persons charged with crime, or may expend money for the detection of crime. Any money expended under this section shall, when approved by the prosecuting attorney, be paid out of the county fund in the same manner as other county expenses are paid."

The account, it will be observed, bears date August 20, 1919. On August 19th Hon. John J. Cornwell, Governor of West Virginia, at the request of Kemp Littlepage, prosecuting attorney of Kanawha county, approved in writing an application made under the authority granted by that section for permission to offer rewards for the apprehension of persons charged with crime, and to expend money for the detection of crime committed against the state's prohibition laws, and for these purposes authorized the expenditure of an amount not to exceed \$3,000 during the fiscal year of 1919-20.

Respondents refused to allow the claim presented to them by the relator for payment as a proper charge against the funds of the county, and declined to draw an order in his favor thereon in satisfaction of the demand, and in their answer attempt to justify their action in that behalf upon several grounds, the first and perhaps the most vital of which is that the statute, as they understand and interpret it, requires separate action by some one of the persons named therein upon each application by the prosecuting attorney for permission to expend the public funds of a county for any of the purposes mentioned in section 21 as an essential prerequisite in the process of creating a liability against the county, and, as a necessary corollary to that proposition, that the authorization of an aggregate sum to be expended at the discretion of the prosecuting attorney finds no sanction in the provisions of that or any other statute upon the subject. In other words, they challenge his right to apply for, and of the persons whose approval is required to approve, an application for the expenditure of public moneys in bulk, or, as they say, "in the form of a lump sum," subject to disbursement as he may elect within the terms of the statute.

[1] Of course it confers no authority to appropriate or expend public funds for any purpose other than those specified in it, and these only upon compliance with its express provisions. In other words, the prosecuting attorney cannot offer a reward for the apprehension of criminals and cannot expend money for the detection of crime without the approval required by section 21 of the prohibition law. But the breadth and scope of the act does not, we think, warrant the restricted interpretation sought to be placed upon it by respondents. Obviously the intention was to confer authority to offer rewards for the apprehension of persons charged with offenses against that act, and to permit the expenditure of public funds of the county for the detection of those who violate its provisions. The discovery of the crime and the criminal was the chief inducement for the enactment. The provision for the approval required by the act evidently was intended to prevent abuse of the authority so conferred, and to safeguard such fund



against the danger of misappropriation for purposes not within the express terms of the statute. But we are unable to discover an intention on the part of the Legislature to burden, circumscribe, or restrict, as respondents would have us do, the mode or manner of obtaining access to funds to be devoted to the attainment of the object contemplated by the statute.

As already remarked, respondents do not question the right, but concede it to be their duty under the statute, to pay out of the funds of the county any money expended for the purposes mentioned therein, when such expenditure is properly authorized. Nor do they deny the allegations of the petition that the course pursued in incurring liability for the same or similar services has uniformly been the same since 1913, when the prohibition statute became effective. "The construction given to a statute by those charged with the duty of executing it ought not to be overruled without cogent reasons." *Daniel v. Simms*, 49 W. Va. 554, 39 S. E. 690. The procedure followed has been, first, to obtain from one of the officers designated in the section his approval of the proposed expenditure of funds for the purposes stated in the section; and, second, the certificate of the prosecuting attorney as to the correctness of the claim presented. The rights and interests of the public are safeguarded in requiring the submission of the proposed expenditure, even though in the form of a lump sum, to one of the designated officers for his approval or rejection, and in further requiring a certificate of correctness by the prosecuting attorney as to each individual claim. At the same time and within these limits it gives to the latter discretionary power to use and expend the fund so authorized as occasion may require, unhampered by unnecessary detail, but subject, of course, to the requirement that all expenditures from the fund must be for the suppression of violations of chapter 32a, Code. *State ex rel. Plant v. Board of Commissioners*, 80 W. Va. 506, 92 S. E. 747. The enforcement of this last requirement rests chiefly with the prosecuting attorney, for it is he who is intrusted with the expenditure of the fund so authorized. To be technically correct, the bill certified by him should show on its face that the services for which compensation is sought were rendered under the prohibition laws of the state. The account presented in this case conforms to that requirement.

[2, 3] It is also the contention of respondents that section 21 does not authorize the

prosecuting attorney to employ a person or persons at a fixed monthly salary for the purpose of aiding him in the enforcement of the provisions of that chapter. We can find no such limitation imposed by the express terms of the section, nor is it reasonably to be implied. In conferring authority to "expend money for the detection of crime," the language used is comprehensive, and apparently leaves to the discretion of the prosecuting attorney, within the limitations above mentioned, the manner of the expenditure. He may find it cheaper and more conducive to efficient service to employ by stated periods, and, if so, the language of the section is sufficiently broad to permit an exercise of discretion in that regard.

The final argument in support of respondents' position is that the account filed in this proceeding, payment of which is sought, is not itemized as required by section 1, c. 14, Acts 1919. The material portion of that section is:

"It shall be unlawful for any county court \* \* \* to pay any claim for services rendered or materials furnished unless an itemized account therefor is filed by the claimant, covering the claim. Said account shall be itemized in detail, and shall show, among other things, the following: If the claim is for services, it shall show the kind of service and dates when same were performed, and the name of the person performing the service. \* \* \*"

The account filed here shows the kind of service rendered, to wit, the detection of Yost law violations in Kanawha county, the dates within which it was performed, and the name of the person rendering it. Where the employment is for a stated period, or stated periods, as in this case, it is not necessary to show each particular item of service rendered during the period, for under such circumstances the service is continuous, occupying all the working time of the employed. Knowing the general kind of service rendered and the dates within which it was performed, the county court can readily calculate the relative value of each day's service and the price paid therefor. It is only when the employment is for a particular piece of work, instead of for a definite term, and where the employed is paid for the particular work performed, and not for the right to direct his services for a stated period, that it becomes necessary for the information of the county court to itemize the elements of the work done. The account filed here sufficiently complies with the statute.

Writ awarded.

(84 W. Va. 638)

CLARKSBURG LIGHT & HEAT CO. v.  
PUBLIC SERVICE COMMISSION.

(Supreme Court of Appeals of West Virginia.  
Oct. 7, 1919.)

(Syllabus by the Court.)

1. PUBLIC SERVICE COMMISSIONS §7—CLAS-  
SIFICATION OF PUBLIC UTILITY RATES PROPER.

For the purpose of fixing the rates to be charged by a public utility, it is proper to place its patrons in different classes, and make different rates applicable to such classes, based upon the varying cost of the service rendered.

2. GAS §1—LIGHT AND HEAT CORPORATIONS  
SUBJECT TO REGULATORY POWER OF PUBLIC  
SERVICE COMMISSION.

A corporation engaged in the business of supplying gas for light, heat, and power to the inhabitants of a city is subject to the regulatory power of the Public Service Commission.

3. PUBLIC SERVICE COMMISSIONS §7—WHAT  
CONSTITUTES "PUBLIC SERVICE UTILITY" DE-  
FINED.

The use which the consumer makes of the commodity furnished does not constitute the test as to whether or not the regulatory powers of the commission in dealing with public utilities may be invoked. It is the duty which the purveyor or producer has undertaken to perform on behalf of, and so owes to, the public generally, or to any defined portion of it, as the purveyor of the commodity, or as an agency in the performance of the service, which stamps the purveyor or the agency as being a "public service utility."

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Public Service Corporation.]

4. CONSTITUTIONAL LAW §48—THAT LEGIS-  
LATURE HAS DESIGNATED CERTAIN BUSINESS  
SUBJECT TO PUBLIC SERVICE COMMISSION  
NOT TO BE DISREGARDED.

Where the Legislature has declared a certain business subject to regulation by the Public Service Commission, such declaration will not be disregarded by this court, unless it appears that there is no substantial basis for holding that the business is of that character which is subject to regulation by the Public Service Commission.

5. CONSTITUTIONAL LAW §81—PUBLIC UTIL-  
ITIES SUBJECT TO REGULATORY POWER OF  
STATE.

Whenever any business or enterprise becomes so closely and intimately related to the public, or to any substantial part of a community, as to make the welfare of the public, or a substantial part thereof, dependent upon the proper conduct of such business, it becomes the subject for the exercise of the regulatory power of the state.

6. GAS §1—CHARGES FOR GAS SUBJECT TO  
REGULATION BY PUBLIC SERVICE COM-  
MISSION.

A corporation engaged in the business of supplying gas to the inhabitants of a city for

the purpose of light, heat, and power is subject to have the rates it charges therefor to all of its patrons regulated by the Public Service Commission, notwithstanding some of such patrons may be engaged in manufacturing enterprises.

7. PUBLIC SERVICE COMMISSIONS §7—PART  
OF RECEIPTS ALLOWED YEARLY FOR AMORTI-  
ZATION OF PLANT.

Where the life of a public utility is determined by the exhaustion of the supply of the material which it furnishes to the public, such part of its receipts each year should be allowed for the amortization of the plant as will return to the stockholders their investment within the probable life thereof.

8. GAS §14(1) — DIVIDENDS OF NATURAL  
GAS COMPANY TREATED IN PART AS RETURN  
OF CAPITAL.

The dividends paid to the stockholders by a natural gas company, whose life is determined by the life of the gas fields from which it obtains its supply, cannot in their entirety be treated as earnings; but such part thereof as will repay to the stockholders their investment within the probable life of the plant must be treated as a return to them of their capital.

9. PUBLIC SERVICE COMMISSIONS §32—RATE  
DETERMINED BY MISAPPLICATION OF LAW TO  
FACTS REVIEWED.

The business of rate making being legislative in its character, a rate based upon a fact determined to exist by the rate-making power will not be reviewed because of an improper finding based upon disputed facts; but, where such fact has been determined by a misapplication of legal principles to the state of facts shown, such finding will be corrected by applying correct legal principles to such state of facts.

10. GAS §14(1)—NEW PIPE LINES OF NAT-  
URAL GAS COMPANY INVESTMENT, AND NOT  
EXPENSES OF OPERATION.

Expenditures of a natural gas company for pipe lines from new wells, which will be used during the life of such wells, are properly included as an item of investment, and are not properly chargeable as an item of expense of operation.

Original petition by the Clarksburg Light & Heat Company for suspension of an order of the Public Service Commission fixing a schedule of rates. Order of suspension refused.

R. S. Douglass and Melvin G. Sperry, both of Clarksburg, for petitioner.

Geo. W. Johnson, of Parkersburg, Law & McCue, of Clarksburg, Glasscock & Glasscock, of Morgantown, J. A. Meredith, of Fairmont, and Hoffheimer & Templeman, of Clarksburg, for respondent.

RITZ, J. The Clarksburg Light & Heat Company has for a number of years been engaged in producing, transporting, distributing

and supplying natural gas for public use in the city of Clarksburg. In July, 1917, it filed with the Public Service Commission a schedule of rates which it proposed to charge for gas thereafter supplied, which was an advance over the rates then charged. Several of the company's patrons filed objections to the said rates, and the schedule was suspended pending a hearing as to the reasonableness of the rates. Before this hearing was completed, to wit, on the 9th day of November, 1917, the gas company filed an amended petition containing another classification and schedule of rates. These rates were an increase over those proposed in the first schedule. Objections were also filed to this amended schedule by a number of patrons of the company. A temporary schedule was made by the commission on the 4th day of December, 1917. This order of the commission classified the company's service as follows:

**Class 1.—Domestic Consumers.** In this class are placed all consumers using gas for household purposes, and all other consumers whose use of gas varies according to the season of the year, but who cannot at any season or time be shut off, either temporarily or permanently, for the purpose of giving household consumers a sufficient supply of gas—in which is included restaurants, storerooms, and the cooking, heating and lighting parts of hotels. The rate allowed for the service to this class was 18 cents per 1,000 cubic feet.

**Class 2** includes city buildings and city utilities, county buildings and schoolhouses where gas is used under boilers and as in manufacturing plants, upon the condition that the company has a right to shut off the gas to keep domestic consumers supplied. The rate for this class is fixed at 10 cents per 1,000 cubic feet net for the first 1,000,000 cubic feet consumed in a calendar month, and 6 cents per 1,000 cubic feet net for the quantity over 1,000,000 cubic feet consumed in a calendar month.

**Class 3** includes manufacturers and other large consumers, who may be shut off immediately in order to provide an ample supply to the consumers in class 1. The rate for this class was fixed at 15 cents per 1,000 feet for the first 200,000 cubic feet, or part thereof, 13 cents for the next 300,000 cubic feet, or part thereof, and 12 cents for all gas in excess of 500,000 cubic feet.

This order of the commission was temporary in its nature, and the application was retained before the commission for final hearing and determination at a later time. Before any final order was had, the gas company, on the 10th day of October, 1918, filed a second amended petition, in which it submitted an amended classification and a schedule of increased rates, which new classification and new rates it proposed to make effective in November of that year. By this amended classification class 1 was made to include certain service which was then included in class 2, such as city buildings, county buildings, school buildings, and other quasi public service; and class 2 was limited

to such consumers as were at that time included in that class, excluding those attempted to be placed in class 1. Class 3 was the same as formerly, but provision was made for the discontinuance of service to this class entirely, except upon contracts made with such consumers by the gas company. The rates proposed in the new schedule were 30 cents per 1,000 cubic feet for class 1, 20 cents per 1,000 cubic feet for class 2, and for class 3 such rates as might be fixed by contract. Hearings were had upon this application, and on the 15th day of April, 1919, the commission entered an order declining to allow the gas company to adopt the changed classification, but allowing an increase in rates above those then in effect, fixing the rates for consumers in class 1 at 22 cents per 1,000 cubic feet, less 2 cents for payment on or before the 10th of the month following that in which the gas is consumed; 14 cents per 1,000 cubic feet for consumers in class 2; 20 cents per 1,000 cubic feet for the first 200,000 cubic feet, or part thereof, 18 cents per 1,000 cubic feet for the next 300,000 cubic feet, or part thereof, and 16 cents per 1,000 cubic feet for all over 500,000 cubic feet for consumers in class 3, with a discount of 1 cent per 1,000 cubic feet to such consumers if payment was made on or before the 20th of the month next following that in which the gas was used; further providing that the service might be discontinued at any time to consumers in classes 2 and 3 when it became necessary to do so in order to furnish an adequate supply of gas to the consumers of class 1. From this order of the commission the gas company prosecuted this appeal, contending: First, that the commission was not authorized to include in this schedule of rates gas furnished by it to manufacturing plants under class 3, for the reason that the same is not a public service, and that its dealings with such concerns are not subject to control by the commission; second, that the rates allowed by the commission upon any theory of the case are confiscatory of the petitioner's property, not yielding to it a reasonable return upon the value of the property devoted to the public service; and further that the commission unauthorizably refused to allow it to adopt its new classification to the extent that it attempted to transfer certain consumers from class 2 to class 1.

[1] The effect of the proposed new classification, as above shown, would have been to transfer from class 2 to class 1 such consumers as schoolhouses, public buildings, and other like institutions, and impose upon such consumers the rates prescribed for consumers of the first class. The petitioner contends that its regulations in this regard were reasonable, and that the commission should have allowed it to place such consumers in class 1. It is contended that such a regulation made by a public utility for the conduct of its business cannot be interfered with by

the commission, unless the same is unreasonable, and the case of Baltimore & Ohio Ry. Co. v. Public Service Commission, 81 W. Va. 457, 94 S. E. 545, L. R. A. 1918D, 268, is relied upon as authority to support this contention. In that case we had under consideration the reasonableness of a regulation adopted by the railway company classifying its shippers of coal for the purpose of car distribution, and we held the regulation proposed reasonable and denied the power of the Public Service Commission to annul it. That regulation had no effect upon rates.

But can it be said, in view of the past conduct of the petitioner's business, that the proposed change in classification is a reasonable one? There is a difference in the rate charged to consumers in the various classes, and this difference in rates is based upon a difference in the cost of the service to the consumers of the several classes. While it costs the same amount to produce each unit of gas, no matter to whom it is delivered, it does not cost as much to deliver it, to collect for it, and to do the other things necessary to render the service in all cases. Where a large quantity is delivered to a consumer, the expense of reading meters, bookkeeping, and collection, as well as other like expenses, is very much less per unit than it is where an equal amount is delivered to a large number of consumers, and it is largely upon this theory that the difference in rates is justified. It appears that at least for some years these public buildings and other like institutions consuming large quantities of gas have been given a rate less than domestic consumers, and we are of opinion that the Public Service Commission was entirely justified in saying that the attempt of the company to raise the rate to these consumers by putting them in another classification was unreasonable, inasmuch as it is entirely apparent that the cost of the service to this class of consumers for each unit of gas furnished is not as much as to those consuming gas in much smaller quantities.

[2] The petitioner earnestly contends that the Public Service Commission has no authority to regulate the rates to be charged by it to its manufacturing consumers. It contends that this is not a public service, and is not subject to the regulatory power of the state, and that the order of the commission fixing the rate to be charged by it to such consumers is without authority of law. It cannot be doubted that the language of the act (Code 1913, c. 150, §§ 1-21 [secs. 636-656]) conferring jurisdiction upon the Public Service Commission to regulate the business of public service corporations is broad enough to include the petitioner, for section 3 of the act provides:

"The jurisdiction of the Commission shall extend to \* \* \* gas companies, electric lighting companies and municipalities furnishing gas

or electricity for lighting, heating or power purposes." Section 638.

And section 7 provides:

"That it shall be unlawful for any public service corporation subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular character of traffic or service, in any respect whatsoever, or to subject any particular person, firm, corporation, company or locality, or any particular character of traffic or service, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Section 642.

[3-5] This language, it appears, is broad enough to embrace the activities of the petitioner, and all of them. But petitioner's contention is that the Legislature did not have power to make of it a public service corporation, or to make any part of its business subject to the regulatory power of the commission, unless the nature of the business was such as to make it subject to the police power of the state. It is quite true that the Legislature cannot arbitrarily convert a private business into a public one for the purpose of regulation, unless there is a substantial basis for the exercise of the police power. The question of whether any particular business comes within the regulatory power of the Legislature, or the Public Service Commission in this case as the agent of the Legislature, in the last analysis, is one for the courts to determine. In reaching a conclusion, however, the public policy of the state as announced by the Legislature will be given due weight, and the determination of the Legislature that a particular business is subject to the regulatory power of the state, because the public welfare is dependent upon its proper conduct and regulation, will not be lightly disregarded by the courts. *People v. Budd*, 117 N. Y. 1, 22 N. E. 670, 682, 5 L. R. A. 559, 15 Am. St. Rep. 460; *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189. The increasing population of the country, closer relations existing between its inhabitants, brought about not only by the increase in population, but the more efficient means of communication, has rendered in recent years many lines of enterprise subject to public regulation which in the past had been considered matters of purely private concern. *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *People v. Budd*, 117 N. Y. 1, 22 N. E. 670, 682, 5 L. R. A. 559, 15 Am. St. Rep. 460; *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189; *Pinney & Boyle Co. v. Gas & Electric Co.*, 168 Cal. 12, 141 Pac. 620, L. R. A. 1915C, 282, Ann. Cas. 1915D, 471. And it cannot be doubted that in the future, as the relations of our ever-increasing population grow more intimate and interdependent, many businesses

and enterprises which are at this day considered as entirely of private concern and beyond the power of the public to regulate will become subject to control under the police power. The fact that the conduct of any particular enterprise may have in the remote or even recent past been considered as entirely the subject of private contract, while persuasive of the private character of the business, is not at all conclusive. Of course it is very well recognized that in order to make any particular business subject to the police power it must be affected with a public interest.

Not only must the service offered be available to any one who applies for it, but any one who desires it must have the right to demand it upon complying with proper regulations, and the payment of proper charges therefor. It must be such a business as the public authorities have a right to subject to the regulatory power of the state for the benefit of its inhabitants, and the question in this case is: Is the petitioner's business such a one? When does any particular enterprise or line of business fall within the regulatory power of public authority? From what we have said it is apparent that no rule can be laid down which can be followed blindly or arbitrarily over any period of time. The ever-changing conditions of modern business, and the constantly varying relations of the public to such business, make necessary the extension of this power in the interest of the public to such businesses as may by their conduct decidedly influence for weal or for woe the general welfare of the community. And it may be said that whenever the relation of any business or enterprise to the public, or to any substantial part of a community, becomes so close as to make the welfare of the public, or any substantial part of it, depend upon the proper conduct of such business, then it becomes a subject upon which the regulatory power of the state may be exercised for the benefit of the whole, and the determination by the Legislature that a particular business belongs to such class will not be set aside, where there is a substantial foundation for it. This question is very elaborately discussed by Mr. Chief Justice Andrews in delivering the opinion of the court in the case of *People v. Budd*, 117 N. Y. 1, 22 N. E. 670, 682, 5 L. R. A. 559, 15 Am. St. Rep. 460, and by the Supreme Court of the United States in the case of *German Alliance Ins. Co. v. Kansas*, above cited. In the latter case Mr. Justice McKenna reviews the authorities at length and discusses the question here involved with great perspicacity, and we cannot do better than to suggest to the interested inquirer a careful perusal of the court's opinion in that case.

[6] Having established this general principle, the remaining question is: Does the business of the petitioner so affect the inter-

est of the community as to make it subject to public regulation, so far as it furnishes gas to manufacturing enterprises? It must be borne in mind that petitioner is furnishing large quantities of gas, not only to these private enterprises, but to all of the people of Clarksburg desiring it. If it is subject to public regulation in supplying its product to one class of consumers, such as domestic consumers, or to schoolhouses or public buildings, it cannot very well be conceived how the supplying of its product to other consumers in the same community can be placed upon a different footing. It is argued that the business in which these manufacturing consumers are engaged is entirely private; that the public has no interest therein, no power to regulate it or control it; and this is entirely true, but that argument applies with equal force to every private residence in the city. The public has no right or power to control the conduct of family life. It is as much, if not more, a private use of gas, when it is consumed by a domestic consumer, as when it is consumed by a manufacturing plant. The use made of the substance by the consumer is not the test. If such were the case, then the public service would only extend to such of the petitioner's product as is furnished to purely public institutions, in which class might be placed courthouses, schoolhouses, and public buildings of that character, and all other of its business would be free from regulation by the public authorities.

Bearing in mind that the legislative intent has been expressed in regard to the business of this petitioner with reasonable clearness to the effect that the same is subject to the regulatory powers of the commission, in order to overturn that expression of legislative intent we must find that the public welfare is not so intimately connected with petitioner's business as to require the public regulation of it. Here we find a gas company supplying the inhabitants of one of the principal cities of the state with an article of prime necessity for their welfare. We find a great number of manufactories, great and small, upon which the life of that city largely depends, being supplied by petitioner with gas for fuel purposes. Necessity demands that these enterprises be allowed to conduct their business without being subjected to any undue or unreasonable disadvantage one over the other. When rival business enterprises locate in a community, can a public service corporation, engaged in supplying fuel to the inhabitants of that community, be permitted to say: We will supply fuel to one of these plants, and will subject the others to the necessity of procuring fuel of another kind at a largely increased cost? Such a holding in the end is bound to result in the petitioner not only having a monopoly in the business of selling gas in which it is engaged, but in creating a mo-

nopoly for the benefit of such private manufacturer, or manufacturers, as it might choose to favor with its supply of gas, to the prejudice of those who are forced to supply themselves with other fuel or discontinue their business.

It is argued that the supply of gas to these manufacturing plants is nothing but the sale of the petitioner's product to them. It is true that it is the sale of the gas produced by the petitioner, but it is more. It is the delivery of the same at the point of consumption. For the purpose of this delivery the petitioner under our law is a public servant. It exercises the power of eminent domain for the purpose of securing rights of way for its pipe lines. It extends the same over the public highways and streets, and appropriates them to its uses, as it contends partly for the public good, but partly purely for private ends. The duty of the petitioner to supply the public with gas is its paramount duty. It makes no difference who that public is, or to what use the gas is to be appropriated. If the petitioner was allowed to conduct one half of its business under public regulation, and to sell the other half of its product upon private contract, the result would be disastrous to the public, for the rates charged to private consumers would control those charged to the public consumers, or vice versa. The intricate accounts which would have to be kept in order to indicate the proper part of the company's expenses chargeable to the one or the other part of its business would be so easily manipulated that in the end the so-called private consumers would either be paying largely for the public service, or the public consumers would in a large measure be paying for the gas furnished for manufacturing purposes. No one can serve two masters is as true to-day as it was 2,000 years ago, and it cannot be doubted that, if this petitioner is allowed to divide its allegiance in the manner desired, the service rendered by it to the class of its patrons, which it would soon despise, would be inefficient and ineffective to meet their reasonable demands, to the end that the needs of that other class of patrons which had secured its favor might be the more efficiently met. We are clearly of the opinion that, so long as the petitioner is engaged in supplying gas to the public in the manner in which it is at this time, it cannot supply a part of that public under private contract, and a part of it under public regulation.

[7, 8] The petitioner contends that the rates prescribed by the Public Service Commission amount practically to the confiscation of its property, and this conclusion is reached upon the theory that the petitioner's plant is not of the character of the ordinary public service utility, for the reason that its life is not perpetual, but is limited by the

life of the gas field from which it procures its gas. It shows that its production of gas in 1916 was 10.41 per cent. less than in 1915, that its 1917 production was 11.43 per cent. less than the 1916 production, and the production for 1918 17.83 per cent. less than the 1917 production, and argues that the fair deduction from these figures is that certainly in 5 or 6 years its gas supply will be exhausted, and its plant worthless, wherefore the commission should have provided rates which would produce a revenue sufficient to amortize the plant within that time, as well as pay a return upon petitioner's investment. The commission, in arriving at a basis for the rates prescribed by it, valued petitioner's properties at \$1,500,000, and then, after providing for all of its proper expenses, allowed \$120,000 as a return upon this investment, and \$150,000 for amortization of the plant. The contention of the petitioner is that, instead of allowing \$150,000 for this purpose, there should have been allowed practically twice that sum, and assuming that the valuation of the plant is correct, and that it will become obsolescent in 5 or 6 years, its contention is perhaps correct. It cannot be doubted that, in fixing the rate to be charged by a public utility such as the petitioner, there is an element to be considered which does not ordinarily enter into the matter of rate making. Public utilities, such as water companies or light companies, are considered upon the theory of perpetual life, and when the proper return is allowed upon the investment, and a proper amount for maintaining the physical properties in effective condition, the public utility has no ground for complaint; but where, as in this case, the life of the utility is determined by the exhaustion of its gas fields, there must be, in addition to the allowance for interest on the investment and for the expense of keeping the plant in effective condition, another item sufficient to amortize the plant within the probable life of the field from which the gas is obtained.

In order to determine whether or not the Public Service Commission has adequately allowed for this purpose, it is necessary to review the fiscal history of the petitioner. It was organized in the year 1904 by the consolidation of two gas companies, then doing business in the city of Clarksburg. While its capital stock was fixed at \$200,000 at that time, it is shown that the properties actually owned by the newly organized company were worth approximately \$650,000. These properties consisted largely of leases upon gas and oil territory and gas-producing wells. From the year 1904 to the year 1914, inclusive, it appears that this company had a net corporate income of \$1,451,954.28; that it declared in dividends during that time the sum of \$738,500; that in addition to this it

issued during that period \$300,000 of bonds, which it delivered to its shareholders, retiring \$100,000 of its stock, giving to the holders of its stock \$300 of these bonds for each share of stock surrendered; that it subsequently retired these bonds out of its income, together with their interest, which amounted in the aggregate to \$338,140. This amount was, of course, in effect a dividend to the stockholders, and indicates that during that 11-year period it paid out to its stockholders in dividends more than \$1,000,000. Its statement shows that for the years 1904, 1905, 1906, 1907, and 1908 it made no deductions from its capital account for depreciation of its plant, or for the purpose of amortizing its investment. For the year 1909 it deducted practically \$81,000 for all purposes; for the year 1910, \$29,500; for the year 1911, nothing; for the year 1912, \$21,000; for the year 1913, \$45,000; and for the year 1914, \$124,800—or a total of a little over \$300,000 in 11 of the most prosperous years of its history, not only on account of depreciation in the physical properties, but for the purpose of amortizing its plant because of the exhaustion of the gas fields owned by it. Thus it will be seen that during these 11 years the petitioner itself allowed less than \$30,000 a year to accomplish a purpose for which it now claims \$150,000 a year is entirely inadequate, and the record shows that during these years, or at any rate during the later ones, the production and sale of gas was more than it has been in the last few years, and more than can reasonably be expected in the succeeding years. While it is true that, in fixing the rate for a public utility such as the petitioner, regard must be had to the fact that its plant will only have a salvage value when its gas supply is exhausted, it is likewise true that the petitioner must be considered to have taken this into consideration during all the life of the plant.

Assuming that the petitioner's contention is correct, that its plant will become obsolescent in 5 years, it would be manifestly unjust to charge those who consume the gas during that last 5 years with practically the entire cost of the plant, in addition to a reasonable return upon the entire investment therein. The dividends heretofore declared amount to much more than a reasonable return on the investment. They amount to from 40 to 50 per cent. on the amount of money actually invested, as contended for by the petitioner, and to more than 100 per cent. on the nominal capital stock. These dividends it cannot be considered were declared out of earnings. It is true they were declared out of the company's receipts from the sale of its gas and the service it performed in delivering it. Such part of these receipts as may properly be construed to be for the purchase price of the gas should have

been treated as in effect purchase money for its property, and its capital have been depreciated to that extent. In other words, in order to arrive at a just conclusion as to what is a proper allowance to be made for amortizing the investment we must consider that this process has been going on during the whole life of the plant. It will not do to say that this company could by continued active operations for the first half of its life exhaust more than one-half of its gas supply, and declare the whole of it in dividends as profits on its investment, and then begin the amortization of the investment after its property had been thus depleted. If we assume that the petitioner's investment amounted to \$1,500,000 or even \$2,000,000, as contended for by it, in order to make which amount, however, the original investment has to be more than doubled because of appreciation in the value of its properties, we must then assume that during all the time it has been operating, and withdrawing gas from its field, and selling the same to its customers, it has been not only earning money, but it has been selling a part of its property, and we must depreciate its investment each year of its existence to the extent of such sales.

Of course, as is stated by the commission in the case of *In re United Fuel Gas Co.*, Public Utilities Rep. 1918C, p. 193, it is a practical impossibility to determine how much should be taken from the capital investment each year because of depletion of the gas supply for that particular year, and the proper way, and perhaps the only possible way, is to distribute over the entire life of the utility the total amount of its investment. In other words, divide the total investment into the number of years of the utility's probable life and depreciate the investment each year by the amount thus found. If in this case we fix the total investment at \$2,000,000 and to do this we are required to more than double the investment actually made because of appreciated value of the property, and divide this amount by 20 years, the probable life of this utility, we find that the investment should have been depreciated each year to the extent of \$100,000 because of exhaustion of the supply of gas by the sales made therefrom. Instead of doing this, as we have before stated, the company during the first 11 years of its life only depreciated it to the extent of \$300,000, when in fairness the investment should have been depreciated down to the year 1914, when the Public Service Commission began to regulate it, to the extent of at least \$1,000,000. It will thus be seen that, instead of the Public Service Commission fixing too small an amount for the proper amortization of the investment, they have fixed it larger than might be justified; but this was partly upon the theory that for

the last 2 or 3 years the petitioner had not been allowed to earn enough to set aside any amount for this purpose.

[9] It may be urged that we cannot go behind the commission's finding that this plant is worth \$1,500,000 as a public utility at this time; that the findings of fact of the commission in this regard are conclusive upon us. It is quite true that rate making is the exercise of legislative power, and where it depends upon the ascertainment of results from disputed facts, the determination of the Legislature—or, in this case, the Public Service Commission in lieu thereof—will not be reviewed; but where such determination is reached by a misapplication of legal principles to the state of facts disclosed, this court will make a correct application of such principles in determining whether or not the rate fixed by the legislative authority is confiscatory. We are, therefore, of the opinion that had the commission applied a proper proportion of the petitioner's receipts for the years 1904 to 1914, inclusive, to the reduction of its investment, instead of treating practically the whole thereof as earnings, the value of this plant at this time would have been found to be less than it was by the commission. In other words, by the application of the legal principle we have above laid down, and the state of facts which it is conceded exists here, the investment of the stockholders in the petitioner had been more than 50 per cent. returned to them by the year 1914, and the investment in the plant should have been reduced to that extent. We think the commission has dealt as liberally with the petitioner in the matter of allowing for the amortization of its plant as could reasonably be expected.

[10] Complaint is made that the commission did not allow the petitioner as expenses an item of \$160,000 to cover the cost of new field lines. It appears that the petitioner, in order to keep up its supply of gas, and to exhaust its field, is constantly drilling new wells and laying new lines thereto, and it contends that the cost of these new lines should be allowed to it as an item of expense to be returned in the year in which made, instead of being added to its investment. The commission treated this item in the same manner that it had been treated by the petitioner during all of its existence. A large part of its investment, as now appears upon its books, is made up of such items as this, all of which were expended out of its receipts, and we think it would be manifestly unjust to charge consumers of gas in any one particular year the total cost of laying pipe lines which will be used to convey the gas from these wells during their entire life.

Our conclusion is to refuse to suspend the order of the Public Service Commission.

LYNCH, J., absent.

(84 W. Va. 662)  
MILL CREEK COAL & COKE CO. et al. v.  
PUBLIC SERVICE COMMISSION.  
(No. 3857.)

(Supreme Court of Appeals of West Virginia.  
Oct. 7, 1919.)

(Syllabus by the Court.)

1. ELECTRICITY ⇐1—ELECTRIC LIGHT AND POWER COMPANY A "PUBLIC SERVICE CORPORATION."

A hydro-electric company, organized in Virginia to engage in the business of a general electric lighting and power company and for the sale and disposal of its electric power to the public, and selling its product to customers in this state, is, as to its business transacted within this state, a "public service corporation," within the terms of chapter 150, Code of West Virginia.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Public Service Corporation.]

2. ELECTRICITY ⇐11—ELECTRIC CURRENT FURNISHED BY HYDRO-ELECTRIC COMPANY TO INDUSTRIES IS A "PUBLIC SERVICE."

Where a hydro-electric company, a public service corporation within the terms of chapter 150, Code, by its charter expressly engages to serve the public, and subjects itself unreservedly to the laws and regulations of the governmental power having jurisdiction in the place where it proposes to conduct its business, and its prolonged subsequent conduct is entirely consistent therewith, the electric service rendered by the company to industrial concerns to be used by them for private profit is a "public service," within the provisions of the Public Service Commission Act, and subject to regulation by the commission.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Service.]

3. COMMERCE ⇐15—TRANSMISSION OF ELECTRIC CURRENT FROM STATE TO STATE IS INTERSTATE COMMERCE.

The transportation or transmission of electric current from state to state through appropriate instrumentalities is "commerce" between the states.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Commerce.]

4. COMMERCE ⇐16—INTERSTATE AND INTRA-STATE COMMERCE DISTINGUISHED.

In determining when commerce ceases to be interstate and becomes intrastate, the essential character or unity of the movement is decisive.

5. COMMERCE ⇐40(1)—TRANSMISSION OF ELECTRIC CURRENT FROM SELLER IN ONE STATE TO BUYER IN ANOTHER IS "INTERSTATE COMMERCE."

The transportation or transmission of electric current direct from the seller in one state to the consumer in another, for immediate or practically immediate use, subject only to a temporary stop en route for the purpose of



reducing the current to a commercial voltage, remains "interstate commerce" until the commodity has reached its goal, unless theretofore sold to independent distributing companies in the latter state for resale to local consumers.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

**6. COMMERCE §10—FEDERAL POWER EXCLUSIVE OVER INTERSTATE COMMERCE OF NATIONAL IMPORTANCE.**

As to those forms of interstate commerce which are of national importance, and require a general system and uniformity of regulation, the federal power is exclusive, and the state may not act, even if Congress has not exerted its paramount legislative authority as to them.

**7. COMMERCE §10—STATE REGULATION OF LOCAL INTERSTATE COMMERCE VALID ON NON-EXERCISE OF POWER BY CONGRESS.**

But where the subject is of local rather than national importance, admitting of diversity of treatment according to the special requirements of local conditions, the state may exercise its regulatory authority within reasonable limits till Congress acts.

**8. COMMERCE §60(1)—REGULATION BY STATE OF RATES FOR FURNISHING ELECTRIC CURRENT IN ANOTHER STATE IS VALID.**

The regulation of the rates at which electric current transported or transmitted from one state to another shall be sold in the latter state is, so long as the rate fixed is not confiscatory or discriminatory against citizens of another state, a matter essentially local in its nature, and not of such national importance as to require a general system and uniformity of regulation.

**9. CONSTITUTIONAL LAW §154(1)—PRIVATE CONTRACT RIGHTS MUST YIELD TO CONSIDERATION OF PUBLIC WELFARE.**

Private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict.

**10. CONSTITUTIONAL LAW §154(2), 298(7)—RATES ESTABLISHED BY STATE FOR ELECTRIC CURRENT NOT IMPAIRMENT OF PRIVATE RATE CONTRACT.**

Reasonable rates for electric energy, prescribed by a state in the exercise of its police power, through the instrumentality of its Public Service Commission, are not repugnant to the contract or due process of law clauses of the federal Constitution (article 1, § 10, cl. 1, and Amendment 14) merely because, if given effect, they will supersede the rates designated in a private contract between the company and a customer, entered into prior to the enactment of the law creating the commission.

**11. PUBLIC SERVICE COMMISSIONS §32—FINDINGS OF FACT BY COMMISSION—GENERALLY NOT REVIEWED.**

Findings of fact by the Public Service Commission, based upon evidence to support them, generally will not be reviewed by this court.

*(Additional Syllabus by Editorial Staff.)*

**12. CONSTITUTIONAL LAW §81 — "POLICE POWER" DEFINED.**

The "police power" of the state embraces regulations designed to promote the public convenience or the general welfare or prosperity, as well as those in the interest of public health, morals, and safety.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Police Power.]

**13. COMMERCE §48—NO UNDUE BURDEN CAN BE PUT ON INTERSTATE COMMERCE UNDER POLICE POWER.**

Not every exercise of the police power of a state affecting interstate commerce is valid, as no direct or undue burden may be imposed.

Petition by the Mill Creek Coal & Coke Company and others for suspension of an order of the Public Service Commission directing the continuance of a former increase of 20 per cent. in the existing rates of the Appalachian Power Company, and allowing a further increase of the same amount. Order affirmed.

A. G. Fox and Sanders & Crockett, all of Bluefield, and W. B. Kegley, of Wytheville, Va., for petitioners.

Geo. W. Johnson, of Parkersburg, R. Dennis Steed, of Charleston, R. E. Scott, of Richmond, Va., and Price, Smith, Spilman & Clay, of Charleston, for respondent.

LYNOH, J. The questions presented upon this appeal originated in an application made by the Appalachian Power Company, a Virginia corporation doing business in this state as well as in Virginia, to the Public Service Commission of West Virginia for an increase of 30 per cent. in the rates in force December 31, 1918. Thirteen months prior to that date the commission had ordered an increase of 20 per cent. in the rates theretofore existing, pursuant to an agreement between the power company and its customers, and as an emergency measure made necessary by the war, though many of such customers, including appellants, held unexpired contracts with the company fixing lower rates to be paid for its service. The increase of 20 per cent. presumably not proving sufficient to enable the company to meet the additional costs incident to war conditions, application was made for the additional 30 per cent. increase. After full investigation and hearing, the commission by an order of April 28, 1919, directed the continuance of the former increase of 20 per cent., and allowed a further increase of the same amount effective April 1, 1919. It is from that order that the present appeal was taken by numerous coal companies served by the power company in this state.

The Appalachian Power Company was or-

ganized in 1911 for the purpose of engaging in the business of a general electric lighting and power company "for the production of electric power intended to be used for public service." Hydro-electric stations of great capacity were constructed on New river, in Virginia, and the current there generated carried into West Virginia by two high-tension transmission lines to three substations in this state, where it is transformed or reduced from 88,000 volts to commercial voltages ranging from 13,200 to 110, and from these points distributed, measured, and sold to the company's West Virginia consumers. These three transforming or reducing substations alone, one at Switchback, one at Bluefield, and one at Coalwood, represent an investment, exclusive of generating machinery, of \$400,000, \$80,000, and \$60,000, respectively. The commission found that the fair value of the power company's investment as a rate base upon which it was entitled to earn a reasonable return, as of September 30, 1918, was approximately \$9,860,000. It further found that the company had not during any year of its history earned a return sufficient to pay its fixed charges and to enable it to set aside a fund to cover accrued depreciation, and that the operations of the company since it commenced business had resulted, as of September 30, 1918, in a deficit of "something in excess of \$1,000,000."

At the time of the applications for increased rates and of the orders of the commission allowing them, many of the customers of the power company were using its current under unexpired contracts having several years yet to run. These contracts definitely fixed the rates chargeable for the service rendered. The commission, however, in effect annulled the provisions of these agreements in so far as they related to rates by authorizing a total and aggregate increase of 40 per cent., finding that the new rates were necessary in order to enable the company to earn a fair return on its investment.

[1, 2] In support of their contention that the commission exceeded its jurisdiction and powers in authorizing the increase in the face of specific rates fixed by contracts having several years yet to run, protestants rely upon four propositions: (1) That the Appalachian Power Company, disposing in West Virginia of electric power generated outside of this state, is not within the purview of the West Virginia Public Service Commission Act, chapter 150 of the Code; (2) that as the electric power furnished in West Virginia originates at the power company's developments in Virginia, its business in this state is interstate commerce, and the Public Service Commission, therefore, has no jurisdiction in the premises; (3) that protestants' rates are fixed by contracts entered into prior to the passage of the act creating the commission, and any interference now

with such contracts would impair the obligations thereof, and deprive protestants of their property without due process of law; (4) that the rates fixed are unreasonable.

With respect to the first ground relied on by petitioners there can be no reasonable doubt. The charter of the Appalachian Power Company states that the purposes of its organization, among others, are:

"To do the business of a general electric lighting and power company, with works to be purchased, leased or constructed, maintained and operated for the production of electric power intended to be used for public service, and for the sale and disposal thereof to the public."

The charter authorizes the company to transmit, use, or dispose of its electrical power or energy in the states of Virginia, West Virginia, Tennessee, and North Carolina. While it is given full power to contract with the public "for such price or prices and on such terms and conditions as to this corporation may seem proper," yet in the same connection it is provided expressly that—

"Said company shall be bound to furnish at reasonable rates any person, company or corporation along its lines with electric energy, and to charge uniformly therefor to all persons, companies or corporations using the same under like conditions as to cost of supply; *all subject to the laws and regulations of the governmental power having jurisdiction in the place or places in which such business or businesses are conducted.*" (Italics ours.)

A certified copy of its certificate of incorporation was duly filed with the secretary of state of this state, and properly recorded, as required by section 30, c. 54 (sec. 2929), Code of West Virginia. It was under such provisions as these that the power company commenced, and has continued, to transact its business in this state.

Not only is the public character of the service to be rendered by the Appalachian Power Company expressly asserted in the articles of incorporation, but its subsequent acts pursuant thereto have partaken distinctly of the same characteristics. The findings of fact of the Public Service Commission sufficiently disclose that fact:

"The applicant is now serving as a public utility with light, heat, and power" 12 towns in Virginia, 6 in West Virginia; 25 coal-mining plants in Virginia, 76 in West Virginia; and the street railway systems of the Bluestone Traction Company and the Princeton Traction Company. "It furnishes 60 per cent. of the power used in coal mining in the Norfolk & Western and Pocahontas territory, and all the power used in mining in the Mullens district on the Virginian Railroad, and 90 per cent. of the power used in coal mining in the Clinchfield district."

Its charter requires it to serve the public along its lines at reasonable and uniform

rates, and subjects all phases of its business to the laws and regulations "of the governmental power having jurisdiction in the place or places in which such business or businesses are conducted." The scope of its activities in West Virginia shows the generality of the service performed here, and state officials having occasion to deal with it, including the Public Service Commission, have recognized and treated it as a public service corporation. Moreover, a like service furnished by electric power, heat, and light companies is of such a public nature as warrants the bestowal upon them of the power of eminent domain. *Pittsburg Hydro-Electric Co. v. Liston*, 70 W. Va. 83, 73 S. E. 86, 40 L. R. A. (N. S.) 602.

Furthermore, the power company involved here falls within the express language of the West Virginia Public Service Commission Act, chapter 150, Code. Section 3 (sec. 638) provides:

"The jurisdiction of the commission shall extend to and include: \* \* \* (c) Gas companies, electric lighting companies and municipalities furnishing gas or electricity for lighting, heating or power purposes; and (d) hydro-electric companies for the generation and transmission of light, heat or power. \* \* \* The words 'public service corporation' used in this act shall include all persons, \* \* \* firms, corporations, municipalities and agencies engaged or employed in any business herein enumerated, or in any other public service business whether above enumerated or not, whether incorporated or not."

There can be no doubt that the power company is a public service corporation within the scope of that act. *Wingrove v. Public Service Commission*, 74 W. Va. 190, 81 S. E. 734, L. R. A. 1918B, 210.

But protestants raise the further jurisdictional question that, granting certain phases of applicant's business to be public in nature, such as the service rendered to domestic consumers and traction companies, the furnishing of electric current to industrial concerns to be used by them for private profit is not of such a public character as to subject such service to regulation by the commission. They contend that such service is purely a matter of private concern, to be regulated by individual contract between the power company and the management of the industrial enterprise, and that, if the Legislature did include that phase of applicant's business within the scope of the Public Service Commission Act, it had no constitutional authority to exercise its regulatory power with respect thereto. This question is not argued at length by protestants, nor do they cite authority on the point. But the particular facts of the case do not necessitate an extensive consideration of the constitutional question involved, for here the company by its charter has dedicated all of its activities to the service of the public and to regula-

tion by it. When, through the years of its existence, it has subjected and still is subjecting itself voluntarily in all phases of its business "to the laws and regulations of the governmental power having jurisdiction in the place or places in which such business or businesses are conducted," does it lie with this court or with those who have dealt with the company subsequent to its organization to say that the extent of its public service is more limited than the company through its recorded charter admits it to be? It has never questioned the authority of the Public Service Commission to regulate all phases of its business, and when it thus dedicates itself unreservedly to the service of the public, it is hardly fitting that this court or any minority of the public which it serves should say that the company has overstepped its powers in subjecting itself to public regulation. It is generally the privilege of the dedicator of property or service to public use or regulation to determine, subject to the sanction of the unit of government under which it acts, the extent of that dedication. When such dedication has been made and has received official sanction, it is conclusive against an attack of this nature. The converse of this situation is presented in the decision rendered to-day in *Clarksburg Light & Heat Co. v. Public Service Commission*, 100 S. E. 551, in which the question was squarely presented whether the service of natural gas, the supply of which is limited by nature, to industrial concerns to be used by them for private profit is or is not of such a public character as to subject such service to regulation by the commission.

[3] With respect to the second point raised by protestants, we concur in their conclusion that the business of the power company is interstate commerce, but cannot agree that the Public Service Commission, therefore, has no jurisdiction in the premises. No longer can there be any doubt that the transportation or transmission of electric current from state to state through appropriate instrumentalities is commerce between the states. *West v. Kansas Natural Gas Co.*, 221 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716, 35 L. R. A. (N. S.) 1193; *The Pipe Line Cases*, 234 U. S. 548, 34 Sup. Ct. 956, 58 L. Ed. 1459; *Western Union Tel. Co. v. Foster*, 247 U. S. 105, 38 Sup. Ct. 438, 62 L. Ed. 1006, 1 A. L. R. 1278; *In re Pennsylvania Gas Co.*, 225 N. Y. 397, 122 N. E. 260. But the more difficult question arises when it becomes necessary to determine at what point the shipment loses its interstate character and becomes merged with the general property of the state and fully subject to exclusive regulation by that state. In the present case the power used by West Virginia consumers is generated in Virginia, transmitted across the state line by high-tension wires to substations in this state, where the voltage is reduced to commercial form, and thence dis-

tributed to the various consumers using such power. There is no break in the essential unity of the transaction—the interposition of no intermediary which would change the essential character thereof. There is no cessation or break in the force of the current; merely a change in its form, that it may be available for use according to the needs of the consumers.

[4] It is settled beyond all doubt by repeated decisions of the Supreme Court of the United States that it is the essential character of the commerce which determines whether it is interstate or intrastate. *Western Oil Ref'g Co. v. Lipscomb*, 244 U. S. 346, 37 Sup. Ct. 623, 61 L. Ed. 1181. There an Indiana corporation, for the purpose of filling orders taken by its salesmen in Tennessee, shipped into that state a tank car of oil billed to the shipper to a point in Tennessee where part of the orders were filled, and thence rebilled to the shipper to another point in that state where the remaining orders were filled. It was held that the movement of the goods to the first point and its continuance thence to the second, the second shipment being between points within the state, were connected parts of a continuing interstate commerce movement, when considered in its entirety. The place of the rebilling was termed a “temporary stop en route.”

So it has been held that a telegram forwarded by the Stock Exchange in New York City to a telegraph company in Boston, with the intention that the latter should transmit it to selected brokers in that city, approved in advance by the Exchange, does not lose its character as a subject of interstate commerce until it reaches the brokers' offices. *Western Union Tel. Co. v. Foster*, 247 U. S. 105, 38 Sup. Ct. 438, 62 L. Ed. 1006, 1 A. L. R. 1278. The continuity of the transaction was not broken by the translation of the code message into English, and its transmission, thus translated, to tickers in the offices of the approved brokers. As said by Justice Holmes in that case:

“If the normal, contemplated, and followed course is a transmission as continuous and rapid as science can make it from exchange to broker's office it does not matter what are the stages. \* \* \*”

[5-7] In this case the transmission from hydro-electric generators in Virginia to consumers in West Virginia was as expeditious and continuous as science could make it. So far as these appellant coal companies are concerned, this is not a case where the current transported into West Virginia is sold to independent distributing companies for resale to local consumers, as was the situation in *Public Utilities Commission v. Landon*, 249 U. S. 236, 39 Sup. Ct. 268, 63 L. Ed. 577, but a direct transmission from seller to buyer, with an incidental and temporary stop

en route for the purpose of transformation into a commercial voltage. As held in the case last cited, the interposition of such independent local distributing companies breaks the chain of interstate commerce. Nor is there present any evidence indicating a storage of the current in this state for later distribution to consumers, which might, though we do not decide the question, require us to hold that the interstate commerce feature of the transmission terminated at the place of storage.

We are not unmindful that the Court of Appeals of Maryland in a recent decision (*West Virginia & Maryland Gas Co. v. Towers*, 106 Atl. 265), has held that where gas is transported from West Virginia to Maryland in high-pressure mains, and at various points in the latter state reduced to a lower pressure for local consumption, such reduction terminates the interstate commerce portion of the transportation. At the time that opinion was written the Supreme Court of the United States had not yet decided the case of *Public Utilities Commission v. Landon*, supra. We are therefore not disposed to adopt the conclusion reached in the *Towers* Case, but rather to follow what we understand to be the rule laid down in *Public Utilities Commission v. Landon*, supra, and *In re Pennsylvania Gas Co.*, 225 N. Y. 397, 122 N. E. 260, affirming 184 App. Div. 556, 171 N. Y. Supp. 1028, namely, that the transportation or transmission of such commodities as gas or electricity across state lines, direct from seller to consumer, for immediate or practically immediate use, remains interstate commerce until the commodity has reached its goal, unless theretofore sold to independent distributing companies for resale to local consumers, or, possibly, unless stored in the state of distribution for a period of such length that it can fairly be said to have lost its original character and to have become merged with the general property of the state.

[12] But, though interstate commerce is involved, the state is not necessarily deprived of the right to regulate and supervise under its police power. That which is attempted here is the regulation of the rates at which electric power produced in Virginia shall be sold in West Virginia. It is settled law that the police power of the state embraces regulations designed to promote the public convenience or the general welfare or prosperity, as well as those in the interest of the public health, morals, and safety. *Lake Shore & Mich. Southern Ry. v. Ohio*, 173 U. S. 285, 292, 19 Sup. Ct. 465, 43 L. Ed. 702; *C., B. & Q. Ry. v. Drainage Commissioners*, 200 U. S. 561, 592, 26 Sup. Ct. 841, 50 L. Ed. 596, 4 Ann. Cas. 1175; *Bacon v. Walker*, 204 U. S. 311, 317, 27 Sup. Ct. 289, 51 L. Ed. 499; *Chicago & Alton R. R. v. Tranbarger*,

238 U. S. 67, 77, 35 Sup. Ct. 678, 59 L. Ed. 1204. And it is clear that the regulation of the rates of public utilities is for the public convenience and general welfare, and hence a proper exercise of the police power of the state. *City of Benwood v. Public Service Commission*, 75 W. Va. 127, 83 S. E. 295, L. R. A. 1915C, 261; *Virginia-Western Power Co. v. Commonwealth (Va.)* 99 S. E. 723. See, also, *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189.

[13] But not every exercise of the police power affecting interstate commerce is valid. No direct or undue burden may be imposed. Since the clarifying opinion of the United States Supreme Court in the *Minnesota Rate Cases*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18, much of the vagueness and ambiguity as to the respective powers of state and federal governments over interstate commerce have been removed. At page 399 of the opinion in 230 U. S. (33 Sup. Ct. 140, 57 L. Ed. 1511, 48 L. R. A. [N. S.] 1151, Ann. Cas. 1916A, 18) the court says:

"It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation."

Again at page 402 of 230 U. S., at page 741 of 33 Sup. Ct. (57 L. Ed. 1511, 48 L. R. A. [N. S.] 1151, Ann. Cas. 1916A, 18), it is said:

"But within these limitations there necessarily remains to the states, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending federal intervention. \* \* \* Further, it is competent for a state to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals, and welfare of its people, although interstate commerce may incidentally or indirectly be involved. \* \* \* Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the federal power."

Congress has never asserted its paramount power over interstate transmission of elec-

tric power; hence it only remains to consider whether the regulation of rates at which electric current shall be sold is essentially local, or of such national importance as to require a general system or uniformity of regulation. The vital distinction should be noted between regulation of rates of transportation and of the rates at which a commodity shall be sold. Transportation across state lines, involving as it frequently does many or all states, is generally a matter of national importance requiring uniformity of regulation respecting the rates thereof, and hence is usually beyond the regulatory power of the state. Because of the very nature of the subject-matter conflicting state regulations respecting rates ordinarily would result in discord and chaos. There are instances, however, where even in such cases the regulatory power of the state has been sustained. *Port Richmond Ferry Co. v. Board of Chosen Freeholders*, 234 U. S. 317, 34 Sup. Ct. 821, 58 L. Ed. 1330. See, also, *Shrader v. Steubenville, etc., Traction Co.*, 99 S. E. 207.

[8] In fixing the rates of sale, however, as distinguished from rates of transportation, the duty regulated is of an entirely different nature. The duty of the power company to sell at reasonable rates was one owed both to citizens of Virginia and to the public in this state. But the two duties do not overlap, as they do where rates of transportation are concerned. The price at which a commodity is sold is essentially local, affecting chiefly those in the community where it is made, and only incidentally, if at all, touching those outside of the community. So long as the rate fixed is not discriminatory or confiscatory, but yields a fair return upon the valuation of the property, it throws no burden upon citizens of other communities or states. As said in *Re Pennsylvania Gas Co.*, 225 N. Y. 397, 122 N. E. 260, respecting the regulation of the sale of gas imported from another state:

"It is idle to speak of the need of uniformity of action by states of equal competence when there is only one state whose action is involved. But even within the state diversity rather than uniformity is exacted by the conditions of the business. Rates adequate in one city are inadequate in another. The local needs are best known to local agencies of government. No central authority, acting for the nation as a whole, will readily discern them."

A similar conclusion was reached in *Manufacturers' Light & Heat Co. v. Ott* (D. C.) 215 Fed. 940. The local regulation stands until Congress occupies the field.

[9, 10] But protestants further claim that their rates are fixed by contracts entered into prior to the passage of the Public Service Commission Act, and any interference with such contracts would impair the obligations thereof and deprive petitioners of their

property without due process of law. Even as to this point we are unable to concur in their contention. Pursuant to its police power the state, through its Legislature, bestowed upon the Public Service Commission in section 5, c. 150, Code (sec. 640), power to—

“change any intrastate rate, charge or toll which is unjust or unreasonable and may prescribe such rate, charge or toll as would be just and reasonable, and change or prohibit any practice, device or method of service in order to prevent undue discrimination or favoritism as between persons, localities or classes of freight.”

In addition, section 22 (Code Supp. 1918, § 656a) empowers the commission to—

“enforce, originate, establish, modify, change, adjust and promulgate tariffs, rates, joint rates, tolls and schedules for all public service corporations; \* \* \* and whenever the commission shall, after hearing, find any existing rates, tolls, \* \* \* unjust, unreasonable, *insufficient* or unjustly discriminatory or otherwise in violation of any of the provisions of this act, the commission shall by an order fix reasonable rates \* \* \* to be followed in the future in lieu of those found to be unjust, unreasonable, *insufficient*. \* \* \*” (Italics ours.)

Clearly these sections bestow upon the commission authority to change rates that are unjust, unreasonable, or insufficient, as it has found these rates to be, unless bound by the contracts previously entered into between applicant and protestants.

If the point were not so seriously pressed, it would be thought unnecessary to enter into any extended discussion of the question. In *Manigault v. Springs*, 199 U. S. 473, 480, 26 Sup. Ct. 127, 130 (50 L. Ed. 274), the court said:

“It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals.”

In *Chicago & Alton R. R. v. Tranbarger*, 238 U. S. 67, 76-77, 35 Sup. Ct. 678, 682 (59 L. Ed. 1204), it is said:

“It is established by repeated decisions of this court that neither of these provisions [the contract and due process clauses] of the federal Constitution has the effect of overriding the power of the state to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and prop-

erty rights are held subject to its fair exercise. \* \* \* And it is also settled that the police power embraces regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of the public health, morals, or safety.”

We have held in the case of *City of Benwood v. Public Service Commission*, 75 W. Va. 127, 83 S. E. 295, L. R. A. 1915C, 261, that the rate-making power is an incident of the police power of the state, and may be exercised without impairing the obligation of contracts or depriving of property without due process of law within the meaning of the federal and state Constitutions. Is it not proper that it be so? Surely it is in the interest of public convenience and of the general welfare that rates of public utilities be subject to regulation, both as a protection against extortionate charges and at the same time for the purpose of safeguarding to a utility so restricted a reasonable return upon its investment. It must of course be recognized that a peculiar sanctity inheres in contracts entered into between parties competent to contract, and that the obligations thereby imposed will not lightly be disturbed. But the same policy that forbids to a utility total freedom of action likewise limits the extent to which contracts with a utility will be recognized when the public need necessitates a partial or total annulment. The duty of the utility to subordinate its right of control over rates in the interest of the public welfare is balanced by a corresponding duty on the part of individuals contracting with such utility to subordinate their rights of contract to the same public welfare. The police power of the state is impartial between utility and contractors, requiring both to surrender rights for the general weal. The public need to preserve the utility in strong financial condition in order that it may better serve is frequently as important as the need to guard the public against extortion. The right of the utility to protection must not be permitted to grow dim in the presence of that other and more popular right of exercising a control over its functions. Both subserve the same public purpose. From the findings of the commission showing the unfavorable financial condition of the power company it is apparent that the public interest will be better served by permitting a fair return on the property valuation over and above ordinary expenses, than by requiring the company to serve without return, to the possible ruin of those who have invested therein, and to the discouragement of others from embarking upon similar enterprises.

A case quite analogous to this was recently decided in *Union Dry Goods Co. v. Georgia Public Service Corporation*, 248 U. S. 372, 39 Sup. Ct. 117, 63 L. Ed. 309, affirming 145

Ga. 658, 89 S. E. 779. There the state of Georgia, through its Railroad Commission, fixed reasonable rates to be charged by a utility for supplying electricity to the inhabitants of a city, which superseded lower rates agreed upon in an existing time contract made previously between the company and a consumer. That result, however, was held to be a legitimate effect of a valid exercise of the police power, not impairing the obligation of contract or depriving the consumer of property without due process of law. See, also, *Portland Ry. Co. v. Railroad Commission*, 229 U. S. 397, 412, 33 Sup. Ct. 820, 57 L. Ed. 1248; *United Fuel Gas Co. v. Public Service Commission*, 73 W. Va. 571, 591, 80 S. E. 931; *B. & O. R. R. v. Public Service Commission*, 81 W. Va. 457, 94 S. E. 545, L. R. A. 1918D, 268; *Raymond Lumber Co. v. Raymond Light & Water Co.*, 92 Wash. 330, 159 Pac. 133, L. R. A. 1917C, 574; note to *Pinney & Boyle Co. v. Los Angeles Gas & Electric Corp.*, L. R. A. 1915C, 282.

But it is said the contracts in this case were entered into before the Public Service Commission Act was enacted, and, therefore, are on a different and higher plane than those of subsequent date. To adopt such a holding would be to permit private contracts to dispossess the state of a portion of its police power, where the statute enacted pursuant to that power was subsequent to such contracts. That would result in discrimination of the worst type, when the service rendered by a utility is required by law to be without discrimination. The commission might authorize a rate which, according to its estimate, would yield a reasonable return, but those who were so fortunate as to possess contracts with the utility would be entirely without the scope of such order, and would pay for the service at a rate lower than is paid by those subject to the commission's order. The resulting difference between the estimated and actual yield would necessarily be made up by a still higher rate to be paid by those not holding such contracts. In other words, the effect would be to recognize the contract action of individuals as of superior dignity to the police power of the state, a result tantamount to a denial of sovereignty in the state in the exercise of one of its most sacred and sovereign powers. Such an argument is unten-

able. *City of Benwood v. Public Service Commission*, supra, where the franchise agreement involved was entered in prior to the enactment of the Public Service Commission Act; *Shrader v. Steubenville, etc., Traction Co.*, 99 S. E. 207; *Yeatman v. Public Service Commission*, 126 Md. 513, 95 Atl. 158.

There is presented here no question involving the capacity of the state to contract away its right to the proper exercise of its police power, such as was presented in *Interurban Ry. & Terminal Co. v. Public Utilities Commission*, 98 Ohio St. 287, 120 N. E. 831, and *Virginia-Western Power Co. v. Commonwealth (Va.)* 99 S. E. 723. Nor is any such question raised as was before the Supreme Court of the United States in *Columbus Ry. Power & Light Co. v. City of Columbus*, 249 U. S. 399, 39 Sup. Ct. 349, 63 L. Ed. 669, recently decided.

[11] The last ground upon which protestants attack the order of the commission is that the rates allowed are unreasonable. The commission found as a fact that the fair value of the power company's investment as a rate base, upon which it was entitled to earn a reasonable return, as of September 30, 1918, was approximately \$9,860,000. It further found that the company had not earned during any year of its history a return sufficient to pay its fixed charges and to enable it to set aside a fund to cover accrued depreciation, and that the operations of the company since it commenced business had resulted, as of September 30, 1918, in a deficit something in excess of \$1,000,000. Under the rates allowed by the commission it is estimated that the company will be enabled "to pay its operating expenses and in addition thereto earn a net return of approximately 8 per cent. upon the value of its investment." There being evidence to support this finding, it will not be reviewed by this court. *Norfolk & Western Ry. Co. v. Public Service Commission*, 82 W. Va. 408, 90 S. E. 62. The general subject of the conclusiveness of orders of the Public Service Commission in this court is more fully discussed in *United Fuel Gas Co. v. Public Service Commission*, 73 W. Va. 571, 582-583, 80 S. E. 931.

For the reasons stated, we affirm the order of the commission.

(22 W. Va. 158)

WILLIAMS v. McCARTY et al.

(Supreme Court of Appeals of West Virginia.  
March 26, 1918.)Concurring opinion. For majority opinion,  
see 95 S. E. 638.

WILLIAMS, J. I concur in affirming the decree dismissing plaintiff's bill, but not for the reason given in the opinion. I do not think the bill presents a case for equity jurisdiction. It shows that the right to the fund in bank depends on the title to the timber from which it was derived and that the title was claimed adversely by J. H. McCarty and by Williams, trustee. Both were bona fide claimants, and McCarty sold the timber in good faith. How, then, can he be a trustee in invitum or ex maleficio? It is not unconscientious for him to retain the proceeds; in fact, he has a right to do so, unless the other claimant establishes a superior title. The mala fides is the governing principle in all such cases, says Story in his work on Equity Jurisprudence, § 1255. There is a wide and fundamental difference between this case and those cited in the opinion to support the decision, which the opinion fails to notice, and that is McCarty's conscientious or bona fide claim of title. The cases cited from other jurisdictions are all cases where the defendant wrongfully misapplied property or funds which he recognized as the property of another, and to which, at the time of misappropriation, he made no claim of title. There was no necessity in any of those cases, as there is here, for the court to determine a disputed question of title before deciding whether defendant was a trustee ex maleficio. In other words, the chancellor is called upon here to settle a disputed title, which should be decided by a court of law, in order to determine whether equity has jurisdiction to impress the fund with a trust.

The title to the timber was purely legal, the ownership depending on the proper construction of the trust deed from S. E. McCarty to Bruffey, trustee, and of his deed to A. D. Williams, a question which a court of law was as competent to determine as a court of equity. Poage v. Bell, 3 Rand. (Va.) 586. No equities are involved. The insolvency of neither J. H. McCarty nor the Spice Run Lumber Company is alleged, and by an action at law against either or both of them plaintiff had a full, complete, and adequate remedy. Hence there is no ground for equity jurisdiction. 1 Pomeroy's Eq. Jur. § 130. No privity of contract existed between plaintiff and any of defendants, and no relation of trust, express or constructive. The bill does not disclose whether plaintiff was a party to the arrangement with the bank or not. Presumably it was made between J. H. McCarty

and the Spice Run Lumber Company only for the latter's protection. But, even if plaintiff had been a party to it, that would not change the situation, so as to give equity jurisdiction of a suit by plaintiff to determine the title to the timber or the fund derived from it, even though equity might have entertained a bill of interpleader by the bank. The timber was severed and converted into personalty before the suit was brought, and full compensation therefor was obtainable by means of a judgment at law. Plaintiff claims the fund on the sole ground that legally he was the owner of the timber, and McCarty, who sold it, was not, thus presenting a state of facts which furnishes a basis for one of the most familiar actions cognizable in a court of law. He cannot, by electing to treat the sale as having been made for his benefit, confer jurisdiction on a court of equity. The property from which the fund was derived must necessarily have been impressed with some equity to entitle him to equitable relief.

"Where personal property is conveyed by deed of trust, and a claim is set up by a third person, a court of equity ought not to enjoin a sale under the deed, but should leave the party to his legal remedy." 3 Rand. 586.

In Sheppard v. Turpin, 3 Grat. (Va.) 373, property held under a deed of trust was sold under execution at the instance of a party not claiming under the trust deed, and the court held that equity would not entertain a suit by either the trustee or cestui que trust against the purchaser for the recovery of the property, on the ground that there was no obstacle to their proceeding at law. If he could not pursue the property itself in equity, I do not see how he could have any better right to follow the fund. See, also, Kuhn, Netter & Co. v. Mack & Bros., 4 W. Va. 186, and Bowyer v. Creigh, 3 Rand. (Va.) 25, both cases in point.

In Franks v. Cravens et al., 6 W. Va. 185, a deed of trust to secure a debt had been given upon a tract of land on which was located a boiler, engine and other machinery, used in connection with a sawmill. These articles were removed to another tract of land, another deed of trust given on them to secure a debt of another party, and they were subsequently sold under the second trust deed, whereupon the cestui que trust under the first deed of trust filed his bill in equity against the purchaser to compel restoration of the property to himself or his trustee, on the ground that it was trust property and was bought with notice of the facts. The court held that, although the property may have been real estate at the time the first trust deed was given, it was converted into personalty, as between the creditor and third parties by its removal, and, because plaintiff had a complete remedy at law for its recovery, equity could give no relief.



Other authorities supporting the proposition that equity is without jurisdiction in the present case are the following: 1 Pom. Eq. Jur. § 176; 2 Pom. Eq. Jur. § 424; Fussell v. Gregg, 113 U. S. 550, 5 Sup. Ct. 631, 28 L. Ed. 993; Young v. Porter, 3 Woods, 342, Fed. Cas. No. 18171; Cole v. Mette, 65 Ark. 503, 47 S. W. 407, 67 Am. St. Rep. 945; Galt v. Galloway, 4 Pet. 332, 7 L. Ed. 876; Bassett v. Brown, 100 Mass. 355; Claussen v. Lafrenz, 4 G. Greene (Iowa) 224; Morgan v. Palmer, 48 N. H. 336; Kimball v. Grafton Bank, 20 N. H. 347; Curtis et al. v. Blair, 26 Miss. 309, 59 Am. Dec. 257; Vick v. Percy, 15 Miss. (7 Smedes & M.) 256, 45 Am. Dec. 303; Hipp v. Babin, 19 How. 271, 15 L. Ed. 633.

Ballard v. Ballard, 25 W. Va. 470, Barrett v. McAllister, 33 W. Va. 738, 11 S. E. 220, and Hogg v. McGuffin, 67 W. Va. 456, 68 S. E. 41, 31 L. R. A. (N. S.) 491, are cited to support equity jurisdiction in the present case. But each of them was a suit to compel specific performance, a remedy peculiarly equitable. Two of them involved contracts for the sale of land, and the third, and last named, an option to purchase stock in a corporation, of peculiar value to plaintiff. Plaintiff had complied with the conditions, but defendant had sold the stock to an innocent purchaser for value, thereby putting it out of his power to comply with his contract. Compliance being impossible, the court there properly gave plaintiff a decree for the proceeds of the sale of the stock as an alternative, on his prayer for general relief, on the ground that Hogg's option to acquire the stock imposed on McGuffin the duty to retain it, so as to be able to comply with his contract in case Hogg should elect to take it within the life of his option. It was impressed with a trust by virtue of the contract. Moreover, McGuffin's insolvency was alleged and proven; therefore his legal remedy was not adequate. In all three of those cases the subject-matter of suit was an equitable claim or title, pure and simple, and the relief sought could be obtained only in a court of equity.

Wolf v. McGugin, 37 W. Va. 552, 16 S. E. 797, was a suit to avoid a preference which an insolvent debtor sought, by a sale of his property, to give to one of his creditors, who, together with another, had become the purchaser thereof, in violation of section 2, c. 74 (sec. 3830), Code. Jurisdiction in equity was sustained in Raleigh County Court v. Cottle, 81 W. Va. 469, 94 S. E. 948, on the ground of discovery, and accounting for public funds, involving settlements between Cottle and said court, in which different sets of sureties on his official bonds were liable for funds coming into his hands at different periods of time during his administration as sheriff.

I find no authority in the books anywhere,

in those jurisdictions where the distinction has been preserved between courts of law and courts of chancery, as it was originally established by a long course of practice in England, for the proposition that, where one of two adverse claimants of the legal title to property, whether it be real or personal, sells it, the other claimant can invoke the aid of a court of equity to recover the proceeds. It is a principle too firmly established to require any citation of authorities that jurisdiction of a cause cannot be conferred by consent.

There is no better argument to show the lack of equity jurisdiction than the conclusion reached by the opinion itself. After holding that equity has jurisdiction, at the suit of the owner of property, to pursue the fund derived from a sale thereof, wrongfully made, it reaches the conclusion that plaintiff had no title to the property when it was sold. I do not deny the correctness of the conclusion as a legal proposition, but I do deny our jurisdiction to decide it in this case, and would simply affirm the decree, for the same reason the lower court sustained the demurrer to plaintiff's bill and dismissed his suit; that is, for want of jurisdiction in equity.

**Affirmed.**

(149 Ga. 471)

**SAUSSY v. POWERS et al.** (No. 1304.)

(Supreme Court of Georgia. Oct. 14, 1919.)

*(Syllabus by the Court.)*

**1. BANKRUPTCY §302(1)—PETITION BY TRUSTEE TO SUBJECT CONTINGENT INTEREST IN LAND.**

Mary A. Ronan devised all her realty to the executor nominated in her will, to be held upon the following terms: "To hold all my real estate intact for ten years, during which time the net income therefrom shall first be applied to the discharge of the mortgage thereon. After the said mortgage is discharged the income shall be equally divided between my three brothers, T. G. Ronan, W. P. Ronan, and J. T. Ronan. At the end of ten years, if the incumbrances on my property have been paid off, my said executor shall distribute the said real estate between my three brothers, share and share alike; the child of a deceased brother to stand in the place of its parents." Before the expiration of ten years the executor paid off the incumbrance, and thenceforward distributed the income among the brothers of the testatrix. During the period of such distribution the brothers pledged the income and all interest they had in the land for a loan made to them jointly. While circumstances were as indicated, a trustee in bankruptcy for W. P. Ronan brought an equitable petition against the executor, Ronan, and others, and alleged all that is stated above, and prayed that title to an undivided one-third in-

terest in the land be decreed to be in him as trustee for the estate of W. P. Ronan, the bankrupt. To this petition the executor interposed a general demurrer, which was sustained, and the plaintiff excepted. *Held*:

The petition seeks to recover an undivided one-third interest in the land, on the ground that under the terms of the will such interest had vested in W. P. Ronan, and, subject to certain incumbrances placed thereon by him, was so vested at the time Ronan was adjudicated a bankrupt, and by operation of law the title so held by Ronan devolved upon plaintiff. It does not seek to recover the income that the executor might be required to pay W. P. Ronan under the provisions of the will.

**2. WILLS §630(2)—CONTINGENT INTEREST IN LAND FAILS WHERE CONTINGENCY NEVER HAPPENS.**

Under a proper construction of the will, his right to the land was contingent upon the incumbrances being removed and W. P. Ronan being in life at the expiration of ten years from the death of the testatrix. As the latter contingency had not happened, the estate was not vested in W. P. Ronan; and the judge did not err in sustaining the demurrer. See Civil Code, § 4117.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Suit by F. T. Saussey, trustee in bankruptcy of W. P. Ronan, against J. J. Powers, executor of Mary A. Ronan, deceased, and others. General demurrer to petition sustained, and plaintiff brings error. Affirmed.

W. K. Miller, of Augusta, and F. T. Saussey, of Savannah, for plaintiff in error.

Osborne, Lawrence & Abrahams, of Savannah, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(149 Ga. 432)

**BRANCH et al. v. SCHLITTLER.** (No. 1470.)  
(Supreme Court of Georgia. Oct. 15, 1919.)

*(Syllabus by the Court.)*

**APPEAL AND ERROR §628(2)—WRIT OF ERROR DISMISSED FOR FAILURE TO FILE BILL OF EXCEPTIONS IN DUE TIME.**

A bill of exceptions assigning error upon a final judgment was filed in the office of the clerk of the superior court by delivering it to a deputy clerk, who made thereon an entry of filing on February 22, 1918. It was not filed in the office of the clerk of the Supreme Court until June 4, 1919. It was then docketed with the cases of the March term, 1919. The clerk of the superior court, in transmitting the record, certified that it had not been sent up in time, because the bill of exceptions, when filed in his office by his deputy, was mislaid by the latter, the clerk himself at the time being en-

gaged "with the local exemption board." The writ of error was certified by the presiding judge on February 8, 1918, and was made returnable "to the next term of the Supreme Court." If the writ had been transmitted within the time prescribed by law it would have been returned to the March term, 1918, of the Supreme Court. It was not filed in the Supreme Court in time for the March term, 1918, or the succeeding October term, 1918. *Held*, that the motion to dismiss the writ of error must be sustained. Civil Code 1910, §§ 6167, 6185; *Earnhart v. Atlanta, etc., R. Co.*, 133 Ga. 59, 65 S. E. 138.

Error from Superior Court, Appling County; J. P. Highsmith, Judge.

Action between W. J. Branch and others and Kizzie Schlittler, administratrix. Judgment for the latter, and the former bring error. Writ of error dismissed.

W. W. Bennett, of Baxley, for plaintiffs in error.

Padgett & Watson, of Baxley, for defendant in error.

GEORGE, J. Writ of error dismissed. All the Justices concur.

(149 Ga. 472)

**SHARPE v. STATE.** (No. 1320.)

(Supreme Court of Georgia. Oct. 14, 1919.)

*(Syllabus by the Court.)*

**1. CRIMINAL LAW §824(4)—FAILURE TO CHARGE ON ALIBI WITHOUT REQUEST ERROR.**

There was evidence submitted by the accused on the trial, which, if credible, was sufficient to sustain his defense of alibi, and the court erred in failing, without request, to instruct the jury on the law of that subject.

**2. MOTION FOR NEW TRIAL.**

The other grounds of the motion for a new trial do not require a reversal.

Beck, P. J., and George, J., dissenting.

Error from Superior Court, Thomas County; W. E. Thomas, Judge.

Proceeding by the State against Jack Sharpe. From the judgment, and the denial of his motion for a new trial Sharpe brings error. Reversed.

B. B. Earle and Leb Dekle, both of Thomasville, for plaintiff in error.

C. E. Hay, Sol. Gen., of Thomasville, Clifford Walker, Atty. Gen., and M. C. Bennet, of Atlanta, for the State.

HILL, J. Judgment reversed. All the Justices concur, except

BECK, P. J., and GEORGE, J. (dissenting). Alibi as a defense involves the impossibility

of the defendant having been at the scene of the crime at the time of its commission, and the range of the evidence in this case is not such as to involve that defense, or to require a charge thereon.

(149 Ga. 480)

**ELMORE v. ELMORE.** (No. 1405.)

(Supreme Court of Georgia. Oct. 15, 1919.)

*(Syllabus by the Court.)*

**TEMPORARY ALIMONY AND COUNSEL FEES—DISCRETION OF COURT.**

Under the evidence in the record it does not appear that the court abused his discretion in awarding the temporary alimony and counsel fees allowed in the present case.

Error from Superior Court, Evans County; W. W. Sheppard, Judge.

Action between W. F. Elmore and Florence Elmore. From an award of temporary alimony and counsel fees, W. F. Elmore brings error. Affirmed.

Chas. G. Edwards, of Savannah, and P. M. Anderson and E. C. Elmore, both of Claxton, for plaintiff in error.

Geo. S. Cargill and Edwin A. Cohen, both of Savannah, for defendant in error.

GEORGE, J. Judgment affirmed. All the Justices concur.

(149 Ga. 473)

**WHEELER v. STATE.** (No. 1472.)

(Supreme Court of Georgia. Oct. 14, 1919.)

*(Syllabus by the Court.)*

**1. CRIMINAL LAW §942(2)—WITNESS' CONFESSION OF FALSE TESTIMONY GROUND FOR NEW TRIAL.**

"Evidence that one of the state's witnesses since the trial has made declarations, even though under oath, that his testimony given upon the trial was false, is not cause for a new trial." *Johnson v. State*, 149 Ga. 214, 99 S. E. 609, and authorities cited. More especially is this true where the motion for new trial is made on extraordinary grounds, as in the present case.

**2. CRIMINAL LAW §913(1)—EXTRAORDINARY MOTIONS FOR NEW TRIAL OR CASES.**

"The extraordinary motions or cases contemplated by the statute are such as do not ordinarily occur in the transaction of human affairs, as when a man has been convicted of murder, and it afterwards appears that the supposed deceased is still alive, or where one is convicted on the testimony of a witness who is subsequently found guilty of perjury in giving that testimony, or where there has been some providential cause, and cases of like

character." *Cox v. Hillier*, 65 Ga. 57; *Harris v. Roan*, 119 Ga. 379, 46 S. E. 433.

Error from Superior Court, Wilkes County; B. F. Walker, Judge.

Proceeding between the State and Watson Wheeler. From the judgment, and the denial of his motion for new trial, Wheeler brings error. Affirmed.

See, also, 148 Ga. 508, 97 S. E. 408.

Hugh E. Combs and Colley & Colley, all of Washington, Ga., for plaintiff in error.

R. C. Norman, Sol. Gen., of Washington, Ga., Clifford Walker, Atty. Gen., and M. C. Bennet, of Atlanta, for the State.

GILBERT, J. Judgment affirmed. All the Justices concur.

(149 Ga. 434)

**EPPS v. STATE.** (No. 1476.)

(Supreme Court of Georgia. Oct. 15, 1919.)

*(Syllabus by the Court.)*

**1. HOMICIDE §228(5) — EVIDENCE INSUFFICIENT TO ESTABLISH CORPUS DELICTI.**

The accused was tried on an indictment charging her with the murder of her four year old child. The evidence showed that the accused was unmarried and was the mother of the child; that the child was, with the consent of the accused, kept and cared for from its birth by another woman, who returned the child to the mother with the explanation that on account of failing health she was unable to care for and rear the child; that the accused did not want to receive the child, and complained that it was sick. It was deformed and helpless. It further appeared that the accused was expecting to be married. The child disappeared. Some time thereafter bones, apparently those of a child, were discovered 50 or 75 yards from the home of accused, by a neighbor, who reported the fact and who together with others proceeded upon an investigation. Upon inquiry the accused made contradictory statements. She first stated that her father had taken the child away on the same day that it was returned to her. Several witnesses swore that she finally admitted the bones which had been discovered were those of her child, and explained that she had left it for a few moments to go into another part of her house, and on returning found it dead; that she was frightened and had no money or friends; that it was at night, and she buried the child with her own hands in a branch near by. It appeared that the body had been exhumed by dogs or vultures. The accused made a statement to the jury, in which she admitted substantially all of the above-stated facts. Neither to the witnesses nor in her statement did the defendant admit killing the child. Upon the contrary, she explained that the child had died while she was in another room in the house. Upon being found guilty, with recommendation for a sentence of life imprisonment.

ment, she made a motion for a new trial based upon the general grounds and certain amended grounds, including newly discovered evidence. *Held*:

The evidence was insufficient to authorize the verdict. It failed to establish the corpus delicti by that degree of proof required. *Lee v. State*, 76 Ga. 498.

## 2. ASSIGNMENTS OF ERROR.

The other assignments of error are not of such character as require a ruling, where the judgment refusing a new trial is reversed on the ground that the evidence did not authorize the verdict, and when the issues will not likely arise on another trial.

Error from Superior Court, Decatur County; W. M. Harrell, Judge.

Eula Epps, alias Nun, alias Williams, was convicted of homicide. Her motion for new trial was denied, and she brings error. Reversed.

J. C. Hale, of Bainbridge, for plaintiff in error.

R. C. Bell, Sol. Gen., of Cairo, F. A. Hooper & Son, of Atlanta, Clifford Walker, Atty. Gen., and M. C. Bennet, of Atlanta, for the State.

GILBERT, J. Judgment reversed. All the Justices concur.

(149 Ga. 482)

## LANDERS v. STATE. (No. 1471.)

(Supreme Court of Georgia. Oct. 15, 1919.)

*(Syllabus by the Court.)*

## 1. CRIMINAL LAW §785(12) — INSTRUCTION ON IMPEACHMENT NOT ERRONEOUS.

The only error alleged to have been committed upon the trial is in the following instruction to the jury: "When a witness has been successfully impeached by any of the legal methods, that is, where his unworthiness of credit is absolutely established in the minds of the jury, he ought not to be believed, and it is the duty of the jury to disregard his entire testimony, unless it is corroborated, in which case you may believe the witness; it being, as a matter of course, always for the jury to determine whether a witness has been in fact so impeached." This instruction was not erroneous. *Powell v. State*, 101 Ga. 9, 29 S. E. 309 (5), 65 Am. St. Rep. 277; *Hamilton v. State*, 143 Ga. 265, 84 S. E. 583 (4).

## 2. SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to authorize the verdict, and there was no error in overruling the motion for new trial.

Error from Superior Court, Jackson County; A. J. Cobb, Judge.

Proceeding between the State and Hollis Landers. From the judgment, Landers brings error. Affirmed.

Wolver M. Smith and Thomas & Thomas, all of Athens, for plaintiff in error.

W. O. Dean, Sol. Gen., of Monroe, Clifford Walker, Atty. Gen., M. C. Bennet, of Atlanta, P. Cooley, of Jefferson, and R. L. J. Smith, of Commerce, for the State.

FISH, C. J. Judgment affirmed. All the Justices concur.

(149 Ga. 479)

## HASTEY v. ROBERTS. (No. 1396.)

(Supreme Court of Georgia. Oct. 15, 1919.)

*(Syllabus by the Court.)*

## 1. MORTGAGES §58 — INCOMPETENCY OF STOCKHOLDER OR OFFICER OF CORPORATION TO TAKE ACKNOWLEDGMENT.

A stockholder or officer, though incompetent to take an acknowledgment of a mortgage on realty as a notary, because he is a stockholder or officer of the mortgagee corporation, is not incompetent as a nonofficial witness to the signature of the mortgage. *Peagler v. Davis*, 143 Ga. 11, 84 S. E. 59, Ann. Cas. 1917A, 282.

## 2. BILLS AND NOTES §191—EVIDENCE §370(5)—PROOF OF AUTHORITY OF SECRETARY TO SIGN MORTGAGE PREREQUISITE TO ITS ADMISSION.

Where a mortgage on realty was signed: "Trustees North Ga. Col. School [Seal]. H. A. Burge, Cor. Sect. [Seal]"—it was erroneous to admit the same in evidence on the trial of a claim to the property, over timely objection that "there was no evidence shown where H. A. Burge had any authority to sign any mortgage;" the evidence failing to disclose any such authority. Civ. Code 1910, § 3570; *Glisson v. Weil*, 117 Ga. 842, 45 S. E. 221. It was not shown that "Trustees North Ga. Col. School" was incorporated, nor does its name imply such.

(a) Indorsed on the note and mortgage were several names, the last of which was, "H. A. Burge, with power of attorney." The power of attorney is not included in the record. At most this could only indicate an ordinary individual indorsement.

Error from Superior Court, Cherokee County; N. A. Morris, Judge.

Proceedings on levy of mortgage *fi. fa.* by A. P. Roberts, transferee after foreclosure with claim by J. H. Haste, executor of Mary E. Watkins, deceased. Judgment for the transferee, and the claimant brings error. Reversed.

E. W. Coleman, of Canton, for plaintiff in error.

John S. Wood, of Canton, and Geo. D. Anderson, of Marietta, for defendant in error.

GILBERT, J. A. P. Roberts, transferee, foreclosed a mortgage on realty. The mortgage *fi. fa.* was levied on land described in the mortgage, whereupon J. H. Hastey, executor of the estate of Mary E. Watkins, interposed a claim based on a sheriff's deed purporting to convey the land in dispute to Mary E. Watkins. The sheriff's sale was based on a common-law judgment obtained by Mary E. Watkins against certain named individuals. The claimant also introduced a deed from P. H. Lyons to "Board of North Georgia High School as follows" (naming the same persons against whom Mary E. Watkins had obtained judgment). At the sheriff's sale the administrator of Mrs. Watkins bought in the property. It was admitted that Roberts was present at this sale and publicly announced that he had a mortgage on the land. The common-law judgment was obtained subsequently to the date of the mortgage. On the trial of the case the judge, by agreement, passed upon the case without the intervention of a jury, and rendered a judgment finding the property subject to the mortgage *fi. fa.* The claimant made a motion for new trial, based on the ground that the verdict was against the evidence and contrary to law, and because the court erred in admitting the original note and mortgage in evidence. The only objection to the admission of same was on the ground that "there was no evidence shown where H. A. Burge had any authority to sign any mortgage."

Judgment reversed.

All the Justices concur.

(149 Ga. 496)

**WOMACK v. WOMACK. (No. 1460.)**

(Supreme Court of Georgia. Oct. 16, 1919.)

*(Syllabus by the Court.)*

APPEAL AND ERROR  $\S$ 714(6)—NEW TRIAL  $\S$ 154—DISMISSAL OF MOTION FOR FAILURE TO FILE BRIEF OF EVIDENCE ERROR.

Where a motion for new trial was duly filed on June 12, 1917, and at the time of filing the motion a brief of evidence was filed, under an order by the judge providing "that this brief of evidence be filed subject to approval on trial of motion for new trial," it was erroneous to dismiss the motion for new trial when the same came on to be heard on March 15, 1919, "for failure to furnish a brief of the evidence." Civil Code 1910,  $\S$  6089.

(a) The brief of evidence having been filed

as indicated above, the case does not fall within the principle of those cases where no brief was filed, but an order was taken to file a brief of evidence within a given time.

(b) The judgment rendered by the court was not affected by the following explanatory note of the judge, attached to the bill of exceptions: "What was presented as a brief of the evidence has never been approved by the court. Messrs. James & Bedgood did not try the case, and Mrs. Womack's attorney who did try it contended that the brief was in fact no proper presentation of what was the evidence. The matter was delayed and neglected by both sides; and while the order stated it was dismissed for failure to file a brief of the evidence, I really was worn out by the delay, and dismissed it for want of attention. The motion was filed June 12, 1917, and dismissed March 15, 1919."

Hill and Gilbert, JJ., dissenting.

Appeal from Superior Court, Fulton County; W. D. Ellis, Judge.

Action between F. H. Womack and Lula Womack. Judgment for the latter, motion for a new trial dismissed, and the former brings error. Reversed.

James & Bedgood, of Atlanta, for plaintiff in error.

Neufville & Neufville, of Atlanta, for defendant in error.

PER CURIAM. Judgment reversed. All the Justices concur, except

HILL and GILBERT, JJ. (dissenting). Where a motion for new trial and a purported brief of evidence was filed as stated in the foregoing headnote, and the motion was not heard at the date named for the hearing, but went over from term to term for nearly two years, and the brief of evidence was never approved by the judge, it not appearing that any effort was made by the movant to secure an approval, and the judge dismissed the motion for new trial "for failure to furnish a brief of the evidence," the judgment dismissing the motion should not be reversed. The judgment passed by the court was tantamount to a dismissal on the ground that the brief presented was not considered correct by the court, and that the delay rendered it impossible for the judge to supply the facts from his own memory. Filing alone of a brief of evidence is not sufficient; the approval of the court is indispensable. *Pease v. Pease*, 66 Ga. 277; *Usry v. Phillips*, 68 Ga. 815; *Milner v. Burrus*, 85 Ga. 642, 11 S. E. 1029.

$\S$ —For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(149 Ga. 483)

RUSHING et al. v. DE LOACH, Sheriff, et al.  
(No. 1473.)

(Supreme Court of Georgia. Oct. 15, 1919.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR §523(2)—AFFIDAVITS AT TRIAL MUST BE BROUGHT UP BY BILL OF EXCEPTIONS.**

Where exception is taken to a refusal to grant an interlocutory injunction, affidavits used on the hearing of the application, in order to be considered by this court, must be brought up in the bill of exceptions, or attached thereto as exhibits and duly identified by the presiding judge, or be included in a brief of evidence approved and made a part of the record. *Roberts v. Cairo*, 133 Ga. 642, 66 S. E. 938.

**2. APPEAL AND ERROR §644(2)—EVIDENCE IN BILL OF EXCEPTIONS, NOT APPROVED OF, NOT CONSIDERED.**

The act of 1911 (Acts 1911, p. 149) applies where a motion for new trial is heard in the court below and the respondent therein fails to object to the brief of evidence for want of approval and permits the hearing to proceed without such approval. The act does not apply to this case. *Springer v. Owen*, 145 Ga. 730, 89 S. E. 780 (2).

**3. APPEAL AND ERROR §613(1), 635(3)—EVIDENCE NOT REVIEWABLE WHERE ALL WAS NOT BEFORE COURT.**

A bill of exceptions stated that certain affidavits were introduced in evidence by the plaintiff and certain other affidavits were introduced in evidence by the defendant, naming the affiants, and that the affidavits were attached to the bill of exceptions as exhibits, marked with certain letters of the alphabet. After the certificate of the presiding judge appeared copies of the affidavits introduced by the plaintiff, duly identified by the signature of the judge, and also following his certificate appeared what purported to be copies of the affidavits introduced by the defendant; but they were not identified by the signature of the judge. A motion to dismiss the writ of error upon the ground indicated was filed by the defendant in error. *Held*, the bill of exceptions shows on its face that all the evidence material to a consideration of the errors complained of is not lawfully before this court, in such manner that it can be considered; and, there being no assignment of error which can be determined without it (treating the assignment of error in the bill of exceptions as sufficient in form), the judgment must be affirmed. *Roberts v. Cairo*, supra; *Jones v. Wadley*, 145 Ga. 569, 89 S. E. 681; *Springer v. Owen*, supra.

Error from Superior Court, Bulloch County; R. N. Hardeman, Judge.

Action between J. B. Rushing and others, and W. H. De Loach, Sheriff, and others. Judgment for the latter, and the former bring error. Affirmed.

Fred T. Lanier, of Statesboro, for plaintiffs in error.

Deal & Renfro, of Statesboro, for defendants in error.

GEORGE, J. Judgment affirmed. All the Justices concur.

(149 Ga. 467)

## SPOONER v. SPOONER. (No. 1382.)

(Supreme Court of Georgia. Oct. 15, 1919.)

*(Syllabus by the Court.)***1. DIVORCE §227(2)—ALLOWANCE OF COUNSEL FEES NOT EXCESSIVE.**

Under the evidence in the record, it does not appear that the court abused his discretion in awarding the counsel fees allowed in the present case.

*(Additional Syllabus by Editorial Staff.)***2. DIVORCE §211—TEMPORARY ALIMONY INCLUDING COUNSEL FEES IN DISCRETION OF COURT.**

An allowance, on wife's application, of temporary alimony, including counsel fees, pending a suit for permanent alimony, is not a matter of arbitrary right, in view of Civ. Code 1910, § 2976, but is to be determined by use of a sound discretion under the facts in the case, including cause of the separation and circumstances of parties.

**3. DIVORCE §217 — JUDGMENT ALLOWING ALIMONY AND COUNSEL FEES WITHIN CONTROL OF COURT.**

A judgment allowing temporary alimony, including expenses of litigation, is subject to the supervisory power of the trial court.

Error from Superior Court, Decatur County; W. M. Harrell, Judge.

Suit by Mrs. M. M. Spooner against B. S. Spooner, her husband, for permanent alimony. From the allowance of counsel fees, on a grant of temporary alimony, defendant brings error. Affirmed.

W. I. Geer, of Colquitt, and Hartsfield & Conger, of Bainbridge, for plaintiff in error.

M. E. O'Neal and J. R. Wilson, both of Bainbridge, for defendant in error.

GEORGE, J. Mrs. M. M. Spooner filed suit for permanent alimony against B. S. Spooner, her husband. Upon an application for the allowance of temporary alimony, including counsel fees, pending the suit for permanent alimony, the court awarded Mrs. Spooner a stated sum per month for temporary alimony, and the sum of \$3,500 for counsel fees. To this judgment the defendant excepted; and the Supreme Court, at the October term, 1918, affirmed the judgment allowing the

plaintiff temporary alimony, but on the question of attorney's fees ruled as follows:

"Under all the circumstances of the case the allowance of \$3,500 as attorneys' fees was an abuse of discretion." *Spooner v. Spooner*, 148 Ga. 612, 97 S. E. 670.

[1] Subsequently the plaintiff renewed her application for the allowance of counsel fees; and the court, after hearing evidence, awarded the sum of \$3,000 for counsel fees, "\$1,500 of said amount to be paid instantler, and the remainder to be paid at the termination of the litigation, and to be subject to modification should the exigencies of the case so demand." The defendant again excepted; and the sole question for decision is whether the court abused its discretion in allowing counsel fees in the sum of \$3,000.

It is necessary to review briefly the facts and issues involved. The plaintiff and the defendant intermarried in January, 1877. The plaintiff is more than 60 years old. They lived together as man and wife until December, 1917. At the time of the marriage the plaintiff owned 500 acres of land, and certain personal property. The defendant owned 200 acres of land, for which he owed a large part of the purchase money, and also some personal property. A considerable fortune was accumulated by the defendant. He admits his net worth to be more than \$50,000, while the undisputed evidence on behalf of the plaintiff is to the effect that he is worth at least \$100,000. The plaintiff alleged the value of his holdings to be not less than \$200,000. The plaintiff aided and assisted the defendant in the accumulation of this estate, which now stands in the name of the defendant; the plaintiff having no separate estate of her own. She not only attended to the household duties, but performed actual manual labor during the greater part of her married life. The defendant admits that the plaintiff, on the whole, has been a dutiful and affectionate wife. He attributes the separation and the filing of the suit for alimony to alleged mental infirmity of plaintiff. On the contrary, the plaintiff charges the defendant with extreme and repeated acts of cruelty. It appears that the plaintiff, on account of her advanced age and physical infirmities, was unable to visit the office of counsel, and that counsel had to go in person to the present home of the plaintiff (in a neighboring town) to prepare the suit for trial. During the greater portion of a week counsel for the plaintiff were engaged in the preparation of the case for trial. The first hearing consumed more than three days. The greater portion of a week was also consumed by counsel in the prosecution of the case in the Supreme Court. The case has been contested at every stage; and the defendant is a man of wealth, and of commercial and social influence. On the present hearing, counsel for the plaintiff testified in detail to the services already ren-

dered by them, and outlined the services which it would become necessary for them to perform in the further prosecution of the case. A considerable item of cost had already been incurred by counsel, for which they have not been reimbursed. The cost of attending the session of the Supreme Court alone amounted to approximately \$200. In the opinion of both the attorneys of record for the plaintiff in error their services were reasonably worth \$7,500. In addition, the testimony of six disinterested attorneys at law, acquainted with the parties to the litigation and the issues involved, was taken. Among the attorneys testifying was a former judge of the superior courts of this state. In the opinion of some of these witnesses the fair and reasonable value of the legal services rendered and to be rendered by counsel for the plaintiff is \$5,000. One of the witnesses testified that \$4,500 would be a reasonable fee, all the facts and circumstances of the case considered, but the majority of them testified that a fee of \$7,500 would be reasonable and just. There is in the record no direct evidence to the contrary.

Section 2976 of the Civil Code authorizes the wife, pending a suit for permanent alimony, to "apply to the presiding judge, by petition, for an order granting to her temporary alimony pending the cause; and after hearing both parties, and evidence as to all the circumstances of the parties and as to the fact of marriage, the court shall grant an order allowing such temporary alimony, including expenses of litigation, as the condition of the husband and the facts of the case may justify."

[2] An allowance on the application of the wife of temporary alimony, including counsel fees, pending a suit for permanent alimony, is not a matter of arbitrary right, under the law of this state. Whether an allowance shall be made for temporary alimony, or counsel fees, is to be determined by the use of a sound discretion under the facts of the case, taking into consideration the cause or causes of the separation, and the circumstances of the parties. *Parks v. Parks*, 126 Ga. 437, 55 S. E. 176; *Keefer v. Keefer*, 140 Ga. 18, 22, 78 S. E. 462, 46 L. R. A. (N. S.) 527. On the hearing for temporary alimony and counsel fees the judge, upon an examination into the cause of the separation and the circumstances of the parties, may in his sound discretion allow or deny both alimony and counsel fees, or may allow one and disallow the other. The allowance of temporary alimony has been made in this case, and the judgment allowing the same is not involved in the present appeal. Counsel fees have also been allowed; and the power of the court, under the facts in the record, to allow a reasonable sum for counsel fees, is not seriously questioned. The amount actually fixed by the court is said to be excessive, and to show an abuse of discretion. Former cases re-

viewed by this court, on the question of the amount of counsel fees allowed, can be of little value in determining the question now presented. It cannot be said that the judge did not fully consider the cause of the separation and the circumstances of the parties. In view of the grave issues involved, the character of the suit, the character and standing of the litigants, it cannot be said as a matter of law that the allowance of \$3,000 as attorney's fees was such a flagrant abuse of discretion as to justify this court in again interfering with the judgment.

[3] It is to be noted that only \$1,500 of the amount awarded as attorney's fees was to be paid instant and in all events. The remaining \$1,500 was to be paid, under the order of the court, "at the termination of the litigation," the court reserving the power to modify the order fixing the fee "should the exigencies of the case so demand." Under our decisions, the power of the court over the judgment allowing temporary alimony, including expenses of litigation, was perhaps needlessly reserved. Such a judgment is subject to the supervisory power of the court. *Osborne v. Osborne*, 146 Ga. 344, 91 S. E. 61.

Judgment affirmed.

All the Justices concur.

(24 Ga. App. 244)

**BATEMAN v. SMALL & THARPE.**  
(No. 10307.)

(Court of Appeals of Georgia, Division No. 1.  
Oct. 10, 1919.)

*(Syllabus by the Court.)*

**1. CONTRACTS** ¶83(2)—**LIABILITY NOT AVOIDED BY FAILURE TO READ CONTRACT BEFORE SIGNING IT.**

"One able to read, who executed a written contract without reading it, cannot avoid liability thereon because he signed without knowing the contents of the contract, when his so doing was not induced by any action or representation amounting to fraud on the part of the person with whom he was dealing."

*(Additional Syllabus by Editorial Staff.)*

**2. PLEADING** ¶84(4)—**ADMISSION AND NOT DENIAL CONTROLS WHERE PLEA CONTAINS BOTH.**

Pleadings are construed most strongly against the pleader, and where a plea contains both an admission and a denial the admission and not the denial must prevail.

**3. COSTS** ¶260(4)—**DAMAGES AWARDED ON APPEAL FOR DELAY ONLY.**

Where the questions raised by bill of exceptions in the case have been so often decided both by Supreme Court and Court of Appeals adversely to position of plaintiff in error, the damages allowed by Civ. Code 1910, § 6213,

for an appeal for delay only will be awarded to defendant in error.

Error from City Court of Houston County; A. C. Riley, Judge.

Suit by Small & Tharpe against C. L. Bateman. Demurrer generally and specially to amended plea sustained, and defendant brings error. Affirmed with damages.

Feagin & Hancock, of Macon, for plaintiff in error.

Hardeman, Jones, Park & Johnston, of Macon, for defendant in error.

**BLOODWORTH, J.** 1. Small & Tharpe sued Bateman for the balance due on a promissory note given for the purchase price of two mules, and containing, among other provisions, the following:

"And the subscriber hereby agrees to pay the within obligation although the property should die or become damaged or destroyed, whether by accident or otherwise. \* \* \* It is further understood and agreed that said Small & Tharpe do not guarantee the health, soundness, working qualities \* \* \* of the within described property, and it is further understood and agreed that should said live stock herein described be not suited to the purposes for which bought, then the undersigned does hereby agree that — will within ten days from the above date return the same to said Small & Tharpe at their place of business in Macon, Ga., in the same physical condition as when purchased, who hereby agree to accept the same and cancel this indebtedness, and upon failure of the undersigned to return the property herein purchased and described within ten days from above date, then the said undersigned waives any claim for damages or failure of consideration as against this contract and likewise any defect in any of said property."

Defendant filed pleas which were stricken upon motion. The only portion of the pleas actually discussed in the brief of plaintiff in error is the following from the original plea:

"The plaintiffs presented to defendant for his signature the note prepared by them on a blank form which they carried in their pocket, telling defendant they had fixed the note as agreed, and for him to sign. Defendant relied on the plaintiffs, had full confidence in their statements, and did not read the note he signed, as it was in very fine print and long, and defendant's eyesight was impaired, rendering it very difficult for him to read the fine printing in which the note was."

The plea was amended as follows:

"That the note and contract signed by this defendant and upon which said suit is based was in very fine print; that by reason of his defectual [defective?] and impaired eyesight this defendant did not and could not read same, all of which was well known to the plaintiff; that the said



written contract is different from the oral agreement and representation made to him by said plaintiffs, and this defendant did rely upon said plaintiff to make the said contract signed by him to contain the contract as made between said plaintiff at the time said contract was made and the writing upon which this suit is based was signed by defendant, and said written contract was signed by defendant believing that same did contain the oral contract as made between the parties as it was represented to him by said plaintiffs; that he did not read said writing before signing same for the reasons above set forth, but did rely upon the representations made to him by plaintiffs that said writing did set up and contain the contract as made between plaintiff and defendant."

Plaintiff demurred generally and specially. The demurrer was properly sustained.

[1, 2] It will be noted that in the original plea the defendant admitted his ability to read the note, though he said he could do it with difficulty. In the amendment he asserts that by reason of his defective eyesight he could not read the note. Pleadings are construed most strongly against the pleader, and where a plea contains both an admission and a denial, the admission and not the denial must prevail. *McNatt v. Citizens' & Southern Bank*, 20 Ga. App. 759, 93 S. E. 271; *City of Moultrie v. Schofields Sons Co.*, 6 Ga. App. 464, 65 S. E. 315(1). See, also, *Southern Ry. Co. v. Hobbs*, 121 Ga. 428, 49 S. E. 294(1). In this connection attention is directed to the following quotation from the opinion in *Hanes v. Farmers' & Merchants' Bank*, 20 Ga. App. 180, 92 S. E. 896:

"The additional statement that the defendant did not have his spectacles with him, and therefore could not read at the time the notes were signed, was not sufficient, under the authorities cited in the other case, to alter the rule."

There is nothing in the record to show that the defendant made any effort to read the note, and found that he could not do so, or that at the time that he signed it there existed an emergency which would excuse his failure to read, or that his failure to read was brought about by any "misleading artifice or device perpetrated by the opposite party amounting to actual fraud such as would reasonably prevent him from reading it." On the contrary, it clearly appears that he signed the note on presentation, without apprising himself of its contents otherwise than by accepting statements with reference thereto made by the representative of the opposite party, and between whom and the defendant there existed no confidential or fiduciary relation. See *Twyman v. Avera Loan & Investment Co.*, 23 Ga. App. 136, 98 S. E. 239, and cases cited. "Where one who can read signs a contract without apprising himself of its contents, otherwise than by

accepting representations made by the opposite party, with whom there exists no fiduciary or confidential relation, he cannot defend an action based on it, on the ground that it does not contain the contract actually made; unless it should appear that at the time he signed it some such emergency existed as would excuse his failure to read it, or that his failure to read it was brought about by some misleading artifice or device perpetrated by the opposite party, amounting to actual fraud such as would reasonably prevent him from reading it." *Tinsley v. Gullet Gin Co.*, 21 Ga. App. 512, 94 S. E. 892(2). See, also, cases cited in the opinion, 21 Ga. App. 516, 94 S. E. 894. "One able to read, who executed a written contract without reading it, cannot avoid liability thereon because he signed without knowing the contents of the contract, when his so doing was not induced by any action or representation amounting to fraud on the part of the person with whom he was dealing." *Barnes et al. v. Slaton Drug Co.*, 21 Ga. App. 580, 94 S. E. 896. See, also, cases cited in the opinion, 21 Ga. App. 582, 94 S. E. 897. "If one cannot read a contract which he is about to execute, it is as much his duty to procure some reliable person to read and explain it to him before he signs it as it would be to read it himself if he were able to do so, and his failure to obtain a reading and an explanation of it is such gross negligence as will estop him from repudiating it on the ground that he was ignorant of its contents." *Chicago, etc., Ry. Co. v. Belliwith*, 83 Fed. 437, 28 C. C. A. 358(1). Where suit was brought for a sum alleged to be due upon a plain and unambiguous contract in writing, and the only evidence submitted by the defendant was to the effect that he could "just read and write a little bit," and did not read the contract, that the nature of the written contract was misrepresented to him and he thought that he was signing an entirely different contract from the one he did sign, but nothing was done to prevent him from reading it or having it read to him, it is not error for the trial judge to direct a verdict against him for the amount appearing to be due under the contract. *Sloan v. Farmers' & Merchants' Bank*, 20 Ga. App. 123, 92 S. E. 893, and cases cited; *Miller v. Walker*, 23 Ga. App. 273, 97 S. E. 869. The party signing this note may have been very indiscreet, but for this alone the law will not relieve him. "Folly is not always fraud." "A party who can read must read, or show legal excuse for not doing so. Fraud which would relieve a party who can read must be fraud which prevents him from reading." *Stoddard Manufacturing Co. v. Adams*, 122 Ga. 802, 50 S. E. 915. The principle announced in the above cases shows that the plea in this case was properly stricken.

[3] 2. The defendant in error requested

that we award the statutory damages of 10 per cent. against the plaintiff in error for bringing this case to this court for the purpose of delay only. As was held in the case of *Miller v. Walker*, supra:

"The questions raised by the bill of exceptions in this case having been so often decided, both by the Supreme Court and this court, adversely to the position of the plaintiff in error, the statutory damages (Civil Code of 1910, § 6213) are awarded the defendant in error."

Judgment affirmed, with damages.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 261)

LOVELL et ux. v. FRANKUM. (No. 10542.)

(Court of Appeals of Georgia, Division No. 1.  
Oct. 10, 1919.)

*(Syllabus by the Court.)*

NEW TRIAL ⇨161(1)—REFUSAL PROPER ON DISMISSAL OF ONE DEFENDANT UNDER MANDATE IN APPEAL.

Frankum sued Ellis Lovell and Mrs. Ellis Lovell. A trial of the case resulted in a verdict for the plaintiff, and the case was taken to the Supreme Court on exceptions to the refusal to grant a new trial. It is reported in 145 Ga. 106, 88 S. E. 569. The first head-note of the decision of that court is as follows: "The testimony did not authorize an instruction on the theory that the contract for breach of which the suit was brought was executed by both defendants;" and in the opinion on page 108 of 145 Ga., on page 570 of 88 S. E., the court said: "We have carefully examined the evidence, and nowhere does it appear that the wife joined with the husband in making the contract with the plaintiff, or that he or any one else was authorized as her agent to make such a contract." The judgment was reversed and a new trial ensued. Upon the second trial the judge charged the jury as follows: "This suit was brought by Mr. Frankum against the defendants, Mr. Lovell and his wife. You can't find a verdict against her. She is eliminated from the case. It is just a matter of whether Mrs. Lovell—I mean Mr. Lovell—is liable for the debt." But in charging the jury as to the form of the verdict, the judge told them that if the plaintiff was entitled to recover, the form of the verdict would be, "We, the jury, find for the plaintiff so many dollars principal and so many dollars interest, with cost of suit." The verdict of the jury was as follows: "We, the jury, find for the plaintiff, principal \$100, interest for five years and two months \$36.15, and cost of suit." The defendants moved for a new trial, and in the motion it was alleged that the judge erred in instructing the jury on the form of the verdict, and in not expressly limiting the finding to a verdict against Ellis Lovell. On the hearing of the motion the judge passed the following order: "The within

motion, as amended, coming on to be heard this day by consent, it appearing that the court, in instructing the jury, expressly eliminated a recovery against Mrs. L. C. Lovell, counsel for plaintiff only signed up a judgment against Ellis Lovell, but, the verdict being general, and Mrs. Lovell appearing in the pleading as one of the defendants, so, to make the pleading comply with the direction of the court, it is ordered and adjudged that if the plaintiff will in five days from this hearing dismiss the name Mrs. L. C. Lovell as a party defendant, the motion is overruled, and a new trial be refused; unless this is done, a new trial is granted and the verdict of the jury set aside. Before signing this order plaintiff dismissed the case against Mrs. L. C. Lovell, so a new trial is refused."

Under the decision of the Supreme Court in this case, which is referred to above, and in the light of the charge of the court, and under this order, Mrs. Lovell is eliminated from the case, and as the evidence is ample to support a verdict against Ellis Lovell, the judgment refusing a new trial is affirmed.

Error from Superior Court, Habersham County; J. B. Jones, Judge.

Action by J. E. J. Frankum against Ellis Lovell and wife. Judgment for plaintiff on a general verdict, motion for new trial denied, and defendants bring error. Judgment refusing a new trial affirmed.

J. C. Edwards & Sons, of Clarkesville, for plaintiffs in error.

McMillan & Erwin, of Clarkesville, for defendant in error.

BLOODWORTH, J. Affirmed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 265)

TOWNS v. STATE. (No. 10618.)

(Court of Appeals of Georgia, Division No. 1.  
Oct. 10, 1919.)

*(Syllabus by the Court.)*

1. PARENT AND CHILD ⇨17(6)—EVIDENCE ADMISSIBLE ON CHARGE OF ABANDONMENT OF MINOR CHILD.

On the trial of one for the abandonment of his minor child, it is not error to exclude testimony offered by the defendant to the effect that his wife, pregnant with her unborn child, abandoned him, despite his entreaties for her to stay and live with him. *Moore v. State*, 1 Ga. App. 502, 57 S. E. 1016; *Parrish v. State*, 10 Ga. App. 836, 74 S. E. 445.

2. CRIMINAL LAW ⇨150—PROSECUTION FOR ABANDONMENT OF CHILD NOT BARRED AFTER TWO YEARS.

Where the absent father has for two years immediately preceding the finding of the accusation against him failed and refused to provide for his dependent child, the time when the original separation took place is entirely im-

material. The continuing dependency of the child vitalizes the offense, and the fact that the absence, and even the dependency, began more than two years prior to the accusation, affords no ground for the interposition of the statute of limitations. *Phelps v. State*, 10 Ga. App. 41, 72 S. E. 524; *Campbell v. State*, 20 Ga. App. 190, 92 S. E. 851.

### 3. SUFFICIENCY OF EVIDENCE.

The evidence authorized the conviction of the accused, and the court did not err in overruling the motion for a new trial.

Error from City Court of Floyd County; W. J. Nunnally, Judge.

Lee Towns was convicted of the abandonment of his minor child, his motion for new trial was overruled, and he brings error. Affirmed.

Harris & Harris, of Rome, for plaintiff in error.

J. F. Kelly, Sol., and W. B. Mebane, both of Rome, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 284)

TOMPKINS v. STATE. (No. 10615.)

(Court of Appeals of Georgia, Division No. 1. Oct. 10, 1919.)

#### (Syllabus by the Court.)

#### 1. MOTIONS TO DISMISS BILL OF EXCEPTIONS.

There is no merit in either of the two motions to dismiss the bill of exceptions.

#### 2. CRIMINAL LAW §614(1)—FURTHER CONTINUANCE FOR ABSENCE OF COUNSEL PROPERLY DENIED.

In the motion for a new trial it is alleged that the court erred in refusing to continue the case on account of the absence of leading counsel for the defendant. To the motion for a new trial the trial judge attached the following note: "This case had been continued several times at the instance of defendant's side. At the November term, 1918, the defendant and one of his counsel, Judge Rawlings, were absent, and the bond of defendant was forfeited. On February 10, 1919, about 10 o'clock a. m., the time this case was set for trial, the same was called, and the motion for continuance made on account of the absence of Judge Rawlings. The same was then set for 1:30 o'clock, to give defendant an opportunity to communicate with and have Judge Rawlings present. At the time set no showing was made that any effort had been made by defendant to procure the presence of Judge Rawlings, and the case proceeded to trial." When considered in the light of the above qualifying note, and the counter-showing made by the state at the hearing of the motion for a new trial, this court cannot say, as a matter of law, that the judge abused his discretion in refusing to further continue the case.

#### 3. CRIMINAL LAW §559—JURY CAN DRAW INFERENCE OF GUILT FROM EVIDENCE.

"Where there is some evidence from which the guilt of one accused of crime can be legitimately inferred, it is entirely within the province of the jury to draw that inference."

Error from City Court of Wrightsville; B. B. Blount, Judge.

I. D. Tompkins was convicted of an offense, and he brings error. Affirmed.

B. T. Rawlings, of Sandersville, and B. H. Moye, of Wrightsville, for plaintiff in error.

C. S. Claxton, Sol., of Wrightsville, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 274)

WARD v. STATE. (No. 10606.)

(Court of Appeals of Georgia, Division No. 1. Oct. 14, 1919.)

#### (Syllabus by the Court.)

#### HOMICIDE §286(2), 309(4)—CHARGE ON MANSLAUGHTER REQUIRED UNDER EVIDENCE.

The evidence in this case fully authorized, if indeed it did not demand, the verdict of manslaughter. The charge of the court on the law of manslaughter was required. See *Trice v. State*, 89 Ga. 742, 15 S. E. 648. The court did not err in charging the jury as follows: "In every case of an unlawful killing malice will be presumed, where no considerable provocation appears and all the circumstances of the killing show an abandoned and malignant heart. If one shoots another without any reason, and, although you may not be able to show that he made up his mind to do so with any degree of deliberation, if he shoots another without any known reason, and all the circumstances show that he did wantonly, without any reason, without any provocation, the law implies malice in a case of that sort." See *Harrell v. State*, 22 Ga. App. 104, 95 S. E. 537, and case cited. The defendant had a fair trial, was ably represented, and no error appears which authorizes a new trial.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Joshua Ward was convicted of an offense, and he brings error. Affirmed.

John R. Cooper, C. A. Cunningham, and W. O. Cooper, Jr., all of Macon, for plaintiff in error.

John P. Ross, Sol. Gen., of Macon, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(178 N. C. 713)

STATE v. PHILLIPS et al. (No. 845.)

(Supreme Court of North Carolina. Nov. 5, 1919.)

**1. CRIMINAL LAW §752½ — CONSTRUCTION OF EVIDENCE ON MOTION FOR NONSUIT.**

On motion to nonsuit, the evidence must be construed in a light most favorable to the state to determine its legal sufficiency to convict.

**2. CRIMINAL LAW §741(1), 742(1)—WEIGHT OF EVIDENCE AND CREDIBILITY OF WITNESSES FOR JURY.**

Where the evidence is legally sufficient to convict, its weight and the credibility of the witnesses are for the determination of the jury.

**3. ADULTERY §14—FORNICATION §9—SUFFICIENCY OF EVIDENCE.**

Direct evidence of a witness that she saw defendants, charged with fornication and adultery, in bed together on three different occasions held sufficient to sustain conviction.

**4. CRIMINAL LAW §377—EVIDENCE OF GOOD CHARACTER SUBSTANTIVE EVIDENCE.**

Where defendant offers evidence of good character, even without being sworn as a witness, it is substantive evidence, to be considered by the jury for what it is worth as tending to prove innocence.

**5. CRIMINAL LAW §1172(2)—HARMLESS INSTRUCTION ON CHARACTER EVIDENCE.**

In a prosecution for fornication and adultery, instruction that the jury should not consider character evidence as substantive evidence held harmless to defendant.

**6. WITNESSES §79(4)—CONCLUSIVENESS OF DETERMINATION OF COMPETENCY OF INFANT WITNESS.**

The finding by a trial judge that an infant is competent to testify is conclusive.

Appeal from Superior Court, Surry County; Bryson, Judge.

Zella Phillips and Mary Key were convicted of fornication and adultery and they appeal. No error.

W. L. Reece, of Dobson, J. H. Folger, of Mt. Airy, and J. Crawford Biggs, of Raleigh, for appellants.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

**BROWN, J. [1-3]** The motion to nonsuit was properly overruled. On this motion the evidence must be construed in a light most favorable to the state for the purpose of determining its legal sufficiency to convict, and, this being shown, its weight and the credibility of the witnesses are for the determination of the jury. *State v. Carlson*, 171 N. C. 818, 89 S. E. 30. Applying this rule to the state's evidence, it seems clear that there was evidence sufficient. The crime itself is of

such a character that its commission, speaking generally, can only be determined by circumstances which accompany the relation of the party. In this case, however, there was direct evidence by the witness, Sarah Key, who testified she saw defendants in bed together on three different occasions. It is useless to discuss this evidence. If it is believed by the jury it is amply sufficient to justify conviction of both defendants. The defendants offered evidence as to their good character, and also there was evidence offered as to the good character of witnesses. The defendant excepted to the following part of the charge:

"Witnesses have been offered as to character. This evidence you will not consider as substantive evidence, but only as corroborative, and the law does not presume that a person proven to be of bad character has necessarily told a false story, but you may consider evidence of good character or bad character as bearing upon the weight you should give the testimony of the witness. You are the sole judges of the facts; you are the sole judges of what the evidence is and the weight you should give it."

[4, 5] It is undoubtedly true that where defendant offers evidence of good character even without being sworn as witness, it is substantive evidence, to be considered by the jury for what it is worth as tending to prove the innocence of the defendant. *State v. Morse*, 171 N. C. 777, 87 S. E. 946. But we think that the defendants were not prejudiced in this case. The judge, in stating that the evidence as to character was referring not to the character of the accused, but to the witnesses whose characters had been proven. This construction of his honor's language is borne out by that part of his charge, in which he says:

"The law does not presume that a person proven to be of bad character has necessarily told a false story, but you may consider evidence of good character as bearing upon the weight you will give to the witnesses."

[8] The other exceptions are entirely without merit. From *State v. Perry*, 44 N. C. 330, to *State v. Merrick*, 172 N. C. at page 872, 90 S. E. 257, it has been consistently held by this court that the finding by a trial judge that an infant is competent to testify is conclusive. As to the remaining objection, it is met by rule 27 of this court (81 S. E. xi) as follows:

"Nor will it be ground of exception that evidence competent for some purposes, but not for all, is admitted generally, unless the appellant asks, at the time of admission, that the purpose shall be restricted."

See *Plemmons v. Murphey*, 176 N. C. 671, 97 S. E. 648.

No error.

(178 N. C. 291)

**BRYANT v. STONE. (No. 287.)**

(Supreme Court of North Carolina. Oct. 22, 1919.)

**1. EVIDENCE ⇨501(6)—INADMISSIBILITY OF OPINION EVIDENCE.**

Where the determinative fact was the condition of a lighter when it was left by defendant at the dock in the evening, and the witness knew nothing of the condition then, but was proposing to express opinions based on what he saw on the morning after, without explanation as to changes naturally brought about by the ebb and flow of the tide, the evidence was properly excluded.

**2. APPEAL AND ERROR ⇨1058(2)—EXCLUDING EVIDENCE WHICH IS GIVEN IN SUBSTANCE.**

Where the witness without objection was permitted to give testimony which was the substance of the answers excluded, exception taken by plaintiff to refusal of court to permit the witness to answer the questions will be overruled on appeal.

**3. APPEAL AND ERROR ⇨1033(3)—ERROR FAVORABLE TO APPELLANT.**

In action involving question whether loss of lumber on lighter, towed by defendant, was due to lighter being improperly tied to wharf, evidence of defendant's witness that there were a great many lighters at the dock and that lighters were frequently changed in their positions or their lines interfered with, while objectionable, because it proved nothing and furnished opportunity for mere surmise, made more for plaintiff appellant than for defendant, since it could be argued that it was an admission that the lighter was negligently fastened.

**4. APPEAL AND ERROR ⇨1068(5)—ERROR CURED BY VERDICT.**

Refusal of instruction relating to burden of proof based on defendant being found to be a common carrier is immaterial, the jury having found that defendant was not a common carrier.

**5. TOWAGE ⇨15(1)—WHETHER OWNER OF LIGHTER WAS CARRIER OR EMPLOYÉ PROPERLY SUBMITTED.**

In action for loss of lumber on lighter towed by defendant for plaintiff, issue whether defendant was acting as a common carrier or employé held fairly submitted.

**6. TOWAGE ⇨15(1)—INSTRUCTION ON CUSTOM TO GUARD LIGHTER AUTHORIZED BY EVIDENCE.**

Plaintiff's witness having testified that it was the custom of the owner of the lumber on a lighter to place a watchman on the lighter when it was tied to the dock, plaintiff's exception on the ground that there was no evidence to support instruction on custom cannot be sustained.

Appeal from Superior Court, New Hanover County; Stacy, Judge.

Action by J. N. Bryant against R. R. Stone, trading as Stone Towing Line. Judgment for defendant, and plaintiff appeals. No error.

This is an action for the recovery of \$405.25, being the value of certain lumber belong-

ing to the plaintiff, which was lost, as the plaintiff alleges, while in the possession of and through the negligence of the defendant.

The plaintiff was engaged in the lumber business and maintained a sawmill near the city of Wilmington. On the 9th of October, 1916, the plaintiff had 49,000 feet of lumber placed on the wharf of the Camp Manufacturing Company on the Cape Fear river, which had been sold and consigned to R. R. Sizer & Co. of New York, and which the plaintiff intended to ship by the Clyde Line Steamer Company to its destination. With this intention he notified the defendant, who was engaged in the business of towing lumber and other materials to and from various points on the river with boats owned and operated by the defendant for hire, that he had the lumber previously mentioned loaded on the lighters at the Camp Manufacturing Company, and that he desired the defendant to deliver the same to the Clyde Line Steamship Company, to be loaded upon one of their vessels, and this the defendant agreed to do for a stipulated sum.

There is a dispute between the parties as to the time of delivery to the Clyde line, plaintiff alleging that it was not to be delivered until 7 o'clock or some time thereafter during the day following the day upon which the agreement to haul the lumber was made, while the defendant contends that there was no agreement, whatever, as to when the lumber should be delivered to the Clyde line.

The defendant took charge of the lighter loaded with lumber on the wharf of the Camp Manufacturing Company about 5 o'clock in the afternoon of the day the agreement between the plaintiff and defendant was made, and the defendant towed the lighter to dock of the Clyde Line Steamship Company, and tied the same to the dock and left it there. The lighter was left unguarded during the night, and about 5 or 6 o'clock the following morning it was swung up under the dock and turning partially over, and dumped its load of lumber into the river. A part of the lumber was recovered, and this suit is brought to recover the value of the lumber which was lost; the value being based upon the price for which the plaintiff had contracted to sell the same.

There are two theories upon which the plaintiff is resting his right to recover. The first is that the defendant, in undertaking to deliver the plaintiff's lumber to the Clyde Line Steamship Company, did so in the capacity of a common carrier, and was therefore an insurer of the goods, so that it would only be necessary for the plaintiff to show the delivery of the lumber to the defendant and its subsequent loss before the defendant had made the delivery to the Clyde Line Steamship Company, under what the plaintiff alleges were the terms of the con-

tract, in order to make out a prima facie case and shift the burden upon the defendant to disprove its negligence. The second theory was that, if the defendant was not acting as a common carrier, he was guilty of negligence in the manner in which the lighter was moored to the dock of the steamship company, and in failing to notify some of the agents of the steamship company that the lighter was moored to the dock, and in leaving the lighter unguarded during the night, and that one or the other or all of these acts of negligence was the proximate cause of the loss of the lumber.

The principal differences between the plaintiff and defendant on the first position of the plaintiff was as to the terms of the contract, the defendant contending his liability ceased when he delivered the lumber at the dock of the Clyde line.

The place of delivery was subject to the tides.

During the trial the plaintiff introduced Frank Sears, who had expert knowledge, and asked him the following questions:

"Q. Are you able to form an opinion satisfactory to yourself as to the reason that this lighter was washed up under the wharf by the tide and dumped its load into the river? A. Yes, sir. (The defendant objected. Objection sustained. Plaintiff excepted. The witness would have testified that the lighter dumped its load because it was improperly tied.)

"Q. What business were you engaged in at this time? A. Lumber business.

"Q. Were you employed at Chadbourn's mill? A. Yes, sir.

"Q. How long have you been engaged in that business? A. About 17 years.

"Q. While you were engaged in the lumber business and employed by Mr. Chadbourn, was it a part of your duty to handle lighters and load them? A. Yes, sir; I supervised it.

"Q. Did you have occasion to take lighters after the same were loaded, or supervise the loading, down to the Clyde Line wharf and other wharves and tie them there? A. Yes, sir.

"Q. State whether or not, in your opinion, if this lighter had been properly tied to the wharf, it would have dumped its load as you have just described this lighter did. (Defendant objects. Objection sustained. Plaintiff excepted. Witness would have testified that it would not.)

"Q. Mr. Sears, in your opinion, could that lighter have been tied to the wharf on the evening before it was sunk in such a manner that it would not have been swept under the sill the following morning as you have testified it was and dumped its load into the river? (Objection by defendant. Sustained. Plaintiff excepted. Witness would have answered: 'Yes, sir; it could have been moored so that both ends of the lighter could come up to the guard piling, then it would have been impossible for it to have gotten under the sill. This lighter was not tied in that way.')

A witness for the defendant, one Register, was asked the following questions:

"Q. State if you know whether, at or about the time we are speaking of, a great many light-

ers of lumber were being carried to and handled at the Clyde dock? (Objection by plaintiff. Overruled. Exception.) A. Yes, sir; great many are handled around there, and some shifted by the Clyde people at different times at night. I have known them to turn lighters and barges adrift and have picked them up in the river.

"Q. Do you know as a fact that it frequently occurred, at or about this time we are speaking of, that lighters which were moored to the Clyde Line docks were changed in their position or their lines interfered with? (Objection by plaintiff. Overruled. Exception.) A. Yes, sir."

The plaintiff excepted to the refusal to give the following instructions:

"The court charges you that if you find from the evidence and by its greater weight that at the time set out in the complaint the defendant was engaged in the business of towing lighters, hauling freight, passengers, or material for hire, to and from various points on the Cape Fear river, and that in the scope of such business carried on by the defendant the defendant contracted to tow the lighter loaded with lumber belonging to the plaintiff from the wharf of the Camp Manufacturing Company and contracted to deliver the same to the Clyde Line Steamship Company, and should further find that in pursuance of such contract the defendant, through its agent and employes, took charge of said lighter with the lumber of the plaintiff loaded thereon for the purpose of delivering the said lumber of the plaintiff to the Clyde Line Steamship Company, and set out to tow the said lighter loaded with lumber to the Clyde Line Steamship Company, and the jury should further find that the said lumber, or part of the same, was lost from aboard the lighter, and that the said lumber was lost, and after the defendant had taken charge of the same and set out to deliver the same to the Clyde Line Steamship Company, then the court charges you that the defendant will be responsible for the safe delivery of the lumber to the Clyde Steamship Company, according to his contract with Bryant; and that it is not necessary for the plaintiff to show or prove any specific act of negligence by the defendant by which the said lumber was lost, but the burden of proof would be upon the defendant to show that he was not negligent in transporting the said lumber upon the lighter and delivering the same to the Clyde Line Steamship Company. And the burden of proof will be upon the defendant to show that the loss of the lumber, if the jury should find that any of the lumber was lost, was not due to any negligence on the part of the defendant, as shown by the plaintiff's twentieth exception."

His honor charged the jury on the first issue as follows:

"Upon that issue the burden rests with the plaintiff to satisfy you of that by the greater weight of the evidence. If you find as a fact from this evidence and you are satisfied by its greater weight that the defendant was engaged in the business of a common carrier at the time, and in the capacity of a common carrier as such undertook to transport and deliver these goods to the Clyde Line Steamship Company, why it would be your duty to answer the first

issue, 'Yes.' On the other hand, if you should find that the relation between the parties at the time was that of employer and employé for the purpose of towing the barge to the dock and there mooring it, and the obligation of the defendant then ceased, why it would be your duty to answer the first issue, 'No.' (Because if Stone undertook simply to tow the barge down to the dock and there moor it and his liability then ceased, why he would not be considered as having undertaken to transport and deliver these goods in the capacity of a common carrier, even if he were a common carrier at the time.) To so much of the court's charge as appears in parentheses above the plaintiff excepted."

And continued:

"Of course, gentlemen, if it was the custom of the harbor that under a contract of this kind the liability and the duty of the man who did the towing ceased as soon as he had moored the barge, it was the custom of the owner of the lumber to then put a watchman upon it, and he neglected to do that, that custom would ripen into law, and therefore a duty devolving upon the plaintiff. But it is a question of fact for you whether you find from this evidence that such was a rule of the port under their agreement and under the contract."

The plaintiff excepted to the last charge upon the ground that there was no evidence to support it.

The jury returned the following verdict:

"(1) Was the defendant engaged in the business of a common carrier, and, as such, did the defendant undertake to transport and deliver the plaintiff's lumber to the Clyde Line Steamship Company as alleged in the complaint? Answer: 'No.'"

"(2) If so, did the defendant breach its contract of carriage and delivery? Answer: —."

"(3) Was the plaintiff's lumber, or any part thereof, lost by the negligence of the defendant as alleged in the complaint? Answer: 'No.'"

"(4) Did the plaintiff by his own negligence contribute to his loss and damage as alleged in the answer? Answer: —."

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

McClammy & Burgwyn, of Wilmington, for appellant.

Robert Ruark, of Wilmington, for appellee.

ALLEN, J. [1, 2] There are two reasons for overruling the exceptions taken by the plaintiff to the refusal of the court to permit the witness Sears to answer the questions propounded to him.

The first is that the evidence offered had no bearing except on the issue of negligence; the determinative fact on that issue being as to the condition of the lighter when it was left at the dock of the Clyde line on the evening of October 9th, and the witness knew nothing of the condition then, but was proposing to express opinions based on what he saw on the morning of October 10th, without explanation as to the changes naturally brought about by the ebb and flow of the

tide; and the second that the plaintiff had the benefit of the evidence in answers to questions not objected to.

The purpose of the evidence was to show that the lighter was tied to the dock negligently, and that it would not have dumped its load of lumber if it had been properly tied, and the witness testified without objection:

"It appeared to me that it had too much slack in the rope, and the tide rising gave a chance for the lighter to swing around, and one end caught under the dock. \* \* \* If the lighter had been placed alongside of the piling, it would be impossible for the lighter to dump its load."

We have here the fact testified to by the witness that the lighter was improperly tied, in that the rope was too slack, and his opinion that if it had been properly tied along the piling, instead of with a slack rope, it would not have dumped its load, which is the substance of the evidence excluded.

[3] The evidence of the witness Register, which is the subject of exception, is objectionable because it proves nothing and furnishes the opportunity for mere surmise and conjecture; but this is a good reason for not making it a ground for a new trial unless we can see it was prejudicial, and as it appears to us it made more for the plaintiff than for the defendant.

It is true counsel for the defendant could argue the possibility of the lines being changed during the night because lines had been changed on the dock in the past, but the earnest and skillful counsel for the plaintiff could, and doubtless did, meet this argument by showing the jury that the question was within itself an admission that the condition in which the lines were seen by Sears on the morning of the 10th was negligent, as otherwise there was no necessity for proving the possibility of a change in them the night before, and that all the evidence was that they had not been changed, but were found the next morning as they were left the night before, as Sears testified the lines were too slack on the morning of the 10th, and Register, an employé of the defendant and his witness, testified that he assisted in tying the lighter on the evening of the 9th, and that the line had to be left slack on account of the rise and fall of the tide.

[4] The instruction which his honor refused to give was not directed to the first issue, but related to the burden of proof based upon the defendant being found to be a common carrier, and is immaterial, as the first issue was found in favor of the defendant.

[5] The controversy on the first issue as presented in this record was one of fact, dependent upon the contract, and as such was fairly submitted to the jury as shown in the part of the charge excepted to.

[6] The last exception cannot be sustained, as the witness Sears testified it was the cus-

tom for the owner to place a watchman on the lighter when it was tied to the dock.

We find no reversible error.

No error.

(178 N. C. 421)

VINCENT v. PACE. (No. 325.)

(Supreme Court of North Carolina. Oct. 29, 1919.)

**LIBEL AND SLANDER** §=123(3, 6)—**JURY QUESTION WHETHER AMBIGUOUS REMARK WAS SLANDEROUS.**

In an action for slander by having insinuated that plaintiff had stolen defendant's chickens, in view of the language, the manner and circumstances under which it was first spoken to defendant, and the way it was charged to have been repeated, whether defendant charged and intended to charge a larceny by plaintiff *held* for the jury.

Appeal from Superior Court, Alamance County; Stacy, Judge.

Action by Joseph H. Vincent against James Pace. From a judgment sustaining demurrer to the complaint, plaintiff appeals. Reversed.

W. H. Carroll, of Burlington, for appellant. Long & Long and Parker & Long, all of Graham, for appellee.

**HOKE, J.** The complaint, after alleging that Mrs. Sinclair Vincent having become suddenly ill, and continued so until she presently died, defendant had been called to the home as a near neighbor, and thereupon the pertinent facts were further alleged as follows:

"(4) That thereafter, to wit, on the 27th day of December, 1918, the defendant, James Pace, contriving to injure the plaintiff in his reputation, and to expose him to public hatred, ridicule, and contempt, did falsely and maliciously speak and utter to one Annie Turner Vincent, and to divers other persons, of and concerning plaintiff, certain false, defamatory, and scandalous words, as follows: 'That when he reached the home of plaintiff on the night of August 23, 1918, Mrs. Lucinda Vincent called him to her and told him that she was greatly troubled about the defendant's chickens, which she said she and her husband had shut up, and she whispered this in his ear, and told him to have them turned out, but that this plaintiff, instead of turning them out, had taken them off and sold them'—thereby intending to charge and did charge the plaintiff with the larceny of said chickens.

"(5) That said statement and every syllable of it was absolutely false and defamatory, and that by reason of speaking thereof as aforesaid the plaintiff has been injured in his reputation, fame, and good name, to his damage ten thousand dollars.

"Wherefore plaintiff prays judgment against

the defendant for the sum of ten thousand dollars, for the cost of this action and for such other and further relief as he is entitled to receive."

In several decisions of the court in which this question was directly considered, it was held that when the words spoken are ambiguous and fairly admit of a slanderous interpretation, it is then a question for the jury to determine on the sense in which the words were used and whether they amounted to the slanderous charge to the reasonable apprehension of the hearers. *State v. Howard*, 169 N. C. 313, 84 S. E. 807; *McCall v. Sustair*, 157 N. C. 179, 72 S. E. 974; *Reeves v. Bowden*, 97 N. C. 30, 1 S. E. 549; *Lucas v. Nichols*, 52 N. C. 32.

In *State v. Howard*, indictment for slandering an innocent and virtuous woman, defendant had said, referring to the prosecutrix, "that he had quit his old girl, \* \* \* that Luther Mills was going with her now; she was no lady; she was nothing but a crook, and he could prove it." Held a question for the jury as to the sense in which the words were uttered, and the court quotes with approval from 25 Cyc. as follows:

"It is the province of the court to determine what constitutes libel or slander abstractly. Hence, if the language is plain and unambiguous, it is a question of law whether or not it is libelous or slanderous. But if the language is ambiguous and susceptible of two meanings, one defamatory and the other not, it is for the jury to decide in what sense it was used; however, it is for the court to determine whether or not the language on its face is capable of a double meaning, and should be submitted to the jury for construction. It is the duty of the court to say whether a publication is capable of the meaning ascribed to it by the innuendo; but, when the court is satisfied of that, it must be left to the jury to say whether the publication has the meaning so ascribed to it."

In *McCall v. Sustair* (civil action for slander) 157 N. C. 179, 72 S. E. 974, Chief Justice Clark delivering the opinion, it was held that the words did not amount to an unequivocal charge of larceny, and being capable of different construction the question was properly left to the jury to determine. And so, in *Reeves v. Bowden*, the defendant, in speaking of the burning of certain houses, said of and concerning plaintiff, "That damned scoundrel \* \* \* knows all about it \* \* \* from beginning to end," it was held the words, being ambiguous, "but permitting of a slanderous interpretation, the jury should determine under all the circumstances what meaning was intended." And to the same effect is *Lucas v. Nichols*.

Applying the principle as approved and illustrated in these and other like cases, we are of the opinion that, considering the lan-



guage, the manner and circumstances under which it was first spoken to the defendant, and the way it is charged to have been repeated, the words, as alleged in the complaint, are capable of the construction that defendant charged and intended to charge the larceny of the chickens, and the cause must be referred to the decision of the jury. There is error.

Reversed.

(178 N. C. 392)

JOHNSON v. BROTHERS. (No. 363.)

(Supreme Court of North Carolina. Oct. 29, 1919.)

1. COSTS  $\S$ 214—MOTION TO RETAX COSTS COLLATERAL ATTACK ON JUDGMENT.

Plaintiff, who did not prosecute his appeal from the judgment at proper time, will not be allowed to attack collaterally the judgment, which is not void or irregular, by motion asserting that all costs were taxed against the wrong party, since such motion, while designated one to retax costs, is in reality a motion that court modify its judgment.

2. JUDGMENT  $\S$ 294—CORRECTION OF ERRONEOUS JUDGMENT BY APPEAL.

Where the court had jurisdiction, and judgment was taken according to the course and practice of the court, the judgment is not void or irregular, and the only way to correct it, if it is erroneous, is by appeal.

Appeal from Superior Court, Forsyth County; Bryson, Judge.

Suit by M. L. Johnson against W. J. Brothers. Judgment for sale of the property in suit to satisfy defendant's lien. Motion to modify judgment and to retax costs denied, and plaintiff appeals. No error.

The plaintiff brought this suit to recover possession of a storehouse, situated on leased premises in the city of Winston-Salem, N. C., together with \$1,200 damages for the alleged detention of same by defendant. The case was referred to J. E. Alexander, referee, at the May term, 1918, to find the facts and the law in the case, and report same back to the court. At the September term, 1918, the referee duly filed his report, and, after finding that defendant had a lien on said premises, he recommended that the property should be sold at public sale, and that the defendant should be paid his lien out of the proceeds thereof, and the excess paid to plaintiff. At the December term, 1918, of the superior court, Judge Lane signed a judgment appointing a commissioner to sell the property, and out of the proceeds to pay the lien of defendant, to pay the costs and expenses of said sale and the court costs, and pay residue, if any, to the plaintiff. The plaintiff thereupon gave notice of appeal to the Supreme Court, but failed to perfect his appeal,

and the case was docketed and dismissed upon motion of the defendant at the Spring term, 1919, of the Supreme Court, under rule 17 of that court (81 S. E. ix).

At the March term, 1919, of the superior court, the commissioner filed his report of sale, and the same was confirmed by Judge Bryson at the May term, 1919, and the moneys ordered disbursed in accordance with the judgment of Judge Lane at December term, 1918. Judge Bryson also signed a judgment, at the May term, 1919, refusing to modify the judgment signed by Judge Lane at December term, 1918, and to retax the costs, denied the motion of the plaintiff, who requested him to do so, and confirmed the judgment of Judge Lane. Plaintiff appealed to this court.

Bennett & Brown, of Winston-Salem, for appellant.

W. T. Wilson, of Winston-Salem, for appellee.

WALKER, J. (after stating the facts as above). [1, 2] The motion of the plaintiff, while called one to retax the costs, is really a motion that the court modify its former judgment as to the costs, by charging them against the defendant, instead of directing, as the court did in its former judgment, that they be paid out of the fund. It is too late now for such a motion to be entertained, as the plaintiff is concluded by the former judgment. He should have prosecuted his appeal from the judgment at the proper time, and, having failed to do so, he will not be allowed to attack the judgment by this collateral proceeding. The original judgment is not void, as the court had jurisdiction of the cause and the parties, nor is it irregular, as it was taken according to the course and practice of the court. It was, at most, erroneous, and the only way to correct it, if there was any error, was by appeal. It was said in *Creed v. Marshall*, 160 N. C. 394, 76 S. E. 270:

"It is well settled that in any case where a judgment has been actually rendered, or decree signed, but not entered on the record, in consequence of accident or mistake or the neglect of the clerk, the court has power to order that the judgment be entered up *nunc pro tunc*, provided the fact of its rendition is satisfactorily established and no intervening rights are prejudiced. If the written judgment fails to incorporate the true sentence or judgment of the court, through inadvertence and in consequence of clerical errors or omissions, it may be completed by an order *nunc pro tunc*, or may be set aside, and the true and correct judgment entered *nunc pro tunc*. But the power to amend the judgment as entered cannot be used for the purpose of correcting errors or omissions of the court. No amendment can be allowed simply for the purpose of entering judgment which the court failed to render at the proper time, or to change the judgment actually rendered to one which was

not rendered. Such procedure cannot be allowed, so as to enable the court to review and reverse its action in respect to what it formerly either refused or failed to do. 23 Cyc. 843."

The law in this respect has very recently been fully reviewed in *Mann v. Mann*, 176 N. C. 353, 97 S. E. 175.

The objection here is not to the items of the bill of costs, but it is now asserted that all of the costs were taxed against the wrong party. This is not retaxing costs, so as to correct errors in the amount of the costs, but is an effort to amend the judgment because of its erroneous taxation of any of the costs against the fund or the plaintiff, which cannot be done. There was no excusable neglect. The motion was properly denied.

No error.

(178 N. C. 407)

FIELDS v. OGBURN. (No. 362.)

(Supreme Court of North Carolina. Nov. 5, 1919.)

LANDLORD AND TENANT  $\S$ 164(2)—LANDLORD NOT LIABLE FOR INJURIES WITHOUT AGREEMENT TO REPAIR.

The lessor of a dwelling house was not liable for injuries to the wife of the tenant when a porch railing gave way, throwing her to the ground, in the absence of agreement on his part to repair.

Appeal from Superior Court, Forsyth County; Bryson, Judge.

Action by Mrs. Carrie Fields against S. A. Ogburn. From judgment of nonsuit, plaintiff appeals. Affirmed.

This action is by a tenant and occupant of a dwelling house against defendant, the landlord and owner, to recover damages for physical injuries caused by alleged negligence on the part of defendant in failing to keep the premises in proper repair. At the close of the plaintiff's testimony on motion there was judgment of nonsuit. Plaintiff excepted and appealed.

Le Roy B. Wall and J. Lindsay Patterson, both of Winston-Salem, for appellant.

R. G. Stockton and Manly, Hendren & Womble, all of Winston-Salem, for appellee.

HOKE, J. The facts in evidence tended to show that in October, 1916, the female plaintiff and her husband were tenants of a four-room dwelling house, owned by defendant and rented to them by defendant's agent and on said date, while plaintiff was sitting on the front porch of said dwelling leaning against the banister it gave way, throwing

her from the porch to the ground, a fall of several feet, and causing serious and painful injuries from which she still suffers; that another woman had been leaning on the banister at the time, and both fell to the ground; that the banister gave way from being insecurely fastened to the house with fourpenny nails, which were insufficient for the purpose, and after the injury the husband of plaintiff nailed same back with several eightpenny nails, and it was thereby made secure, continuing so thereafter while plaintiff remained at the house, a period of two or three months; that before the occurrence they had lived there as tenants for 2½ years, and while plaintiff had continually complained to the agent of defendant for repairs which she desired, no complaint had been made of the condition of the porch or the banister in question, and in reply to her repeated complaints the agent had several times made answer that he would like to do more for her, but that he could only go according to instructions, etc.

On these, the facts chiefly relevant, we concur in his honor's view, and are of opinion that the judgment of nonsuit has been properly entered. In the absence of express stipulation on the subject, there is usually no obligation or assurance on the part of the landlord to his tenant that the premises will be kept in repair, or that the same are fit or suitable for the purposes for which they are rented. It is true that in case of latent defects of a kind that import menace of appreciable injury when these are known to the landlord, and of which tenant is ignorant and not likely to discover on reasonably careful inspection, liability has been recognized and recoveries sustained both on the ground of negligent breach of duty and at times for fraud and deceit, but ordinarily, as stated in the well-sustained brief of appellee's counsel:

"There is no implied covenant in a lease of such property, either that the place is let for habitation, or that the owner will keep the same safe and in repair, and ordinarily the doctrine of caveat emptor applies to leases of realty, and throws on the lessee the responsibility of examining as to existence of defects on the rented premises and of providing against their ill effects."

Propositions that are approved by direct decision with us and which prevail generally in jurisdictions where the rights of the parties are dependent on common-law principles. *Smithfield Improvement Co. v. Coley & Bardin*, 156 N. C. 255, 72 S. E. 312; *Edwards v. Railroad*, 98 N. Y. 245, 50 Am. Rep. 659; *Mullen v. Rainear*, 45 N. J. Law, 520; *Doyle v. Railroad*, 147 U. S. 413, 13 Sup. Ct. 333, 37 L. Ed. 223; *Walsh v. Schmidt*, 206 Mass. 405, 92 N. E. 496, 34 L. R. A. (N. S.) 798; *Thomas v. Lane*, 221 Mass. 447, 109 N. E.

363, L. R. A. 1916F, 1077; Phelan v. Fitzpatrick, 188 Mass. 237, 74 N. E. 328, 108 Am. St. Rep. 469; Galvin v. Beals, 187 Mass. 250, 72 N. E. 969; Howard v. Water Power Co., 75 Wash. 255, 134 Pac. 927, 52 L. R. A. (N. S.) 578; Shearman & Redfield on Negligence, § 709; 16 R. C. L. 772, Landlord and Tenant, § 268.

In Smithfield Improvement Co. v. Bardin, supra, Associate Justice Brown delivering the opinion, it was said:

"By the common law the lessor is under no implied covenant to repair, or even that the premises shall be fit for the purpose for which they are rented."

In Edwards v. Railroad, supra, it is held that—

"There is no implied warranty upon the devise of real estate that it is fit for occupation or suitable for the purposes for which it is leased."

In Galvin v. Beals, 187 Mass. 250, 72 N. E. 969, injury from a defective railing on a piazza, recovery was denied, the court stating the general position applicable as follows:

"The general rule in this commonwealth must be considered as settled that a tenant cannot recover against his landlord for personal injuries occasioned by the defective condition of the premises let, unless the landlord agrees to repair, makes the repairs, and is negligent in making them."

We consider these authorities as decisive of the questions presented, nor do we see that the principles upon which they rest are in any wise affected by the cases cited for appellant.

Bailey v. Long, 175 N. C. 687, 94 S. E. 675, presented a case where a patient taken for treatment in defendant's hospital claimed to have been injured from exposure caused by a defective building. There the defendant retained the control of the building and of the particular room as well, and in referring the case to the jury the rights of the parties were made dependent upon the contract and the duties growing out of the relationship thereby created between them.

In Rucker v. Willey, 174 N. C. 44, 93 S. E. 379, there was an express agreement for repairs on the part of the landlord, and Knight v. Foster, 163 N. C. 329, 79 S. E. 614, 50 L. R. A. (N. S.) 286, was made to rest upon the facts peculiar to that case and involving the duties and obligations of a landlord and owner towards third persons. The respective obligations as existing between landlord and tenant were not directly presented.

We find no error in the record, and the judgment of nonsuit is affirmed.

Affirmed.

(178 N. C. 249;  
RUARK et al. v. HARPER et al.  
(No. 283.)

(Supreme Court of North Carolina. Oct. 15, 1919.)

**1. TENANCY IN COMMON ⇐20(1)—ACQUISITION OF OUTSTANDING TITLE BY HUSBAND OF COTENANT.**

A husband is not a tenant in common by reason of the fact that his wife is a tenant in common, and there is no obligation growing out of the marriage contract which will invalidate the husband's purchase of the interest of the other tenants in common on sale of the common property for nonpayment of taxes.

**2. ADVERSE POSSESSION ⇐79(4)—SHERIFF'S TAX DEED TO HUSBAND OF COTENANT COLOR OF TITLE.**

A sheriff's tax deed to property held in common, transferring the same to the husband of one of the tenants in common, was color of title, certainly as to the interest of those tenants in common other than the wife; and where the purchaser held the land, seven years' possession will ripen title to the interest acquired under the tax deed, other than that belonging to the purchaser's wife.

**3. ADVERSE POSSESSION ⇐79(4) — THREE YEARS' POSSESSION BY HOLDER OF TAX DEED BARS RECOVERY.**

Under Revisal 1905, § 395, subd. 10, three years' possession under a tax deed bars the rightful former owners from recovery of the property.

**4. ADVERSE POSSESSION ⇐71(1)—WHEN DEED COLOR OF TITLE.**

Where the husband of one tenant in common bought in the property on sale of the same for taxes, and the purchaser and his wife joined in conveying the same, their deed constituted color of title, so that possession under the same would ripen into adverse title.

**5. EVIDENCE ⇐383(4)—RECITAL IN CERTIFIED COPY OF SHERIFF'S DEED THAT IT WAS UNDER SEAL.**

Though the certified copy of the sheriff's tax deed did not show a sale, yet, where it recited that the deed was under seal, it will be presumed a seal was on the original deed.

**6. ADVERSE POSSESSION ⇐79(4)—TAX DEED, THOUGH NOT UNDER SEAL, COLOR OF TITLE.**

Though a sheriff's deed to land sold for taxes bore no seal, and did not comply with the statute, it is, under Revisal 1905, § 395, subd. 10, good as color of title, and seven years' occupancy is sufficient to ripen title in the possessor.

**7. ADVERSE POSSESSION ⇐23—WHAT CONSTITUTES.**

Where defendants claimed under color of title, and were in such possession as the nature of the premises permitted of, and exercised such dominion over the property, as the cutting of wood for seven years, their occupancy will ripen into title.

**8. TAXATION** **§798(1)—RIGHT OF FORMER OWNER TO QUESTION TAX TITLE.**

Tax title cannot be questioned by former owner until he shall have complied with Revisal 1905, § 2909, declaring that no person shall question title acquired by sheriff's deed, etc., without making a showing that all taxes upon the property had been paid, etc.

Appeal from Superior Court, New Hanover County; Calvert, Judge.

Action by H. K. Ruark and others against J. W. Harper and others. From a judgment for plaintiffs, defendants appeal. Action dismissed.

This was an action to remove a cloud, upon title to lands. William Grissom died intestate in 1875, seised of three contiguous tracts of land in said county. His wife died in 1889. He owned no other land in said county at his death, after which the land was listed for taxes in the name of the "heirs of William Grissom." The court found as facts:

"The sheriff executed his tax deed to the said J. W. Mintz, husband of Emily A. Mintz, dated May 27, 1901, recorded January 5, 1904, for '164 acres in Federal Point Township, adjoining lands of W. J. Harris, listed as heirs of William Grissom.' Thereafter said J. W. Mintz and Emily A. Mintz by like description executed their deed to W. A. McQuillan, dated June 12, 1903, and recorded December 22, 1905. Thereafter said McQuillan and wife by like description executed their deed to J. W. Harper, the ancestor of the present defendants Harper, dated August 6, 1912, and recorded August 7, 1912, which deeds appear in the record.

"J. W. Harper, the original defendant herein, has died since the commencement of this action, leaving a last will and testament, under which he devised, after certain bequests, his estate to the defendants Ella C. Harper, his wife, and to his children, Catherine and James Harper, minors, and if said sheriff's deed is valid to convey the whole of said land, they are entitled thereto in fee, or if valid to convey only the interest therein of Emily A. Mintz, by virtue of the deed of herself and husband to W. A. McQuillan aforesaid, then to an undivided sixth of the whole and an undivided one-fifth of one-sixth part inherited by said Emily A. Mintz from her deceased brother, Edgar A. Grissom, subject to the dower right of his wife therein, the plaintiff Cassie P. Grissom: Provided, the defendant heirs of Emily A. Mints are not entitled to inherit these interests."

The court adjudged upon the pleadings and admissions that the plaintiffs and defendants were tenants in common, and that the deeds above mentioned constituted a cloud upon the title, and adjudged that they had no legal effect and the cloud should be removed. The defendants appealed.

E. K. Bryan, of Wilmington, for appellants.

Iredell Meares, of Wilmington, for appellees.

CLARK, C. J. [1] The court held that the sheriff's deed, "if otherwise valid, did not operate to convey the whole of said premises to said J. W. Mintz, because of his relation as husband of said Emily A. Mintz, who was a tenant in common, and the title remained unchanged, and the cotenancy existing between them and her as cotenants continued thereafter." In this there was error. Mintz was not a tenant in common by reason of the fact that his wife was, and while it has been held in *Jordan v. Simmons*, 169 N. C. 140, 85 S. E. 214, that the husband could not buy the wife's land at a tax sale and claim title against the wife, there is no obligation growing out of the marriage contract which invalidated his purchase of the interest of the other tenants in common. The subsequent deed of J. W. Mintz and his wife, Emily A. Mintz, June 12, 1903, to W. A. McQuillan, purported to convey the whole of said land. It was effective to convey the wife's undivided one-sixth interest and the undivided five-sixths interest acquired by J. W. Mintz under the sheriff's deed.

[2] The deed from the sheriff to J. W. Mintz was color of title, certainly as to the interest of the tenants in common other than the wife and her one-sixth interest, was undisputed, and the seven years' possession would ripen title to the five-sixths interest acquired under the tax deed.

[3] The statute law in regard to sales of real estate for taxes permits the sheriff to sell property held by tenants in common, and provides that three years' possession under a tax deed bars the rightful former owners from the recovery of the property, without exception or reservation (Rev. § 395, subd. 10), and by statute one tenant in common is permitted to pay his or her part of the tax and let the other shares go. It is true that this court has held that a tenant in common in actual possession of the entire property could not permit the sale of the property for taxes and acquire the title as against his cotenants. *Smith v. Smith*, 150 N. C. 81, 63 S. E. 177. But this was put distinctly upon the ground of the tenant's occupancy of the entire property, and his breach of duty in allowing the sale to take place, and in taking advantage of his own wrong by purchasing the property; but here the purchaser was not a tenant in common. Mintz was not a tenant in common at all, and there was no reason why he could not purchase the interest of all the cotenants, except the interest of his wife, and that she conveyed by joining in the deed with her husband to convey the entire property to McQuillan, who afterwards conveyed to Harper.

[4] In this case the husband of the tenant in common was not charged with the same trust that his wife would have been, had she been in the occupancy of the entire property. The tax deed was color of title to Mintz, the

purchaser at the tax sale, of all interest in the land, except the wife's, and seven years' occupancy would bar the recovery by the other tenants. Rev. § 395; *Kivett v. Gardner*, 169 N. C. 78, 85 S. E. 145; *Dobbins v. Dobbins*, 141 N. C. 210, 53 S. E. 870, 10 L. R. A. (N. S.) 185, 115 Am. St. Rep. 632. It was said in *Lumber Co. v. Cedar Works*, 168 N. C. 344, 84 S. E. 523, Ann. Cas. 1917B, 992, that the doctrine of possession by tenants in common would not be extended further than the court has heretofore gone. In this case exclusive possession was taken by Mintz as purchaser, who was not a tenant in common, and was retained by him. He did not buy from one tenant in common, but from the sheriff. His wife alone might claim that by his purchase of the other five-sixths interest he was tenant in common with her, but by joining with him in the deed to McQuillan June 12, 1903, they conveyed the entire interest; at least their deed was color of title, and McQuillan had the right to claim title to the whole, and continue possession under said deed. He was not a tenant in common buying at the tax sale. In *Everhart v. Adderton*, 175 N. C. 403, 95 S. E. 614, the court said: "The purchaser was not a tenant in common, but merely the wife of one of them." There was evidence of seven years' adverse possession, which would ripen the title in said McQuillan and those claiming title under him. *Gill v. Porter*, 176 N. C. 451, 97 S. E. 381.

In this view it is unnecessary to consider the allegations of irregularities in the sale for taxes, and whether they were cured by the presumptions of regularity raised by the statute regulating sales of realty for taxation. The tax deed to Mintz and the subsequent conveyance by him to McQuillan being color of title, which would ripen by seven years' adverse possession by said McQuillan and those claiming under him, the defendants are entitled to have an issue submitted to the jury upon that question, and also as to the three years' possession under the tax deed.

An issue should also be submitted to the jury as to the identity of the land claimed by the plaintiffs and the defendants, which is denied by the pleadings. The court erred in holding as a matter of law that the deeds from the sheriff to Mintz and from Mintz and wife to McQuillan and Harper constituted the defendants cotenants with the plaintiffs.

[5] The certified copy of the sheriff's deed does not show a seal, but it recites that the deed was under seal, and in such case the law presumes a seal was on the original deed. *Brown v. Hutchinson*, 155 N. C. 205, 71 S. E.

302; *Edwards v. Supply Co.*, 150 N. C. 173, 63 S. E. 740; *Smith v. Lumber Co.*, 144 N. C. 47, 56 S. E. 555; *Heath v. Cotton Mills*, 115 N. C. 208, 20 S. E. 369.

[6] Even though there is no seal, and the tax title does not comply with the statute, it is good as color of title, and seven years' occupancy is sufficient to ripen the title in the possessor (*Kivett v. Gardner*, 169 N. C. 78, 85 S. E. 145; Rev. § 395, subd. 10), and this was expressly pleaded by the defendants. It would seem that the description in the tax deed was sufficient, *Fulcher v. Fulcher*, 122 N. C. 101, 29 S. E. 91.

[7] The relief demanded in the complaint is to remove a cloud upon title. This was doubtless because, as it seems, no one was in actual physical possession at the time the action was brought; but the relief demanded does not govern the remedy, which depends upon the facts admitted or proven. If the jury shall find from the evidence that the defendants, or those under whom they claim, were in such possession as the nature of the premises permitted of, as cutting wood, or otherwise, and exercised such dominion over the premises for seven years under the tax deed, then the defendant acquired title.

There was evidence of cutting wood and using other exclusive dominion over the property, and that McQuillan built a house upon the property in which he lived, and cultivated land upon it, and if the jury shall find that the defendants and those under whom they claim were in adverse possession of the land for 7 years under color of title, then they cannot be ousted therefrom upon the allegation that the relief sought is to remove a cloud, for his ripened title is title, and not a cloud upon title.

[8] Besides, the plaintiffs have not complied with the requirements of Rev. § 2906:

"No person shall be permitted to question the title acquired by a sheriff's deed made pursuant to this chapter without first showing that he or the person under whom he claims title had title to the property at the time of the sale, and that all taxes due upon the property have been paid by such person, or the person under whom he claims title."

Nor have the plaintiffs put in any evidence to rebut the presumptions in favor of the regularity of the deed which are recited in that section. Then there is the provision as to the matters in regard to which the deed is conclusive proof. The conditions precedent required in that section for bringing an action to set aside a tax deed cannot be avoided by the plaintiffs styling this action to be for the purpose of "removing a cloud from title."

Action dismissed.

(178 N. C. 656)

**J. G. WRIGHT & SON v. SHEPARD.**  
(No. 284.)

(Supreme Court of North Carolina. Oct. 22, 1919.)

**BROKERS**  $\S$  44—WITHDRAWAL OF LAND FROM AUTHORITY TO SELL.

A landowner, who had employed a realty broker to sell, on withdrawing the land, was required, not only to give notice to the broker that the land was withdrawn from his authority, but such action had to be in good faith, and not merely for the purpose of defrauding the broker of any earned commission.

Appeal from Superior Court, New Hanover County; Stacy, Judge.

Action by J. G. Wright & Son against L. L. Shepard. Judgment for defendant, and plaintiffs appeal. No error.

This is an action begun before a justice of the peace to recover the sum of \$75, which the plaintiff alleged was due him as his commission upon the sale of a piece of property, which the defendant had given to the plaintiff, who was a real estate dealer, to sell for him. Upon appeal to the superior court there was one issue submitted to the jury: "Is the defendant indebted to the plaintiff? If so, in what amount?" The jury answered the issue, "No," and the plaintiff appealed from judgment for defendant.

McClammy & Burgwin, of Wilmington, for appellant.

W. F. Jones, of Wilmington, for appellee.

**PER CURIAM.** The controversy was one of fact; the plaintiff contending that he was employed by the defendant to sell his lot and that he procured a purchaser to whom the defendant afterwards sold, and the defendant that the plaintiff could not procure a purchaser at the price he was authorized to sell, that he withdrew the lot from the plaintiff and then sold it; and it has been submitted to the jury under proper instructions, which not only required the defendant to show that he gave notice to the plaintiff that the lot was withdrawn, but also that this was done in good faith.

No error.

(178 N. C. 359)

**LAWS et al. v. CHRISTMAS et al.** (No. 331.)

(Supreme Court of North Carolina. Oct. 29, 1919.)

**1. WILLS**  $\S$  448—CONSTRUCTION—PRESUMPTION AGAINST INTESTACY.

To construe a provision of a will, stating that the testatrix wanted certain property sold, the proceeds put in a bank to go to C. and used for the education of his children, as merely expressing a desire or wish, would violate the presumption against intestacy.

**2. WILLS**  $\S$  675—CONSTRUCTION—CREATION OF TRUST—PRECATORY WORDS.

Language of a will, though precatory in form, will create a trust if the intent clearly appears.

**3. TRUSTS**  $\S$  25(1)—CREATION—SUFFICIENCY OF LANGUAGE USED.

Technical language is not necessary to create a trust if the intention is apparent.

**4. WILLS**  $\S$  675—CONSTRUCTION—CREATION OF TRUST—PRECATORY WORDS.

Precatory words in a will create a binding trust if meant to govern the conduct of the person to whom addressed and not merely as an indication of what the testator thinks would be a reasonable exercise of a discretion thereby left to such person.

**5. WILLS**  $\S$  675—CONSTRUCTION—CREATION OF TRUST—PRECATORY WORDS.

That the person or object to which they apply is clearly pointed out and the quantum of the estate given clearly defined, has great weight in determining whether precatory words in a will create a trust.

**6. WILLS**  $\S$  675—CONSTRUCTION—POWER OF SALE.

A will providing that after the life tenant's death, testatrix wanted property sold and the proceeds put in a bank "to go to C. and used for the education of his children" authorized a sale and disposition of the proceeds notwithstanding the precatory word "want."

**7. WILLS**  $\S$  675—CONSTRUCTION—CREATION OF TRUST—PRECATORY WORDS.

Such provision created a trust in favor of the children, especially as the testatrix used the word "give" in other parts of the will where an absolute gift was intended.

**8. TRUSTS**  $\S$  287—INABILITY OF TRUSTEE TO EXECUTE—DISPOSITION OF PROPERTY.

Property bequeathed to a person in trust for the education of his children was properly ordered paid to the clerk as receiver for the children, where the father could not give bond, had not seen the children in years, did not know where they were, and admitted his inability to execute the trust.

Appeal from Superior Court, Orange County; Stacy, Judge.

Action by George Laws, executor, and R. L. Christmas against Beatrice Christmas and others. From an adverse judgment the plaintiff R. L. Christmas appeals. Affirmed.

This is an action by the executor of Louisa Frye and R. L. Christmas against the children of the said Christmas to obtain a construction of the will of the said Frye and to determine the rights in the proceeds of the sale of a certain lot of land. The will is in the following words:

"I, Louise Frye, being of sound mind and memory, do make this my last will and testament as follows.

"I desire my body to be decently buried in the new cemetery plot on the south side, designated by Mr. George Laws, who will attend to my burial and for his services and furnishing the coffin I give to him my gold watch, now in his possession. I give to my sister, Eliza Christmas, the following household articles to be sold: 1 bureau, 1 sideboard, 1 stove, 1 new feather bed and pillow of down.

"I also give to my sister, Eliza Christmas, my house and lot, at depot, during her lifetime; I also give my sister, Eliza, all the money I should have in bank at my death. I want her well provided for a good sum and board.

"After my sister Eliza's death, I want my house and lot to be sold, the money to be put in bank to go to Robert L. Christmas, and used for the education of his children. I appoint Mr. George Laws executor to this my last will and testament.

"Witness my hand and seal, this 26th day of June, 1906. Louisa Frye. [Seal.]"

In 1909, about three years after the death of the testatrix, the plaintiff R. L. Christmas separated from his wife and children, and he has not seen his children since then, and does not know where they are. The wife of R. L. Christmas is dead.

The lot referred to in the will has been sold, and the controversy is over the proceeds of the sale; R. L. Christmas contending that the proceeds of sale are given to him in the will, and the defendants that a trust is declared in their favor.

His honor rendered judgment holding that there was a trust in favor of the defendants, and as the plaintiff Christmas was unable to give a sufficient bond for the security of the funds, he ordered that it be paid to the clerk of the superior court of Orange county as the receiver for the defendants, and the plaintiff excepted and appealed.

T. C. Carter, of Mebane, for appellant.

A. H. Graham and John W. Graham, both of Hillsboro, for appellees.

ALLEN, J. The words which give rise to the present controversy are "want" and "used for the education of his children"; the plaintiff R. L. Christmas contending that there was an absolute gift of the money to him when the testatrix said "to go to R. L. Christmas," and that the word "want" is precatory and merely expressive of a desire or wish, while the defendants, his children, insist that a trust is declared in their favor.

[1] The first difficulty in the way of the position taken by the plaintiff is that it proves too much, since it is not reasonable to hold that the word "want" relates to the sale of the lot, and then, passing over two dispositions of the property, say it affects the provision for the education of the children, without also holding that it pervades the whole item, giving character to each provision, so that the will would read:

"I want my house and lot to be sold." "I want the money to be put in bank." "I want it to go to Robert L. Christmas." "I want it to be used for the education of his children."

And under this construction, if held to be precatory, and not imperative, no one would take anything under the item of the will, and the testatrix would be intestate as to the remainder in fee in the lot, which is contrary to the presumption that "every testator is presumed to intend to dispose of all his estate, so as not to die intestate as to any part" (*Foust v. Ireland*, 46 N. C. 187; *Foil v. Newsome*, 138 N. C. 119, 50 S. E. 597, 3 Ann. Cas. 417), and to the language of the will which manifests a purpose to make some disposition of the property.

Why mention it at all, if she did not intend to create some right or impose some duty in regard to it? The fact that she refers to it shows that she had the remainder interest in mind, and it is reasonable to conclude she would have remained silent if she did not intend to devise it.

We cannot adopt this view of the plaintiff, and, as it appears to us, but one of two constructions is permissible. The testatrix either intended to express the wish that the lot be sold, and to make explicit disposition of the fund, in which event the word "want" would only refer to the sale of the lot, or that the whole devise or bequest should be imperative, although precatory words were used.

[2] The effect of precatory words in a will has been considered in several recent decisions, and while the older English doctrine that, "Whenever property was given coupled with expressions of request, hope, desire, or recommendation that the person to whom it is given will use or dispose of the same for the benefit of another, the donee will be considered a trustee for the purpose indicated by the donor," has not been followed, the principle is recognized in all that, although in form precatory, the language will be held to be imperative, and to impose a trust if the intent clearly appears. *Carter v. Strickland*, 165 N. C. 70, 80 S. E. 961, Ann. Cas. 1915D, 416; *Hardy v. Hardy*, 174 N. C. 507, 93 S. E. 976.

[3-5] The Wisconsin court states the controlling principles in *Knox v. Knox*, 59 Wis. 172, 18 N. W. 155, 48 Am. Rep. 487, as follows:

"First. 'It is not necessary that technical language should be used to create a trust. It is enough that the intention is apparent.' 1 Jarm. Wills (5th Ed.) 385, and note.

"Second. 'That precatory words used in a will, that is, words of recommendation, entreaty, request, wish, or expectation, addressed to a devisee or legatee, may be sufficient to create a trust in favor of the person or persons in whose favor such expressions are used.' 1 Jarm. Wills (5th Ed.) 385; *Lewin, Trusts*,

118; 2 Story, Eq. Jur. pars. 1068, 1068a; Hill, Trustees, 71; 2 Redf. Wills, 410, 411.

"Third. In order to determine whether precatory words in a will create a binding trust, 'the real question always is whether the wish, desire, or recommendation expressed by the testator is meant to govern the conduct of the party to whom it is addressed, or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of the party, leaving it, however, to the party to exercise his own discretion.' 2 Redf. Wills, 416; Williams v. Williams, 1 Sim. (N. S.) 358; Hill, Trustees, 114; 2 Story, Eq. Jur. (12th Ed.) par. 1068b, and cases cited.

"Fourth. In determining that precatory words in a will create a trust, the courts give great weight to the fact that the person or object to which the precatory words apply is clearly pointed out, and the quantum of the estate to be given to such person or object is also clearly defined. 1 Jarm. Wills, 396; 2 Redf. Wills, 416; 2 Story, Eq. Jur. pars. 1070, 1071."

Here we have the persons clearly pointed out, if the precatory words apply to the provision for the children, the quantum of the estate given is clearly defined, and that the testatrix intended to control the fund appears from the entire absence of words of discretion in connection with the gift to the plaintiff and that he takes it for a specific purpose.

[6] The testatrix gave the lot to her sister for life, the remainder in fee is not referred to, except in the item before us, there is no reason for mentioning it, except to dispose of it, and in our opinion the language used is sufficient to authorize a sale and to dispose of the proceeds.

[7] Does it impress the fund with a trust in favor of the children?

"It must be conceded that it is not necessary for the valid declaration of a trust that any peculiar language be used." St. James v. Bagley, 138 N. C. 398, 50 S. E. 842, 70 L. R. A. 160.

"The intent is what the court looks to." Blackburn v. Blackburn, 109 N. C. 489, 13 S. E. 937.

"No technical language, however, is necessary to the creation of a trust, either by deed or by will. It is not necessary to use the words 'upon trust,' or 'trustee,' if the creation of a trust is otherwise sufficiently evident. If it appear to be the intention of the parties from the whole instrument creating it that the property is to be held or dealt with for the benefit of another, a court of equity will affix to it the character of a trust, and impose corresponding duties upon the party receiving the title, if it is capable of lawful enforcement." Colton v. Colton, 127 U. S. 310, 8 Sup. Ct. 1169, 32 L. Ed. 138.

"It is sufficient if the language used shows the intention to create a trust, clearly points out the property, the disposition to be made of it, and the beneficiary." Witherington v. Herring, 140 N. C. 497, 53 S. E. 304, 6 Ann. Cas. 188.

All of these requirements are present, if the intent of the testatrix is made manifest. It is significant that the testatrix required the money "to be put in bank," instead of giving it to the plaintiff, which would have been the natural course if she had intended him to have the beneficial interest. It is also worthy of note that in the preceding parts of the will she uses the terms "I give" four times, showing she knew what it meant, and particularly in connection with the gift of the money in bank at the time of her death; but when she makes disposition of the proceeds of the sale of the lot in bank, this is "to go to" the plaintiff, which is less certain and at least ambiguous. And it is to go to him coupled with the purpose in the mind of the testatrix, "and used for the education of his children."

Use and trust are in many respects synonymous, and when property is given to be used for a particular person it would require great refinement to distinguish this from a gift to his use, in trust for him, or for his benefit. In Jarrell v. Dyer, 170 N. C. 178, 86 S. E. 1032, the language in the will was:

"I, Emma J. Simmons, being of sound mind, do hereby will and bequeath to my mother, Pauline E. Jarrell, all the property recently deeded to me by her, also all my other property, that she may administer it to the use of my children."

And the court said of this provision:

"The testatrix evidently bequeathed to her mother all of her property, including that which had been conveyed to her by her mother, as well as that which she derived from other sources, in trust that the mother may use, control, and administer it for the benefit of the testatrix's children."

We cannot think the construction would have been changed if the testatrix had said "for the use of my children," or "to be used for them."

[8] We are therefore of opinion a trust is declared in favor of the children, and, if so, the court had the right, and it was its duty, to see that the fund was secured as it did by its order, as the plaintiff was unable to give bond, had not seen his children for 10 years and does not know where they are, and says in his complaint:

"That under any circumstances it will be impossible at this time for him to carry out the wish and even a trust, if the court should decide that he was a trustee."

"Under the old equity system the chancellor had power to order one, who held the legal title in trust for another, to execute a deed. So he had power to order a defendant who held a fund in trust, whether it consisted of bonds or of money, to pay 'the fund' into court, to the end that the fund should be put under the protection of the court. This power the court still has under the new system in all cases



where there is the relation of trustee and cestui que trust, and the land or the fund is, in contemplation of a court of equity, the property of the plaintiff in an action brought to enforce the equity, and an order made for the execution of a deed, or the payment of the fund into court, is a lawful order." *Daniel v. Owen*, 72 N. C. 342.

**Affirmed.**

(178 N. C. 339)

**SANDERSON v. SANDERSON.** (No. 299.)

(Supreme Court of North Carolina. Oct. 22, 1919.)

**DIVORCE** ⚡37(16)—**ACTION BY HUSBAND FOR DESERTION.**

Under Consol. St. c. 30, § 5, a husband is not entitled to a separation from wife, although they have lived separate and apart for ten successive years, where the separation was brought about by cruel and inhuman treatment of the wife by the husband.

Appeal from Superior Court, Robeson County; Calint, Judge.

Action by Robert Sanderson against Susan Sanderson. Judgment for plaintiff, and defendant appeals. Reversed.

This action was instituted by plaintiff to obtain a divorce from his wife, the defendant, on account of 10 years' separation. The defendant answered, and did not deny the separation, but set up that the same was caused by the cruel and inhuman treatment that she had received from the plaintiff, and that she was the injured party in such separation, and that the plaintiff ought not to be allowed to obtain a divorce from her and escape the marital obligation on account of his own wrong. These facts are established by the verdict, which finds that the defendant was the injured party in the separation. The verdict of the jury was as follows:

"1. Were the plaintiff and defendant duly married, as alleged in the complaint? Yes.

"2. Did the plaintiff and defendant live separate and apart continuously for ten successive years immediately preceding the institution of this action and the filing of the complaint? Yes.

"3. Has the plaintiff been a resident of the state of North Carolina for ten years next preceding the institution of this action? Yes.

"4. Was the plaintiff the injured party? No; the defendant was the injured party."

The defendant moved for judgment on the verdict, which was refused, and the defendant excepted. Judgment for the plaintiff, and the defendant appealed.

McLean, Varser, McLean & Stacy, of Lumberton, for appellant.

Johnson & Johnson, of Lumberton, for appellee.

**ALLEN, J.** The appeal of the defendant presents the question for decision of the right of the husband to a divorce on the ground of a separation for ten years, when the separation has been brought about by his abandonment of his wife or by forcing her to leave him by his own misconduct. The Consolidated Statutes, which went into effect August 1, 1919 (Pub. Laws 1919, c. 238, § 8), provides in chapter 30, § 5, that—

"Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony, on application of the party injured, in the following cases:

"1. If the husband commits adultery.

"2. If the wife commits adultery.

"3. If either party at the time of the marriage was and still is naturally impotent.

"4. If the wife at the time of the marriage is pregnant, and the husband is ignorant of the fact of such pregnancy and is not the father of the child with which the wife was pregnant at the time of the marriage.

"5. If there has been a separation of husband and wife, and they have lived separate and apart for ten successive years, and the plaintiff in the suit for divorce has resided in this state for that period."

It is thus seen that all causes for divorce are collected in one section of one statute, and that the same condition is imposed as to each, that the divorce shall be granted "on application of the injured party," which, as the grounds for divorce are statutory, has been frequently held to mean that the party to the marriage contract, who is in the wrong, cannot obtain a divorce. *Whittington v. Whittington*, 19 N. C. 64; *Moss v. Moss*, 24 N. C. 56; *Foy v. Foy*, 35 N. C. 90; *Tew v. Tew*, 80 N. C. 316, 30 Am. Rep. 84; *Setzer v. Setzer*, 128 N. C. 170, 38 S. E. 731, 83 Am. St. Rep. 666; *House v. House*, 131 N. C. 140, 42 S. E. 546.

All of these cases except *Moss v. Moss* were cited and approved in *Page v. Page*, 161 N. C. 175, 78 S. E. 619, the court saying in conclusion:

"No one will be allowed to take advantage of his or her own wrong. This maxim was applied to a case of divorce by Judge Pearson in *Foy v. Foy*, supra. In the words of the statute (Code, § 1285; Revisal, § 1562), the application for the divorce must be made 'by the party injured,' and these words were construed in *Steele v. Steele*, 104 N. C. 631 [10 S. E. 707], to mean that neither of the spouses is entitled to divorce if his or her marital fault provoked or induced the alleged misconduct of the other."

"We have the highest authority for the precept 'that whosoever shall put away his wife, saving for the cause of fornication, causeth her to commit adultery,' which is not more obligatory as an injunction of revealed religion, than it is just and true as a proposition in the philosophy of the human mind and heart" (*Whittington v. Whittington*, supra)

—a principle embodied in the statute, which denies a divorce except to the injured party, and applied in the decisions of this court.

The plaintiff insists, however, that the question has been decided differently in *Cooke v. Cooke*, 164 N. C. 272, 80 S. E. 178, 49 L. R. A. (N. S.) 1034, and, as this is the last utterance of the court, it destroys the effect of prior decisions; but an examination of the opinions in the *Cooke* Case demonstrates that it does not question the correctness of the principle that one who is in the wrong cannot procure a divorce under a statute which gives the right of action to the injured party alone, and that the decision rests upon the ground that the cause for divorce on account of separation for ten years, as it then stood, was provided for in a separate statute, which did not have in it the condition "on application of the injured party," and that, although in form an amendment to the Revisal, the language of the statute was so explicit the court was—

"not at liberty to interpolate or superimpose conditions and limitations which the statute itself does not contain." Hoke, J., in the opinion of the court.

Brown, J., who cast the deciding vote, makes it clear that this was the reason moving him as he says in a concurring opinion:

"It is contended that the plaintiff must allege and prove that the plaintiff is the injured party. There are no such words in the act, although they are and have been in the Revisal long prior to the act of 1907. I think those words plainly apply to those causes of action which grow out of the personal misconduct of the parties. They would be out of place in the act of 1907, and are entirely inconsistent with its spirit and purpose."

The *Cooke* Case, then, conceding it was correctly decided, when considered in connection with the reasoning of the court and the ground of the decision, does not militate against the principle announced in the earlier cases, and is no authority for the position that one, who is in the wrong, may now have a divorce on account of a separation of ten years since the statute, making this a cause for divorce, has been taken from its original setting and has been made a part of a statute, which gives no right of action except to the injured party.

The question decided in *Ellett v. Ellett*, 157 N. C. 162, 72 S. E. 861, 39 L. R. A. (N. S.) 1135, Ann. Cas. 1913B, 1215, was that there was error in the charge of the court as to the degree of proof required on the seventh issue, and for this error a new trial was ordered on the whole case.

We are therefore of opinion the finding on the fourth issue prevents the plaintiff from obtaining the divorce sued for, and it would be a harsh and cruel rule to declare otherwise, as to do so would permit a husband to

drive a loving faithful wife from his home and refuse to permit her to return for ten years, and then reward his conduct by granting him a divorce because he and his wife had lived separate for ten years.

Reversed.

(178 N. C. 710)

STATE v. MEDLEY et al. (No. 347.)

(Supreme Court of North Carolina. Oct. 29, 1919.)

1. WITNESSES  $\S$  300 — COMPELLING CODEFENDANT IN A CRIMINAL PROSECUTION TO TESTIFY.

In a prosecution for highway robbery, refusal of the court to call one defendant at the request of another, under Revisal 1905, § 1630, relating to compelling interested persons to testify, and section 1634, relating to competency of persons charged with crimes as witnesses, was not an abuse of discretion, in view of section 1635, and Const. art. 1, § 11, providing that such persons shall not be compelled to give evidence incriminating themselves, where the testimony sought from such defendant would not only prejudice her trial for robbery and feloniously receiving property, but would have a direct tendency to establish her guilt of criminal prostitution, under Laws 1919, c. 215.

2. WITNESSES  $\S$  308 — COMPELLING WITNESS TO INCRIMINATE HIMSELF.

While ordinarily desirable that a defendant in a criminal prosecution, requested to testify by a codefendant, should be called to the stand to determine witness' constitutional privilege against giving testimony that might incriminate herself, where the facts showed that the evidence sought must prejudice such witness' defense, and as well incriminate the witness with reference to another crime, the court's refusal to have the witness called to the stand must be sustained.

Appeal from Superior Court, Forsyth County; Bryson, Judge.

Bunks Medley and Fannie Robertson were convicted of highway robbery. From a judgment imposing sentence on Bunks Medley, he excepts and appeals. No error.

Indictment for highway robbery, in feloniously taking by force a watch, etc., from the person of one G. M. Simpson, with count also for feloniously receiving said watch, etc. There was a verdict of guilty as to both defendants, with recommendation of mercy as to Fannie Robertson.

Moses Shapiro and Fred M. Parrish, both of Winston-Salem, for appellant.

Jas. S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

HOKE, J. There were facts in evidence tending to show that in March, 1919, about 12 o'clock at night, or shortly thereafter, on

the streets of Winston-Salem, the defendant Bunks Medley held up the prosecutor with a pistol, while the female defendant went through his pockets, taking his watch, etc. There were other facts tending to confirm the direct evidence on the subject.

[1] During the progress of the trial, the male defendant proposed to examine his co-defendant, Fannie Robertson, as a witness, stating that his purpose was to show by her that he was not with her that night, and had not been for two months, and that the watch which she had in her possession (that of the prosecutor) had been found in the bed which had been occupied by her and the prosecutor, Simpson. Said Fannie Robertson having stated that she did not care to take the stand as a witness, the court declined to allow her to be examined as proposed, and defendant excepted. Speaking generally, and under section 1630 of Revisal, all parties and persons interested are made competent and compellable to testify as witnesses in judicial investigations, or before courts or tribunals having power to hear and examine evidence, except in actions or other proceedings instituted on account of adultery or in actions for criminal conversation.

Under section 1634, in all indictments, complaints, or other proceedings against persons charged with crimes, etc., the person so charged shall at his own request, and not otherwise, be a competent witness, etc.; and in section 1635 it is provided that nothing in the preceding section (1634) shall render any person charged with a criminal offense competent or compellable to give evidence against himself, nor shall it render any person compellable to answer any question tending to incriminate himself, etc. Construing these and other sections appertaining to the subject, it has been held that, on trial for crime, any defendant is competent and compellable to testify for or against a co-defendant, provided he is not compellable to give evidence that may tend to convict him, either of the crime charged or other offense against the criminal law. *State v. Smith*, 86 N. C. 705.

While this is at present the authoritative interpretation of the statute law on the subject, and the position may be at times essential to the efficient enforcement of the criminal laws of the state, in its practical application it is very difficult to safeguard the constitutional guaranty of such a witness against self-incrimination, when the question of his own guilt is involved in the issue and before the same jury. In such case the trial judge should be allowed a large discretion in

the matter, and his rulings in the effort to preserve the constitutional rights of the witness should not be disturbed, unless substantial error is very clearly made to appear. A perusal of this proposed evidence will show that the greater and most significant part of it not only tended to establish an essential fact towards her conviction of the offense charged, and for which she was then on trial, but it also had a direct tendency to establish her guilt of the crime of criminal prostitution under Laws 1919, c. 215.

In *Smith v. Smith*, 116 N. C. 386, 21 S. E. 196, it was held on this question that the true intent and meaning of this article of the Constitution (section 11, art. 1), is that a witness shall not be compelled to answer any question, the answer to which would disclose a fact which forms an essential link in the chain of testimony which would be sufficient to convict him of a crime, and Chief Justice Faircloth, delivering the opinion, said:

"We think the provision of our Constitution ought to be liberally construed to preserve personal rights and protect the citizen against self-incriminating evidence."

[2] Even if the first portion of this suggested evidence could be considered as a separate proposition—that is, that she had not been with the male defendant for two months—there is no doubt on the facts of the record if the witness should be forced to respond to questions concerning it. True, if the witness had answered as the male defendant desired, such answer might have been insisted on; but suppose the answer had been to the contrary, or suppose that, unwilling to support the prisoner by false evidence, she had refused to answer the question, this would of itself have been a pregnant circumstance against her on the issue as to her own guilt. True, as appellant contends, it is ordinarily desirable that a witness be called to the stand, so that the court may more intelligently determine whether the questions and answers will trench upon his constitutional privilege; but on the facts of the present record, and considering the issue, the position of the parties concerning it, and the evidence as proposed, we are of opinion that the power of his honor in the premises has been providently exercised, and we approve his ruling in refusing to have the witness called to the stand and subjected to the proposed examination.

There is no error, and the judgment is affirmed.

No error.

(178 N. C. 315)

(100 S.E.)

## SILLS v. BETHEA. (No. 222.)

(Supreme Court of North Carolina. Oct. 22, 1919.)

**1. HUSBAND AND WIFE ⇨184—INSUFFICIENCY AS CONVEYANCE OF WIFE'S DEED LACKING WRITTEN ASSENT OF HUSBAND.**

Where the privy examination of a wife conveying land was duly taken, but her deed lacked the written assent of her husband, it was insufficient as a conveyance under Const. art. 10, § 6, requiring husband's written assent.

**2. HUSBAND AND WIFE ⇨187—DEED WITH MORTGAGE BACK CONSTITUTES CONTRACT TO CONVEY ON PAYMENT.**

Where, at the instant of making of deed by a wife, the grantee conveyed back the property by a mortgage to secure the purchase money, the wife's deed in legal effect was in no sense a "conveyance," but merely a contract to convey on payment of the purchase money, notwithstanding in form there was a deed from the wife to her grantee, and a mortgage deed back from him, and, as a contract to convey, was valid under the Martin Act, which repealed Revisal 1905, § 2094, and authorized every married woman to contract as to her real and personal property as if unmarried, excepting only contracts with her husband under Revisal 1905, § 2107, although as to conveyances of her realty still requiring the written assent of her husband and her privy examination.

**3. HUSBAND AND WIFE ⇨199—WIFE'S CONTRACT TO CONVEY WITHOUT WRITTEN ASSENT OF HUSBAND.**

Under the Martin Act, repealing Revisal 1905, § 2094, where a wife without the written assent of her husband deeded land to a grantee, who executed notes for the purchase money secured by mortgage back on the land, and, after the wife became discover by death of her husband, she advertised the land for sale under the mortgage, but subsequently, when the grantee mortgagor tendered her the full amount of the notes and interest, called the sale off and brought ejectment, the grantee mortgagor is entitled to decree for specific performance; the wife's deed having been good as a contract to convey, and she having recognized its obligation after her husband's death.

**4. SPECIFIC PERFORMANCE ⇨85—ACTION FOR DAMAGES ON WIFE'S CONTRACT TO CONVEY.**

While her husband lived, the obligation of a wife's contract to convey could be enforced only by an action for damages, as the court could not require specific performance on account of its inability to compel the husband to give his written assent to a conveyance.

Walker and Hoke, JJ., dissenting.

Appeal from Superior Court, Sampson County; Gulon, Judge.

Ejectment by Johnie P. L. E. Sils against Frank Bethea. Judgment for defendant, and plaintiff appeals. Affirmed.

The judge finds from the pleadings and admission of the parties that the plaintiff, while married, executed the deed for the land to the defendant, who at the same time executed notes for the purchase money secured by mortgage on the same land. After the plaintiff became discover by the death of her husband, she advertised the land for sale under the mortgage; but subsequently, when the defendant tendered her the full amount of the notes and interest, she called the sale off and brought this action for ejectment. The court rendered judgment for specific performance.

Kerr & Herring, of Clinton, for appellant.

Butler & Herring and Fowler & Crumpler, all of Clinton, and E. O. West, of Dunn, for appellee.

CLARK, C. J. The plaintiff has gone into court asking recovery of the land, and the defendant asks a decree of specific performance.

[1] The facts are found by the judge upon the pleadings and admissions of the parties. The privy examination of the plaintiff was duly taken, but his honor correctly held that the deed was not sufficient as a conveyance because it lacked the "written assent of the husband." Const. art. 10, § 6.

[2] Irrespective of that defect, it was not a conveyance of any title because at the instant of making the deed the defendant conveyed back the property by a mortgage to secure the purchase money. It was therefore, in legal effect, in no sense a "conveyance," but merely a contract to convey upon payment of the purchase money, notwithstanding that in form there was a deed from the plaintiff to the defendant and a mortgage deed back. This was held in *Bunting v. Jones*, 78 N. C. 242, and numerous citations thereto in *Anno. Ed.*, holding that in such case "no title vested in the defendant whose wife acquired no dower or homestead rights therein."

It is therefore simply a "contract" that upon payment of the purchase money the plaintiff would convey the property. It has no other legal effect.

The Martin Act (chapter 109, Laws 1911) repealed Rev. 2094, and substituted therefor the following: "Every married woman shall be authorized to contract and deal so as to affect her real and personal property in the same manner and with the same effect as if she were unmarried," with the exception only of contracts with her husband under Rev. 2107; and as to "conveyances of her real estate" still requiring the written assent of the husband and privy examination. The sole exception as to contracts was as to contracts with her husband under Rev. 2107.

[3] Further, after the death of her husband, the plaintiff, recognizing fully the ob-

ligation of the contract, endeavored to enforce it against the defendant and advertised the property for sale under the mortgage. But when the defendant tendered her the full amount of the note and interest thereon, together with the costs of sale under the mortgage, and demanded execution of the deed for the property under the terms of the contract, she refused to comply and brought this action to recover the land, and the defendant asks a decree of specific performance.

Judge Gulon, after reciting in the judgment the facts above set out, as to which there was no controversy, recites:

"The court being further of the opinion, while the deed set forth in the answer was invalid and ineffectual to convey said land by reason of the want of the written assent of the husband thereto, yet being of the opinion that said deed so executed was a good and sufficient contract to convey said land under the provision of Laws 1911, c. 109," adjudges that there was a "good and sufficient contract to convey said land, and that upon payment to the plaintiff of the full sum evidenced by the notes described in the answer, with the interest thereon until paid, said plaintiff should execute to the defendant a deed for the land described in the complaint and that the defendant recover of the plaintiff the costs of the action."

This is in exact accordance with the terms of the contract which the plaintiff under the Martin Act had the right to make "in the same manner and with the same effect as if she were unmarried." There is exactly the same enforcement of the contract against the plaintiff which she sought to have against the defendant after she again became a single woman by advertising the property for sale under the contract.

The just and accomplished judge applied to both parties the thrice repeated scriptural injunction, "With what measure ye mete, it shall be measured to you again" (Matthew, vii, 2), which was repeated (Mark, iv, 24, and Luke, vi, 38). Equity and justice know no higher standard than this. The plaintiff, her husband being dead, attempted to enforce the contract and cannot now complain that the court has made her comply therewith.

[4] While the husband lived, the obligation of the contract could be enforced only by an action for damages (Warren v. Dail, 170 N. C. 406, 87 S. E. 126), for the reason that the court could not require specific performance because it could not compel the husband to give his written assent (Fortune v. Watkins, 94 N. C. 315, which was the case where the wife refused to join in the husband's deed); but, the husband being dead, there is no obstacle now in requiring the plaintiff to comply with her contract by specific performance. Affirmed.

BROWN, J. (concurring). After the death of her husband when she became discover,

in my opinion, the plaintiff had the right to repudiate the transaction and sue for the land, or else to affirm the sale and collect the purchase money represented by the purchase-money notes and mortgage. It is manifest that she elected to collect the purchase money, and thereby affirmed the sale. When she advertised the land under the power of sale contained in the mortgage, she thereby demanded the purchase money of the defendant and indicated her election to take the purchase money and not the land. This was as clear an indication of her purpose as if she had brought her suit to foreclose the mortgage and bar the defendant of his equity of redemption. It was a clear, unmistakable, and unequivocal election on her part, and, when the defendant tendered her the full amount of the purchase money after the land had been advertised for sale, it was her duty to accept it. As the plaintiff could not have the land and the purchase money both, it was her duty, after the death of her husband, if she intended to claim the land, to cancel the purchase-money notes and mortgage and return them to the defendant and make demand upon him for the land, which she failed to do.

For these reasons, I concur in the judgment of the court.

WALKER, J. I dissent in this case upon the ground so strongly and clearly stated in the dissenting opinion of Justice Brown, in Warren v. Dail, 170 N. C. 406, at page 415, 87 S. E. 126, 130, in which I concurred. He there says:

"If any legal question has ever been settled by repeated decisions of this court, it is that the deed or contract of a married woman charging her real estate in this state is a nullity unless her husband joins and her privy examination is taken. Scott v. Battle, 85 N. C. 184 [39 Am. Rep. 694]; Farthing v. Shields, 106 N. C. 289 [10 S. E. 998]; Ball v. Pacquin, 140 N. C. 83 [52 S. E. 410, 3 L. R. A. (N. S.) 307]; [Clayton v. Rose, 87 N. C. 106]; Bank v. Benbow, 150 N. C. 781 [64 S. E. 891]; Council v. Pridgen, 153 N. C. 443 [69 S. E. 404]. The assent of the husband is a constitutional requirement. The necessity for the privy examination is not only required by Rev. 962, as to all her lands, and by the Constitution as to the homestead, but it is made a necessary requisite by the so-called Martin Act itself. So carefully has this court guarded this protection to married women that in Smith v. Bruton, 137 N. C. 79 [49 S. E. 64], it is held that a married woman cannot bind herself by agreeing to arbitrate the question of title to land owned by her. It might result in conveying away her land by an award of arbitrators without the necessary assent of her husband and privy examination. \* \* \* In this case the attempt is being made to give force and vitality to a contract that has never had legal existence."

In this case, there was no assent of her husband to the deed she is alleged to have

made, and no valid privy examination. It was therefore void—an absolute nullity—and incapable of ratification by anything she has since done, and relied on as such. She has done nothing to prejudice any one's rights. The mere advertisement under the power contained in the mortgage is not sufficient to estop her or to bind her by ratification, admitting that the void deed is susceptible of ratification by an act of hers sufficient for that purpose. How was anybody hurt by her advertisement? She withdrew it, and stood upon her rights under the law, before there was even any equitable estoppel by completing the sale, making a deed, and receiving the purchase money. There is no contention that any other kind of estoppel prevents her from claiming her land.

In *Bank v. Bridgers*, 98 N. C. 67, 3 S. E. 828, 2 Am. St. Rep. 317, Mrs. Bridgers, whose original note was held to be void, because given during her coverture, gave a new note after she became discover, which was founded upon a fresh consideration. She was held to be bound by the second note, because it was a new transaction, based upon a sufficient legal consideration. The Martin Act, when properly considered, in my judgment, is not applicable to the facts of this case. It is conceded that the deed of this lady, who was a married woman when it was executed, is void, not having the assent of her husband, and her valid privy examination not having been taken, and yet it is proposed to hold her bound by it as a contract and to compel her to do by our decree what the law plainly and positively forbids. This is not an action for damages, but we are now dealing directly with her land, with a view of taking it from her, whether by deed or decree, without the formalities and ceremonies which the law expressly and imperatively requires to be observed. What is forbidden to be done directly cannot be done indirectly. The anomaly thus presented was surely not contemplated by the act of 1911, and was not in the mind of its able and learned author when he formulated it. Her deed is absolutely void, and is a nullity. *Ex nihilo nihil fit*.

It is suggested that this instrument, in form and substance a deed, may operate as a contract to sell. But if this be so, and I must deny its correctness, it makes no difference in the result, because by the statute (Revisal, §§ 952 and 953) a contract to sell the wife's land, without the written assent of the husband, is just as void as if it were treated only as a deed. The husband and wife cannot execute the deed or contract by separate instruments. They must execute it jointly, and then the probate, as to both, can be taken by different officers at different times and places. But here there was no good execution, and, whether treated as a deed or a contract, the instrument was an

absolute nullity, or, as the court says in *Scott v. Battle*, supra, it is so utterly void that it has no more force or effect than a "blank piece of paper." I am unable to see how a paper absolutely void can be vitalized by the husband's death, without anything being thereafter done by the wife, which, in law, imparts life to it. The mere fact of the husband's death does not by any principle of law known to our jurisprudence produce any such effect. The Martin Act is far from warranting the assumption that the deed of a married woman can thus be made to operate as her contract. And a majority of the court, as I understand it, take this view; the disagreement between them being only as to whether there was a ratification.

But it is now strenuously urged that she is bound by her void deed, even as a deed, and not merely as an executory contract, because she has ratified it after her discover. How and why? Judge Guion took no such position, when he entered judgment upon the agreed facts. He held her bound by it, not as a deed but as a contract to convey, which fell within the operation of the Laws of 1911, c. 109; but that view does not meet with the concurrence of a majority of this court, and the judgment cannot be affirmed unless the feme is equitably estopped, by her acts or conduct, to allege the invalidity of her deed, or, for the same reason, she has ratified the same. A naked ratification, or admission of her liability, by words will not do, if it is oral, because, as all the cases show, it would be void by the statute of frauds, and we would permit her land to pass to another in clear violation of all our statutes (*Price v. Hart*, 29 Mo. 171); and besides, it would contain no element of an equitable estoppel (*Brown v. Bennett*, 75 Pa. 420). I have examined the authorities upon this subject carefully and exhaustively, and find that, in every case where it was held that a married woman, who had become discover, was bound because of ratification, there was some element of fraud or, at least, of an estoppel, which made it inequitable that she should be allowed to disavow or repudiate, her deed, or there was formal ratification by a binding written instrument. It is said in *Price v. Hart*, supra:

"That deed, not having been acknowledged according to law, had no validity as a deed against Mrs. Collins, and, as a contract, could not bind her, as she was at the time of its execution feme covert. Although a nullity in the law, it had, however, a physical existence; and as it contained a distinct account of the sale of the land, a minute description of the land itself, and a specification of the terms of sale, it might very well have been adopted, or ratified, by a subsequent agreement, if that subsequent agreement was in the form required by the law. In such case it is obvious that the binding force of the contract is in the subsequent agreement and not in the deed, and the

agreement must therefore be in writing. If the deed can be adopted or set up by a mere parol declaration, made by Mrs. Collins after the removal of her disability of coverture, it would seem to let in all the evils which the statute was designed to guard against."

In order to bind the feme by her deed, which was an absolute nullity when it was executed, as all our cases admit, there must either be a new consideration for her promise to ratify it (*Bank v. Bridgers*, supra), or she must be prevented from setting up its invalidity by an estoppel in pais; but she is not estopped where she has done nothing which has misled another into acting to his prejudice.

"Estoppel by misrepresentation, or equitable estoppel (which is estoppel in pais), grows out of such conduct of a party as absolutely precludes him, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either by contract or of remedy. This estoppel arises when any one, by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist, and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts. It consists in holding for truth a representation acted upon, when the person who made it, or his privies, seeks to deny its truth and to deprive the party who has acted upon it of the benefit obtained." 16 Cyc. 722; *Boddie v. Bond*, 154 N. C. 359, 70 S. E. 824; *Id.*, 158 N. C. 204, 73 S. E. 988; *Patillo v. Lytle*, 158 N. C. 95, 73 S. E. 200.

"The representation must have been acted upon to the damage of the party acting. It is not enough that the representation has been barely acted upon, for, if no substantial prejudice would result by admitting the party who made it to contradict it, he will not be estopped." *Bigelow on Estoppel*, 23.

"The law \* \* \* does not favor estoppels, and as to estoppels by matter in pais it may be said that, unless a person has induced another by representations or declarations to alter his position injuriously to himself, he will not be estopped. \* \* \* The fundamental principle on which the doctrine of estoppel rests is an equitable one—a principle which is intended to suppress fraud and to compel just and fair dealings between all. On no principle of fair dealing and equity can it be held that one should be estopped to protect his rights in a matter because of his \* \* \* conduct in reference thereto and upon which another has

acted, but without prejudice to his interests. It cannot, with consistency, be said that a man has taken advantage of his own wrong where his statements have not damaged or injured another." *Rainey v. Hines*, 120 N. C. 376, 27 S. E. 92; *Lovelace v. Carpenter*, 115 N. C. 424, 20 S. E. 511; *Eaton's Equity*, p. 169.

There has been no formal ratification in writing. What then has been done to validate her deed? The act of advertising did not, as it prejudiced no one, having been withdrawn before any sale. I have not been able to recall any legal principle that holds her bound by these acts, as a ratification, or an estoppel, and she has not ratified otherwise. The tender of the money surely could not have that effect, because that was not her act, but the gratuitous act of the defendant, and she declined to accept the tender and receive the money, which was a distinct repudiation of her void deed, instead of being a ratification of it.

The court may require her to surrender the note and mortgage, as was suggested in *Scott v. Battle*, supra, 85 N. C. at page 192, 39 Am. Rep. 694, if she has them in her possession or under her control; but there is no reason, either in law or in equity, why it should go beyond this requirement, which will place all parties in statu quo, and no prejudice will be done to any one.

It is manifest that the plaintiff withdrew the property from sale, because, at the time she advertised the same, she was not aware of her rights, but supposed that her deed was valid, and, as soon as she discovered her mistake, she promptly asserted her right by refusing to accept the money tendered and discontinued the prosecution of the sale. This was a repudiation of the deed, rather than a ratification of it, and she has misled or deceived no one, and certainly no prejudice has resulted, and none will follow if the papers are surrendered. The court, in its judgment, can make this a condition precedent to a recovery or a writ of possession.

It must be remembered that the opinion in *Warren v. Dall*, supra, was confined strictly to the question whether action for damages would lie on a broken contract to convey land made by a married woman, and it was recognized by the learned justice who spoke for the court that the doctrine there considered would not apply to her deed, or so as to compel her to execute a deed for the land, under her contract to do so.

HOKE, J., concurs in this dissenting opinion.

(178 N. C. 417)

(100 S.E.)

GUILFORD LUMBER MFG. CO. et al. v.  
HOLLADAY et al. (No. 394.)(Supreme Court of North Carolina. Nov. 5,  
1919.)**1. MECHANICS' LIENS** ¶315—RIGHTS OF  
OWNER AGAINST CONTRACTOR'S SURETY.

Owner of building *held* not entitled to compel surety on the bond of the contractor to erect the building to make good to it the sum it was required to pay materialmen on account of failure to retain money to satisfy such claims, as required by Pell's Revisal, § 2021, when settling with the contractor; the liability not coming within the bond.

**2. MECHANICS' LIENS** ¶315—RECOVERY  
FROM CONTRACTOR'S SURETY OF AMOUNTS  
PAID MATERIALMEN.

The owner of a building, which, after notice, in violation of Pell's Revisal, § 2021, paid to the contractor to erect the building the full amount due him when he owed materialmen, *held* not entitled to recover from the surety on the contractor's bond the amounts it was required to pay the materialmen, since to permit recovery would be to predicate the owner's right of action on its own breach of statute.

**3. CONTRACTS** ¶167—INVOLVING PERFORMANCE  
OF DUTY.

When a statute provides a duty, and a contract is made involving performance of the duty, the statute becomes part of the contract.

**4. PRINCIPAL AND SURETY** ¶115(1)—PERSONAL  
SURETY NOT LIABLE AFTER SURRENDER  
OF SECURITY.

A principal is not allowed to surrender the security which it holds for the performance of a bond, and then to hold the personal surety on the bond liable for it.

**5. PRINCIPAL AND SURETY** ¶115(1)—CREDITOR  
PARTING WITH FUND APPLICABLE TO  
OBLIGATION EXONERATES SURETY.

Where a creditor without the consent of the surety parts with a fund he has the right to apply in satisfaction of the obligation, the surety is exonerated to the extent of the value of the fund.

Appeal from Superior Court, Guilford County; Lane, Judge.

Action by the Guilford Lumber Manufacturing Company and others against M. L. Holladay, the Greensboro College for Women, and J. L. Armfield, trading as the Gate City Trust Company. From judgment against defendant Armfield in favor of the college, Armfield appeals. Reversed.

Raper & Raper, of Lexington, for appellant Armfield.

T. C. Hoyle, of Greensboro, for Greensboro College for Women.

BROWN, J. This action was brought by plaintiffs, who are materialmen, against the contractor, Holladay, the Greensboro Col-

lege for Women, which owned the building, and one Armfield, surety on the contractor's bond. The plaintiffs were awarded judgment against the college, the owner of the building, for the amounts of their claims, and the college was awarded judgment against the surety, Armfield, for the amount it is compelled to pay the plaintiffs. The controversy is between the college and the defendant Armfield, surety upon the bond of Holladay, the contractor.

These facts were found by the referee and adopted by the court. Briefly stated, they are:

Greensboro College for Women contracted with M. L. Holladay to erect for it a dormitory building. The contractor executed to the college a bond, with Armfield, surety, conditioned as follows:

"Now, therefore, the condition of the above obligation is such that if the above bounden, M. L. Holladay, shall construct said building in accordance with said contract, plans, and specifications heretofore designated, and shall supply such labor and material as is named in said contract, and shall fully indemnify and save harmless Greensboro College for Women for all costs and damages which it may suffer by reason of said Holladay's failure to do so, and shall fully reimburse and pay to said Greensboro College for Women all outlay and expenses which it may incur in making good said default (which outlay and expense shall include attorney's fees and increased compensation of architect, if on account of such default said College shall be compelled to employ counsel to defend itself, or pay additional compensation to the architect); then in such case this bond shall be null and void; otherwise to be in full force and effect."

The contractor completed the building according to contract, and college accepted the same.

Upon completion of the building, Holladay, the contractor, gave to the college a complete statement of amounts and persons to whom he was indebted for material, giving names of plaintiffs.

After this notice the college made up settlement with Holladay and found it was due him \$4,800, which was more than the amount he owed for material, as per his statement.

The college then paid this amount to the contractor, Holladay, and he failed to apply the money to the materialmen.

The plaintiffs the materialmen make no claim against the surety upon the contractor's bond. Under the statute they obtained judgment against the college, the owner of the building, and their claims were properly declared a lien thereon. The question presented upon this appeal is this: Can the college compel Armfield, the surety on the contractor Holladay's bond, to make good to it the sum it is required to pay the plaintiffs on account of its failure to retain the money when settling with the contractor?



We are of opinion that the college cannot recover against the surety on the contractor's bond, upon two grounds:

[1] I. The liability sought to be enforced does not come within the terms and conditions of the bond. The bond provides that the contractor, Holladay, shall construct the building in accordance with the contract, plans, and specifications furnished, and shall supply such labor and material as is named in the contract, indemnify and save harmless the college from all costs and damages which it may suffer by reason of said Holladay's failure to do so. The bond further provides that the surety shall fully reimburse and pay to said college all outlay and expenses which it may incur in making good said default. According to the admitted facts, Holladay has fully complied with every one of the conditions named in the bond. He has constructed the building in accordance with contracted plans and specifications. He has supplied the labor and the kind of material specified in the contract. There is nothing required of Holladay in the language of that bond which, so far as the college is concerned, Holladay has not performed. He completed the building according to contract, and the college accepted the same. Holladay gave to the college the full statement of the amount and persons to whom he was indebted for material, giving the names of the plaintiffs who are materialmen. After receiving this notice, the college had a full settlement with Holladay and found that it owed him \$4,800, which is more than the amount he owed for material. The college then voluntarily, without any sort of compulsion, paid this money to Holladay, trusting to him to apply the money to the satisfaction of the claims of the materialmen, which Holladay failed to do. It is thus evident to us, from the facts as found, that Holladay has fully performed the contract, and that under the terms of the bond the college cannot recover of the surety.

[2] II. The second ground, which we think bars a recovery, is equally as strong.

The contention of the surety is that under the express terms of the law the owner was required, upon settlement with contractor and upon notice from the contractor, to withhold payment from contractor, and pay directly to materialmen the amounts due them.

The college, having, after notice, in violation of the provisions of the law, paid to Holladay, cannot now recover for its wrongful payment of the surety.

The law requires the contractor, before receiving the contract price, to furnish a statement of persons and amounts he owes for material. Pell's Revisal, § 2021.

When a statement was made, as was done in this case, the law provides:

"It shall be the duty of the owner to retain from the money then due the contractor a sum not exceeding the price contracted for, which

will be sufficient to pay \* \* \* such person for material furnished, which said amount the owner shall pay directly to the \* \* \* person furnishing materials."

This section was amended, Laws 1913, c. 150, § 4, by adding thereto:

"And after the notice herein provided for no payment to the contractor shall be a credit on or discharge of the lien herein provided."

[3-5] The contention that the statute was not enacted for the benefit of the surety cannot be maintained. It was enacted primarily for the protection of materialmen and laborers upon the building, but it also protects the owner of the building as well as the surety upon the contractor's bond. When a statute provides a duty and a contract is made involving a performance of that duty, the statute becomes part of the contract. 13 Corpus Juris, 560, § 523; N. P. R. R. Co. v. Wall, 241 U. S. 523, 36 Sup. Ct. 493, 60 L. Ed. 905. This statute existed at the time of making the contract between the college and the surety, Armfield. It entered into and formed a part of it for the benefit and protection of all the parties. O'Kelly v. Williams, 84 N. C. 281; Graves v. Howard, 159 N. C. 594, 75 S. E. 998, Ann. Cas. 1914C, 565. The provisions of the statute are plain and explicit, and all persons entering into building contracts, including the surety, are supposed to contract with reference to existing law. In this case it was the plain duty of the college to withhold the sum necessary to pay these materialmen, as the law directed that the college retain the money and pay it to the person to whom it was due. When it paid the money to Holladay, instead of retaining it, when it had full notice of the existence of claims of the materialmen, it was a direct violation of its duty, and it would be inequitable to allow the college to take advantage of its own wrong and compel the surety to make good the default. He had a right to assume that the college would obey the statute, retain the money, and apply it to the claims of the materialmen. When the college paid the money belonging to the materialmen over to Holladay, trusting him to settle with the materialmen, it made Holladay its agent for that purpose, and whatever loss is sustained, it must bear. It is elementary that a principal is not allowed to surrender the security which it holds for the performance of a bond, and then hold the personal surety on the bond liable for it. The principal would have to account for the value of the property wrongfully surrendered. Upon this principle a principal in a note cannot release one of the sureties without releasing all. A mortgagor may not cancel the mortgage and still hold the surety upon the note secured in the mortgage. It is well settled that where the creditor without consent of the surety parts with a fund which he has the right to apply in satisfaction of an obliga-

tion, the surety on the bond is exonerated to the extent of the value of such fund. The reason is that the fund is impressed with a trust for the payment of the debt and the creditor is bound to apply it for the benefit of the surety. *Carriage Co. v. Dowd*, 155 N. C. 307, 71 S. E. 721.

In *Cooper v. Wilcox*, 22 N. C. 90, 32 Am. Dec. 695, it is said:

"Between the creditor and a surety, the former is not bound to active diligence to protect the latter; but, if by his act he deprives him of a security, the latter is pro tanto discharged." *Bell v. Howerton*, 111 N. C. 69, 15 S. E. 891; *Purvis v. Carstaphan*, 73 N. C. 575.

According to law, as well as under the terms of the building contract, the college had the right, and it was its duty, to retain this money and apply it to the payment of the materialmen. It failed to do so, but paid it over to Holladay and trusted him to discharge these claims. The college cannot now take advantage of its own wrong. Having failed to perform its duty, it must bear the resulting loss.

Reversed

(178 N. C. 353)

**BLAYLOCK v. SOUTHERN RY. CO.**  
(No. 322.)

(Supreme Court of North Carolina. Oct. 29, 1919.)

**1. CARRIERS §271—DUTY TO STOP TRAIN AT STATION CALLED FOR BY TICKET.**

It is the duty of a common carrier receiving a passenger on its train with a ticket calling for a certain station, and without notice the train does not stop there, to stop the train at the station and permit the passenger to alight.

**2. APPEAL AND ERROR §927(3)—CONSIDERATION OF EVIDENCE ON MOTION FOR NONSUIT.**

The Supreme Court can consider only evidence favorable to plaintiff on motion for judgment of nonsuit, or on exception to the trial court's refusal to direct the jury to answer an issue in the negative, for defendant, if they believe the evidence.

**3. CARRIERS §277(2)—WRONGFUL FAILURE TO TRANSPORT TO DESTINATION.**

Where a railroad's passenger purchased a ticket to a certain point, and boarded a train without notice that it did not stop at such point, her cause of action was complete when she was required to leave the train before reaching her destination, and she had the right to recover at least nominal damages, irrespective of any subsequent contributory negligence on her part.

**4. CARRIERS §276(2)—EVIDENCE IN ACTION FOR FAILURE TO TRANSPORT TO DESTINATION.**

In a woman's action against a railroad for failure to transport her to the destination for which she bought tickets, and for having put her off at an intermediate point, plaintiff's evi-

dence as to the condition of her health at the time of the injury complained of, and subsequently, was competent on the issue of damages.

**5. CARRIERS §277(1)—REMOTE DAMAGES FROM FAILURE TO TRANSPORT TO DESTINATION.**

A woman who purchased a railroad ticket and boarded a train which would not stop at her destination, so that she was compelled to get off at an intermediate station, where she might have changed trains and have been carried to destination, though having a cause of action for the railroad's failure to transport her, could not recover for injuries she received by reason of going to destination on a street car from the intermediate point.

Appeal from Superior Court, Alamance County; Lynn, Judge.

Action by Mrs. Daisy Blaylock against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. New trial.

This is an action to recover damages for wrongfully ejecting the plaintiff from the train of the defendant at Greensboro.

The plaintiff alleges that on December 22, 1917, she went to the station of defendant in Graham, accompanied by two children, one 2 and one 10 years of age, to go to Terra Cotta on a visit; that she bought one whole and one half ticket, and upon inquiry was informed by the agent that the train she was taking went by Terra Cotta and stopped there; that she got on the train, and when the conductor took up her ticket, he told her she would have to get off that train at Greensboro; that it did not stop at Terra Cotta.

The defendant answered, and admitted selling the tickets; denied that its agent told plaintiff that the train she was taking, which passed Graham about 11 a. m., stopped at Terra Cotta; alleged that said train was not scheduled to, and never had been scheduled to, stop at Terra Cotta.

It averred that train 21, which plaintiff took from Graham, according to its published, advertised schedule, did not stop at Terra Cotta, and that no train that passed Graham did stop at Terra Cotta; that the proper way to go to Terra Cotta was to leave Graham on the train which plaintiff left on, change at Greensboro to a train that left Greensboro about 2 o'clock p. m., and arrived at Terra Cotta about 2:11 p. m.; that plaintiff left on the proper train, and that defendant maintained a comfortable station in Greensboro for plaintiff to wait in, and a comfortable train for plaintiff to go to Terra Cotta on; and that these were all in existence and operating on the day plaintiff left Graham.

Defendant further pleaded that plaintiff by her own conduct brought about any injury which she sustained by reason of exposure because of said street car trip; that

she voluntarily left the station in Greensboro and went to Pomona on a street car, and then walked to her home instead of going on the train upon which she held a ticket, and which was provided by defendant to carry her to Terra Cotta.

Both parties introduced evidence in support of the allegations in the pleadings and the plaintiff also testified that she had gone to Terra Cotta from Graham before this on the same train, and to her injuries, most of which were sustained by reason of going to Pomona on the street car. The defendant excepted to the evidence of damage after the plaintiff left the train, and also to evidence of the physical condition of the plaintiff at the time of the injury complained of.

The defendant requested the court to charge the jury as follows:

"(1) If you find the facts to be as testified to by the witnesses, you will answer the first issue, 'No.' (Refused, and defendant excepted.)

"(2) If you find the facts to be as testified to by witnesses, you will answer the second issue, 'Yes.' (Refused, and the defendant excepted.)

"(3) If you find from the evidence in this case that plaintiff failed to inquire in the station at Greensboro or from the conductor as to a train leaving Greensboro that would stop at Terra Cotta, and that because of such failure and want of knowledge on her part she took the street car, then any injury she sustained by reason of taking said street car you should not consider as damages sustained by plaintiff because of negligence of defendant." (Refused, and defendant excepted.)

The jury returned the following verdict:

"(1) Did the defendant company wrongfully eject plaintiff from the train as alleged in the complaint? Yes.

"(2) Did the plaintiff, by her own negligence, contribute to any and all injuries which she sustained? No.

"(3) What damage, if any, is the plaintiff entitled to recover of the defendant? \$950."

Judgment for plaintiff, and the defendant appealed.

Parker & Long, of Graham, for appellant.  
W. H. Carroll, of Burlington, and R. C. Strudwick, of Greensboro, for appellee.

ALLEN, J. [1] Under the authorities in this state it is the duty of a common carrier, receiving a passenger on its trains with a ticket calling for a certain station, and without notice that the train does not stop at that station, to stop the train at the station and permit the passenger to alight. It was so held in *Hutchinson v. Railroad*, 140 N. C. 128, 52 S. E. 263, 6 Ann. Cas. 22, which has been affirmed frequently, notably in *Elliott v. Railroad*, 166 N. C. 483, 82 S. E. 854, in which Brown, J., says:

"It is the settled law of this state that where a common carrier receives a passenger upon

its train, with a ticket calling for a certain station, it is the duty of the railroad company to stop the train at such station, even though the passenger did not know that this particular train did not stop at such station."

It is also said in the latter case, quoting from *Thompson on Carriers*, § 66:

"Carrying a passenger beyond his destination in disregard of his request to be put off there will afford a good ground of action, and this though no bodily harm, mental suffering, insult, oppression, or pecuniary loss be shown." *Hutchinson v. Railroad*, 140 N. C. 124, 52 S. E. 263, 6 Ann. Cas. 22.

—and the same principle imposes liability on the carrier for wrongfully failing to carry the passenger to his destination.

It is also held in *Mace v. Railroad*, 151 N. C. 404, 66 S. E. 342, 24 L. R. A. (N. S.) 1178, *Norman v. Railroad*, 161 N. C. 338, 77 S. E. 345, Ann. Cas. 1914D, 917, *Hallman v. Railroad*, 169 N. C. 130, 85 S. E. 298, and *White v. Railroad*, 172 N. C. 31, 89 S. E. 788, that the passenger has the right to rely on the representation made by the agent selling the ticket, and that the carrier is responsible for injuries brought about by his mistake.

The *White Case* is strikingly like the case before us. In that case the evidence tended to prove that on November 19, 1914, the plaintiff, accompanied by her daughter purchased from the defendant's agent at Mackeys Ferry a ticket to Chapanoke, upon the assurance of the agent that the ticket was good for continuous passage upon the through train of the defendant, which passed Mackeys Ferry about 1 o'clock.

The plaintiff's husband, by arrangement, met this through train at Chapanoke to carry his wife to their home, some distance in the country. As the plaintiff did not arrive on this train, the husband returned home. When this train of the defendant which runs from New Bern to Norfolk and passes Mackeys Ferry, arrived at Edenton, the conductor for the first time informed her that this train did not stop at Chapanoke, and told the plaintiff that if she did not get off at Edenton he would carry her on to some other point.

Plaintiff was compelled to get off at Edenton and take the next train, an hour or more later, which was a local train and stopped at Chapanoke. When she arrived at Chapanoke her husband had gone home. It was a rainy, blustery day, and plaintiff was subjected to much inconvenience by reason of having to change trains at Edenton.

The court overruled a motion to nonsuit and said:

"The plaintiff had the right to rely upon the assurance of the agent that the train which she took at Mackeys Ferry would stop at Chapanoke to put her off. It was the duty of the agent, when he sold a ticket to Chapanoke, to inform the plaintiff that she would have to take a local train at Edenton and would ar

rive at Chapanoke some time after the other train had passed. Upon the assurance of the defendant's agent, the plaintiff had reason to believe that she would meet her husband there to take her and her little daughter to their home. *Hutchinson v. Railroad*, 140 N. C. 125 [52 S. E. 263, 6 Ann. Cas. 22], and cases cited."

[2] The plaintiff brings her case well within these principles, as her evidence is to the effect that she went to the station of the defendant at Graham on December 22, 1917, with two small children, that she purchased tickets for Terra Cotta, and was told by the agent the train she was about to take stopped at Terra Cotta; that she had gone on the same train before, and it stopped at this place; that the conductor told her the train did not stop at Terra Cotta, and required her to leave the train at Greensboro; that the train did not stop at Terra Cotta that day; that her mother was at the station to meet her; that she suffered serious injury; and, as we can consider only the evidence favorable to the plaintiff on a motion for judgment of nonsuit or on an exception to the refusal to direct the jury to answer the first issue "No" if they believe the evidence, there is no error in the failure to give the first instruction prayed for.

[3] And the same result follows as to the prayer on the issue of contributory negligence, because, the jury having found the facts according to the contentions of the plaintiff, her cause of action was complete when she was required to leave the train at Greensboro, and she then had the right to recover at least nominal damages, and up to that time there is neither allegation nor proof of contributory negligence.

If she had a good cause of action, entitling her to nominal damages, when she left the train, her subsequent conduct in going on the street car is material on the issue of damages and not on the issue of contributory negligence.

[4] The evidence of the plaintiff as to the condition of her health at the time of the injury complained of and subsequent thereto was competent on the issue of damages.

[5] The other exceptions to evidence and to the failure to give certain instructions are to the refusal to eliminate the injuries sustained by the plaintiff by reason of going to Pomona on the street car from the issue of damages, and in this respect we are of opinion there is error.

"In torts the damages must be the legal and natural consequences of the wrongful act, and such as according to common experience and the usual course of events might have been reasonably anticipated. If the cause is remote in efficiency and does not naturally result from the tort, it will not be considered as proximate. To be such it must be 'a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could

have foreseen that such a result was probable under all the facts as they existed.' *Ramsbottom v. Railroad*, 138 N. C. 42 [50 S. E. 448]; *Brewster v. Elizabeth City*, 137 N. C. 392 [49 S. E. 885]." *Garland v. Railroad*, 172 N. C. 639, 90 S. E. 779, L. R. A. 1917B, 706.

Following this rule, it has been held that damages were too remote, and could not be recovered for exposure and injuries caused by walking from Toecane to Bakersville, when there had been negligence in transmitting a telegram requiring a car to meet the plaintiff at Toecane (*Young v. Tel. Co.*, 168 N. C. 36, 84 S. E. 45); for exposure in a storm while walking from Toecane to her home, the defendant having negligently carried her beyond her station (*Garland v. Railroad*, 172 N. C. 638, 90 S. E. 779, L. R. A. 1917B, 706); for injuries sustained by falling in a cattle guard while walking from Minneapolis to Cranberry, there being evidence that the defendant negligently failed to stop its train for the plaintiff at Minneapolis when signaled to do so (*Brown v. R. R.*, 174 N. C. 694, 94 S. E. 431).

These authorities are cited and approved in *Johnson v. Tel. Co.*, 177 N. C. 31, 97 S. E. 757, in which the plaintiff sued to recover damages for negligence in the delivery of a telegram, and as a part of his damage alleged injuries sustained while riding on a freight train and when walking from Dillsboro to Franklin, and the court, in denying a recovery for these injuries, said:

"Without going into the details of the injuries and sufferings endured by the plaintiff on the freight train and in attempting to walk from Dillsboro to Franklin, it is sufficient to say that in no sense can the delay in the delivery of the telegram be deemed a proximate cause of such injuries. \* \* \* The defendant could not have foreseen, or contemplated, that if the message was not delivered the plaintiff would seek transportation by freight, nor that he would be roughly handled on such trip. Still less could the defendant be responsible for the plaintiff undertaking to walk from Dillsboro to Franklin. \* \* \* Both these grounds of alleged damage are too remote and speculative. It is a settled principle that the law looks to the immediate and not the remote cause of damage, the maxim being, 'Causa proxima, sed non remota, spectatur.' The cause of the damage on the freight train was the negligence of the carrier either in the handling of its train or in the defective condition of its roadbed or equipment. The cause of the overfatigue in attempting to walk out from Dillsboro was the mountainous road and the lack of physical strength in the plaintiff to endure the fatigue, and still more his own bad judgment in attempting to walk so long a distance."

The plaintiff reached Greensboro about 12 o'clock and left the train at the depot where there was a waiting room. A local train of the defendant left this depot at 2 o'clock, and if she had taken it, she would have reached Terra Cotta about 2:11 o'clock,

but instead of waiting, and without making inquiry of any one, she took a street car for Pomona, one-fourth mile from Terra Cotta, which she reached about 2:30 o'clock, and it is for injuries on the street car and while walking from Pomona she asks a recovery. They are too remote, and could not have been foreseen or anticipated.

New trial.

(178 N. C. 348)

**KIRKPATRICK v. CRUTCHFIELD.**  
(No. 327.)

(Supreme Court of North Carolina. Oct. 22, 1919.)

**1. ASSAULT AND BATTERY ⚡27—EVIDENCE OF TRESPASS AS DEFENSE.**

In action for assault during dispute as to whether plaintiff had a right to tie cows on certain land, plaintiff, being charged with trespass, had the right to explain her claim of right and to show her good faith.

**2. TRESPASS ⚡8—REMOVAL OF COWS FROM TREES WHERE TIED FORCIBLE TRESPASS.**

Where the owners of cows had securely tied cows to trees, it was forcible trespass for lessee of land to take cows away, against will of owners of cows, who were present and forbidding him from doing so; the cows being in actual possession of and under immediate personal control of their owners, in law, and lessee having no right to impound cows, under Revisal 1905, § 1879, since they were not running at large.

**3. TRESPASS ⚡8—FORCIBLE REMOVAL OF COWS.**

Where owners of cows had tied them on certain land with permission of person in possession thereof, one who claimed to be entitled to the land had no right to attempt to forcibly remove cows; his right being a resort to legal proceedings.

**4. ASSAULT AND BATTERY ⚡2—CIVIL LIABILITY FOR ASSAULT ON WOMAN.**

Under Revisal 1905, § 3620, as amended by Laws 1911, c. 193, man, who took hold of cow chain, jerked down woman, who had hold of other end, and dragged her on ground, injuring her, committed an assault upon the woman, and is liable for injuries sustained.

**5. ASSAULT AND BATTERY ⚡15—USE OF FORCE TO RESIST TAKING OF PROPERTY.**

Owner of cow, who had tied cow to trees with permission of one who claimed to be in possession of the land, had the right to prevent another person, claiming right to possession of land, from forcibly taking cow from her against her will, and to use all necessary force for that purpose.

**6. DAMAGES ⚡38—EFFECT ON EARNING CAPACITY FROM PERSONAL INJURIES.**

Wife, suing for personal injuries, was entitled to recover for loss of earning capacity.

**7. ASSAULT AND BATTERY ⚡43(4)—INSTRUCTION AS TO BURDEN OF PROOF OF PLAINTIFF.**

In action for injuries growing out of an assault, court, in charging that burden was on plaintiff to satisfy jury by evidence that her injuries were caused by wrongful acts of defendant, did not commit reversible error by failure to add "by the greater weight of the evidence."

**8. TRIAL ⚡295(11)—INSTRUCTION AS TO EFFECT OF PERSONAL INJURIES ON EARNING CAPACITY.**

In wife's action for personal injuries, instruction that jury "had the right to consider her reduced capacity to make a living" held correct, in view of charge as a whole.

**9. DAMAGES ⚡167—EXPECTANCY OF LIFE CONSIDERED ON QUESTION OF REDUCED EARNING CAPACITY.**

In personal injury action, jury, in compensating plaintiff for her reduced earning capacity, had the right to consider her expectancy of life.

**10. DAMAGES ⚡100—REDUCTION OF EARNINGS FROM PERSONAL INJURIES.**

In personal injury action, plaintiff was entitled to recover the present net value of the difference between what she would have earned and what she has been able to earn in her present condition.

**11. EVIDENCE ⚡106(1)—WITNESSES ⚡333—CORROBORATIVE TESTIMONY OF CHARACTER OF WITNESSES.**

Evidence of good character of the plaintiff and defendant and other witnesses is not substantive evidence, but is corroborative evidence, for purpose of better enabling jury to pass upon the truthfulness of the witnesses whose character is proven to be good.

**12. HUSBAND AND WIFE ⚡209(2)—WIFE'S RIGHT TO SUE FOR PERSONAL INJURIES.**

In view of Revisal 1905, § 408, subd. 1, and Laws 1913, c. 13, a wife may bring an action to recover for personal injuries.

Appeal from Superior Court, Alamance County; Lyon, Judge.

Action by Mrs. Eulalia Kirkpatrick against J. M. Crutchfield. Judgment for plaintiff, and defendant appeals. No error.

This was an action by the plaintiff, 33 years old, the mother of two children and living with her husband, who is not made a party plaintiff. The defendant was living near by and cultivating a crop on lands of the Southern Power Company, which he had leased for one year, and one William Boswell had also rented a portion of this land and was in possession of it. Said Boswell gave permission to the plaintiff to tie her cows there in a place where there was shrubbery and trees, but no crops planted. The defendant came to where the cows were tied, armed with a long whip, and in a rude, angry, and insulting manner, as plaintiff contends, and demanded to know why the cows were tied there. The evidence of the plain-

tiff was that the defendant knew her husband was not at home, that the defendant became enraged and swore that Boswell had no authority to give her permission, and proceeded to untie a cow when the plaintiff forbade him to do so, but he persisted, and while the plaintiff had hold of one end of the chain the defendant violently snatched it, jerking her down, and dragged her upon the ground, inflicting many wounds and bruises upon her; that he then proceeded to untie the other cow, and again in a violent, angry, and malicious manner jerked the chain from the plaintiff's hand, dragging her 75 feet or more, and in the course of this assault he jerked her through a barbed wire fence into the public road, tearing her clothes almost off her, and terribly wounding her limbs and body. This evidence was corroborated by one Frank Baldwin, and the testimony of the four physicians was that the plaintiff was at that time in a delicate condition, and on account of the injuries inflicted upon her she had a miscarriage and was permanently injured and made a nervous wreck for life. The defendant gave a different version.

The jury found, upon the issues submitted, that the defendant wrongfully assaulted and wounded the plaintiff as alleged in the complaint, and assessed her actual damages at \$4,000, and defendant appealed. Judgment thereon for plaintiff.

Following is the whole charge of the court, referred to in opinion:

This is an action brought by Mrs. Eulalia Kirkpatrick against J. M. Crutchfield to recover damages for alleged assault made on her by the defendant.

The plaintiff contends the evidence shows, and that you should so find, that on the 27th day of June, of last year, she and her mother-in-law had a cow each tied out on a little strip of land just across the road from her house. She contends that the land was not hers, but that it was woodland, and that it was not being cultivated by any one, and that Mr. Boswell, who lived on this land, having rented the house from the power company, gave her permission to tie her cow for grazing purposes on that little strip of woodland; contends that Boswell himself had his cow tied out there, or had had, without the objection of any one, and contends that Boswell was the true owner, or rather entitled to the true possession, of that strip of land; contends that the defendant, Crutchfield, had only the farming land rented, as was evidenced by his contract that he was to have one-third of what he made.

She contends that on this morning, while her husband was away, she saw the defendant over there untying her mother-in-law's cow; that her mother-in-law was out there, and she heard some conversation, and she went to the scene; that when she got there, about the time the defendant had untied the first cow, that she grabbed the end of the chain and told him she would take the cows off, if there was any objection to their staying there, and to turn the cow loose; that he replied that he would not,

that he was going to take them to his home, and have damages for what they had done.

She contends that the cow could not possibly have damaged him or any one else, that they were simply grazing on land that was uncultivated and was not used for any purpose, except that Boswell used it for the purpose of pasturing his cow.

She contends that he jerked her down while they had hold of the chain of the first cow and dragged her some considerable distance, and that she finally got that cow away from him, or he turned it loose, and then she turned it loose, and the cow was driven by her mother-in-law across the road to their home; that he then made for her cow, and that she grabbed the end of the chain and wrapped it around her wrist, that she might hold onto it, and that the defendant jerked the chain, jerked her down several times, bruised her body, limbs, arms, and legs, and that she had hold of the end of the chain, and the defendant had the chain between her and the cow, and as he would jerk the cow would back, or stand still when they were standing still, and that by jerking and dragging he finally got her to the wire fence, and that the wire fence was built just at the foot or on the decline of the hill going into the road, and that she backed herself up against that fence for the purpose of holding onto the cow, and that he fetched her a jerk, not a push, but a jerk, that jerked her down, and that she rolled under the fence, and that it was a barbed wire fence, and that her clothes were torn and she was bruised by falling under the fence; that when she fell, and was under there prostrate, she called for a stick, and the defendant said, "There is one," and she said there was a little rotten limb there, and she remarked that was not big enough, and some one told her there was a shovel, and she picked up the shovel and threw it at the defendant, and that then he turned the cow loose, and that she took the cow and carried it home.

She contends that at the time, although she did not know it at the time, she was pregnant, and that the jerking and bruising she received shocked her nervous system, and she became ill from the effect of the wounds that she received; that she sent for a doctor, and she continued to get no better for about six days; she said she was able to get up and help a little around the breakfast table when they were threshing wheat, and she went out where they were threshing wheat, for about 20 or 25 minutes, and sat in a chair and held the bag open, but she continued to grow worse and sent for a doctor, and was finally carried to the hospital about August or September, and on examination it was discovered she was pregnant, and had been, and that the fetus or child in her womb had become destroyed; and that she had had her menses from the time of this occurrence up to that time, and that an operation had to be performed; contends that she suffered great physical pain and mental anguish in consequence of the injuries that she had received; contends that she is permanently injured, that her health has been affected, and that she has become anemic; that she is not physically strong; that she is not able to do the work that she was able to do before this occurrence; contends that up to that time she

milked the cows and did her household work, and had given birth to two children, but since that time that she has been unable to even milk the cows, or to do the cooking for herself and family; that her husband has that to do.

Now, that is what the plaintiff contends that this evidence shows, and that you should so find.

Defendant contends that he was not guilty of any wrongdoing, that he had the place rented, and that the plaintiff's chickens, and other chickens around there, had been disturbing his oat patch, not on this land, but on another patch of land, and he had notified them to keep their stock and chickens off his premises; contends that the mule of the husband of plaintiff had eaten his corn, and he had been paid 50 cents for that by the husband of this plaintiff. He contends, when he saw the cows hitched there in this strip of woods, he went there with the intention of taking them to his house and making the plaintiff and her mother-in-law pay damages, and he untied the first cow, and the plaintiff came up and took hold of the end of the chain, and that she did the pulling and jerking, and that he never did anything that would cause her any injury, and that she finally got that cow, and it went home. That he attempted to take the other cow, and did get the other cow unfastened; that the plaintiff got hold of that one and pulled and jerked the cow, going in the direction of her house when the cow was turned loose by him.

He contends he did nothing but hold onto the cow, thinking he had a right to take the cow to his own home and require damages from the plaintiff. He contends he was acting in good faith under what he supposed to be his legal rights.

He further contends that you should not be satisfied from the evidence that the plaintiff's present condition or condition since that time was caused by what took place on that occasion; contends that there are other causes that might produce the same results, and that you should not tax him with what might be the result of other causes.

Now, these are the contentions, gentlemen of the jury, of the plaintiff and the defendant, that arise upon the evidence in this case.

You are the triers of the facts, and you find the facts from the evidence as you recollect it. If your recollection of the evidence differs from that of counsel on either side, or from the court, you will rely upon your own recollection. You take the law from the court, and apply the law that the court lays down to you, to the facts as you may find the facts to be, and render your verdict accordingly.

There are three issues submitted to you.

First. Did the defendant wrongfully assault and wound the plaintiff as alleged in the complaint?

Now, the burden of that issue is on the plaintiff to satisfy you from evidence, and by its greater weight, that the defendant wrongfully assaulted her.

The court charges you that the cows being confined—being tied—that the defendant had no right to impound them, as cattle running at large, and the court charges you that if you should find that this strip of woods was legal-

ly in possession of defendant, that still he would have no right to go there and forcibly take the personal property that had been placed there by the plaintiff, that was confined, from the actual possession of the plaintiff, the plaintiff objecting and protesting against such taking.

If you should find that the property was in possession of Boswell, and that Boswell had given permission to the plaintiff to tie her cows there, then the court charges you that he had no right to go there and remove or attempt to remove the cow.

The court further charges you that if he had a right to go there and remove the cattle, that he had no right to do it in a forcible manner or to commit an assault upon plaintiff in doing it.

If you find that after the plaintiff had gotten hold of the chain of the cow, that he jerked her down and dragged her, and caused the injury and bruises she had suffered, he would be liable, and it would be your duty to answer the first issue, "Yes."

But if you find that he had a right to the possession of the piece of property, and that he went there peaceably and attempted peaceably to remove the cows off the piece of ground, he had no right to impound them; but if he attempted to remove them off the piece of ground peaceably, and did no more than that, and the plaintiff's injuries were caused by her own conduct, he would not be liable, and you would answer the first issue, "No."

If you answer the first issue "No," you need not answer the other issues; but if you answer the first issue "Yes," it is your duty to answer the second issue, which is: "What amount of actual damage is the plaintiff entitled to recover of the defendant?"

Actual damages are called compensatory damages—damages to compensate plaintiff for the injury she has received, and in passing upon what damages she would be entitled to, she would have a right to ask you to consider the physical pain that she has suffered, the mental anguish, that is the trouble of mind, the mental anguish she has suffered; and if you find that she has been permanently injured you have a right to consider that, and give her such damages as will compensate her for the injuries she has received which resulted from the defendant's wrongful act, and these may embrace loss of time, loss from inability to perform physical labor or of capacity to earn money, and for actual suffering of body and mind which are the immediate and necessary consequences of the injuries complained of, and which were caused by the wrongful act of the defendant; the burden being on the plaintiff to satisfy you by the evidence that her injuries were caused by the wrongful acts of defendant, and that such acts were the proximate cause of her injuries, a cause that produced the result without any independent cause supervening and bringing it about.

In deciding what is a just compensation, you have a right to consider her reduced capacity for earning a living, if you should find that her capacity has been reduced in consequence of her injury, and in considering her reduced capacity to earn a living, if there is such, you have a right to consider her expectancy of life, that is, if her injuries are permanent, and, having

determined what that expectancy is, she is entitled to recover the present net value of the difference between what she would have earned and what she has been able to earn in her present condition.

As to the third issue, "What amount of punitive damages, if any, is the plaintiff entitled to recover of defendant?" that issue is known as punishment damages, and it is entirely discretionary with the jury whether they give anything—whether they consider it or not. If you should find from the evidence in this case that the conduct of the defendant on this occasion was wanton and malicious, or was done in aggravated manner, totally disregarding the rights of the plaintiff, the jury would have a right, by way of punishment, to give damages under that issue; but it is entirely discretionary with the jury, and if you should find that he acted in good faith, although he might have been mistaken in his legal rights, and that he had no malice, and did not do the acts wantonly or in total disregard of the rights of the plaintiff, then he would not be liable for punishment damages.

Now, I have told you about the contentions of the parties, I have given you the rule of damages under the second issue to compensate the plaintiff—defendant contending, as I have told you, that her troubles were not the result of what occurred on that occasion; she, contending that they were, that she was healthy before that time, that she was able to do all her necessary household work and to bear children, contends that since then she has not been able to do practically anything.

You can retire, gentlemen, and make up your verdict, and answer the issues as you may find the facts to be.

The law requires me to call your attention to the difference between substantive and corroborative evidence. The evidence of good character of the plaintiff and the other witnesses is not substantive evidence; it is corroborative evidence, offered for the purpose of better enabling the jury to pass upon the truthfulness of the witness whose character is proven to be good.

You may retire, gentlemen.

E. S. W. Dameron, of Burlington, and John A. Barringer, of Greensboro, for appellant.

W. H. Carroll, of Burlington, for appellee.

CLARK, C. J. The first four exceptions in the defendant's brief are directed principally to the right of the plaintiff to recover. He contends that the cows were in his lawful possession, being tied on land which he had rented, and that the plaintiff had no right to undertake to prevent his carrying them off, but that she should have resorted to the law to reclaim them. The court charged the jury that the defendant had no right to go there and forcibly take personal property that had been placed there by the defendant, and which were tied and not damage feasant. The jury found the controverted facts with the plaintiff; and indeed the court might have instructed the jury that, if they believed the testimony of the plaintiff, the

defendant in any event had used excessive force.

[1] The court properly permitted the plaintiff to testify, as was alleged in the complaint, that she had tied her cows there on permission from William Boswell, who claimed to be in lawful possession, in which she was corroborated by Boswell. Being charged with trespass, she had the right to explain her claim of right to show her good faith. *Everett v. Smith*, 44 N. C. 303; *State v. Faggart*, 170 N. C. 741, 87 S. E. 31.

[2] The court also properly charged the jury that the defendant had no right to impound the cows. Rev. § 1679, authorizes only the taking up of live stock running at large. *State v. Hunter*, 118 N. C. 1196, 24 S. E. 708. The cows, being securely tied to trees, were in the actual possession and under the immediate personal control of the plaintiff and her mother-in-law, and it was a forcible trespass to take them away against their will; they being present and forbidding.

[3] The court also properly charged the jury that if the land was in the possession of Boswell, and he had given permission to plaintiff to tie the cows there, the defendant had no right to go there and attempt to remove them forcibly. *State v. Davenport*, 156 N. C. 602, 72 S. E. 7, which holds that the rightful possession "cannot be vindicated by a bludgeon," but must be determined by a resort to legal proceedings.

The court further charged that, if the defendant had the right to go there and remove the cattle, he had no right to do so in a forcible manner, or commit an assault on plaintiff in doing so. *May v. Telegraph Co.*, 157 N. C. 416, 72 S. E. 1059, 37 L. R. A. (N. S.) 912. If the defendant was in the rightful possession of the land, but the cows were tied securely to trees and doing no damage, and the owner was present and forbidding him to take the property, the defendant's remedy was by legal action.

[4, 5] The court properly charged the jury:

"If you find for a fact that the plaintiff had gotten hold of the chain of the cow, that the defendant jerked her down and dragged her, and caused the injury and bruises she has suffered, then he would be liable, and it would be the duty of the jury to answer the first issue 'Yea.'"

This was correct. Rev. § 3620, amended by Laws 1911, c. 193; *State v. Smith*, 157 N. C. 578, 72 S. E. 853. On the other hand, the plaintiff had the legal right to prevent the defendant from taking her property from her forcibly and against her will, if she could, and to use all necessary force for that purpose. The evidence tended to show that the force used by the defendant was excessive. *State v. Taylor*, 82 N. C. 554; *State v. Leggett*, 104 N. C. 784, 10 S. E. 464; *State v. Hemphill*, 162 N. C. 632, 78 S. E. 167, 45 L.



R. A. (N. S.) 455. The cattle were doing no damage. They were confined, and in the actual and peaceable possession of plaintiff and her mother-in-law, and the defendant's action was, as found by the jury, a forcible trespass.

[8] The defendant's assignments of error 7, 8, 9, 10, and 11 are to the charge of the court on the question of damages, but in them we find no error. Exception 7 was that the court allowed as an element of damage a consideration of the plaintiff's capacity to earn money. This court has repeatedly held that:

"Damages for \* \* \* personal injury include actual expenses for nursing, medical services, also loss of time and of earning capacity and mental and physical suffering." *Wallace v. Railroad*, 104 N. C. 442, 10 S. E. 552; *Rushing v. Railroad*, 149 N. C. 158, 62 S. E. 890; *Ridge v. Railroad*, 167 N. C. 510, 83 S. E. 762, L. R. A. 1917E, 215.

[7] The eighth assignment of error is because the judge charged the jury that the burden was upon the plaintiff to satisfy the jury by the evidence that her injuries were caused by the wrongful acts of the defendant. It was not reversible error not to add "by the greater weight of evidence."

[8, 9] The ninth assignment was to the instruction that the jury "had the right to consider her reduced capacity to make a living." This, taken in connection with the whole charge, was correct. The tenth assignment of error was to the instruction that the jury had "the right to consider her expectancy of life." Where injuries are permanent, as testified to in this case, the charge is unexceptionable. *Ruffin v. Railroad*, 142 N. C. 120, 55 S. E. 86; *Clark v. Traction Co.*, 138 N. C. 77, 50 S. E. 518, 107 Am. St. Rep. 528.

[10] The eleventh assignment of error is because the judge instructed the jury:

"She is entitled to recover the present net value of the difference between what she would have earned and what she has been able to earn in her present condition."

In *Johnson v. Railroad*, 163 N. C. 431, 79 S. E. 690, Ann. Cas. 1915B, 598, the court held that, in an action for personal injuries resulting in diminished earning capacity, the measure of damages is not the difference between the probable earnings of the plaintiff before and after the injury, but the reasonable present value of the diminution of his earning capacity—citing *Fry v. Railroad*, 159 N. C. 360, 74 S. E. 971.

[11] The twelfth assignment of error is because the court charged the jury that:

"The evidence of good character of the plaintiff and defendant and the other witnesses is not substantive evidence, but is corroborative evidence, for the purpose of better enabling the jury to pass upon the truthfulness of the witness whose character is proven to be good."

This is elementary law.

The error most strenuously urged in the defendant's brief is that the plaintiff was not entitled to recover for her injury, but that it was for her husband to bring such action, and defendant's counsel contends that:

"It is the law in North Carolina that the husband is entitled to the society and to the services of his wife, and consequently to the fruits of her industry. She cannot contract or render those services to another without his consent. Those rights were given to the husband, because of the obligation imposed by law upon him to provide for her support and that of her offspring, and the right continues unimpaired so long as the duty continues"—citing *Syme v. Riddle*, 88 N. C. 463; *Baker v. Jordan*, 73 N. C. 145; *Hairston v. Glenn*, 120 N. C. 341, 27 S. E. 32; *Cunningham v. Cunningham*, 121 N. C. 413, 28 S. E. 525; *State v. Robinson*, 143 N. C. 620, 56 S. E. 918.

The counsel for the defendant was inadvertent to chapter 13, Laws 1913, which provides 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."

And Rev. § 408 (1), provides:

"When the action concerns her separate property, she [a married woman] may sue alone."

The contention made for the defendant in this case was earnestly presented to the court in *Price v. Electric Co.*, 160 N. C. 450, 76 S. E. 502, better known as the "Washerwoman's Case." In that case a washerwoman at Charlotte, carrying her weekly washing home in a cart, was run over and badly injured by the negligence of the conductor in charge of a trolley car. "Her right foot was amputated, her right arm was broken and permanently rendered stiff, and her head severely gashed." She was confined for several weeks in a hospital, suffering great agony, and at considerable expense. "For these injuries and for her physical and mental suffering, and for her diminished power to earn wages by reason of injuries, the jury assessed the compensation at \$5,000. The able counsel for the railroad company strenuously argued that, being a married woman, this compensation was the property of her husband, and could be recovered only by him, and not by her." Two of the court were of the opinion that the married woman was entitled to recover her own earnings under the Constitution, which provided (article 10, § 6) that she was entitled to any property "acquired before marriage, or to which after marriage she may become in any manner entitled," as fully as if single, and that this was certainly true since the Martin Act of 1911, c. 109, had given her "the right to com-

tract as if single," and that for "her earnings in occupations elsewhere than in her household duties \* \* \* she has the same right to recover \* \* \* as the husband has to sue for his own earnings" and that, "for a stronger reason, damages for injury to her person and for her physical and mental suffering must belong to her." The counsel for the railroad company cited the cases now relied upon by defendant, and the majority of the court, in deference to those authorities, felt constrained to hold that the woman could not recover; but, as the husband had been made a coplaintiff (though merely as a formality), the court would not set aside the verdict.

[12] It was felt to be unjust and illogical that the husband should recover for labor which the wife had performed outside the household duties, and under a contract she had a legal right to make "as if single," and that when the wife had borne the physical and mental suffering of the amputation of her foot, and a broken arm and other injuries, compensation therefor should go to her, and not to her husband, who had suffered nothing. The discharge of household duties, unending and tiresome and without limitation of hours, the rearing of children, the loving companionship and attentions of a wife, are full compensation for her right to support by the husband. Accordingly, at the ensuing term of the Legislature, one of the first statutes passed was chapter 13, Laws 1913, above set out, which has settled the law in this state, in no uncertain terms.

Upon review of all the exceptions, and construing the charge of the court as a whole, we find no error.

ALLEN, J., concurs in result.

(178 N. C. 403)

LANDIS CHRISTMAS SAV. CLUB v. MERCHANTS' NAT. BANK. (No. 356.)

(Supreme Court of North Carolina. Nov. 5, 1919.)

# 1. DEPOSITIONS ¶95 — INTRODUCTION OF WHOLE DEPOSITION.

The party offering the deposition of a witness must introduce the whole of it, including the cross-examination, and it was error for plaintiff to offer a deposition, but to decline to introduce the last question and answer.

# 2. COPYRIGHTS ¶48 — TESTIMONY OF OFFICER OF DEFAUDED BANK ON RECOVERY OF LICENSE FEE.

In an action against a bank to recover a license fee for two years for permission to operate Christmas and vacation savings clubs devised by plaintiff, testimony of the vice president of defendant bank as to the statements and representations made by plaintiff's agent to

induce defendant bank to contract, and showing such statements were false and fraudulent, held material and admissible.

# 3. EVIDENCE ¶503, 522 — EXPERT OPINION AS TO VALUE AND VALIDITY OF COPYRIGHT.

On the issue of the validity of a copyright of a Christmas and vacation savings plan, the opinions of experts in patent and copyright law are admissible to show the worthlessness of the copyright as an exclusive right, as well as to sustain it, the action being against a bank to recover license fees for the use of the plan; the defense being the contract was procured by false representations.

# 4. COURTS ¶489(4)—JURISDICTION OF STATE COURT AS TO VALIDITY OF COPYRIGHT.

The state court had ample jurisdiction to pass on a claimed copyright when its invalidity was set up as a defense in an action on a contract to pay certain license fees for its use.

Appeal from Superior Court, Forsyth County; Bryson, Judge.

Action by the Landis Christmas Savings Club against the Merchants' National Bank. Judgment for plaintiff, and defendant appeals. New trial.

Thomas Maslin's testimony, referred to in the opinion, follows:

I was vice president and cashier of the Merchants' National Bank during the period covered by these contracts referred to in this case. We used plaintiff's system 1914, 1915, and 1916. We paid them the license fee under the contract for those three years; the first year was \$100, and the next year they reduced it to \$80, and the next year it was \$80. Our bank spent a great deal of money in advertising this system. In the three years we spent something over \$600 in advertising, and we employed an office man to handle that business at about \$50 a month. We also bought between \$200 and \$300 equipment, such as filing cabinets and trays, etc., for the handling of this system. In December, 1915, we found out, through newspaper advertisement, that another system was being operated in this city on identically the same plan, and in the same month I learned that Wachovia Bank & Trust Company, of Winston-Salem, N. C., was operating a system identical with Landis system, ascending and descending class, 1 cent and 2 cents a week, going up, and same amounts coming down. According to the Landis system we had Class 2, ascending, and Class 2a, descending, and Class 5, ascending, and Class 5a, descending. For instance in Class 2 a person would start in to pay 2 cents a week on the 20th of December, and the next week he would pay 4 cents, and the next week 6 cents, and so on, progressing 2 cents a week until the end of the term of 50 weeks. At the end of the term we would pay him \$25.50, which included interest. Class 2a is the reverse of that. Class 5 and 5a is on the same principle, only paying 5 cents a week instead of 2 cents. The advertising matter, cards, etc., used in this case was what was sold to defendant by plaintiff. The bank holds one card and the subscriber holds the other card; the subscriber brings his card to

the bank with his payments weekly, and has his card punched. The card merely specifies the amount to be paid in, and we paid the interest on it for the average time, which is a separate proposition. The card represents the whole system. I had a conversation with the representative of the defendant company, who came here to negotiate the contract with our bank.

Q. Please state where he was and when it was and what representations were made to you about it that induced you to enter into it, if any? (Plaintiff objects; objection sustained; defendant excepts.)

I am acquainted with other systems of like kind and character with that of the Landis system in use at the end of the third year of our contract. They are: The Wrightson Company, of Philadelphia, the United Savings System Company, of Lancaster, Pa.; the Goodman Company, Memphis, Tenn.; I. S. Call, Savannah, Ga.; the Ready Money Club, Greensboro; Geo. D. Barnard & Co., St. Louis, Mo.; Young & Selden, Baltimore, Md. Our bank did not have any trouble with the plaintiff up to the time Wachovia Bank & Trust Company undertook to and did open up a similar savings club.

Cross-examination: The Christmas Savings Club business is purely advertising; it is not profitable. At the outset it was profitable as an advertising medium. Our bank was the first bank in Winston-Salem to inaugurate this Christmas Savings Club plan, and for two years we were the only bank operating this plan, but the third year the Wachovia Bank & Trust Company began operating a system identical with ours. I knew the English language was not subject to copyright. Plaintiff agreed to furnish us supplies at a stated price. We still have the fixtures we bought for handling this system. The Wachovia Bank & Trust Company operated the Wrightson system, which is the system indicated in the deposition of Mr. Boll, but for about three years our bank had exclusive representation here in the Christmas Savings Club business. The plaintiff stated in its written contract that it would not sell its system to any one else in Winston-Salem. It did not sell to any of my competitors in Winston-Salem. That exclusive privilege that was provided for in that contract has not been violated by plaintiff. This contract was for a period of five years, and we paid them for three years on the contract. The Christmas Savings Club business is handled separate and apart from the other banking business. We did a thriving Christmas Savings Club business at first, so much so that it was necessary to employ an additional clerk to handle it, and he was kept busy most of his time on it. I could not say that through that medium we secured new customers. Very few members of Christmas Savings Club deposited their money with us; it was too near Christmas. We are still conducting a Christmas Savings Club through our bank, and have been doing it since 1912. The banks last year tried to agree to abolish this plan, but they had already bought their supplies they contracted for, but the probabilities are that they will abolish it this year. After our relations ceased with plaintiff we secured another system.

Redirect examination: We have no system of bookkeeping to tell what reasons a person has for depositing in our bank, or that the Savings Club business causes him to do other busi-

ness with our bank. We still have the files and cases on hand, which we have no use for, and for which we paid several hundred dollars.

Mr. Maslin was recalled for the purpose of stating what representations were made that induced defendant to enter into the contract, the court stating he would rule upon the admissibility of the representations after hearing what they were.

J. E. Alexander, of Winston-Salem, for appellant.

W. Reade Johnson and Craige & Vogler, all of Winston-Salem, for appellee.

BROWN, J. The plaintiff, Landis Christmas Savings Club, entered into a contract with the Merchants' National Bank, by the terms of which the plaintiff agreed to give to the defendant an exclusive license to use, for a period of five years from December 15, 1912, its system of operating and maintaining a "Christmas Savings Club," of which system it was the owner in a United States copyright, for which the defendant agreed to pay the sum of \$100 per year. Some time later the plaintiff secured another United States copyright for the operation and maintenance of a "Vacation Savings Club," and on November 24, 1913, the plaintiff and defendant entered into a supplemental contract by the terms of which it was agreed defendant would use both systems and purchase the necessary supplies therefor during the term stated in the original contract, and the consideration was reduced from \$100 per year to \$80 per year. This action is brought to recover \$160, being for two years use.

The defendant denies the indebtedness, and alleges that the execution of the contracts was procured by the false and fraudulent representations of plaintiff; that plaintiff falsely represented that the plaintiffs had a new invention or patent and copyright for a plan of Christmas Savings Clubs; that its plan, being a new invention, was a monopoly, and that it had the right to sell exclusive privileges to defendant, whereby it would have the sole and exclusive right to operate a Christmas Savings Club, and the sole and exclusive right to the use of such name and advertising of such plan for the space of five years, and thereupon the contracts were entered into and carried out for three years, when another bank in Winston-Salem, to wit, Wachovia Bank & Trust Company, opened up on a large scale the identical, or nearly identical, plan and advertising, which plan of advertising and conducting the said clubs furnished by plaintiff to defendant under the contracts became a part thereof; that correspondence ensued between the parties to this action, the defendant asking of plaintiff explanations of this, none being given, the plaintiff avoiding a reply and contenting itself by merely sending its bill or offering to reduce the license fee to \$25 and then \$5 a year.

And defendant alleges that plaintiff has in effect admitted the falsity of its representations and abandoned its said contracts or waived them to the extent stated above, and that said contracts are invalid, discharged, and of no binding force.

That as defendant is now informed, advised and believes, and so alleges, the matters, plans, and things sold, or attempted to be sold, to defendant as capable of being patented and copyrighted were not in fact the subjects of patent or copyright, and defendant alleges that, as it is now informed, advised, and believes, the said purported patents and copyrights are invalid, the said matter not being capable of being lawfully patented or copyrighted, such matter not being new, being largely merely mathematical calculations, and not the subject of invention, patent or copyright, and not being lawfully salable as such. And defendant alleges that no recovery can be had by the plaintiff against the defendant on account of such attempted fraudulent sale of illegal patent and copyright privileges and licenses.

Defendant then sets up a counterclaim to recover money paid plaintiff under such contract.

[1] Plaintiff offered the deposition of one Boll, but declined to introduce the last question and answer. Defendant excepted. This was error. This question has been decided differently by different courts, but the weight of authority is that the party offering the deposition must introduce the whole of it, including the cross-examination. *Dawson v. Woodhull*, 67 Fed. 451, 14 C. C. A. 464; *Grant v. Pendery*, 15 Kan. 236; *Lanaham v. Lawton*, 50 N. J. Eq. 276, 23 Atl. 476; *Ins. Co. v. Knight*, 6 Whart. (Pa.) 327; *Calhoun v. Hays*, 8 Watts & S. (Pa.) 127, 42 Am. Dec. 275; *Bank v. Rhutasel*, 67 Iowa, 316, 25 N. W. 261; *Edwards v. Crenshaw*, 30 Mo. App. 510. This court has aligned itself with the above cases. In *Boney v. Boney*, 161 N. C. 621, 77 S. E. 787, Mr. Justice Allen says:

"We have not been able to find a direct adjudication in this state sustaining his honor in excluding parts of the deposition of Mrs. Turner because the whole was not offered, but the authorities elsewhere are in accordance with his ruling. *Killbourne v. Jennings*, 40 Iowa, 475; *Schwartz v. Brunswick*, 73 Mo. 257; *Hamilton v. Milliken*, 62 Neb. 117 [86 N. W. 913]; *State v. Rayburn*, 31 Mo. App. 386; *Lanaham v. Lawton*, 50 N. J. Eq. 276 (23 Atl. 476); *Grant v. Pembry*, 15 Kan. 242." *Barton v. Morphis*, 15 N. C. 243.

[2] The defendant excepts to the ruling of the court in excluding the testimony of Thomas Mastin as to the statements and representations made by plaintiffs' agent to induce defendant to enter into the contract, and that such statements were false and fraudulent. This testimony is set out in the record, and is very material. We are of opinion that the court erred in excluding it and directing

a verdict for amount claimed. The court should have submitted proper issues to the jury, with appropriate instructions as to the validity of the copyright as an exclusive right and the representations of plaintiffs' agent as to its value and character.

[3] Upon such issue the opinions of experts in patent and copyright law may be offered in evidence for the purpose of showing the worthlessness of the copyright as an exclusive right, as well as for the purpose of sustaining it upon the same principle that the opinion of lawyers learned in the law of another state may be offered in this state as to the law of their own state.

[4] The state court had ample jurisdiction to pass on the copyright when its validity is set up as a defense. In *Pratt v. Coke Co.*, 168 U. S. 259, 18 Sup. Ct. 64, 42 L. Ed. 458, the Supreme Court of the United States says:

"The state court had jurisdiction both of the parties and the subject-matter, as set forth in the declaration, and it could not be ousted of such jurisdiction by the fact that, incidentally to one of these defenses, the defendant claimed the invalidity of a certain patent. To hold that it has no right to introduce evidence upon this subject is to do it a wrong and deny it a remedy. Section 711 [Comp. St. § 1233] does not deprive the state courts of the power to determine questions arising under the patent laws, but only of assuming jurisdiction of 'cases' arising under those laws. There is a clear distinction between a case and a question arising under those patent laws. The former arises when the plaintiff in his opening pleading—be it a bill, complaint, or declaration—sets up a right under the patent laws as ground for a recovery. Of such the state courts have no jurisdiction. The latter may appear in the plea or answer or in the testimony. The determination of such question is not beyond the competency of the state tribunals."

In his opinion in that case, Mr. Justice Brown, referring to a contrary decision of a state court, further says:

"There is, however, an overwhelming weight of authority to the contrary. Beginning with the case of *Bliss v. Negus*, 8 Mass. 46, in which, in a similar action upon a note, it was held the defendant might show that the patent had been obtained by fraud and perjury, the Supreme Judicial Court of Massachusetts has held steadily to the doctrine that where the question of the validity of a patent arises collaterally, it will take jurisdiction of it. In *Dickinson v. Hall*, 14 Pick. [Mass.] 217 [25 Am. Dec. 390], evidence that the patent was void was held to be pertinent to show a total want of consideration for the defendant's note. The principal case, however, is that of *Nash v. Lull*, 102 Mass. 60 [3 Am. Rep. 435], in which the opinion of the court was delivered by Mr. Justice Gray, to the effect that any degree of utility or practical value in a patent will support the consideration paid for it; but that if it be wholly void, a note given for it is without consideration, and such issue may be tried in the state court as well as in the Circuit Court of the United States. See, also, to the same ef-

fect, *Bierce v. Stocking*, 11 Gray [Mass.] 174; *Lester v. Palmer*, 4 Allen [Mass.] 145.

"Like opinions have been pronounced in the courts of New Hampshire, Connecticut, New York, Pennsylvania, Indiana, Wisconsin, Illinois, and Missouri; and in all these states the principle seems well-established that any defense which goes to the validity of the patent is available in the state courts."

New trial.

(178 N. C. 342)

**BLACKWOOD v. SOUTHERN RY. CO.**  
(No. 329.)

(Supreme Court of North Carolina. Oct. 22, 1918.)

**1. WORK AND LABOR ⇨4(2)—IMPLIED PROMISE TO PAY.**

In the absence of a special contract, where one person has rendered services of value for the benefit of another for which the latter is under a binding obligation to perform, and such services and the benefits therefrom, not intended to be gratuitous, have been knowingly accepted and received, the law will imply a promise to pay what such services are reasonably worth.

**2. WORK AND LABOR ⇨4(1)—IMPLIED PROMISE TO PAY.**

Where postmaster, with office 200 to 300 feet from railroad station where mail was delivered, for four consecutive years, under impression it was his duty, and with knowledge of the railroad, carried the mail from the station to the office four times a day, the railroad, being under contract with the government to carry such mail to the post office, was liable to the postmaster for the value of the services rendered for its benefit.

Appeal from Superior Court, Durham County; Lyon, Judge.

Action by Robert Blackwood against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. No error.

The action is to recover the value of services rendered for defendant's benefit in carrying the mail from the post office in Carrboro, said county, to the railway station. On denial of liability there was verdict for plaintiff, judgment, and defendant excepted and appealed.

Fuller, Reade & Fuller, of Durham, for appellant.

R. O. Everett, of Durham, for appellee.

HOKE, J. On the hearing, recovery was resisted by defendant principally for the alleged reason that plaintiff did this work for his own advantage, in that by keeping the mail pouches open that much longer his cancellation of stamps was increased, thereby adding to his salary, and that the services for which pay is now sought were and were

intended to be gratuitous. But on a perusal of the pleadings, the evidence, and the charge of the court, this view has been rejected in the verdict, and the facts as accepted and acted on by the jury are to the effect that from 1910 to 1917 plaintiff, engaged in business, was also postmaster at Carrboro in said county, the office being from 200 to 300 feet from the railroad station where defendant delivered the mail; that for four consecutive years of that period plaintiff, under the impression that it was a part of his official duty, and with full knowledge of the defendant company, its agent, etc., carried the mail from the station to the office four times per day, to his great inconvenience and the interruption of his personal business; that in 1915, having ascertained that defendant company was under a contract for hire with the government to do this work, plaintiff stopped, and since that time it has been undertaken by company and same let out by them for pay, etc.

In the case of *Sanders v. Ragan*, 172 N. C. 612, 90 S. E. 777, L. R. A. 1917B, 681, the court said that—

"The action of *indebitatus assumpsit* \* \* \* is dependent largely on equitable principles, \* \* \* and, in the absence of a special contract controlling the matter, and unless in contravention of some public policy, it will usually lie wherever one man has been enriched or [the value of] his estate enhanced at another's expense under circumstances that, in equity and good conscience, call for an accounting by the wrongdoer"—citing *Mitchell v. Walker*, 30 N. C. 248; *Keener on Quasi Contract*, p. 318.

[1, 2] In application of the general principle, it is ordinarily true that in the absence of a special contract, where one person has rendered services of value for the benefit of another, or which the latter is under a binding obligation to perform, and such services and the benefits therefrom, not intended to be gratuitous, have been knowingly accepted and received, the law will imply a promise to pay what such services are reasonably worth.

It is said by an intelligent commentator (15 A. E. [2d Ed.] pp. 1082, 1083) that there are limitations on the principle, among them, that the party benefited must have the legal power to make a direct contract of a similar kind, and again the services and benefits must have been received under circumstances that afforded the person benefited the opportunity to reject them, etc., but no such modifications are presented in the present case where, as stated, it has been made to appear that the services were performed by plaintiff under the impression that they were a part of his official duties; that this was permitted by the defendant with full knowledge of attendant conditions, and, further, with the fair and reasonable inference that the com-

pany has been compensated for this work that they knowingly allowed plaintiff to do, and of which they have received the benefits.

The well-considered case of *Blowers v. So. Ry.*, 70 S. C. 377, 50 S. E. 19, seems to be in direct support of the present recovery, and several decisions of our own court are in full approval of the principle upon which it rests. *Sanders v. Ragan*, supra; *Blount v. Guthrie*, 99 N. C. 93, 5 S. E. 890; *Bailey v. Rutjes*, 86 N. C. 517, 15 A. & E. (2d Ed.) p. 1083; 40 Cyc. pp. 2810, 2811.

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

No error.

(178 N. C. 288)

ARMFIELD CO. et al. v. SALEEBY et al.  
(No. 297.)

(Supreme Court of North Carolina. Oct. 22, 1919.)

**1. FRAUDULENT CONVEYANCES §47—WHAT CONSTITUTE BULK SALES.**

Where jury could have found from the evidence that debtor's entire stock of goods was worth \$4,500 or more, the court erred in not instructing in substance that a sale by debtor of two lots of apples, one for \$300 and the other for \$150, was not the sale of a large part or the whole of the stock of merchandise within the Bulk Sales Law.

**2. FRAUDULENT CONVEYANCES §47—WHAT CONSTITUTE BULK SALES.**

The sale of 10 per cent. of the value of a stock of goods is not a large part thereof within the Bulk Sales Law.

**3. COURTS §170—JURISDICTION OF SUPERIOR COURT ON APPEAL FROM RECORDER'S COURT.**

Where complaint as originally framed indicated clearly that it was the intention of the pleader to waive the tort and sue on the contract, the superior court on appeal from the recorder's court had the power, though the amount involved was less than \$500 and more than \$300, to proceed against defendant on the supposition that the tort had been waived and that plaintiff had elected to sue on contract; *Pub. Loc. Laws 1913, c. 667*, making the jurisdiction of the recorder's court, in cases of contract where the amount does not exceed \$500 and in cases of tort where the amount does not exceed \$300, concurrent with that of the superior court, and *Revisal 1905, § 495*, requiring a liberal construction of pleadings.

**4. PLEADING §249(2) — AMENDMENT NOT CHANGING CAUSE OF ACTION.**

Where complaint as originally framed indicated clearly that it was the intention of the pleader to waive the tort and sue on the contract as an indebitatus assumpsit, an amendment expressly waiving the tort did not substantially change the cause of action.

**5. FRAUD §31—ACTION OF ASSUMPSIT IN CASE OF FRAUD MAINTAINABLE.**

In cases of fraud where the person committing it has been thereby enriched to the damage or detriment of the other, an innocent party, indebitatus assumpsit will lie upon the ground that the law implies a promise to restore what has been gained by the transaction.

**6. APPEAL AND ERROR §882(4)—WAIVER OF OBJECTION TO IMPROPER PARTY.**

A defendant cannot ask that a party be brought in, and when it is so ordered object because he is an improper party.

**7. BANKRUPTCY §156—TRUSTEE IN BANKRUPTCY PROPERLY JOINED AS PARTY.**

In action to recover judgment for open account due plaintiff and to set aside as fraudulent two sales of debtor, the trustee in bankruptcy of debtor was a proper party to prevent further litigation in view of *Revisal 1905, § 507*.

Appeal from Superior Court, Cumberland County; Stacy, Judge.

Suit by the Armfield Company against C. A. Saleeby and others. There was judgment for plaintiff in the recorder's court. On appeal to the superior court the trustee in bankruptcy of defendant named was made a party plaintiff, and from the judgment there rendered defendants appeal. New trial.

The plaintiff, Armfield Company, alleged that the defendant, C. A. Saleeby was indebted to them in the sum of \$446.29, for goods sold and delivered, and that he, being a retail fruit dealer, had sold a large part of his stock in bulk to his codefendants. T. S. Saleeby & Co., with intent to defraud the creditors of C. A. Saleeby, and contrary to the provisions of Bulk Sales Law.

The suit was brought first in the recorder's court, and then carried by appeal from the judgment to the superior court. The jurisdiction of the recorder's court is restricted to actions on contracts not exceeding in amount \$500, and actions of tort where the amount does not exceed \$300.

The facts were, so far as admitted, that C. A. Saleeby had increased his stock of goods just before and during the Christmas holidays, and among other additions to his stock he had bought 179 barrels of apples in two lots, one of 100 barrels and the other of 79 barrels, and that he had afterwards sold them in the same way, that is, in two lots of 100 barrels and 79 barrels, about the same time from the cars. There was much evidence as to the value of the stock varying from \$1,500 to \$5,000, the estimates, though depending somewhat, it appears, upon the times they were made. It was admitted that both lots of apples were worth \$450. The court submitted it to the jury to find whether there had been a violation of the Bulk Sales

Law, upon all the evidence as to the value of the stock, the nature of the business, and other pertinent matters. The defendants asked the court to give this instruction to the jury:

"If the jury shall find that the usual stock of goods in the store of C. A. Saleeby was from \$3,000 to \$5,000, then the court charges you that the sale of 100 barrels of apples of the value of about \$300 is not the sale in bulk of a large part, or the whole, of the stock of merchandise of C. A. Saleeby, and you should answer the issue, 'No.' This is also true as to the 79 barrels of apples."

This instruction was refused, and the defendants excepted. It was admitted that defendants had not complied with the requirements of the Bulk Sales Law, as to giving notice, etc.

The jury returned the following verdict:

"Did the defendant C. A. Saleeby sell in bulk a large part of his stock of merchandise, otherwise than in the ordinary course of trade and in the regular and usual prosecution of his business, without complying with the requirements of section 964a, Pell's Revisal, as alleged in the complaint? Answer: 'Yes.'"

Judgment and appeal.

W. S. O. B. Robinson, of Goldsboro, and Q. K. Nimocks and Rose & Rose, all of Fayetteville, for appellants.

H. W. B. Whitley, of Raeford, for appellee.

WALKER, J. (after stating the facts as above). It having appeared that the property sold by C. A. Saleeby to his codefendants was worth more than the amount of his indebtedness to the plaintiff, the court gave judgment against both defendants for \$448.29, which was the amount of the debt.

[1] The court submitted to the jury, for their determination upon the evidence, the question whether the Bulk Sales Law (Gregory's Supp. Pell's Revisal, p. 962, § 964a) had been violated, and refused to instruct the jury as requested by the defendant. This was error. The statute forbids the sale of a large part or the whole of a stock of merchandise, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, without first complying with certain requirements therein specified, as to notice, etc., and if they are not observed, declares that the sale shall be void, and, even if they are, such a sale is made prima facie evidence of fraud. Fraud on creditors is the basis of this new remedy; in the one case the fact of noncompliance with the requirements of the statute is conclusive evidence of it, and the sale is void, and in the other it is prima facie fraudulent and the evidence is referred to the jury upon which they may find the fact of fraud. *Gallup v. Rozler*, 172 N. C. 283, 90 S. E. 209; *Pennel v. Robinson*, 164 N. C. 257, 80 S. E.

417, Ann. Cas. 1915D, 77. The precise questions now before us were not present in the *Gallup v. Rozler* Case, which involved only the correctness of the charge, upon a different ground than the one taken in this case. The point here is whether the court should have given the instruction requested by the defendant. A sale is not forbidden by the statute unless it is of the whole or a large part of the stock, and we do not think that 10 per cent. thereof constitutes a large part of this stock. There was evidence to support the prayer of defendants, for L. L. Greenwood, plaintiff's witness, testified that in ordinary times C. A. Saleeby carried a stock of goods worth \$3,000 or \$4,000, and consisting of groceries, fruits, dry goods, notions, and the like, and there was other like evidence, sufficient at least to justify the instruction.

[2] The stock during the approach of Christmas was increased in size and seems to have been at its maximum, when the 179 barrels of apples were sold, so that the jury might well have found that the stock was worth, at that time, \$4,500, and perhaps even more than that amount. If they had so found, and it being admitted that the apples were worth \$450, it follows that they were worth only 10 per cent. of the value of the stock, which in our judgment is not a large part thereof. It should be something more than that or nearer a half of the stock to come under the condemnation of the statute. No such question has been before this court since the statute was passed, but it has been considered in the case of *Fiske Rubber Co. v. Hayes Motor Car Co.*, 131 Ark. 248, 199 S. W. 96, and the court held that a sale of 10 per cent. of the stock by an automobile agency and accessories shop was not forbidden by the statute, which was substantially like ours, as it was not a sale of a large part of the stock. The court conceded, as we decided in *Gallup v. Rozler*, supra, that such a stock as was sold there, came within the words of the statute, and a sale of it, or a large part of it, would be void if the requirements were not met by the seller. The syllabus of the *Fiske Rubber Co.* Case is as follows, and it correctly states accurately the point decided:

"A sale by an automobile agency and accessories shop of goods aggregating approximately \$150 out of an accessories stock of \$1,500 to its successors in the agency, when the seller was about to move the accessories stock, is not a sale in bulk requiring compliance with the Bulk Sales Law."

In the course of the opinion, Judge Humphreys says:

"The sale of items such as these in respect to value and quantity was not out of the ordinary in the conduct of the retail business in which they were engaged. \* \* \* In the instant case only a small portion of the stock was sold. The number of items and value there-

of were inconsequential when compared with the amount and value of the entire stock. The number of articles sold and the value thereof were within an ordinary retail transaction. Thompson & Dalhoff were engaged in the retail business. It is manifest that the sale was not intended to impair a continuation of the Thompson & Dalhoff automobile accessory business at some other location in the city. \* \* \* In order to constitute a fraudulent sale under the act, it must appear that a material portion of the stock was sold in bulk out of the ordinary course of trade and contrary to the regular prosecution of the business of the seller. The chancellor found in the instant case that the sale was an ordinary retail transaction. We think the finding was supported by the weight of evidence. It certainly cannot be said that the finding was contrary to a clear preponderance of the evidence."

We take it, therefore, that the court should have recognized this construction of the law and have given the instruction, at least in substance.

[3] The defendant further contends that, as this action was originally brought in the recorder's court, the superior court only acquired the jurisdiction derivatively of the recorder's court, and could not amend the pleadings so as to change that jurisdiction or to enlarge it, and that it has attempted to do so by allowing the plaintiff to waive the tort, arising out of the fraud, and to sue on contract. The jurisdiction conferred upon the recorder's court is limited to those cases of contract where the amount in dispute does not exceed \$500, and in cases of torts when it does not exceed \$300; but within those limits the jurisdiction is quite broad and comprehensive. The Public Local Laws of 1913, c. 667, makes the jurisdiction of the recorder's court concurrent with that of the superior court (section 3, subsec. 2), in all civil actions, matters and proceedings founded on contract within the above limit, and the same provision is made in the case of torts, and by section 26 the procedure, with certain exceptions, is required to follow the rules and practice as set forth in chapter 12 of the Revisal of 1905, on Civil Procedure and Amendments Thereof, in so far as the same may be adapted to the needs and requirements of said court, and any changes in the rules of procedure of the court are required to be published. We think the court had the power, under this act, to proceed against both defendants upon the supposition that the tort, if one was committed, had been waived, and that plaintiff had elected to sue in contract. The complaint, as originally framed, indicated clearly that this was the intention of the pleader, and we must construe it liberally. Revisal, § 495; Blackmore v. Winders, 144 N. C. 215, 56 S. E. 874; Brewer v. Wynne, 154 N. C. 467, 70 S. E. 947; Bank v. Warehouse Co., 172 N. C. 602, 90 S. E. 698. No one can read the complaint, with prayer for judgment, and

not conclude that the plaintiff was waiving the tort and suing on the contract, as in *indebitatus assumpsit*.

[4] When the court allowed the amendment so as expressly to waive the tort, it did not substantially change the cause of action, but simply amplified the statement so as to show more clearly and expressly what was implied, or to be inferred, from the complaint as already drawn. This was legitimate and proper. It was not the substitution of a new cause of action, but a better pleading of the original one. *Simpson v. Lumber Co.*, 133 N. C. 95, 98, 45 S. E. 469; *Pickett v. Railroad Co.*, 153 N. C. 148, 69 S. E. 8; *Hockfield v. Railroad Co.*, 150 N. C. 419, 64 S. E. 181, 134 Am. St. Rep. 945; *Gadsden v. Crafts*, 175 N. C. 358, 95 S. E. 610, L. R. A. 1918E, 226. We said in the *Simpson Case*, *supra*:

"The general scope and purpose of this action, or what is sometimes called the gravamen or the grievance or injury specially complained of, were not changed by the amendment. \* \* \* Amendments which only amplify or enlarge the statement in the original complaint are not deemed to introduce a new cause of action, and the original statement of the cause of action may be narrowed, enlarged, or fortified, in varying forms, to meet the different aspects in which the pleader may anticipate its disclosure by the evidence"—citing 1 Enc. Pl. & Pr. 557-562.

[5] We have held that in cases of fraud, where the person committing it has been thereby enriched to the damage or detriment of the other and innocent party, *indebitatus assumpsit* will lie against him, upon the ground that the law implies a promise on his part to restore what he has thus gained by the transaction. The subject is discussed in *Keener on Quasi Contracts*, pp. 318-325. We so decided in *Sanders v. Ragan*, 172 N. C. 612, 90 S. E. 777, L. R. A. 1917B, 681, where Justice Hoke treats the subject, and reviews the authorities, with much clearness and discrimination, and concludes as follows:

"The action of *indebitatus assumpsit*, as stated, is dependent largely on equitable principles (*Mitchell v. Walker*, 30 N. C. 243), and, in the absence of a special contract controlling the matter, and unless in contravention of some public policy, it will usually lie wherever one man has been enriched or his estate enhanced at another's expense under circumstances that, in equity and good conscience, call for an accounting by the wrongdoer."

The third syllabus is especially pertinent to this case:

"When one's property has been wrongfully converted by fraud or deceit, the owner is allowed to waive the tort and sue on an implied contract in the equity of *indebitatus assumpsit*."

It has also been held that, in equity, where one has acquired the property of another in



fraud of the rights of a third party, and has disposed of the same, so that it cannot be reached by execution or ordinary process, the court may render a money judgment against the fraudulent vendee for the value of the property so fraudulently converted. *Sprinkle v. Wellborn*, 140 N. C. 163-178, 52 S. E. 666, 3 L. R. A. (N. S.) 174, 111 Am. St. Rep. 827, and cases cited. The law simply compels the vendee, who co-operated with his fraudulent vendor, to surrender what he has unfairly and unjustly received, and of which he has deprived the vendor's creditors; it being an asset of their debtor to which they are entitled to resort for the satisfaction of their claim.

It was decided in *Whitmore v. Hyatt*, 175 N. C. 117, 95 S. E. 38, where the property was alleged to have been sold in violation of the Bulk Sales Law, that the creditors could recover of the buyer the value of the goods so sold by their debtor, who was the seller, citing *Daly v. Drug Co.*, 127 Tenn. 412, 155 S. W. 167, Ann. Cas. 1914B, 1101, and *Marlow v. Ringer*, 79 W. Va. 568, 91 S. E. 386, L. R. A. 1917D, 619. The *Daly Case* involved this very question.

[8, 7] The remaining objection of defendants is not one which they are in a position to set up, as the record shows that they moved to dismiss the action because J. A. Nevin, trustee in bankruptcy, had not been made a party thereto, whereupon the court found that he had theretofore been made a party as interpleader, without objection, by order of Judge Lyon, and then ordered that he come in and be allowed to join with the plaintiff in the prosecution of the action. By not objecting at first defendants waived their right to object now. A defendant cannot ask that a party be brought in, and, when it is so ordered, object because he is an improper party; for, when the court has done what he has asked to be done, he is in no position to insist that it be undone. But the trustee was a proper party under the circumstances to prevent further litigation. He claimed the entire fund as trustee for all the creditors, including the plaintiff, while the latter claimed only his proportionate part of it. *Symons v. Reid*, 58 N. C. 327; *Vanhorn v. Duckworth*, 42 N. C. 261; *Ayers v. Wright*, 43 N. C. 229; *Kornegay & Co. v. Farmers, etc., Steamboat Co.*, 107 N. C. 115, 12 S. E. 123. The plaintiff is not objecting to the trustee being made a party, or to his intervening. He is not claiming all of the fund, but only his ratable part. The court "must" make parties in some cases, and in others it "may" add new parties. *Revisal*, § 507. "It can very rarely happen," said the Chief Justice, "that making an additional party will be a serious prejudice, and hence such orders are usually discretionary, and not reviewable." *Bernard v. Shemwell*, 139 N. C. 446, 52 S. E. 64, citing *Code*, § 273; *Till-*

*ery v. Candler*, 118 N. C. 889, 24 S. E. 709. Defendants cannot be prejudiced by making the trustee a party. It is rather beneficial to them, as they will be protected from another action by him, based upon his right to recover the money for the creditors generally, the fund to be administered in the bankruptcy proceedings. We have considered all the questions, as there must be a new trial, for they would be raised again.

There was error in the charge, because of which a new trial is ordered.

New trial.

(178 N. C. 715)

# STATE v. MOON. (No. 378.)

(Supreme Court of North Carolina. Nov. 5, 1919.)

## 1. STATUTES $\S$ 230—EFFECT OF AMENDMENT.

An amendment to a statute from its adoption has the same effect as if it had been part of the statute when first enacted.

## 2. CRIMINAL LAW $\S$ 108(1)—PROSECUTION FOR BIGAMY IN COUNTY OTHER THAN WHERE COHABITATION TOOK PLACE.

Under *Revisal* 1905, § 3361, as amended by *Laws* 1913, c. 26, prosecution for bigamous cohabitation may be instituted in a county other than where the cohabitation took place.

## 3. CRIMINAL LAW $\S$ 84(3)—STATUTE DENOUNCING BIGAMOUS COHABITATION NOT UNCONSTITUTIONAL.

*Revisal* 1905, § 3361, as amended by *Laws* 1913, c. 26, denouncing cohabitation within North Carolina after bigamous marriage outside of the state, held not unconstitutional as punishing for a crime committed outside of the territorial limits of the state.

Appeal from Superior Court, Guilford County; Lane, Judge.

John W. Moon was convicted of bigamous cohabitation, and he appeals. No error.

T. J. Gold and L. B. Williams, both of High Point, for appellant.

Jas. S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

BROWN, J. Defendant was convicted at the June term, 1919, of Guilford county superior court, of bigamous cohabitation under *Revisal*, § 3361, as amended by chapter 26, *Public Laws* 1913. That section, as amended, reads as follows, so far as material:

"Bigamy. If any person, being married, shall marry any other person, during the life of the former husband or wife, every such offender, and every person counseling aiding or abetting such offender, shall be guilty of felony, and imprisoned in the state's prison or county jail for any term not less than four months nor more than ten years; and any such offense may be dealt with, tried, determined and punished

in the county where the offender shall be apprehended, or be in custody, as if the offense had been actually committed in that county. If any person, being married, shall contract a marriage with any other person outside of this state, which marriage would be punishable as bigamous if contracted within this state, and shall thereafter cohabit with such person in this state, he shall be guilty of a felony and punishable as in cases of bigamy."

The defendant filed a plea in abatement, upon the ground that the bigamous cohabitation took place in Buncombe county and not in Guilford. Defendant contends that the part of section 3361 which permits the defendant to be tried in the county in which he is apprehended applies only to the offense of the bigamy itself, and not to the offense of bigamous cohabitation.

The following is the wording of chapter 26, Public Laws 1913, which is the amending statute:

"That section three thousand three hundred and sixty-one of the Revisal of one thousand nine hundred and five be, and the same is, hereby amended by striking out the words 'whether the second marriage shall have taken place in the state of North Carolina or elsewhere,' in lines two, three, and four thereof, and by inserting in line ten, between the words 'county' and 'providing,' the following: 'If any person being married shall contract a marriage with any other person outside of this state, which marriage would be punishable as bigamous if contracted within this state, and shall thereafter cohabit with such person in this state, he shall be guilty of a felony and punishable as in cases of bigamy.'"

[1-3] The legal effect of the amendment is the re-enactment of the old statute with the amendment incorporated in it, and the amendment from its adoption has the same effect as if it had been a part of the statute when first enacted. *Nichols v. Board*, 125 N. C. 13, 34 S. E. 71. The plea in abatement was properly overruled. It is further contended that the amendment of 1913 is unconstitutional, inasmuch as its effect is to punish the defendant for a crime committed outside of the territorial limits of the state. This contention cannot be sustained. It is an offense committed in North Carolina called bigamous cohabitation. Similar statutes have been enacted in the states of Alabama, Iowa, Massachusetts, Minnesota, Missouri, Tennessee, and Vermont, and in each of these states they have been sustained.

In Alabama, *Cox v. State*, 117 Ala. 103, 23 South. 806, 41 L. R. A. 760, 67 Am. St. Rep. 166.

In Iowa, *State v. Steupper*, 117 Iowa, 591, 91 N. W. 912; *State v. Sloan*, 55 Iowa, 217, 7 N. W. 516.

In Massachusetts, *Commonwealth v. Bradley*, 2 Cush. (Mass.) 553.

In Minnesota, *State v. Johnson*, 12 Minn. 476 (Gil. 378), 93 Am. Dec. 241.

In Missouri, *State v. Stewart*, 194 Mo. 345, 92 S. W. 878, 112 Am. St. Rep. 529, 5 Ann. Cas. 963.

In Tennessee, *Keneval v. State*, 107 Tenn. 581, 64 S. W. 897.

In Vermont, *State v. Palmer*, 18 Vt. 570.

In *State v. Ray*, 151 N. C. at page 714, 86 S. E. 205, 134 Am. St. Rep. 1005, 19 Ann. Cas. 566, Judge Hoke says:

"As now advised, and speaking for himself, the writer sees no reason why a state should not declare the coming into the state and cohabiting together here by the parties, after a bigamous marriage in another state, a felony, and punish it as such."

No error

(178 N. C. 388)

**MERCHANTS' NAT. BANK OF WINSTON  
v. PACK et ux. (No. 361.)**

(Supreme Court of North Carolina. Oct. 29, 1919.)

**1. APPEAL AND ERROR ⇨1047(5)—ERROR IN  
ADMISSION OF EVIDENCE IS HARMLESS.**

Permitting plaintiff to introduce in evidence only a part of a paragraph of defendants' answer, if erroneous, was harmless, where there was no real controversy as to existence of the fact admitted in the part of the paragraph not introduced.

**2. APPEAL AND ERROR ⇨232(1)—OBJECTION  
AVAILABLE.**

Defendants appellants must abide in the court on appeal by the ground of objection which they assign below.

**3. WITNESSES ⇨393(1) — IMPEACHMENT OF  
DEFENDANT BY INTRODUCING EXAMINATION  
BEFORE CLERK.**

It was competent to read in evidence the examination taken before the clerk and question defendant husband in regard to his answers, which appeared therein for the purpose of impeaching his testimony as to the ownership of the property alleged to have been conveyed by him to defendant wife in fraud of creditors.

**4. APPEAL AND ERROR ⇨273(6)—REVIEW OF  
EXCEPTIONS TO LONG EXTRACTS FROM  
CHARGE.**

Exceptions which are taken to long extracts from the charge will not be considered on appeal, where the extracts are correct in some particulars.

**5. FRAUDULENT CONVEYANCES ⇨95(1), 159  
(1)—PURCHASER'S KNOWLEDGE OF EVIL IN-  
TENT OF VENDOR.**

If wife did not pay value, or purchased with full knowledge of the evil intent and fraudulent purpose of her husband in making the conveyance to her, her title fails as to his creditors.

**6. FRAUDULENT CONVEYANCES** ¶165 —  
**KNOWLEDGE OF PURCHASER OF INTENT OF GRANTOR.**

If the conveyance is upon a valuable consideration and made with the actual intent to defraud creditors upon the part of the grantor alone, and not participated in by the grantee, and of which intent he had no notice, it is valid.

**7. FRAUDULENT CONVEYANCES** ¶159(1), 163 —  
**PURCHASER'S KNOWLEDGE OF INTENT TO DEFRAUD CREDITORS.**

If the conveyance is upon a valuable consideration, but made with actual intent to defraud creditors on the part of grantor, participated in by the grantee, or of which he has notice, it is void.

Appeal from Superior Court, Forsyth County; Bryson, Judge.

Action by the Merchants' National Bank, on behalf of itself and all other creditors, against L. C. Pack and wife. Judgment for plaintiff, and defendants appeal. No error.

The plaintiff alleged that the defendants are husband and wife, and were so at the times hereinafter mentioned; that it was a creditor of the male defendant, L. C. Pack, when he conveyed to his wife by deed a certain tract of land therein described; that at the time the husband was then indebted to plaintiff and others, and made the deed to his wife without any consideration therefor, and without retaining property fully sufficient and available to pay his then existing creditors; that the deed was executed with the intent to hinder, delay, and defraud the plaintiff; that the wife had notice of the fraudulent intent of her husband, and actually participated in the fraudulent transaction; and, further, that the husband acted as her agent in conducting and consummating the same.

The defendant denied all of these allegations, and alleged that the land was purchased with her own money and belonged to her, although title had been taken in her husband's name, and that he was a trustee for her, and that the transaction was wholly free from any fraud or dishonesty on the part of the defendants, or any intention of either of the defendants to defraud the husband's creditors.

The court submitted issues to the jury, and they found that the deed was executed by the husband with the intent to defraud his creditors, and that his wife had notice of the fraudulent intent of her husband when she accepted the deed. Judgment was entered for the plaintiff upon the verdict, and the defendants appealed, having reserved several exceptions.

Bennett & Brown, of Winston-Salem, for appellants.

J. E. Alexander, of Winston-Salem, for appellee.

WALKER, J. (after stating the facts as above). [1] The court permitted the plaintiff to introduce as evidence, a part of the complaint and the corresponding part of the answer. The objection was not to the competency of the pleadings themselves as evidence, but the only ground taken was that plaintiff was allowed to offer only a part of the answer, which was that L. C. Pack executed the deed to his wife, whereas the whole of that part of the answer is, as follows:

"That the allegations set out in paragraph 6 are denied, except (it is admitted that Mrs. D. L. Pack is the wife of L. C. Pack, and that on or about the 19th day of February, 1917, the defendant L. C. Pack executed a deed to his wife, D. L. Pack) for a valuable consideration, all other allegations are expressly denied."

We need not pass upon the correctness of this ruling of the court, as we are of the opinion, if there was error it was harmless, as both L. C. Pack and his wife were examined as witnesses, and each of them stated on the direct examination that the deed had been executed at the time alleged in the complaint, February 19, 1917, and there was really no conflict of evidence and no real controversy as to the existence of the fact. If there was error therefore it was harmless. The charge of the court also, as we think, prevented any harm to the defendants as it clearly stated the issues and the evidence bearing upon them which the jury should consider. It would not do to reverse upon so slight a ground, even if there was technical error. We have examined the entire case with care and scrutiny and cannot see that defendants have been prejudiced by the rulings.

[2] The defendants restricted themselves to a single ground of objection and must abide here by the one they assigned below. *Rollins v. Henry*, 78 N. C. 342; *Kidder v. McIlhenny*, 81 N. C. 123; *Ludwick v. Penny*, 158 N. C. 104, 73 S. E. 228; *Proffitt v. Insurance Co.*, 176 N. C. 680, 97 S. E. 635; *State v. Evans*, 177 N. C. 564, 98 S. E. 788. We cannot therefore consider the competency of the testimony, that is, the contents of the pleadings, though we may say upon a review of all the evidence and the charge of the court, that if there was any error in this particular, and proper objection has been made, this ruling would also have been harmless, or not of sufficient importance to justify another trial. *3 Graham & Waterman on Trials*, 1235; *Brewer v. Ring and Valk*, 177 N. C. 476, 99 S. E. 358; *Schas v. Eq. Assurance Society*, 170 N. C. 420, 87 S. E. 222, *Ann. Cas.* 1918A, 679; *State v. Smith*, 164 N. C. 476, 79 S. E. 979.

[3] It was competent to read the examination taken before the clerk, and question L. C. Pack in regard to his answers, which appear therein, for the purpose of impeaching his testimony as to the ownership of

the property. If he had contradicted himself concerning this material fact, we see no reason why it could not be shown in this way. It is merely one way of showing contradictory statements of the witness. *Johnson v. Railroad Co.*, 140 N. C. 581, 53 S. E. 362; *Keerans v. Brown*, 68 N. C. 43; *Edwards v. Sullivan*, 30 N. C. 302; *State v. McLeod*, 8 N. C. 344. And such evidence may also be used for the purpose of corroboration. *Allred v. Kirkman*, 160 N. C. 392, 76 S. E. 244; *Bowman v. Blankenship*, 165 N. C. 519, 81 S. E. 746.

The issues were sufficient to cover the case and to present all matters in controversy. *Hatcher v. Dabbs*, 133 N. C. 239, 45 S. E. 562; *Potato Co. v. Jeanette*, 174 N. C. at p. 240, 93 S. E. 795, and cases there cited. The judge gave those of the requested instructions to which the defendants were entitled, and the charge was more favorable to them in some respects than they had a right to expect.

[4] The exceptions to the charge are without any merit, and, besides, they are taken to long extracts therefrom, which are surely correct in some particulars, even if not so in others. When this is the case, the exception will not be considered. *Nance v. Telegraph Co.*, 177 N. C. 313, 98 S. E. 838; *Ritter L. Co. v. Moffitt*, 157 N. C. 568, 73 S. E. 212; *Hendricks v. Ireland*, 162 N. C. 523, 77 S. E. 1011. The charge was a fair, full, and correct statement of the evidence and the law arising thereon, and complete, in all respects, with the statute. If the contentions of the parties were not correctly stated, the attention of the judge should have been called to it at the proper time, so that he might make the necessary change in them, if any was required. *McMillan v. Railroad Co.*, 172 N. C. 853, 90 S. E. 683; *State v. Foster*, 172 N. C. 960, 90 S. E. 785; *Mfg. Co. v. Bldg. Co.*, 177 N. C. 103, 97 S. E. 718; *Alexander v. Cedar Works*, 177 N. C. 138, 98 S. E. 312.

[5] We may add that a purchaser from a fraudulent vendor must have acquired the land for value and without notice. If feme defendant did not pay value or purchased with full knowledge of the evil intent and fraudulent purpose of the vendor in making the conveyance to her, her title falls as to his creditors. *Cox v. Wall*, 132 N. C. 730, 44 S. E. 635; *Morgan v. Bostic*, 132 N. C. 743, 44 S. E. 639; *Crockett v. Bray*, 151 N. C. 619, 66 S. E. 666; *Eddleman v. Lentz*, 158 N. C. 65, 72 S. E. 1011; *Pennell v. Robinson*, 164 N. C. 257, 80 S. E. 417, Ann. Cas. 1915D, 77; *Smathers v. Hotel Co.*, 168 N. C. 69, at pages 70 and 71, 84 S. E. 47, citing *Vosburgh v. Diefendorf*, 119 N. Y. 357, 23 N. E. 801, 16 Am. St. Rep. 836; *Giberson v. Jolley*, 120 Ind. 301, 22 N. E. 306; *Bank v. Fountain*, 148 N. C. 590, 62 S. E. 738. The jury have evidently found, when we construe the verdict in the

light of the evidence and the charge of the court, as we should do, that the feme defendant paid no consideration for the land, and took the conveyance from her husband with full knowledge of his intent to defraud his creditors.

[6, 7] In *Aman v. Walker*, 165 N. C. 224, 227, 81 S. E. 162, 164, Justice Allen states the principles relating to fraudulent conveyances, and along with others are these two, which are pertinent to this case:

(1) "If the conveyance is upon a valuable consideration and made with the actual intent to defraud creditors upon the part of the grantor alone, not participated in by the grantee, and of which intent he had no notice, it is valid."

(2) "If the conveyance is upon a valuable consideration, but made with the actual intent to defraud creditors on the part of the grantor, participated in by the grantee, or of which he has notice, it is void"—citing *Black v. Sanders*, 46 N. C. 67; *Warren v. Makely*, 85 N. C. 14; *Worthy v. Brady*, 91 N. C. 268, and other cases, as supporting the classification.

See, also, *Cox v. Wall*, supra, *Morgan v. Bostic*, supra, *Pennell v. Robinson*, supra, and *Smathers v. Hotel Co.*, supra.

There was no ground upon which the court could have ordered a nonsuit. There was plenary evidence of the fraud.

The exceptions not specially considered by us are untenable.

No error.

(178 N. C. 325)

OWENS v. HINES, Director General of Railroads, et al. (No. 20.)

(Supreme Court of North Carolina. Oct. 22, 1919.)

# 1. APPEAL AND ERROR ¶722—RULES AS TO ASSIGNMENTS AND GROUPING OF EXCEPTIONS.

Rules of the Supreme Court 19 (2) and 27 (81 S. E. x and xi), requiring that errors relied on be assigned in the record, and that the exceptions relied on shall be grouped, numbered, and set out immediately after the statement of the case on appeal, must be strictly adhered to, except when the appeal is on the ground the judgment was not justified by the facts found or admitted, or that the court did not have jurisdiction; the appeal of itself being an exception.

## 2. RAILROADS ¶51½. New, vol. 6A Key-No. Series—EFFECT OF FEDERAL CONTROL ON POLICE REGULATION.

The police regulation of Revisal 1905, § 2632, imposing penalties on railroads for delays in the transportation of intrastate shipments less than a carload, held not impaired by the federal control of railroads statute (Act March 21, 1918 [U. S. Comp. St. 1918, §§

3115½a to 3115½p)], in view of section 15, and General Order No. 50a of January 11, 1919, of the United States Railroad Administration.

**3. RAILROADS** ¶5½, New, vol. 6A Key-No. Series—FEDERAL DIRECTOR GENERAL AS PARTY TO ACTION.

In an action against a railroad to recover the penalty, under Revisal 1905, § 2632, for delay in transporting an intrastate shipment of corn less than a carload, and also to recover payment for a bag of corn not delivered, the federal Director General of Railroads, to the extent of the recovery for the bag, was a proper party to the action.

Walker, J., dissenting.

Appeal from Superior Court, Tyrrell County; Devin, Judge.

Action by M. F. Owens against Walker D. Hines, Director General of Railroads, and the Norfolk Southern Railroad Company. From judgment for plaintiff, defendant railroad appeals. Affirmed.

This was an action brought, under Revisal, § 2632, before W. L. Godwin, justice of the peace, to recover the penalty of \$40 for delay in delivery of two bags of corn, and the value of one bag of corn lost in transit, shipped from Asheboro, N. C., on March 27, 1918, and received at Columbia, N. C., on April 16, 1918. The evidence showed that three bags were shipped and only two received. On appeal from the justice, in the superior court, his honor allowed the plaintiff to make Walker D. Hines, Director General of Railroads, a party defendant, the action originally having been brought against the Norfolk Southern Railroad Company. The superior court rendered judgment for \$21 as the penalty for 12 days' negligent delay, the value of the corn lost having been paid into court by the defendant.

Small, McLean, Bragaw & Rodman, of Washington, N. C., for appellant.

H. L. Swain, of Columbia, and Ayldett, Simpson & Sawyer, of Elizabeth City, for appellee.

CLARK, C. J. [1] The plaintiff objects that there is no assignment of error. Rule 27 (81 S. E. x) requires that the errors relied on should be assigned in the record, and rule 19, subd. 2 (81 S. E. x) of this court prescribes that the exceptions which are relied upon shall be grouped, numbered, and set out immediately after the statement of the case on appeal under penalty of dismissal, if this is not done. This is a very necessary requirement, as this court has repeatedly stated, and it must be strictly adhered to. *Jones v. Railroad*, 153 N. C. 419, 69 S. E. 427,

and citations thereto in the Anno. Ed. But there is an exception when the appeal is upon the ground that the judgment was not justified by the facts found, or admitted, or that the court did not have jurisdiction. In such case the appeal of itself is an exception.

[2] The court found the following facts by consent: The plaintiff delivered to the defendant carrier at Asheboro, N. C., March 27, 1918, three bags of seed corn for shipment to plaintiff at Columbia, N. C. Two of these said bags were delivered to plaintiff on April 16, 1918. The carriage of said goods by the defendant railroad was entirely over its line and in the state of North Carolina; and, there being between Asheboro and Columbia three intermediate points, allowance should be made therefor in accordance with the statute. That the distance between the initial point and the point of delivery is 285 miles. Thereupon the court adjudged that the plaintiff was entitled to recover the penalty of \$21; i. e., \$10 for the first day, \$1 for 11 succeeding days, after allowing 2 days at the initial and 6 days for the three intermediate points, as provided by statute. The court further finds that one of the bags of seed was lost in transit, that its value was \$3.50, which the defendant has paid and rendered judgment for \$21, with interest from the first day of the term and the costs.

The transcript shows an exception to the order making Walker D. Hines, Director General of Railroads, an additional party defendant, and the appeal from the judgment presents the validity of the judgment for the recovery of the penalty prescribed by the statute.

The United States Supreme Court, in *Railroad v. North Dakota*, 250 U. S. 135, 39 Sup. Ct. 502, 63 L. Ed.—, in an opinion by Chief Justice White, filed June 2, 1919, held that under Act March 21, 1918, c. 25, 40 Stat. 451, § 10 (U. S. Comp. St. 1918, § 3115½j), authorizing the president to fix rates for railroads under federal control, but providing for review by the Interstate Commerce Commission, and section 15 (section 3115½o) declaring that nothing in the act shall be construed to impair lawful police regulations of the state, the President had power to prescribe intrastate rates for railroads under federal control, though such rates shall conflict with the rates previously fixed by state authority.

Our Revisal, § 2632, provides that in shipment of less than a carload there shall be a penalty of \$10 for the first day's delay, and a dollar per day for each succeeding day shall be allowed. In this case there was a delay for 20 days. After deducting the exemption of 8 days, as properly allowed by the judge, there was a net delay of 12 days, the penalty for which is \$21, as

correctly stated by the judge. This was an intrastate shipment, and this court has held that Revisal, § 2632, is a valid law. Davis v. Railroad, 147 N. C. 68, 60 S. E. 722; Wall v. Railroad, 147 N. C. 407, 61 S. E. 277.

The statute prescribing such penalty for delay was a police regulation, and section 15 of the act of March 21, 1918, as recited by Chief Justice White in Railroad v. North Dakota, supra, declared that "nothing in that act should be construed to impair lawful police regulations of the state." This was the view taken by the United States Railroad Administration, for in General Order No. 50-A, January 11, 1919, it is provided:

"General Order No. 50, issued October 28, 1918, is hereby amended to read as follows: It is therefore ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control, or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for federal control might have been brought against the carrier company, shall be brought against the Director General of Railroads, and not otherwise: Provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures."

It seems clear from this order that the Director General of Railroads did not assume to repeal the state police regulation fixing a penalty for delay in the transportation of freight between two points in this state, but only directed that he should be made a party defendant in other actions brought against any railroad company, and he provided:

"This order shall not apply to actions, suits or proceedings, for the recovery of fines, penalties and forfeitures."

He thus recognized, as Chief Justice White has stated, that the police regulations were not impaired by the federal statute, but provided that he should be exempt from being made a party to the suits therefor.

[3] When this action was instituted a part of the recovery sought was payment for the bag of corn not delivered. He was therefore to that extent a proper party to the action, and the exception to the amendment making him a party was properly overruled, but the judgment stands good as to the defendant railroad company for the penalty imposed by the statute.

Affirmed.

WALKER, J., dissents.

(178 N. C. 388)

COMER v. CITY OF WINSTON-SALEM.  
(No. 360.)

(Supreme Court of North Carolina. Oct. 29, 1919.)

1. BRIDGES ⇐41(2)—FAILURE TO SUFFICIENTLY GUARD.

Defendant city was liable for not maintaining an efficient railing, which would have prevented plaintiff's intestate, a child 28 months old, from getting through and falling 20 feet below upon the concrete bottom of the extension of the bridge; the bridge being about 200 feet from plaintiff's house, in a residential and thickly settled portion of the city, adjoining a playground.

2. DEATH. ⇐75—EVIDENCE AS TO CONTRIBUTORY NEGLIGENCE.

In action for death of a child, due to his falling off a bridge, evidence held to show that the parents were not guilty of contributory negligence.

3. APPEAL AND ERROR ⇐1050(1)—ADMISSION OF INCOMPETENT EVIDENCE HARMLESS ERROR.

In action for death of a child, due to his falling off a bridge, admitting evidence that engineer, who supervised construction of bridge, thought it dangerous, if erroneous, was harmless; the negligence charged not being the construction of the bridge, but failure to maintain a sufficient railing.

4. DEATH ⇐95(4) — MEASURE OF DAMAGES FOR DEATH OF CHILD.

In action for death of a child, charge that the measure of damages is the present value of the net pecuniary worth of deceased, to be ascertained by deducting the cost of his living from the gross income based on his life expectancy, held correct.

Walker and Allen, JJ., dissenting.

Appeal from Superior Court, Forsyth County; Bryson, Judge.

Action by Charles S. Comer, administrator, against the City of Winston-Salem. Judgment for plaintiff, and defendant appeals. No error.

The plaintiff's intestate, Joseph Earl Comer, was a white child about 28 months old, whose parents were preparing to leave the city; their household effects being at the railroad station for shipment. His mother was staying with her parents in Winston-Salem preparatory to moving. The intestate, with a 3 year old child was playing horse in the yard of its grandmother, about 200 feet from the bridge over Tar branch in West street; its mother was helping in the housework, preparing dinner at this time; there were 13 members of the family; the child had not been out of the sight of the mother more than 20 minutes, and just 5 minutes before it was killed the mother had sent her

younger sister, who found the child still playing in the yard.

West street is one of the oldest streets in Salem, and runs east and west. The first bridge or culvert across Tar branch was built with brick walls on either side, and around this culvert the children played, for it was a gathering place for the children of the whole neighborhood. Later this culvert was removed, and the Southbound Railroad Company under a contract with Salem, which was afterwards consolidated with Winston under an act by which all contracts of Winston and Salem became the contracts and liabilities of Winston-Salem. This branch carries a considerable volume of water, and where it crosses West street it is 8 or 10 feet wide, and the base of said culvert extends about 10 feet further south than the top of the culvert. From the water at the south end of the culvert to the top is about 20 feet.

The water in passing over this extension of the base rushes out with considerable force, making such noise that people passing along the top of the culvert can hear the rushing of the water. Owing to the dyes poured into the stream from the mills above the bridge, the water is at times of many colors. As the water runs out from under the culvert, it empties off of said basin into a small pool. The rippling of the water can be heard by children on the bridge, but can only be seen by them by leaning over the banisters or railing, or getting through it.

The jury found that the death of the plaintiff's intestate was caused by the negligence of the defendant as alleged in the complaint; that is that the culvert having been constructed in one of the principal streets in said city, at a point which was used as a playground by the children in the community, the city negligently and carelessly built the banisters over said culvert, so unsuitable and unsafe that a child at the age of the plaintiff's intestate could and did get through the banister or railing to see the rushing of the colored water, which it could hear, and childlike, wished to see, and that by reason of such defective railing it fell and was killed. The jury further found that the plaintiff did not contribute to the injury of the intestate, and assessed the damages at \$2,500.

Manly, Hendren & Womble, of Winston-Salem, for appellant.

F. M. Parrish and Jones & Clement, all of Winston-Salem, for appellee.

CLARK, C. J. This case in many respects is a stronger case for plaintiff than *Starling v. Cotton Mills*, 171 N. C. 222, 88 S. E. 242, in which there was a reservoir near a cotton mill, around which the children of the employees were in the habit of playing, and there was the protection only of a fence, which becoming dilapidated, a child got

through and, falling into the water, was drowned. The court held in that case that it was the negligence of the owners of the mill that the fence was defective.

[1] In this case the city was responsible for not maintaining an efficient railing, which would have prevented this child from getting through and falling 20 feet below upon the concrete bottom of the extension of the culvert. A small-mesh, strong wire fence would have prevented such danger as this, and would have saved the life of the little one, whose death was caused by leaning over the railing, or getting through it, to look at the gurgling many-hued ripples of the stream below. As was well said by Mr. Justice Walker in *Ferrell v. Cotton Mills*, 157 N. C. 540, 73 S. E. 147, 37 L. R. A. (N. S.) 64:

"The doctrine which imputes negligence to a parent in such a case is repulsive to our natural instincts, and repugnant to the condition of that class of persons who have to maintain life by daily toil."

Again (157 N. C. on page 541, 73 S. E. on page 147) he said:

"If parents are negligent in permitting children to play out of doors, on public ground, in the daytime, unattended by the parents themselves or others, then, in the majority of cases, it will be necessary to go out of the business of raising or attempting to raise children, because parents cannot be with children at all hours of the day; neither is it practical to employ others to be with them to guard them against unseen dangers."

It is alleged in the complaint, and admitted in the answer, that the bridge over the culvert, with the approaches, being a part of the street, is about 40 to 45 feet long and 40 feet wide; that on each side of the culvert, for about 45 feet, till the street strikes level land at each end, there are posts several feet apart of concrete, and in these are inserted two parallel iron pipes about an inch and a half in diameter—the lower pipe being 11 inches from the top of the culvert, and the upper pipe being 17 to 18 inches above this. There was evidence that since the construction of the culvert the street at that place has been especially attractive to children, who lean over the banisters to see the water as it rushes out at the southern end of the culvert, and it was while looking at the water, and probably by getting over, or under, the bottom pipe, that the child fell 20 feet on the cement extension and its skull was crushed, causing almost instant death; the water at the time being about 3 inches deep. The culvert is about 200 feet from plaintiff's house, and is near a number of houses in the community; it being in a residential and thickly settled section, adjoining the playground, where the children of the neighborhood were accustomed to gather.

[2] A child cannot be kept in the house at

all times; neither can it be chained; and if not allowed to play in the open, which necessarily means, in a city which is crowded, that it must play at times in the street, the children could not be raised, as light, air, and exercise are absolutely necessary for their development. There was ample evidence upon which the jury have found that the parents were not guilty of contributory negligence on this occasion. The little child went off with its little playmate to the playground of the neighborhood, where the children were known to be in the habit of gathering. It had only been gone a few moments, while the busy mother was engaged in cooking dinner, when the fatal accident occurred.

The plaintiff did not claim that the bridge was defective, but relied upon the fact that the authorities knew that the rippling of the water and its many-hued colors attracted the children, and that for 20 years the locality adjacent had been a playground for them, and with knowledge of the natural curiosity of children in such cases more sufficient protection should have been placed at that point. Certainly the evidence should have been submitted to the jury upon the fair and impartial charge of the judge.

This is not even the case of an "attractive nuisance" on the property of another, which would render that other liable, if not sufficiently protected. A silent turntable on the property of a railroad would not attract the attention of children as irresistibly as their irrepressible curiosity would tempt them to investigate the cause of the gurgling of the many-hued water, which rushed from under the bridge 20 feet below the point at which they would attempt to see it.

The bridge was not an attractive nuisance. It was not a nuisance at all. It was a necessary structure for the use of the city. But the noises made by the gurgling of the water would move children to wish to investigate the cause. There was no conflict of evidence that, as stated in the brief of the defendant—

"for 20 years or more the children had been in the habit of playing in the vacant ground near by, and also coasting down the sidewalk on West street, which sloped to the bridge, and also frequently played around and on the bridge."

The negligence was not in the grade of the street, nor in the bridge or culvert, but in the want of sufficient protection for the children of the neighborhood frequenting that spot. This little child was accompanied to the spot by his little playmate, who doubtless had told him of the wonders of this many-colored stream roaring out from under the bridge. Travelers in Europe go miles to see

"The blue rushing of the arrowy Rhone."  
(Byron.)

Men cross the oceans to behold the swirl waters at Niagara, and to see a mighty

river dash itself into mist at the Falls of the Zambesi, and to the childish mind this many-hued gurgling water, viewed from a height of 20 feet, was as sufficient to compel this trip of 200 feet.

[3] The nonsuit was properly denied. There was evidence to go to the jury upon the issues submitted to them. The defendant objected that evidence was admitted that while the bridge was being constructed a witness had a conversation in 1917 with the engineer supervising the work, in which the witness told him that he was putting up a trap to catch children, and the engineer replied that he was instructed to build it in that manner, but thought it dangerous himself. This exception, however, and the other exceptions as to evidence in regard to the contract under which the bridge was built, might be material, if there was any defect alleged in the construction of the bridge; but the ground of the complaint is that the street at this point over the trestle, with the precipice of 20 feet at a point where children were accustomed to gather, and which was especially attractive to them, required that the city should have put up a stout wire fence or other guard after the culvert was built, that would keep young children from getting through the open work railing with liability of such fatal accidents as this. The negligence is not in the construction of the bridge, but in failing to have a protection of this kind against such danger as this, and the jury found that the city was negligent in this respect. The defendant well says in his brief:

"No matter who builds a bridge in the street, the municipality is responsible for its condition and method of construction from the standpoint of safety."

If, therefore, it was error to admit the evidence objected to, it was harmless error, for the condition of the street and the lack of precautions for safety of children was the negligence of the city.

[4] The defendant also objects to the charge of the court upon the measure of damages, which seems to have been in effect taken from that which was approved in *Mendenhall v. Railroad*, 123 N. C. at page 278, 31 S. E. 480, as follows:

"The measure of damages is the present value of the net pecuniary worth of the deceased to be ascertained by deducting the cost of his own living and expenditures from the gross income, based upon his life expectancy. As a basis on which to enable the jury to make this estimate, it is competent to show, and for them to consider, the age of the deceased, his prospects in life, his habits, his character, his industry and skill, the means he had for making money, the business in which he was employed—the end of it all being to enable the jury to fix upon the net income which might be reasonably expected, if death had not ensued, and thus arrive at the pecuniary worth of the de-



ceased to his family. You do not undertake to give the equivalent of human life. You allow nothing for suffering."

This charge is in accordance with many other decisions. *Benton v. Railroad*, 122 N. C. 1007, 30 S. E. 333; *Coley v. Statesville*, 121 N. C. 301, 28 S. E. 482; *Pickett v. Railroad*, 117 N. C. 616, 23 S. E. 264, 30 L. R. A. 257, 53 Am. St. Rep. 611. In *Watson v. Railroad*, 133 N. C. at page 191, 45 S. E. 555, the court reviews these charges and approves them.

In *Poe v. Railroad*, 141 N. C. 525, 54 S. E. 406, on which the defendant relies, the court read to the jury the Annuity Table; but this was not done in the present instance by the judge, who simply gave them the mathematical rule prescribed in the above cases, and illustrated it to aid the jury in arriving at the present value of the loss sustained in the death of the plaintiff's intestate.

No error.

WALKER and ALLEN, JJ., dissenting.

(178 N. C. 717)

STATE v. RUMPLE et al. (No. 348.)

(Supreme Court of North Carolina. Nov. 5, 1919.)

1. INDICTMENT AND INFORMATION §203 — GOOD COUNTS NOT VITIATED BY BAD.

An indictment for violation of the lynching statute, two of whose four counts were bad, nevertheless could support conviction on the two good counts.

2. CRIMINAL LAW §1167(2)—PRESENCE OF DEFECTIVE COUNTS IN INDICTMENT HARMLESS.

Where nol. pros. was entered as to the third and fourth counts of the indictment before submission to the jury, defendants never having been tried on such counts, which are bad, have suffered no injury by having them incorporated in the indictment.

3. CRIMINAL LAW §108(1) — JURISDICTION OF COURTS OF ONE COUNTY OVER OFFENSE IN ANOTHER.

Under Revisal 1905, §§ 3233, 3269, the superior court of the county of Surry had jurisdiction to try prosecution for the offenses of conspiracy to break a prison, and breaking and entering the prison with intent to remove a prisoner for lynching, which offenses were committed in Forsyth county.

4. CRIMINAL LAW §422(1) — DECLARATIONS OF MOB COMPETENT AGAINST CONSPIRATORS TO LYNCH.

In a prosecution for violation of the lynching statute, where the evidence tended to prove concert of action and conspiracy to break a municipal prison and take a prisoner to lynch him, and that defendants were active participants in the common purpose, the declarations and

acts of members of the crowd were competent against defendants.

Appeal from Superior Court, Surry County; Long, Judge.

Jack Rumble and others were convicted of violation of the statute to prevent lynching, and they appeal. No error.

The defendants were convicted under the statute enacted to prevent lynching, and have appealed from the judgment pronounced upon the verdict.

The indictment was found and the defendants tried in the county of Surry, and the crime was committed in Forsyth county.

The indictment originally contained four counts: (1) A conspiracy to break a prison; (2) breaking and entering the prison with intent, etc.; (3) a riot and disorderly conduct; (4) defacing and injuring a certain building.

A nol. pros. was entered as to the third and fourth counts before the case was submitted to the jury.

The defendants Chris Chappel, Ira Whitaker, and A. R. Castevens were convicted on the first and second counts in the indictment and the defendants Frank Hester, Wynn Carter, J. E. Savage, and George Douthit were convicted of an attempt to commit the crime charged in the second count.

The evidence tended to prove that on November 17, 1918, Russell High was arrested about 12 or 1 o'clock in the day on the charge of a criminal assault upon Mrs. Childress, and was imprisoned in the city guardhouse; that about 3 o'clock the prison was attacked by a mob, who broke it open and did serious damage to the building, the purpose of the mob being to lynch High; that the riot continued during the afternoon far into the night; that the home guard was called out, and succeeded in dispersing the crowd for awhile, but that it then became necessary to send troops from Raleigh and Charlotte; that stores were broken open after the home guard reached the prison, for the purpose of getting firearms to be used in capturing the prisoner High.

Evidence was admitted over the objection of the defendants as to the declarations and acts of those in the crowd.

The other exceptions relied on by the defendants are stated in the opinion of the court.

Benbow, Hall & Benbow and W. H. Beckerdite, all of Winston-Salem, for defendant Douthit and Carter.

J. Gilmer Korner, Jr., Fred S. Hutchins, and Lewis M. Swink, all of Winston-Salem, for defendant Hester.

Hastings & Whicker and J. B. Craver, all of Winston-Salem, for defendants Savage, Castevens, Whitaker, and Chappel.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

ALLEN, J. The defendants are indicted under a statute enacted in 1893, designed to prevent lynching, the material parts of which, as applicable to this appeal, are embodied in sections 3698 and 3233 of the Revisal, and are as follows:

3698. *Lynching*. "If any person shall conspire to break or enter any jail or other place of confinement of prisoners charged with crime or under sentence, for the purpose of killing or otherwise injuring any prisoner confined therein; or if any person shall engage in breaking or entering any such jail or other place of confinement of such prisoners with intent to kill or injure any prisoners, he shall be guilty of a felony, and upon conviction, or upon a plea of guilty, shall be fined not less than five hundred dollars, and imprisoned in the state's prison or the county jail, not less than two nor more than fifteen years."

3233. *Lynching*. "The superior court of any county which adjoins the county in which the crime of lynching shall be committed shall have full and complete jurisdiction over the crime and the offender to the same extent as if the crime had been committed in the bounds of such adjoining county."

The statute has been sustained as a valid exercise of legislative power, and an indictment has been approved which was found by the grand jury of Union county for the offense committed in the county of Anson, and containing three counts, the first two of which were practically identical with the first and second counts of the present indictment. *State v. Lewis*, 142 N. C. 626, 55 S. E. 600, 9 Ann. Cas. 361.

The defendants, admitting this much, say however, the indictment is bad because: (1) It charges the defendants in the third count "with an attempt to commit the alleged crime of lynching in the county of Forsyth," and "that the grand jury of Surry county has no jurisdiction or authority in law to present a bill of indictment for the matters and things therein alleged"; (2) it charges the defendants "in the third and fourth counts with the alleged crime of riot, disorderly conduct, and with defacing, damaging, and injuring a certain building in the city of Winston-Salem, county of Forsyth, known as the 'Municipal Building,' all of which crimes are alleged to have been committed within the county of Forsyth, state of North Carolina, and these defendants are advised and believe that the grand jury of Surry county has no authority nor jurisdiction in law to present to this court a bill of indictment against these defendants for the matters and things therein alleged, and this court is without jurisdiction to put these defendants on trial therefor, but that the grand jury of Forsyth county has the proper authority and jurisdiction to present such indictment for said crimes therein alleged."

The first ground of objection to the indictment is not true in fact as neither the third

nor the fourth count charges an attempt to commit the crime of lynching, and this is recognized in the second plea of the defendants, which describes the third count correctly as charging the crimes of "riot, disorderly conduct," and the fourth as charging the defendants "with defacing, damaging and injuring a certain building."

[1] But neither of the objections, if otherwise valid, can avail the defendants, because the first and second counts are not assailed, and a defective count does not vitiate the indictment.

"If one count is bad for failure to state any offense, or to state it with sufficient precision this will not render a good count bad." *Clark's Crim. Procedure*, 299.

To the same effect, *State v. Holder*, 133 N. C. 709, 45 S. E. 862; *State v. Avery*, 159 N. C. 495, 74 S. E. 1016.

"In criminal cases the practice of uniting counts for cognate offenses has always been encouraged, not merely because in this way the labor of the courts and the expenses of prosecution are greatly diminished, but because it relieves defendants of the oppressiveness which would result from the splitting of prosecutions." *State v. Toole*, 106 N. C. 739, 11 S. E. 169.

[2] Again a nol. pros. was entered as to the third and fourth counts before the case was submitted to the jury, and the defendants have never been tried on those counts, and have suffered no injury by having them incorporated in the indictment.

[3] The defendants next contend that the statute conferring jurisdiction on the courts of an adjoining county deals only with the completed offense, and not with an attempt to commit the offense; and, if the third and fourth counts were properly eliminated, there was no charge of an attempt left in the indictment, and that it was error to submit to the jury the view that the defendants might be convicted of an attempt to commit the crime charged, but here the defendants are met by the language of the statute, which says that the superior court of the adjoining county "shall have full and complete jurisdiction over the crime and the offender to the same extent as if the crime had been committed in the bounds of such adjoining county" and by section 3269 of the Revisal, which provides that—

"Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime."

The charge of the crime includes an attempt, and under the latter statute it cannot be doubted that the defendants could have been convicted of an attempt under an indictment, charging the principal offense,

found and tried in the county of Forsyth, and, if so, the same result must follow when the indictment is found and tried in an adjoining county, which under the statute, has as "full and complete jurisdiction over the crime" as the courts of Forsyth.

This is not a harsh rule, but is favorable to defendants, as to hold otherwise would divide the crime and subject them to the hardship and expense of defending successive indictments in different counties, a result which the General Assembly, could not have contemplated.

There was also a motion for judgment of nonsuit in behalf of each defendant.

We have examined the record, and find evidence that the defendants were present and participated actively in the unlawful conduct of the mob as alleged in the indictment, and there was no error in overruling these motions. It can serve no useful purpose to point out the evidence against each defendant, and we refrain from doing so.

[4] The evidence, much of it circumstantial, tended to prove concert of action—a conspiracy—to break the municipal prison and take a prisoner confined therein for the purpose of lynching him, and that the defendants were active participants in the common purpose, and under these conditions the declarations and acts of members of the crowd were competent against the defendants.

In *Saunders v. Gilbert*, 156 N. C. 463, 72 S. E. 610, 38 L. R. A. (N. S.) 404:

"It appeared that many persons had gathered in the street and followed the plaintiff to his home, where they stopped in front of his house, some or all of them using abusive and threatening language. The question arose in the trial below whether these outcries of this mob, or unlawful assembly, were competent against each and every one of the crowd. With regard to this, we said: 'The testimony as to what was said in the road and in front of the plaintiff's home was clearly competent. The *res gestæ* includes what was said as well as what was done. The acts and the outcries of this unlawful assembly—for that is, in plain speech and in law, what it was—is held to be competent as *pars res gestæ*, and also as tending to show their purpose or *quo animo*. Nothing is better settled than this rule of evidence. *State v. Rawls*, 65 N. C. 334; *State v. Worthington*, 64 N. C. 594. We find it stated in 4 *Elliott on Evidence*, § 8128, that "what is said and done by persons during the time they are engaged in a riot (or unlawful assembly) constitutes the *res gestæ*, and it is, of course, competent, as a rule, to prove all that is said and done," the acts and words of the mob or any members of it, as in *Rex v. Gordon*, 21 *State Trials*, 485 (563), wherein evidence of the cries of the mob "No Popery," as it was proceeding towards Parliament House, were held competent and admissible as a part of the *res gestæ*.' This would seem to be a full answer to these objections. The same rule of

evidence had been before stated and applied by us in *Henderson-Snyder Co. v. Polk*, 149 N. C. 104, 107, 62 S. E. 904. We there held that, where two prisoners are engaged together in the execution of a common design to defraud others, the declarations of each relating to the enterprise, and in furtherance of it, are evidence against the other, though made in the latter's absence, if a common design has been shown, citing *Lincoln v. Chaplin*, 7 *Wallace* (U. S.) 132, 19 L. Ed. 106. It is, perhaps, the universal rule that any act done, or any declaration made, by any one of the conspirators in the furtherance or perpetration of the alleged conspiracy may be given in evidence against himself or his coconspirators." *State v. Davis*, 177 N. C. 576, 98 S. E. 785.

It is true that some of these declarations and acts were after the crowd had left the prison on the arrival of the home guard, but it appears that they had not abandoned their purpose, and, on the contrary, that when a store was entered forcibly, a fact to which the defendants strenuously object, it was for the purpose of securing firearms to be used in capturing the prisoner High.

These are the objections chiefly relied on, and we find no error in them or in the other exceptions appearing in the record.

No error.

(178 N. C. 382)  
**BENNETT et al. v. PLOTT.** (No. 359.)

(Supreme Court of North Carolina. Oct. 29, 1919.)

**CONTRACTS §323(1)—INSUFFICIENCY OF EVIDENCE TO JUSTIFY SUBMISSION OF COUNTERCLAIM.**

In action to recover for work in building concrete roads for defendant, evidence held too inadequate and uncertain to justify submission of defendant's counterclaim for breach of contract to the jury.

Appeal from Superior Court, Rockingham County; Bryson, Judge.

Action by J. H. Bennett and others against J. T. Plott. From judgment for plaintiffs, defendant appeals. No error.

The evidence in the case was as follows:  
J. H. Bennett, plaintiff, testified as follows:

I live in Reidsville, N. C. The work was performed in the fall of 1917 and finished in the winter of 1918. The contract I had with Mr. Plott was a verbal one. I was doing some work for Rockingham county, N. C., and Mr. J. T. Plott came to me on several occasions and told me that he had some work in South Carolina he would like to get me to do. It was a long ways off, and I didn't want to go down there, and he asked me what I was getting for this work, and I told him \$9 a yard. He said, "I have some work for \$10, \$11, and \$20 per yard, different bridges to be built." He said, "You can hire all the labor you want for \$1.25, plenty

of laborers down there; you can buy lumber for the forms cheap, \$1 a hundred; your sand is right in the creek, nothing to do but take the sand up and use it." It looked pretty good to me, and better than anything I had been doing; and, while it was a long ways off, I didn't like to go away from home down there, and I put him off, and he would come again, time after time, until finally he came and said, "Are you going down there?" and I said, "I will go down and look it over, provided I can get Mr. Sharp interested." Mr. Sharp was a carpenter, and I would have to hire a high-priced man to do the carpenter work, and he says: "Go down and look it over, and come back, and, if you don't find it like I tell you, I'll pay your expenses." So we went and looked it over. We didn't find out anything about the labor, except we asked two or three fellows, and they said we could hire all the labor we wanted. We found that the stone was in the crops, and people said we couldn't get it until they picked their cotton, and the engineer took us out to see the job, and he says, "Here's the sand, right here at you," and it looked pretty good. But we gave out entirely going; the stone was in the crop, and we would bother folks going over their land to get the stone, and we decided we would not go, and he came back again and asked me about it, and finally we agreed to go, and we went down there and got on the job, and went to work as soon as we could get there, but found we couldn't hire any labor at all. We couldn't get anybody to help us, and we picked up some little boys. We decided to get along the best we could until the crop got in and we could hire some fellows to help us. When we commenced to use the sand, the engineer came out and said: "You can't use this sand. It won't do." And I said, "What is the matter with it?" and he said: "There is too much dirt in it; it's red, or something is wrong with it, and you can't use it." There I was, down there, and we were at considerable expense; but for that we could have pulled up and come back. We were men of small means, and we had to go ahead and do the best we could. So we hauled the sand two or three miles, and very often that didn't suit. We couldn't hardly suit the men. In a little while Mr. Plott came down, and in the meantime when we saw the profile, it didn't look good at all. There was so much carpenter work, and run in small work instead of heavy work, and there was not yardage to run out for the carpenter work you had to do. It was not a paying proposition at all. We complained to Mr. Plott about it, and he said: "You boys are down here; go ahead and do the best you can, and I won't charge you the 10 per cent. I'll give you everything I get out of the job to do it."

Before I went down there, Mr. Sharp and I were together, and he introduced me to a cement drummer, and Mr. Plott told the drummer we were in the market for some cement, and we bought some cement from him. When we got ready for cement, I wired the cement people for a car, and they shipped it, but I didn't see any bill. They shipped the car, and we unloaded the car and went to work, getting along the best we could, because we didn't have any labor; we couldn't make any headway, and he said for us to go ahead and do all we could. In a short time I got a letter from Mr. Plott say-

ing: "You fellows are getting along mighty slow. I have got my money in that cement." I wrote him that I had never seen a bill for that cement. He said, "I paid for it, and I want to get my money out of it." I wrote him back: "If you paid for the cement, you got 5 per cent. discount, you got your pay; you know you can get your money out of the job, but I thought I was paying for the cement, but it seems like you are doing it." He offered to lend me money time and time again, and I told him we had money enough to do with, but we couldn't hire the labor. We didn't have the profile of the work to be done until we started the work, and it was given to us then. The specification of the yardage it takes to do the work was 2,219 pounds of steel, 103 yards of stone, and 44 yards of sand, and 148 bags of cement. That is the second bridge we built. This was supposed to be 110.5 yards of concrete when completed. We built that bridge according to the profile. The specifications for the first bridge call for 843 pounds of steel, 473 yards of stone, and 24 cubic yards of sand. The material called for we put in that bridge. In building the first bridge we struck rock and didn't go down as far as the specifications called for for that reason; it would have amounted to two or three yards of cement.

Our agreement as to what we were to be paid for this work, as shown by the profile, was one \$10, one \$11, \$12, and \$20.50. The different classes are shown and are paid according to the mix. I think I was to be paid \$10 for class A; \$12 for class B; and the handrail, \$20.50 or \$20. The work and the material which we furnished down there came to \$1,588.57. They have paid me \$697.70 on that bill. They are due me \$55.55. I was to get 2 cents a pound for putting the steel in—that is, reinforced work. I paid the freight on the steel, which was \$19.05; I did 3.60 yards of haul-rail at \$20, making \$72. In class C I have 2,988 square yards of concrete at 12 cents, \$358.56, and 65.47 of class B at 11 cents, making \$720.17; 15.84 cubic-yards of class C at 10 cents, \$158.40; 129 pounds of steel at 2 cents, \$62.58. There is an item of 17.21 yards short, and the material was put in there and don't show it; it didn't measure it, and this shortage amounted to \$197.81, and that makes a total of \$1,588.57. There is an item I owe Mr. Plott for cement of \$309, and \$116.89, making \$435.87, which leaves a balance of \$1,152.70. Then I show an item of payments \$697.70, leaving a balance of \$455, which is the amount I claim is due me to date. The reason I left down there was I had built one bridge complete and was working on the second, and had the material all there, stone and sand and everything hauled for it. We were at work on it. It was one Sunday. I walked out on the job and saw Mr. Wright. He was doing some work, and he and I walked and talked. I told him I had finished hauling on the job and I was going to start the teams on the other job next morning, and he said: "If I were you, I would not." Mr. Plott has let that job to somebody else." Up to that time I had no intimation that Mr. Plott was going to let the job to anybody else. That was part of the work he had contracted for me to do. Mr. Wright was working under Mr. Plott. In a few days Mr. Plott came, and I told him what I had heard, and I said: "We are fixed here.

I have torn my tent down and moved here between the jobs, and I am ready to go to hauling on the other, and I want to know about it. I heard you had let it to somebody else." And he says: "I have got to go down the road. I'll be back in a few minutes." That is about what he said to me, and he got in his car and passed me down the road, and when he came back it looked like he got faster, and he didn't try to stop. I tried to stop him, but he didn't stop, and in a day or two I got a letter from him, from Greenwood, stating that he had let this work, and that the engineers were kicking on the slow time, and that he had let it to a man who had a concrete mixer, and they were going to finish the work by January 1st, or soon thereafter. He wrote me that if I wanted to I could go back five or six miles somewhere else and do some work over there. When I pulled up and left a job it entailed expense. I had a team of mules down there, and the mules were standing idle, and I sold my mules at a sacrifice. I had my lumber there to use in another job. This lumber cost us very high, and I had to give it away. It cost \$100 and I sold it for \$10. I am not asking any damages; all I want is what he actually owes me. In finishing up there, we tore the forms off and dressed up one side of it and then dressed the other side, but the hand-rail was too green to tear the forms off when we left, and we would have been there, at a dead expense, and I left and hired a good man to take the forms off and dress it up, and he did it. Pretty soon I went for a settlement, and he said the engineer won't receive it and that the fellow didn't dress the handrail up, and it went on month after month. Finally, Mr. Plott told me that the engineer wouldn't receive it and had spent some money on it. I afterwards learned that the engineer had received the work and that the public was driving over it every day, and I told Mr. Plott this and asked for a settlement. The cement was locked up, and I gave Mr. Wright the key before I left. Mr. Plott afterwards used the cement on the job.

#### Cross-examination:

The specifications were in writing. I really didn't pay any attention to the specifications; I went by the profile. I went down to South Carolina to look the work over and talked it over with Mr. Plott. He said to me, "Go and look it over, and, if it is not what I tell you, I'll pay your expenses." I never afterwards asked him to pay my expenses, and I went on to do the work. The engineer showed me the work when I went down there. Mr. Plott said I could hire all the labor I wanted for \$1.25 a day; it was plentiful. I understood the situation. I knew that Mr. Plott was not personally doing any work, but was subletting it to other contractors. I took his word for the labor part of it. I went down to look at the work and didn't look for labor. After we looked at the work, we decided we didn't want it and we didn't look for any labor. We did decide we didn't want the work and consequently didn't make any inquiries about labor. Mr. Plott came and insisted on our going down there, and I told him that if Mr. Sharp will go with me I'll go. I didn't have any work on hand at that time, so we decided to go. Mr. Plott was to get 10 per cent. on the work we did. The engineer said I was getting along slow with the work and he would like for me

to get along faster; but it was impossible. I couldn't get the labor. It was our interest to get through and come back. Mr. Plott told me: "You fellows won't have to pay me the 10 per cent. go ahead, and, if you find out you are not satisfied, you can build two or three bridges and then pull out and leave, if you are not satisfied." I never made a contract to finish the work as fast as somebody else might desire.

Q. When you were going down to find out why they didn't settle with you, why didn't you write to the civil engineer; why didn't you write to him? (Objection by plaintiff. Sustained. Defendant excepts.) I quit the work. I finished the one I was on (bridge) before I quit. The material was in the job when I quit. The reason we left was we had to wait 8 or 10 days to get the plank forms off that held the cement that was on the handrail. The forms were only left on the handrail. When we left, the job was all built complete according to the instructions of the inspector who was on the job at the time. There were other culverts on the road that we didn't complete when we left.

#### J. T. Plott, defendant, testifies as follows:

Mr. J. H. Bennett came to me on the streets of Reidsville, after I got the contract job of work in South Carolina, and asked me about doing some of the concrete work, and stated that he would like to get the work, and asked for the specifications. Afterwards I told him that I would give him my price, less 10 per cent. This was a week or ten days after he had the specifications to read over. I told him that I practically knew nothing about concrete work because I had not had any concrete work myself, and that always in taking a job I managed to sublet the concrete part of it. He wanted to know if that was the best I would do, and I told him that it was, and that I thought I could let it at that price. I said to him: "If you want to go down and look at the work, if you don't like it and don't want to take it, I'll bear your expenses; if you take it you bear your own expenses." He told me when he was going, and about a week later I saw him and he reported that he had been down there and looked at the work, and that he hardly knew what about it; that the farmers hadn't gotten their cotton picked; and that he didn't know whether they could get the rock until it was picked. This was probably the latter part of September. I told him that he could possibly get enough rock to start with, and that it wouldn't be but a short time until the cotton was picked. So far as the sand, cement, and labor was concerned, I knew nothing about it, and didn't tell him where either could be gotten. I simply offered to pay his expenses in order that he could see for himself and be satisfied before he entered upon the contract. He was at liberty to stay down there as long as he wished to, in order to find out these things, at my expense. When he first came back, and I talked with him, he gave me no answer. Probably a week later he stated that he had talked with Mr. Sharp about it, who went with him, and that they had decided to do the work. He didn't say whether he had Mr. Sharp employed as hand or as a partner.

During this time, a representative of the Atlas Cement Company was to see me in Reidsville at the Womack Garage. \* \* \* (Objection by plaintiff. Sustained. Exception.) I

didn't tell him what labor could be had for. I have paid him \$1,301.98. I paid him cash, \$697.26; he used 153½ barrels of cement, amounting to \$422.15; 312 pounds steel amounting to \$172.09; \$10.50 paid to man for dressing up the job which includes the amount the engineer paid him. Mr. Bennett left on the ground cement and steel, and we gave him credit for the difference. We didn't know how much was left. Some of the cement was damaged. He is only charged with what was actually used by me. I paid for the remainder. Mr. Bennett left the job, and I had to get some one else to put on the job. He left the job about March, 1918. I sent Mr. Warlich down there to finish the job.

#### Cross-examination of J. T. Plott:

I used all the cement left by Mr. Bennett except three (3) bags. I paid Mr. Bennett \$697.26. I had an item charged on bill furnished Mr. Bennett of \$10.50, which was for dressing the concrete bridge built by Bennett. I rendered Mr. Bennett statement in December showing a balance due him of \$232.83. At that time I had not used the cement. I used the cement in September. I used 87½ barrels of cement, worth \$2.75 per barrel. I had charged Mr. Bennett with 232 barrels of cement, at \$2.75. He is entitled to a credit, according to that bill for 87½ barrels, which is worth \$216.87.

#### Redirect examination:

After Mr. Bennett was on the job, I received a letter from the engineer insisting that I put another man force on it, that Mr. Bennett was getting nothing done, and that the grading contractor was right up against him with his work, and there was a culvert nearer down where the grading contractor was at work that he wanted put in at once or it would necessitate extra expense to the grading contractor. I went down there on account of this, and he complained about he couldn't get this done and couldn't get that done. I don't think he put over four laborers on the work, and the job to be properly handled should have had at least 10 or 20.

Nat C. Nave, witness for defendant, testifies as follows:

I live in Elizabethtown, Tenn., and work in McCormick county, S. C., and in March, 1918, left there for the Army. I had been working there as assistant engineer since October, 1917, and was inspector on the work that Mr. Bennett did. I reported there on October 8th, as assistant engineer, to Mr. Warrell. Bennett and Sharp moved with a small outfit and began work. They had trouble about the sand and trouble building their forms, and finally got started and completed the work on one bridge and started another. They put in the material and practically completed the bridge, but on account of leaving the forms on longer than they should have, it cost more to dress the work up than it should have. One bridge was never completed until after Mr. Bennett and Mr. Sharp left there. My records show that we paid Mr. Plott \$1,542.17 for this work. I was authorized by the commissioners and engineer to speak to Mr. Bennett to push the work and get it completed faster than he seemed to be doing. I do not recall whether I was there

when Mr. Bennett left, but he told me he was going to leave; that he would not be there to dress up the work; he had dressed up one bridge and one had the forms on. He told me he had made arrangements with a man living over there to finish the work; that he was going to leave and this man would dress the work; that he had done all except tear off the forms and dressing the work; he had not fulfilled the contract and had not done all the work that was to be done on the job.

Q. Did he give any reason as to why he was going? (Objection by plaintiff. Sustained. Defendant excepts.) He finished one culvert and furnished material and put it in another one.

#### Cross-examination:

Mr. Plott was paid \$1,542.17 for this work. I do not know what it cost to dress the handrail.

Mr. Warrick, witness for defendant, testifies as follows:

My business is road building. Mr. Plott sent me to South Carolina, the latter part of June, and I built the two bridges and culverts that they (Bennett and Sharp) left and had not built in June, 1918. I built two bridges and culverts. I do not know what it costs. I had nothing to do with the figures.

J. T. Plott, defendant, recalled, testified as follows:

I sent Mr. Warrick to finish part of the work and Mr. Whittemore to finish part of it that Bennett left. It cost me about \$2,000 to build the bridge over and above what the work came to.

#### Cross-examination:

All told, there were about 450 yards of concrete to be done. I said awhile ago it would cost ten or twelve thousand dollars, but I have never figured what it cost. I would know if I sat down and figured it. I do not know what the cement cost that went in the job. I do not know what the steel cost that went in it, neither do I know what the labor cost.

Q. Do you know anything about it? A. Yes, sir, I know that after there has been about 450 yards put in, when the whole job is complete, there will be 300 yards more to be put in.

By the Court: You say you had to construct several yards of cement and reinforced steel in building the culvert and bridges; was that the result of these plaintiffs quitting their work, or would that have to be done anyhow? A. It was the result of their quitting; I had to go and complete it.

Q. Did you contract with somebody else or hire them? A. I hired them.

Q. I understood you to say that this was extra work that you had to do because these men quit; did you do any more work than was called for by the specifications, those things which Bennett and Sharp would have to do if they had completed it? A. Certainly not, the whole bridge had to be built.

Q. Just the unfinished work on the bridge that you said you paid \$10.50? A. We did work on both bridges; I put my own men there and did work on the other that is not charged.

Q. Did you have to do any extra work—but

you didn't have to do any extra work except what was called for by the profile? A. No, sir; he had not touched them.

J. O. Sharp, plaintiff, testifies as follows:

Mr. Plott told Mr. Bennett and me, after we were down there, that we were up against it, that he would give us the 10 per cent., and that he would not look for anything out of the concrete work at all. He told us we could get the sand right on the job; the engineer showed us the rock; the people said that there was plenty of rock, but you can't go in my cotton-patch for it. He said labor was plentiful and could be gotten for \$1 per day, not over \$1.50 per day. We could not get labor there, except a little. We hauled the sand two miles. We left the job because the engineer made it so hard and went and undermined us and gave the job to the other fellow, and the material on that job was closer than we had to work. We might have gotten through if we had gotten that work. He let the contract to some one else and notified us what to do, and I said, "If that is the case, we'll leave." Mr. Bennett kept records, and I do not know what is due us on the job.

#### Cross-examination:

We went down to look at the work. Hands could not be gotten at all, and we had to take a couple of boys with us. The engineer never showed me any papers.

The action was tried in superior court upon the following issues:

(1) Is the defendant indebted to the plaintiff, and, if so, in what amount?

Answer: "Yes, \$445.50."

(2) Are the plaintiffs indebted to the defendant, and if so, in what amount?

Answer: "No."

From the judgment rendered the defendant appealed.

W. R. Dalton, of Reidsville, for appellant.  
J. M. Sharp, of Reidsville, for appellees.

BROWN, J. This action was brought to recover for work done by the plaintiffs for the defendant in South Carolina, the plaintiffs claiming the defendant owed them a balance for work done in the sum of \$455.50. The defendant, answering, denied allegations of the plaintiffs and set up a counterclaim for breach of contract in the sum of \$2,000. There are three exceptions to the evidence which we have examined and find to be without merit. The fourth exception is as follows:

"(4) That the court charged the jury as follows: 'As to the second issue: Are the plaintiffs indebted to the defendant, and, if so, in what amount? The court charges you that there is no evidence by which you could answer this issue in favor of the defendant, and instructs you, as a question of law, to answer that issue, "No." You will therefore concern yourselves with the answer to the first issue, applying to the evidence the rules of law I have given you.'

The entire evidence discloses that the plaintiffs performed the work as alleged and were due the sum found over and above all payments for the work and labor actually performed. We have examined the evidence upon which the alleged counterclaim is based, and are of opinion that it is entirely too inadequate and uncertain to justify his honor in submitting the counterclaim to the jury, and we are of opinion that there is no necessity to discuss it.

No error.

(113 S. C. 5)

**FARMERS' BANK & TRUST CO. v. FUDGE et al.** (No. 10285.)

(Supreme Court of South Carolina. Oct. 22, 1919.)

#### 1. APPEAL AND ERROR ⇐843(2)—REVIEW OF ACADEMIC QUESTIONS.

The question whether under Civ. Code 1912, § 1352, a mortgage was a duly recorded instrument in view of claimed disqualification of witnesses making and taking affidavit for probate was academic, where judgments, the basis of claims in opposition to the mortgage, were recovered upon debts contracted prior to the mortgage.

#### 2. DEEDS ⇐47—MORTGAGES ⇐58—ATTESTATION.

Deeds and mortgages are required to be executed with the same formalities, and both must comply with Civ. Code 1912, § 3453, as to attestation.

#### 3. MORTGAGES ⇐58—COMPETENCY OF ATTESTING WITNESSES.

Under Code Civ. Proc. 1912, §§ 437, 438, and in view of Act Sept. 19, 1866 (13 St. at Large, p. 377), stockholders and officers of a bank which took a mortgage are competent witnesses to its execution within the requirements of Civ. Code 1912, § 3453, providing for the execution of deeds.

#### 4. MORTGAGES ⇐58—GOOD BETWEEN PARTIES THOUGH ATTESTATION INVALID.

A mortgage attested by witnesses who are incompetent stands on the same footing as if it were without witnesses, and is good between the parties.

#### 5. MORTGAGES ⇐248—RIGHT TO ACCELERATE MATURITY PASSES TO ASSIGNEES.

Where a mortgage provided that in event of the mortgagor's failure to pay interest at the stipulated dates the mortgagee should have the option to declare the principal and interest due, such right passed to an assignee of the mortgage.

#### 6. MORTGAGES ⇐401(4)—NOTICE OF ELECTION TO DECLARE SAME DUE ON DEFAULT IN INTEREST.

Where a mortgage gave an option to declare the principal and interest due on default in payment of interest, it is not necessary for the mortgagee to give notice, other than the commencement of an action for the interest and

principal, of an election to exercise the option to demand payment of principal and interest.

**7. MORTGAGES — 489 — EFFECT OF ELECTION TO DECLARE PRINCIPAL AND INTEREST DUE.**

Where a mortgagee exercised an option to declare both the interest and principal due on nonpayment of interest, *held* that the aggregate of the principal and interest then due became an interest-bearing fund, bearing interest at the rate of 7 per cent. only, and not at the rate of 8 per cent., which was the rate fixed by the mortgage.

Appeal from Common Pleas Circuit Court of Chester County; R. W. Memminger, Judge.

Action by the Farmers' Bank & Trust Company against R. H. Fudge and others and the Lancaster Mercantile Company and another. From a judgment for plaintiff, the last-named defendants appeal. Modified and affirmed.

This action was commenced on the 20th of October, 1917, for the foreclosure of four mortgages on certain lands. The complaint contains two causes of action. In the first, it is alleged: That the defendant R. H. Fudge made his promissory note, of which the following is a copy:

"\$10,300. Rock Hill, S. C. January 3, 1910.

"On the date hereinafter stipulated, I promise to pay to the order of Sep Massey the sum of ten thousand three hundred dollars, due and payable nine years after date, together with interest from date at the rate of eight per cent. per annum, payable on January 1st of each succeeding year, provided that failure to meet the interest at the interest period above named shall make the full amount of interest and principal become due and payable forthwith at the option of the mortgagee, negotiable and payable at the National Union Bank, of Rock Hill, S. C., and in case this note is put in the hands of an attorney for collection by suit or otherwise, upon default of payment thereof, then the undersigned shall pay to the owner of this note ten per cent. in addition to cover the fees and commissions of said attorney. Value received.

"[Signed] R. H. Fudge."

That in order to secure the payment thereof, he executed a mortgage on the lands therein described, which was recorded on the 7th of January, 1910. That on October 18, 1917, the note and mortgage were duly transferred to the plaintiff by Sep Massey for \$11,380. That by the terms and conditions of said note and mortgage, the defendant R. H. Fudge having failed to meet the interest installments when the same became due, the full amount of principal and interest is due and payable, and plaintiff has elected to foreclose the said mortgage. That the condition of the mortgage has been broken, and there is due therein \$11,380.40, with interest from October 18, 1917, at 8 per cent. per

annum. That plaintiff's attorney is entitled to a reasonable attorney's fee.

It is alleged that two other mortgages were given as additional security for said indebtedness, but it is not necessary to describe them.

In the second cause of action it is alleged:

"That on January 28, 1915, the defendants R. H. Fudge, Gertrude Fudge, and M. E. Cox, executed their joint and several note to plaintiff for \$11,123.11, payable on November 15, 1915, with interest after maturity at 8 per cent. per annum, payable annually, which note further stipulated for 10 per cent. of the principal as attorney's fee, in case the note be placed in the hands of an attorney for collection after maturity. That on same day, to secure payment of said note, interest, and attorney's fees the defendants R. H. Fudge, Gertrude Fudge, and M. E. Cox mortgaged to plaintiff the following lands. \* \* \* That on the 1st day of February, 1915, the said mortgage was duly recorded. \* \* \* That the condition of the mortgage has been broken, and that there is due upon the mortgage debt, \$11,123.11, with interest from the 15th of November, 1915, at 8 per cent., payable annually, together with attorney's fees."

The defendant judgment creditors, other than Lancaster Mercantile Company and Catawba Fertilizer Company, made answer, setting up their judgments respectively, against R. H. Fudge, and praying that their rights may be protected according to their priorities.

The Lancaster Mercantile Company and the Catawba Fertilizer Company, appellants, both by demurrer and by answer, separately raised the question that the action in the first cause of action is premature, in that it appears upon the face of the complaint that the alleged note for \$10,300, dated January 3, 1910, does not fall due until nine years thereafter, viz. January 3, 1919. That the mortgagee, Sep Massey, did not, during the time of his ownership of the note and mortgage, declare the mortgage debt to be due and payable, in default of payment of interest annually thereon, and did not give any notice of the exercise of his option to declare the mortgage due. That the plaintiff claimed to have purchased said mortgage on October 18, 1917, and immediately thereafter commenced this action without any demand for any arrears of interest or notice of the exercise of any option in respect thereto. That plaintiff is without power to exercise an option granted to the mortgagee, Sep Massey, not asserted by Sep Massey, but waived by him and for a default occurring previous to plaintiff's alleged ownership.

These defendants, separately answering, denied the allegations of the complaint and set up their respective judgments as prior liens upon the mortgaged premises. That the Lancaster Mercantile Company recovered judgment against R. H. Fudge on April



3, 1913, for \$5,350.87 (this judgment, however, was not entered on the abstract of judgments until September 16, 1916), and that plaintiff had notice of the judgment at the time of the execution of mortgage to the plaintiff. That the Catawba Fertilizer Company recovered judgment against R. H. Fudge, Gertrude Fudge, and M. E. Cox on April 11, 1917, for \$3,818.32, and that execution thereon was lodged with the sheriff and remained wholly unsatisfied.

The answer of each of these defendants further alleges that on and previous to January 28, 1915, the defendants R. H. Fudge, Gertrude Fudge, and M. E. Cox were indebted to the Catawba Fertilizer Company upon the indebtedness for which said judgment was recovered, and that plaintiff had notice of this fact. That R. H. Fudge, Gertrude Fudge, and M. E. Cox were then and now are each insolvent and that the property covered by the mortgage was practically all the property of the defendant mortgagors. That the claim sought to be secured by the mortgage was antecedent to said mortgage. That the mortgage was made with a view to give plaintiff an unlawful preference over the other creditors. That plaintiff at the time of execution of said mortgage had reasonable cause to believe that the mortgagors were insolvent, and that the mortgage was made to give plaintiff an unlawful preference. That said mortgage was an assignment with unlawful preference, and void under the assignment statute. The answer further alleged that said mortgage was given and accepted with intent of mortgagors and mortgagee to hinder, delay, and defeat the claims of these defendant creditors, and is void under the Statute of Elizabeth.

The prayer of the answer was: That the complaint as to the first cause of action be dismissed as prematurely brought. That the mortgage set up under second cause of action be declared void. That in the event of sale of the premises, provision be made for payment of defendant's judgment according to rank.

The decree of his honor, the circuit judge, is as follows:

"The cause was heard by me on November 14, 1918, during the November term of the court of common pleas of Chester county, upon the issues stated, and upon the testimony reported and after full argument by counsel, especially of counsel for contesting judgment creditors, who was heard uninterruptedly for practically a whole day, and upon careful consideration of same, and of all the testimony, the court concludes that the points raised by the contesting defendants, including the demurrer to the first cause of action, are not well taken, and the same are overruled, and that the mortgages held by plaintiff are entitled to be foreclosed.

"The court finds as a matter of fact from the testimony that the bank did not know that an order for judgment had been made against R. H. Fudge in favor of Lancaster Mercantile Com-

pany on April 3, 1913, which was held back from entry until September 16, 1916, or that Fudge owed other debts or was insolvent; and, while from the facts that the mortgage was witnessed by officers of the bank, thereby requiring a greater scrutiny as to its fairness, upon the whole case the court is satisfied that there was no fraud, and that the transaction was perfectly fair.

"This court is also satisfied that there was no intention on the part of Fudge to make a preference in favor of the bank as against other creditors, but he was acting under the belief that he would pull through after a bad year; and the bank, even if he had any intention to prefer it to hinder, delay, or defraud creditors, was not a party to such intention, and did not co-operate in any such idea.

"The court finds from the testimony that there is now due on the mortgage debt stated in the first cause of action the sum of \$12,359.11, together with the further sum of \$515, found to be a reasonable fee for plaintiff's attorney in the first cause of action, making a total due on the said mortgage of \$12,874.11.

"The court finds from the testimony that there is now due on the mortgage debt stated in the second cause of action the sum of \$14,006.23, being principal and interest, together with the further sum of \$556.15, found to be a reasonable fee for plaintiff's attorney in the second cause of action, making a total due on the said mortgage debt of \$14,562.38.

"The attorney's fee is fixed at 5 per cent. of the principal of each mortgage debt, which is supported by the evidence, and which is considered entirely reasonable in view of the fierce contest that has been waged herein throughout."

Then follows the judgment of the court as to the manner in which the decree should be enforced.

Jones & Jones, of Lancaster, for appellants.

W. P. Robinson, of Lancaster, and Dunlap & Dunlap, of Rock Hill, for respondents.

GARY, C. J. (after stating the facts as above). Two of the appellants' exceptions assign error on the part of his honor, the circuit judge as follows:

"In sustaining the mortgage as a duly recorded instrument, when the undisputed evidence is that W. H. Millen, the witness who made the affidavit for probate was then a stockholder, director, and cashier of the plaintiff bank, and directly represented the bank in procuring and accepting the mortgage, and that W. P. Robinson, the other witness who took and certified said affidavit as notary public, was then stockholder, director, and attorney of the bank, and actively represented the plaintiff in the transaction, each of them and the plaintiff knowing the relation of interest of both to the plaintiff, but without disclosing the same upon the record.

"In sustaining the mortgage to the plaintiff bank as a legally executed instrument, the undisputed evidence being that the subscribing witnesses were disqualified by interest to be witnesses thereto, both being stockholders and directors of the bank, one of them being cashier

and vice president of the bank, and the other secretary of the board of directors and attorney for the bank, and both directly representing the bank, in procuring and accepting the mortgage."

[1] Section 1352 of the Code of Laws (Civ. Code) provides:

"Before any deed or other instrument in writing can be recorded in this state, the execution thereof shall be first proved by the affidavit of a subscribing witness to said instrument, taken before some officer within this state competent to administer an oath; \* \* \* the proof in every case to be recorded with the instrument."

The latest decisions of the court upon the construction of that section were in the cases of *Dillon v. Oliver*, 106 S. C. 410, 91 S. E. 304, and *Arthur v. Hollowell*, 98 S. E. 202.

The fact, however, that the debts, upon which the appellants recovered their judgments were contracted prior to the execution of the plaintiff's mortgage shows that the question presented by the first exception is not properly before the court for consideration; it being purely academic.

[2, 3] We proceed to determine the other exceptions:

Section 3453 of the Code of Laws (Civ. Code) is as follows:

"The following form or purport of a release shall, to all intents and purposes, be valid and effectual to carry from one person to another or others the fee simple of any land or real estate, if the same be executed in the presence of and be subscribed by two or more credible witnesses. \* \* \*"

Deeds and mortgages are required to be executed with the same formalities. *Harp-er v. Barsh*, 10 Rich. Eq. 149.

"An act which requires that the signing by the grantor, shall be attested by witnesses, has been held to require witnesses *competent to testify in an action at law, between the parties to the deed, involving the subject matter of the conveyance.*" (Italics added.) 9 Enc. of Law, 148.

Section 437 of the Code of Civil Procedure is as follows:

"No person offered as a witness shall be excluded by reason of his interest in the event of the action."

And section 438, contains this provision:

"A party to an action or special proceeding in any and all courts, and before any and all officers and persons acting judicially, may be examined as a witness on his own behalf, or in behalf of any other party, conditionally, on commission, and upon the trial or hearing in the case, in the same manner and subject to the same rules of examination as any other witness. \* \* \*"

There is a proviso, but there is no saving clause specially providing that the section

should not in any manner affect the law, relating to the attestation of conveyances, or other instruments in writing, required by law to be attested, as in the statute that was under consideration, in the case of *Winstead Bank v. Spencer*, 26 Conn. 195, where it was held that such a saving clause prevented the application of the statute, which removed the disqualification of subscribing witnesses, arising from interest.

In 1866 (13 St. at Large, p. 377) and prior to the adoption of the Code, in 1872, a statute was enacted, entitled "An act to make parties, plaintiffs and defendants, in all cases, competent to give testimony in such cases, in like manner as other witnesses." There are three sections, but it is only necessary to quote the first, which is as follows:

"That on the trial of any issue joined or of any matter or question, or any inquiry arising, in any suit, action or proceeding in any court of justice in the state, or before any person having, by law or by consent of parties, authority to receive, hear and examine evidence, the parties thereto, and the persons in whose behalf any such action or other proceeding may be brought or defended, and any and all persons interested in the same, except as hereinafter excepted, shall be competent and compellable to give evidence, either viva voce or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said action or other proceeding: Provided, that nothing herein shall be understood to prevent either party from introducing evidence to contradict or impeach the testimony of parties having interest, and made competent by this act to testify."

This act was construed in the case of *Noseley v. Eakin*, 15 Rich. 324, wherein the court used the following language:

"By the first section it is declared that 'on the trial of any issue joined, etc., the parties thereto, etc., and all persons interested in the same, except as hereinafter excepted, shall be competent and compellable to give evidence, etc., on behalf of either or any of the parties to the said action or other proceeding.' By the existing law, not only persons interested, but parties in the cause who might have no pecuniary interest, such as executors and administrators and others, were excluded from testifying. The manifest object of the act was to remove these causes of disqualification."

It is true that the act of 1866 has been superseded by the foregoing sections of the Code, but, as the said act and the sections of the Code were intended in the main to accomplish a similar result, a case in which the act of 1866 was construed throws light upon the question under consideration.

It is manifest that it was the intention of the act of 1866, as well as the said sections of the Code, to remove the disqualification of all witnesses, arising from interest, not only in actions but in any proceeding where they are called upon to testify as a witness, except in those cases where the

sections of the Code otherwise provide, which do not include subscribing witnesses to a mortgage.

[4] Another reason why this exception cannot be sustained is that the mortgage, even without witnesses, would have been good between the parties; and the fact that the witnesses may be disqualified by interest would not have the effect of destroying its validity. A mortgage attested by witnesses, who are incompetent by reason of interest, stands upon the same footing as if it were without witnesses.

Blackstone in Book 2 of his Commentaries, tells us "that the last requisite to the validity of a deed is the attestation or execution of it, in the presence of witnesses; though this is necessary rather for preserving the evidence than as constituting the essence of the deed." In the case of *Craig v. Pinson, Cheves, 272*, the Court had under consideration the question whether a deed with one subscribing witness was valid to convey land. After quoting the foregoing language from Blackstone, the court said:

"From which it would seem that according to the laws of England, subscribing witnesses are not \* \* \* necessary to the validity of a deed. An instrument of this kind has been held good, as an agreement in writing, to authorize \* \* \* a specific performance."

It was also held in *Harper v. Barsh, supra*, that a mortgage with a single subscribing witness is void as a legal mortgage, but could be enforced in equity. The effect of the defective execution of a will is quite different from that of a mortgage. Section 3564 of the Code of Laws provides that wills shall be attested, in the presence of three or more credible witnesses, "or else they shall be utterly void and of none effect," while section 3453 provides that in order for a deed to be valid and effectual to carry the fee simple, it shall be executed in the presence of two or more credible witnesses. There are, however, no such words in section 3453 as "or else they shall be utterly void and of none effect." The mere disqualification of a witness does not render a mortgage void, but there must be a provision of law to that effect.

[5, 6] The next exceptions that will be considered are as follows:

"(1) In overruling appellants' demurrer to the first cause of action on the ground that the mortgage debt was not mature, at the commencement of the action.

"(2) In not sustaining the defense made in the answers of appellants, to the first cause of action, that the suit was prematurely brought."

The note contains the proviso:

"That failure to meet the interest at the interest period above named, shall make the full amount of principal and interest become due, and payable forthwith, at the option of the mortgagee."

The mortgagor made default in the payment of interest, in January, 1917, and the plaintiff, as assignee, had the right to exercise the option. *Welborn v. Cobb, 92 S. C. 384, 75 S. E. 691*.

It was not necessary to give other notice than the commencement of the action, that the plaintiff elected to exercise the option, or to demand payment of the principal and interest. *Sizer v. Dopson, 89 S. C. 535, 72 S. E. 464*; *Nixon v. Wright, 104 S. C. 376, 89 S. E. 320*.

The mortgagor, R. H. Fudge, testified:

"I agree for the Farmers' Bank & Trust Company, to take up that note in October, 1917. This foreclosure is entirely agreeable to me."

The appellants' attorneys have failed to satisfy this court that either Sep Massey or the plaintiff, his assignee, waived the right to insist upon the option.

[7] The next question is presented by the following exception:

"In adjudging that there was due on the mortgage debt, in the first cause of action, \$12,359.11 as principal and interest, up to the date of decree, whereas, if maturity had been accelerated amount then due would not exceed \$12,251.82."

The exercise of the option had the effect of accelerating the maturity of the note, and both principal and interest immediately became payable. The aggregate of principal and interest then due became an interest-bearing fund. The exercise of the option had the effect of substituting one contract for another, and the words "with interest from date at the rate of eight per cent. per annum" do not form a part of the substituted contract, which does not specify the rate of interest. Therefore the aggregate of principal and interest bore interest at the rate of 7 per cent. per annum from the time the option was exercised, to wit, the commencement of the action, until the recovery of the judgment. *Langston v. Railroad, 2 S. C. 248*; *Briggs v. Winsmith, 10 S. C. 133, 30 Am. Rep. 46*; *Sharpe v. Lee, 14 S. C. 371*; *Mobley v. Davega, 16 S. C. 73, 42 Am. Rep. 632*; *Mauer v. Wilson, 16 S. C. 469*.

His honor, the circuit judge, erred, therefore, in allowing interest at the rate of 8 per cent. per annum.

As to the remaining questions, this court is satisfied with the conclusions of his honor the circuit judge, for the reasons assigned by him.

It is the judgment of this court that the judgment of the circuit court be modified in the particular hereinbefore mentioned, and that in all other respects it be affirmed.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

(24 Ga. App. 587)

BAILEY et al. v. STATE. (No. 10789.)

(Court of Appeals of Georgia, Division No. 1.  
Dec. 12, 1919.)*(Syllabus by the Court.)***DENIAL OF MOTION FOR NEW TRIAL.**

The evidence in this case authorized the conviction of the defendants. The charge of the court, when considered in its entirety, fully and fairly submitted the issues and contentions of the defendants. For no reason assigned was it error to overrule the motion for a new trial.

Error from Superior Court, Miller County;  
W. C. Worrill, Judge.

J. S. Bailey and others were convicted of an offense, their motion for a new trial was overruled, and they bring error. Affirmed.

P. D. Rich, of Colquitt, for plaintiffs in error.

B. T. Castellow, Sol. Gen., of Cuthbert, and R. R. Arnold, of Atlanta, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J.,  
concur.

(149 Ga. 435)

CRAWFORD v. STATE. (No. 1512.)

(Supreme Court of Georgia. Oct. 15, 1919.)

*(Syllabus by the Court.)***1. HOMICIDE — 309(5) — EVIDENCE INSUFFICIENT TO REQUIRE CHARGE ON VOLUNTARY MANSLAUGHTER.**

Under the evidence submitted by the state, the homicide which formed the basis of the charge against the accused was unprovoked murder. Under the evidence of other witnesses to the killing, who were introduced by the defendants, the killing was justifiable homicide. There was no evidence which would have authorized the court to charge upon the subject of voluntary manslaughter.

**2. HOMICIDE — 13, 286(2) — CHARGE ON "MALICE."**

There was no error in charging the jury as follows: "Malice, as referred to in the law, gentlemen, does not necessarily mean that there shall be entertained by the slayer any hatred, or ill will, or ill feeling, or anything of that character, towards the person killed. It means in law the intention on the part of the slayer to take human life under such circumstances that the law will neither justify nor in any degree excuse or mitigate that intention, if the killing should take place as intended. A man may kill another against whom he entertained no ill will whatever; he may be a stranger to him, and yet be guilty of murder. No particular length of time is required for malice to be gen-

erated in the mind of the slayer; it may be formed in a moment, and instantly a mortal blow may be given or a fatal shot fired; yet if malice is in the mind of the slayer at the time of the doing of the act or killing, and moves him to do it, it is sufficient to constitute the homicide murder." The exception to this charge upon the ground that it is not a correct statement of the law, that it was misleading and confusing, is without merit.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Malice.]

**3. SELF-DEFENSE—CHARGE.**

Section 73 of the Penal Code of 1910 reads as follows: "If a person kill another in his defense, it must appear that the danger was so urgent and pressing at the time of the killing, that, in order to save his own life, the killing of the other was absolutely necessary; and it must appear, also, that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given." The failure of the court to charge this section of the Code could not possibly have been harmful to the defendant.

**4. CRIMINAL LAW — 1178—GROUNDS OF MOTION FOR NEW TRIAL, NOT BRIEFED, ABANDONED.**

Grounds of the motion for a new trial, which are not referred to in the brief of counsel for the plaintiff in error, are considered as abandoned.

Error from Superior Court, Webster County;  
Z. A. Littlejohn, Judge.

Sam Crawford was convicted of homicide, with recommendation, his motion for a new trial was overruled, and he brings error. Affirmed.

G. Y. Harrell, of Lumpkin, and R. R. Jones, of Dawson, for plaintiff in error.

Jule Felton, Sol. Gen., of Montezuma, Clifford Walker, Atty. Gen., and M. C. Bennet, of Atlanta, for the State.

BECK, P. J. Sam Crawford was indicted for the offense of murder, and upon the trial of the case the jury returned a verdict of guilty, with a recommendation. The defendant made a motion for a new trial, which, after a hearing, the court overruled, and the defendant excepted.

[1] 1. In one ground of the motion the movant contends that he is entitled to a new trial because the court failed to give, as a part of his instructions to the jury, a charge upon the subject of voluntary manslaughter; movant insisting that the evidence demanded a charge upon this grade of homicide. There was no error in refusing to charge the law of voluntary manslaughter in this case. The killing with which the defendant was charged was either justifiable homicide or it was murder. There is no middle ground. Witnesses for the state testified to a state of facts which showed an unprovoked shooting of the decedent, unattended by any mitigat-

ing circumstances whatever. One eyewitness, John Williams, testified:

"I saw the shooting, and know that it happened in Webster county on the date I have named. John Bryant [the decedent] didn't do nothing to Sam Crawford to make him shoot him. He told him it was his damn car and our damn money [other evidence showing that there were negotiations for a ride with the accused in his automobile], and then Sam pulled out his pistol from his right-hand hip pocket. It was a shiny pistol. He pulled it partly out first at the railroad crossing, and at the time of the killing he pulled it slam out. Myself, Will Burt, John Bryant, and John Dice were together. \* \* \* Sam says, 'It will cost you a dime.' He says, 'I got money to burn.' That time his other brother come up in a car, and Sam says he was going to carry us boys to Kimbrough and was going to charge us a dime apiece."

There was further altercation between the parties. They separated immediately after this, and there was no shooting at that time. In a short time the decedent and the accused met. At this point the witness continues:

"John Bryant [the decedent] says, 'You boy in the middle with the cap on; ain't you the one we tried to go to Kimbrough with?' He says, 'I feel mistreated about the way you treated me; you pulled your pistol out on me. I didn't mean no harm when I told you it was your damn car and our damn money, and I don't like it a damn bit;' and that time Sam [the accused] shot him—made two shots, and he hit him once. At that time John Bryant had nothing in his hand; that is, when he got shot. Sam shot twice, but hit John Bryant one time. There was no other pistol shot. After Sam Crawford shot John Bryant, John runs his hand in his pocket and got his pistol, pulled it out, and dropped it on the ground. He felt himself hurt, and was about to fall down there. He never got his pistol up; he got it out of his pocket and dropped it on the ground, and Sam Crawford picked it up. \* \* \* Sam Crawford shot him. John Bryant did not go for his pistol before he was shot. \* \* \* I suppose John and Sam were about five feet apart. When Sam got his pistol out to shoot, he shot right then; shot right then, rapidly together, and one of the bullets hit John Bryant."

Other testimony to the same effect was given by eyewitnesses. Clearly in all this testimony there appears no other crime than that of unprovoked murder, and the doctrine of voluntary manslaughter could not be invoked as applicable to the circumstances here portrayed.

Several eyewitnesses were sworn in behalf of the defendant. One of them was Clifford Moreland. On direct examination he testified as follows:

"I remember the time that John Bryant got killed over here at the church. I was with that

boy that killed him, Sam Crawford. We was on our way coming back from the spring. Roy Lee Moreland was with us; just us three. When we three come up from the spring, we met John Bryant and John Williams coming from the spring. This John Williams asked Sam wasn't he the one driving the car, and Sam told him, 'Yes,' and asked him, 'Why?' and, when Sam told him that, asked him, 'Wasn't you the one that cussed me?' When asked, 'Sam, did you cuss me?' Sam says, 'No; I ain't the one.' That time this fellow walking on the right-hand side of the road pulled his pistol out and shot, and Sam jumped behind me and pulled out his pistol and shot. John Bryant pulled out his pistol and shot first. There was no cussing, but that John [Tick] Bryant said, 'What did he want to cuss him out about his car?' He did not cuss any right then; that's all he said. Then he stepped out of the road and shot at him, but didn't hit him. It was not long after that when — shot twice after he shot. It was right afterwards."

On cross-examination the same witness testified:

"When he backed and stopped, he was about as far from Sam as from you to the jury. When he backed off that way, he asked Sam Crawford wasn't he one that cussed him out; and Sam told him, 'No, sir,' says, 'I ain't cussed you.' That time John Bryant pulled out his pistol and pointed it at him right straight, Sam kinder behind me, and he missed him. He shot at him on the other side. \* \* \* When Sam Crawford shot John Bryant, he dropped the pistol and grabbed his hand this way. Sam Crawford never shot at John Bryant until John Bryant shot at him. Sam jumped behind me when John shot; I don't know how long before; I reckon I would have time to count ten. Now, after John had shot, and I had time to count ten about, Sam shot twice, very rapidly."

Three other eyewitnesses were introduced by the defendant. Their testimony is substantially the same as that which we have quoted above. All of this evidence clearly shows a case in which the accused was justifiably firing upon the decedent in defense of his own life. Summed up in a few words, it is that the decedent, without justification or provocation, drew his pistol and began firing at the defendant, and the defendant then drew his pistol and returned the fire. It requires no argument to demonstrate that the shooting under such circumstances would be justifiable.

These two theories of the state and of the defendant were properly submitted to the jury under the instructions of the court, and there was no place for a charge on the subject of voluntary manslaughter.

[2-4] 2-4. The rulings made in headnotes 2, 3, and 4 require no elaboration.

Judgment affirmed.

All the Justices concur.

(149 Ga. 475)

ARNAU v. FIRST NAT. BANK OF DUBLIN. (No. 1358.)

(Supreme Court of Georgia. Oct. 15, 1919.)

*(Syllabus by the Court.)*APPEAL AND ERROR  $\S$ 1005(2)—OVERRULING MOTION FOR NEW TRIAL BASED ON GENERAL GROUNDS PROPER.

The evidence authorized the verdict. The judgment overruling the motion for a new trial, based on the general grounds only, will not be reversed.

Error from Superior Court, Laurens County; J. L. Kent, Judge.

Action between A. R. Arnau and the First National Bank of Dublin. Judgment for the latter, motion for new trial denied, and the former brings error. Affirmed.

M. H. Blackshear, of Dublin, for plaintiff in error.

Larsen & Crockett, of Dublin, for defendant in error.

GILBERT, J. Judgment affirmed. All the Justices concur.

(149 Ga. 474)

RUIS v. LOTHDRIDGE et al. (No. 1305.)

(Supreme Court of Georgia. Oct. 15, 1919.)

*(Syllabus by the Court.)*

1. VENUE  $\S$ 5(4)—IN SUIT AGAINST TWO DEFENDANTS SEEKING RELIEF AGAINST ONE IMPROPERLY BROUGHT IN COUNTY OF OTHER'S RESIDENCE.

Where an equitable petition was brought against the sheriff of Bacon county, and against Mrs. Agnes J. Lothridge, of Stephens county, in the superior court of Bacon county, praying for cancellation of certain judgments and *fi. fas.* described in the petition, and for cancellation of a certain sheriff's deed therein described, and for injunction to restrain the sheriff from dispossessing the plaintiff from certain lands described in the petition, under the sheriff's deed made to Mrs. Lothridge, no substantial relief was prayed against the sheriff, and as equity cases shall be tried in the county where the defendant resides against whom substantial relief is prayed, the petition was properly dismissed on demurrer. Civ. Code 1910,  $\S$  6540; Coker v. Montgomery, 110 Ga. 20, 35 S. E. 273.

2. PLEADING  $\S$ 205(2)—GENERAL DEMURRER RAISING QUESTION OF JURISDICTION NEED NOT ALLEGE SPECIALLY WANT OF JURISDICTION.

The above facts all appearing upon the face of the petition, the question raised by the general demurrer was jurisdictional, and it was not necessary for the demurrer to specially set forth that the court was without jurisdiction to entertain the case. See, in this connection,

Civ. Code 1910,  $\S$  5665; Curtis v. College Park Lumber Co., 145 Ga. 601, 89 S. E. 680(4).

3. PROPER TERM OF COURT.

As the above ruling is controlling on the question of jurisdiction, it is unnecessary to decide whether the suit was brought to a proper term of the court.

Error from Superior Court, Bacon County; J. I. Summerall, Judge.

Suit by M. E. Ruis against A. J. Lothridge, and the Sheriff of Bacon County. Demurrer to petition sustained, and petition dismissed, and plaintiff brings error. Affirmed.

W. W. Bennett, of Baxley, for plaintiff in error.

J. B. Moore, of Baxley, and Fermor Barrett, of Toccoa, for defendants in error.

HILL, J. Judgment affirmed. All the Justices concur.

(149 Ga. 475)

JENKINS et al. v. GEORGIA INV. CO. et al. (No. 1368.)

(Supreme Court of Georgia. Oct. 15, 1919.)

*(Syllabus by the Court.)*

1. TRUSTS  $\S$ 72, 124—BENEFICIARIES IN RESULTING TRUST AS TENANTS IN COMMON.

Where A. and B. jointly buy land, each paying one-half of the purchase money, and the title is taken in the name of a third party or parties, a trust in favor of A. and B. will be implied; and where B. subsequently goes into possession of the land to the exclusion of A., a court of equity will decree A. to be a tenant in common with B. to the extent of a one-half undivided interest. Civ. Code 1910,  $\S$  3739; Bispham's Eq. (9th Ed.)  $\S\S$  80, 83, and notes; Perry on Trusts (6th Ed.)  $\S\S$  138, 139, and notes; Wilder v. Wilder, 138 Ga. 573, 75 S. E. 654; Pound v. Smith, 146 Ga. 431, 91 S. E. 405.

2. TRUSTS  $\S$ 17, 18(6)—NECESSITY OF WRITING TO CREATE "EXPRESS TRUST."

Under our statute an express trust must be created or declared in writing. Therefore where two persons agree that they will jointly purchase a tract of land for the purpose of making thereon certain improvements, and that the same are to be used for stipulated purposes, and for temporary purposes the legal title to the land is, by consent and acquiescence, made directly to designated persons as trustees for the joint purchasers, such agreement constitutes an express trust, and must be declared in writing.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Express Trust.]

### 3. REFORMATION OF INSTRUMENTS ¶7—EXPRESS TRUST NOT ENGRAFTED ON DEED BY PAROL TO THIRD PARTY.

The facts set forth in the next preceding headnote will not authorize a reformation of the deed conveying the land to third parties, because an express trust cannot be engrafted on a deed by parol. Civil Code 1910, § 3733; *Wilder v. Wilder*, supra; *De Loach v. Jefferson*, 142 Ga. 436, 83 S. E. 122. Besides, it does not appear from the allegations of the petition that the deed in question did not express the intention of the parties, nor is it alleged that anything was omitted therefrom by fraud, accident, or mistake.

### 4. ADVERSE POSSESSION ¶60(3, 4)—WHERE RIGHTS OF BENEFICIARY NOT DISPUTED LAPSE OF TIME IMMATERIAL.

As long as a person who is in possession of the property of another, using the same for the owner's benefit, recognizes the latter's ownership, no lapse of time will bar the owner from asserting his title against the person in possession. Before any lapse of time will be a bar to the owner it must appear that the person in possession has given notice, or there must be circumstances shown which would be equivalent to notice to the owner that the person in possession claims adversely to him. In such a case the statute will begin to run from the date of such notice. Until the owner has such notice he has the right to treat the possession of the other person as his own. Civ. Code 1910, § 3782; *Teasley v. Bradley*, 110 Ga. 497, 501, 35 S. E. 782, 78 Am. St. Rep. 113. The same principles apply to the objection that the claim is a stale demand. *Stanley v. Reeves*, 149 Ga. 151, 99 S. E. 376.

(a) The defendant in the present case is alleged to be the grantee of the persons receiving legal title to the land under the implied trust, but it is also alleged that the defendant was the equitable owner of a one-half undivided interest with the plaintiff, and that the defendant took the title and went into possession of the whole of the land with notice of the plaintiff's equity, and had recognized plaintiff's interest until June 5, 1918, when the defendant for the first time denied the plaintiff's rights and gave notice of its intention to claim the entire interest in land.

### 5. TRUSTS ¶371(1)—ESTABLISHMENT—PETITION TO ESTABLISH IMPLIED TRUST SUFFICIENT.

Applying the principles announced in the foregoing notes, the court erred in sustaining the demurrers and dismissing the petition as a whole. In so far as the petition sought a decree establishing an implied trust entitling plaintiff to a one-half undivided interest in the land, it set out a cause of action, and was not subject to the general demurrer.

Error from Superior Court, Laurens County; J. L. Kent, Judge.

Suit by J. J. Jenkins, master, etc., and others against the Georgia Investment Company and others. From a judgment sus-

taining demurrers and dismissing the petition, plaintiffs bring error. Reversed.

The petition relates the following case: On November 14, 1901, the prospective corporation to be known as Georgia Investment Company was in process of formation and organization. Daniel Cummings was a prospective stockholder and officer of this proposed corporation and interested in its organization. D. W. Williams was then a member of Land Mark Lodge No. 64 A. F. & A. M., on behalf of which the petition is brought. On the date mentioned Williams, acting for the lodge, and Cummings, acting for the proposed corporation, agreed that they would jointly purchase a certain tract of land in the city of Dublin, described in the petition, upon which it was proposed there should be erected a two-story brick building, the first story of which was to be used by the proposed corporation and the second story to be used by the plaintiff for lodge purposes. It is alleged "that for temporary purposes the legal title to said lot of land was, by the consent and acquiescence of petitioners, made directly unto the said Daniel Cummings and D. W. Williams, as trustees for your petitioners and the said defendant corporation then in process of formation." It was understood that upon procurement of charter by the proposed corporation Cummings and Williams would convey to it, as trustee for itself and the lodge, title to the land; that the proposed corporation would, within a reasonable time, construct the first story of the building; that the lodge would then construct the second story of the building, and when this had been done the proposed corporation would execute to the lodge good and sufficient legal title. Pursuant to this agreement the lodge furnished one-half of the purchase price of the land; the title was taken in the name of Cummings and Williams, who on August 23, 1904, conveyed the land by deed to Georgia Investment Company for a recited consideration of \$400; but no money was paid by the corporation for the conveyance, and it was executed in accordance with the agreement between Cummings and Williams, already stated. Since the making of said conveyance the lodge has, through committees appointed for that purpose, on divers occasions and at least annually, urged the Georgia Investment Company to proceed with the construction of the first story of the building on said lot in accordance with the agreement. The company has rendered first one and then another excuse, usually that it "was not quite ready from a financial standpoint to carry out the object of the original undertaking." On March 6, 1918, the lodge in writing proposed to the company that the latter should carry out the original agreement by erect-

ing the first story of the building, or that it make to the lodge a conveyance of the interest of the company in the land upon the basis of \$60 per front foot, the then value of the land, or that the lodge would convey to the company its own interest upon the same basis. On June 5, 1918, the company for the first time refused to carry out the agreement above stated, and acquainted the lodge with its apparent design to appropriate and confiscate the property to its corporate uses. During all the years since the execution of the conveyance to Williams and Cummings and by them to the Georgia Investment Company the lodge has relied upon Cummings' honor to carry out the original agreement, and he has time and again agreed to do so, but the Georgia Investment Company through Cummings is now undertaking to abuse petitioner's confidence by claiming the absolute title to the property. Petitioner is the equitable owner of an undivided half interest in said property; the present condition of the legal title operates as a gross injustice to it, and gives to the defendant corporation an unconscientious advantage. Williams is dead, his estate has been fully administered, and the administrator discharged; but the petition joins as parties defendant all his heirs at law. Cummings is not made a party. The prayers are: (1) That a trust be implied in favor of the lodge, that it be decreed to be the beneficial owner of an undivided half interest in the land, and that the Georgia Investment Company is a trustee accordingly in its behalf; (2) that the deed from Williams and Cummings to Georgia Investment Company, exhibited with the petition, be so reformed as to embody the true and correct understanding between the parties; (3) that the plaintiff have judgment against the Georgia Investment Company to cover damages accruing from the breach of the contract; (4) for general relief; (5) for injunction to prevent the disposition or encumbering of the property; and (6) for process.

The Georgia Investment Company demurred generally upon the grounds: (a) No cause for relief of any kind is set forth by the petition. (b) From its allegations it appears that the plaintiff is not entitled to any relief sought. (c) The claim set up is barred, is a stale demand, and petitioner has been guilty of such delay and laches as will prevent a recovery. (d) It appears that Williams, who committed fraud against petitioner, is dead, his estate has been administered, the administrator discharged, and during all these years petitioner has shown no vigilance nor taken any steps which would justify a court of equity or law in interfering. The court dismissed the petition, and the plaintiffs excepted.

R. Earl Camp, of Dublin, for plaintiffs in error.

R. D. Flynt, of Dublin, for defendants in error.

GILBERT, J. Judgment reversed. All the Justices concur.

(149 Ga. 480)

HUMPHRIES v. STATE. (No. 1435.)

(Supreme Court of Georgia. Oct. 15, 1919.)

(Syllabus by the Court.)

BURGLARY  $\S$  41(4)—SUFFICIENCY OF EVIDENCE TO SHOW BREAKING AND ENTERING.

Under the facts stated in the question propounded by the Court of Appeals, the jury were authorized to find that there had been a breaking and entering of the house in question.

Certified Questions from Court of Appeals.

Will Humphries, alias E. K. Davis, was convicted of burglary, and he brings error, and the Court of Appeals certifies questions. Questions answered.

Conformed to in Court of Appeals, 100 S. E. 791.

Park & Stone, of Blakely, and Hubert F. Rawls, of Macon, for plaintiff in error.

John P. Ross, Sol. Gen., of Macon, for the State.

BECK, P. J. The Court of Appeals desire instruction from the Supreme Court upon the following questions, a determination of which is necessary for the decision of this case: The undisputed evidence shows, that Roscoe Carter, his wife and baby, and a man named Banks lived in the same house, and occupied the entire house; that on Thursday, September 5, 1918, Carter and Banks left the house about half past 5 in the morning, and went to their work about a mile away, and Carter's wife left about an hour later, with her baby, and went to the field to pick cotton, leaving no one in the house. There were three rooms and two front doors and a back door to the house, and after fastening all the windows and locking the back door and one of the front doors from the inside, she locked the other front door from the outside, and left them in that condition. The door which was locked from the outside had an ordinary lock, but the key had to be inserted bottom upwards. On her return about sundown, before her husband and Banks arrived, she found the house locked and closed, apparently just as she had left it. After unlocking and entering the house she noticed that the lid of a trunk was raised, and the tray of the trunk was on a bed, and several articles of her husband's wear-



ing apparel were gone from the trunk. She looked in another room of the house, and discovered that two suits of clothes, three other pairs of pants, a suitcase, a black hat, and a shirt were gone. Some of these clothes belonged to Carter and some to Banks. She noticed a little mud on the porch at the front door, but could not see the prints of a shoe on the porch. Two days afterward some of the stolen articles were found and reclaimed in a pawnshop.

(1) Is the foregoing evidence sufficient to authorize a finding that there had been a breaking and entering of the house?

(2) Is the decision in *Lester v. State*, 106 Ga. 371, 32 S. E. 335, that the evidence there was not sufficient to show a breaking and entering, a correct ruling?

The evidence set forth in the question propounded by the Court of Appeals is sufficient to authorize a finding that there had been a breaking and entering of the house; and this is not in conflict with the decision in the case of *Lester v. State*, 106 Ga. 371, 32 S. E. 335, where it was held that the evidence was not sufficient to show a breaking and entering. An examination of the record in the case just referred to discloses that certain material facts do not appear in the official report of that case; but, when those facts are considered, the ruling made by the court was undoubtedly correct.

All the Justices concur.

(24 Ga. App. 267)

**NORTON v. ANDERSON.** (No. 10659.)

(Court of Appeals of Georgia, Division No. 1.  
Oct. 10, 1919.)

*(Syllabus by the Court.)*

**APPEAL AND ERROR** ⇨1005(2)—**REFUSAL OF NEW TRIAL SUSTAINED.**

The only question raised by the exceptions in this case is whether the evidence authorized the verdict. Upon a careful examination of the evidence, we cannot say that the verdict was without evidence to support it. The trial judge having approved the verdict, it was not error to overrule the motion for a new trial.

Error from Superior Court, Cobb County;  
N. A. Morris, Judge.

Action between O. G. Norton and J. D. Anderson. Judgment for the latter, and the former brings error. Affirmed.

H. B. Moss, of Marietta, for plaintiff in error.

C. M. Dobbs and Herbert Clay, both of Marietta, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 201)

**HINES, Director General, v. JOLLY**  
(two cases).

**SAME v. KELLEY** (two cases).

(Nos. 10922-10925.)

(Court of Appeals of Georgia, Division No. 2.  
Oct. 4, 1919.)

*(Syllabus by the Court.)*

**APPEAL AND ERROR** ⇨776—**MOTION TO TREAT BILL OF EXCEPTIONS AS EXCEPTIONS PENDENTE LITE DENIED.**

In each of the above cases the plaintiff in error filed a petition in which he asked this court to grant him permission to withdraw his bill of exceptions and to direct that the official copy of the same of file in the clerk's office of the trial court be treated as exceptions pendente lite. In each case the bill of exceptions assigned as error the overruling of the defendant's motion to transfer the case to the federal court, and the reason assigned in the petition for the request made was that "through inadvertence" the plaintiff in error had failed within the proper time to have counsel for the defendant in error acknowledge service of the bill of exceptions, and that in the subsequent acknowledgment of service by such counsel the right to move for the dismissal of the bill of exceptions for lack of service within the proper time was specifically reserved. The petition to this court was dated October 1, 1919, and showed that the judgment of the lower court which was excepted to was rendered on September 8, 1919, and consequently that the 30 days in which the plaintiff in error had the right to apply for the writ of certiorari had not expired. Held, as the only reason given in the petition as to why the acknowledgment of service of the bill of exceptions was not secured from counsel for the defendant in error was "through inadvertence," the petition is denied. Counsel for the plaintiff in error by proper diligence could have perfected service of the bill of exceptions within the time required by law, and thereby have rendered their petition to this court unnecessary. See, in this connection, *United Glass Co. v. McConnell*, 110 Ga. 617, 36 S. E. 58; *Ross v. Mercer*, 115 Ga. 353, 355, 41 S. E. 594; *Harvey v. Bowles*, 112 Ga. 421, 37 S. E. 364 (2); *Berryman v. Haden*, 112 Ga. 752, 38 S. E. 53(4); *Farmers' & Merchants' Bank v. Burwell*, 120 Ga. 540 (2), 542, 48 S. E. 145; *Savannah Electric Co. v. Tuck*, 132 Ga. 48 (2), 50, 63 S. E. 800.

In *Harker v. State*, 6 Ga. App. 774, 65 S. E. 963, cited by counsel for the plaintiff in error in support of their petition, no opinion was rendered, but the headnotes show that the bill of exceptions was certified, and service of the same acknowledged, on June 12th, but that the bill was not filed in the office of the clerk of the trial court until June 30th. This court dismissed the writ of error, but in the second headnote held as follows: "It appears, however, that the exceptions are to interlocutory matters, and that the bill of exceptions was certified and filed during the term. Upon the special facts shown, the court grants the application of the plaintiff

in error for a direction that the official copy of the bill of exceptions, of file in the office of the trial court, shall operate as exceptions pendente lite." An examination of the original record in that case and the documents therein, of file in the office of the clerk of this court, shows that counsel for the plaintiff in error submitted to this court an affidavit, sworn to by him, in which he stated that the bill of exceptions "was actually filed with the clerk of the city court of Richmond county, Georgia, by Austin Branch, attorney for the plaintiff in error," but "that through some mistake or inadvertence, or by reason of the said bill of exceptions being mislaid or misplaced *without any fault or neglect on the part of the plaintiff in error or his counsel*, the said bill of exceptions was not marked filed until June 30th." (*Italics ours.*)

Error from Superior Court, De Kalb County; Charles W. Smith, Judge.

Separate actions by Clem Jolly by Mrs. Clem Jolly, by J. F. Kelley, and by Mrs. Sarah Kelley against W. D. Hines, Director, General. Defendant's motion in each case to transfer the case to the federal court overruled, and he brings error in each case, and in each files a petition for permission to withdraw his bill of exceptions and to have them treated as exceptions pendente lite. Petitions denied.

McDaniel & Black, of Atlanta, for plaintiff in error.

Colquitt & Comyers, of Atlanta, for defendants in error.

BROYLES, P. J. Petitions denied.

BLOODWORTH and STEPHENS, JJ. CONCUR.

(24 Ga. App. 232)

SCOTT v. STATE MUT. LIFE INS. CO.  
(No. 10464.)

(Court of Appeals of Georgia, Division No. 1.  
Oct. 9, 1919.)

(Syllabus by the Court.)

ELECTRICITY — 19(2) — PETITION INSUFFICIENT TO SHOW RIGHT OF ACTION.

The plaintiff in this case first instituted suit against Rome Railway & Light Company for his alleged injuries. It was held in that case that the plaintiff was a trespasser coming in contact with a wire charged with electricity on private premises, not adjacent to any path in general use by the public. This court affirmed a judgment of nonsuit. See *Scott v. Rome Railway & Light Co.*, 22 Ga. App. 474, 96 S. E. 569. The present suit is against the State Mutual Life Insurance Company, and recovery is sought upon the ground that the defendant owns the house which is supplied with electricity through the wires that injured the plaintiff. The petition alleges that the wires were strung

along on poles by the defendant's predecessor in title, and that the defendant was at the time of the injury using the wires to convey electricity into the house. The petition alleges that the plaintiff was injured while walking along a pathway upon an adjacent woodland lot not owned by the defendant; that the plaintiff had been in the woods, picking blackberries, and was returning from the woods and was walking near the defendant's fence, which separated the defendant's property from the uninclosed woodland tract over which plaintiff was walking; that plaintiff was running along, and suddenly stumbled and fell, and, in falling, one of his hands came in contact with one of the electric wires, which had been allowed to sag to within two feet of the ground; that the insulation on it on a space of about six inches had been allowed to be rubbed off or had rotted off; that when he caught hold of it he was burned by the electricity passing through it; that the defendant knew, or in the exercise of ordinary care ought to have known, that said wire was so hanging and dangerous as alleged; that the electricity was being conveyed through the said wires by the Rome Railway & Light Company; and that the path over which he was traveling was used by the public. The court sustained a general demurrer to the petition. *Held*, inasmuch as the petition fails to show that the defendant held out an invitation to the plaintiff to use the path or the uninclosed woodland tract (which it did not own), or that the path was of such a character as to amount to an invitation or permission to use it as a passageway over the land, or to show that the injury resulted from the use of the path or passageway while the plaintiff was in the act of availing himself of this permission, it was not error to sustain the general demurrer. See *Ethridge v. Central Railroad*, 122 Ga. 855. In addition to what has already been said, the petition shows that the plaintiff entered on the premises over which the wires were strung and where he was injured, without any enticement, allurement, or inducement being held out to him by the defendant. The petition shows that the plaintiff was crossing over said tract of land for his own pleasure. See *Jones v. Asa G. Candler, Inc.*, 22 Ga. App. 717, 97 S. E. 112. The present case is distinguishable from *Mandeville Mills v. Dale*, 2 Ga. App. 607, 58 S. E. 1060, *Ashworth v. So. Ry. Co. et al.*, 116 Ga. 635, 43 S. E. 36, 59 L. R. A. 592, *Southern Bell Tel. & Telegraph Co. v. Howell*, 124 Ga. 1050, 53 S. E. 577, 4 Ann. Cas. 707, *American Tel. & Telegraph Co. v. Murden*, 141 Ga. 209, 80 S. E. 788, and *Wallace v. Matthewson*, 143 Ga. 236, 84 S. E. 450. From the facts pleaded in each of these cases it appears that the defendants therein were so placed as to owe a duty to the plaintiffs, the violation of which was the proximate cause of the injury sued for.

Error from City Court of Floyd County; W. J. Nunnally, Judge.

Action by J. W. Scott, by next friend, against the State Mutual Life Insurance Company. Demurrer to petition sustained, and plaintiff brings error. Affirmed.

Harris & Harris, of Rome, for plaintiff in error.

Maddox & Doyal, of Rome, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 224)

OVENS v. CLAXTON CARRIAGE & HARDWARE CO. et al. (No. 10375.)

(Court of Appeals of Georgia, Division No. 1. Oct. 9, 1919.)

*(Syllabus by the Court.)*

1. MUNICIPAL CORPORATIONS  $\S$ 816(1)—PETITION FAILING TO SHOW DEFECT IN STREET PROXIMATE CAUSE.

The court did not err in sustaining the general demurrer of the city of Claxton and in dismissing the suit as to the city as an alleged joint tort-feasor; the petition not showing a defect in the condition of the streets to have been the proximate cause of the alleged injury.

2. NEW TRIAL  $\S$ 172—INSTRUCTIONS IN SECOND TRIAL.

Failure to charge the jury on the theory of accident was not error, in view of what is said in the note of the trial judge to the bill of exceptions, as follows: "In connection with the above certificate to the bill of exceptions, I desire to say that this is the second trial; that I granted a new trial on the first motion for new trial to a large extent upon the ground of the motion that the court erred in giving in charge the law of accident. That was made one of the particular grounds of the amended motion, and, on the idea that the question of accident was not involved in the case, I granted the first new trial, the plaintiff's attorney contending that there was no question of accident in the case. On the last trial counsel for the defendant argued to the jury the question of accident, without any objection on the part of counsel for the plaintiff, and counsel for the plaintiff having full opportunity to make his argument to the jury or to call the attention of the court to that feature of the case, but failed to do so, and on this second trial the court declined to make any charge on the question of accident because the court did not believe there was any evidence to authorize the question of accident, and did not think it was proper to consider the question at all. The court did not think it was proper to charge the theory of accident, even in the negative, when the court had already granted a new trial on the ground that accident was not involved."

3. CHARGE—EVIDENCE.

The charge of the court submitted to the jury fairly and fully the contentions of the parties, and, when read in its entirety, is not subject to the criticisms urged in the motion for a new trial. The evidence authorized the verdict, which has the approval of the trial judge, and

for no reason assigned did the court err in overruling the motion for a new trial.

Error from Superior Court, Evans County; W. W. Sheppard, Judge.

Action by Fannie Owens against the Claxton Carriage & Hardware Company and the city of Claxton. General demurrer of defendant city of Claxton sustained, and suit against it dismissed. Judgment against plaintiff, her motion for a new trial denied, and she brings error. Affirmed.

W. B. Stubbs and G. N. Alford, both of Savannah, for plaintiff in error.

Oliver & Oliver, of Savannah, for defendants in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 226)

KNOWLES v. WESTERN & A. R. CO. et al. WESTERN & A. R. CO. v. KNOWLES.

(Nos. 10394, 10395.)

(Court of Appeals of Georgia, Division No. 1. Oct. 9, 1919.)

*(Syllabus by the Court.)*

1. MASTER AND SERVANT  $\S$ 233(2)—EVIDENCE INSUFFICIENT TO SHOW NEGLIGENCE OF DEFENDANT RAILROAD.

In this case an interstate carrier was sued for personal injuries under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St.  $\S$  8657-8665]). The evidence discloses that on a rainy night the plaintiff was walking, with a lighted lantern, beside a railroad track, and fell into a ditch or underpass, with which he was familiar and was thus injured. The plaintiff testifies that he was engrossed with his duty and for the moment did not realize the danger or the proximity of the underpass. The rule announced in the case of King v. S. A. L. Ry., 1 Ga. App. 88, 58 S. E. 252, cannot be extended, so as to apply to this case. The evidence here does not show that any negligence of the defendant caused the injury, and, on the other hand, the evidence shows that the injury was the result of the plaintiff's own negligence and lack of ordinary care. See Civ. Code 1910,  $\S$  3130; Jacobs v. Southern Railway Co., 241 U. S. 220, 36 Sup. Ct. 588, 60 L. Ed. 970; Southern Ry. Co. v. Blackwell, 20 Ga. App. 630, 93 S. E. 321. It may be further stated that the evidence discloses that there was a safe way around the place where plaintiff was injured, and that this way was known to him.

2. MASTER AND SERVANT  $\S$ 258(2)—GENERAL DEMURRER TO PETITION SHOWING NO NEGLIGENCE SUSTAINED.

It was not error to sustain the general demurrer of the Seaboard Air Line Railway. The petition alleged no act of negligence which made

that defendant a joint tort-feasor owing the plaintiff a duty.

### 3. NONSUIT.

It was not error for the court to grant a nonsuit.

Error from Superior Court, Bartow County; M. C. Tarver, Judge.

Action by C. F. Knowles against the Western & Atlantic Railroad Company, the Seaboard Air Line Railway, and others. General demurrer of defendant Seaboard Air Line Railway sustained, and a nonsuit granted, and plaintiff brings error, and defendant Western & Atlantic Railroad Company takes a cross-bill of exceptions. Affirmed on main bill of exceptions, and cross-bill dismissed.

Lawton Nalley, of Atlanta, and A. W. Fite, of Cartersville, for plaintiff in error.

Tye, Peeples & Tye, of Atlanta, and Neel, Finley & Neel, of Cartersville, for defendants in error.

LUKE, J. Judgment on main bill of exceptions affirmed; cross-bill dismissed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 278)

MILLER v. SWILLEY. (No. 10685.)

(Court of Appeals of Georgia, Division No. 1.  
Oct. 14, 1919.)

#### (Syllabus by the Court.)

### 1. JUSTICES OF THE PEACE $\S$ 86(10)—SUFFICIENCY OF LEVY OF ATTACHMENT.

A levy of an attachment upon realty, which recited: "By virtue of the within attachment issued from the justice's court of the 753d district, G. M., I have this day levied upon the following property, 250 acres of land, being lot No. 47 in the 19th district of said state and county, as the property of the defendant," was sufficient as against the objection that it did not show in what manner the property was seized or levied upon. *Hiles Carver Co. v. King*, 109 Ga. 180, 34 S. E. 353.

### 2. EXECUTION $\S$ 168—ISSUE ON AFFIDAVIT OF ILLEGALITY.

In an illegality case, the only issue to be determined is that specifically raised by the affidavit of illegality. *Miller v. Perkerson*, 128 Ga. 465, 57 S. E. 787.

### 3. NOTICE OF LEVY OF ATTACHMENT TO NON-RESIDENT DEFENDANT—EVIDENCE.

Upon the question of notice of the levy of the attachment the evidence authorized the jury to find that the nonresident defendant had notice.

### 4. ATTACHMENT $\S$ 113—SUFFICIENCY OF AFFIDAVIT AS TO NON-RESIDENT DEFENDANT.

An affidavit to obtain an attachment against a nonresident is sufficient, when the affidavit

shows that the defendant is a nonresident of Georgia.

### 5. MOTION FOR NEW TRIAL.

For no reason assigned did the court err in overruling the motion for a new trial.

Error from City Court of Cairo; L. W. Rigsby, Judge.

Attachment proceeding between D. W. Miller and J. E. Swilley, with affidavit of illegality. Judgment for the latter, and the former brings error. Affirmed.

R. R. Terrell, of Whigham, for plaintiff in error.

S. P. Cain of Cairo, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 239)

PATTERSON v. STATE. (No. 10560.)

(Court of Appeals of Georgia, Division No. 1.  
Oct. 9, 1919.)

#### (Syllabus by the Court.)

### 1. INTOXICATING LIQUORS $\S$ 134—EVIDENCE SUSTAINING CONVICTION FOR UNLAWFUL MANUFACTURE.

A substance made of corn meal and molasses, designed for the purpose of, and to be used for, distilling whisky, and commonly called "still beer," or simply "beer," which is alcoholic, and will produce intoxication if drunk to excess, and which is in such a physical state that it can be and actually is drunk as a beverage (and where similar substances have been drunk), is a "beverage" in the sense in which the latter term is used in the act approved March 28, 1917, making it an offense against the criminal laws of this state for any person to "distill, manufacture or make any alcoholic spirituous, vinous, malted or mixed liquors or beverages, any part of which is alcoholic." Pamph. Acts (Ex. Sess.) 1917, p. 18, § 23. Evidence, therefore, that the defendant made a substance or liquid as above described (though not an ordinary "beverage") is sufficient to authorize his conviction of the offense of making alcoholic liquors in violation of that act, under an indictment generally charging a violation of all the offenses prohibited by the act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Beverage.]

### 2. CRIMINAL LAW $\S$ 778(11)—EVIDENCE AUTHORIZING CHARGE ON FLIGHT.

Evidence that the defendant had escaped from jail, where he had been confined awaiting trial on the charge for which he was being tried, is sufficient to authorize the judge to charge the jury the rule of law governing the weight to be given evidence of flight on the part of the defendant as tending to establish his guilt.

**3. CHARGE OF COURT—EXPRESSION OR INTIMATION OF OPINION.**

The charge of the court is not subject to the objection that it contained any expression or intimation of opinion as to what had been proved, or that it did not fairly submit to the jury the contentions of the defendant.

**4. CHARGE ON REASONABLE DOUBT.**

The court fully and properly instructed the jury upon the subject of reasonable doubt, and the instruction thereon set out in the motion for a new trial was not error for the reason assigned.

**5. CRIMINAL LAW §1178—GROUNDS OF MOTION FOR A NEW TRIAL, NOT BEING ARGUED, ABANDONED.**

The grounds of the motion for a new trial, not argued in the brief of counsel for the plaintiff in error, are treated as abandoned.

**6. CHARGE OF COURT.**

None of the excerpts from the charge of the court complained of require a new trial.

Error from Superior Court, Gwinnett County; Andrew J. Cobb, Judge.

Pat Patterson was convicted of making alcoholic liquors in violation of law, his motion for a new trial was denied, and he brings error. Affirmed.

M. D. Irwin, of Lawrenceville, and T. J. Shackelford, of Athens, for plaintiff in error. W. O. Dean, Sol. Gen., of Monroe, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 244)

**VOGT v. BRIDGES. (No. 10629.)**

(Court of Appeals of Georgia, Division No. 1. Oct. 9, 1919.)

(Syllabus by the Court.)

**1. MOTION TO DISMISS BILL OF EXCEPTIONS.**

There is no merit in the motion to dismiss the bill of exceptions, and accordingly it is denied.

**2. OVERRULING OF CERTIORARI.**

Under the facts of the case, the judge of the superior court did not err in overruling the certiorari.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action between W. J. E. Vogt and J. E. Bridges. Judgment for the latter, certiorari overruled, and the former brings error. Affirmed.

Chambers & Dickey, of Atlanta, for plaintiff in error.

Lawton Nalley, of Atlanta, for defendant in error.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 228)

**COX v. CHARLES CONE REALTY CO. (No. 10439.)**

(Court of Appeals of Georgia, Division No. 1. Oct. 9, 1919.)

(Syllabus by the Court.)

**JUDGMENT OF SUPERIOR COURT ON CERTIORARI.**

The judge of the superior court did not err in this case in rendering the following judgment: "It is considered, ordered and adjudged that the within certiorari be and the same is hereby overruled, and the judgment allowed to proceed in favor of Chas. Cone Realty Co. v. W. S. Cox, for the principal sum of \$190, interest and costs."

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action between W. S. Cox and the Charles Cone Realty Company. From a judgment of the superior court, overruling the certiorari, etc., the former brings error. Affirmed.

Anton L. Etheridge and F. A. Hooper & Son, all of Atlanta, for plaintiff in error.

R. H. Jones, Jr., of Atlanta, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 231)

**WHATLEY et al. v. RILEY, Ordinary, for Use, etc. (No. 10454.)**

(Court of Appeals of Georgia, Division No. 1. Oct. 9, 1919.)

(Syllabus by the Court.)

**APPEAL AND ERROR §1005(2) — APPROVED VERDICT SUSTAINED BY EVIDENCE CONCLUSIVE.**

The only question raised by the exceptions in this case is whether the evidence authorizes the verdict. A careful examination of the evidence convinces us that there is some evidence upon which the verdict may be sustained. The trial judge having approved the verdict, this court cannot interfere.

Error from Superior Court, Taylor County; J. L. Rent, Judge.

Action by A. H. Riley, ordinary, for use, etc., against J. H. Whatley and others. Judg-

ment for plaintiff, and defendants bring error. Affirmed.

Homer Beeland, of Reynolds, and C. W. Foy, of Butler, for plaintiff in error.

Gilbert C. Robinson, of Montezuma, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 240)

**BENTON TRADING CO. v. BAILEY.**  
(No. 10594.)

(Court of Appeals of Georgia, Division No. 1.  
Oct. 9, 1919.)

*(Syllabus by the Court.)*

**FRAUDS, STATUTE OF §32—AGREEMENT FOR  
SUBSTITUTION OF THIRD PARTY FOR ORIGINAL  
DEBTOR.**

Benton Trading Company brought suit against Bailey, alleging that it owned an execution against Spooner. Bailey notified it and its attorney that he had purchased practically all the real estate and personal property of Spooner, and that under the terms of the purchase he was to assume certain liens on the property and pay to Spooner the remainder of the purchase price; that he did not wish the plaintiff to levy the execution on Spooner's property; that if they would wait for awhile he would pay the fi. fa. in full; that subsequently he did pay \$400 on the execution, and that, relying on Bailey's promise to pay the execution, the plaintiff did not levy the fi. fa., and Spooner thereafter became insolvent; and by reason thereof the plaintiff was damaged in an amount equal to the balance due on the execution. The defendant demurred, upon the grounds: That the petition set forth no cause of action; that the promise to pay was not in writing; that the petition failed to show that the plaintiff was prevented from levying the fi. fa.; and that there was no agreement between the three persons and concurred in by them whereby Spooner was released and Bailey accepted as the debtor. *Held*, it was not error for the court to sustain the demurrer and dismiss the suit. In every such case, in order to take the transaction out of the operation of the statute of frauds, it must appear that the person substituted for the debtor was, by agreement between the creditor, the debtor, and himself, substituted for the original debtor, and the latter released from the obligation. See *Palmetto Mfg. Co. v. Par-*

*ker & Anderson*, 123 Ga. 798, 51 S. E. 714; *Fields v. Bullington*, 20 Ga. App. 102, 92 S. E. 653.

Error from Superior Court, Miller County; W. C. Worrill, Judge.

Suit by the Benton Trading Company against J. W. Bailey. Demurrer to petition sustained, and suit dismissed, and plaintiff brings error. Affirmed.

M. E. O'Neal, of Bainbridge, and N. L. Stapleton, of Colquitt, for plaintiff in error.

W. I. Geer, of Colquitt, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 242)

**TOWNS v. WELLS.** (No. 10619.)

(Court of Appeals of Georgia, Division No. 1.  
Oct. 9, 1919.)

*(Syllabus by the Court.)*

**1. DEMURRER TO PETITION.**

The petition as amended set forth a cause of action, and the demurrer thereto was properly overruled.

**2. APPEAL AND ERROR §1005(2)—DENIAL OF  
MOTION FOR NEW TRIAL ON GENERAL GROUNDS  
AFFIRMED.**

The motion for a new trial contains the general grounds only, there is evidence to support the verdict, which has the approval of the trial judge, and a new trial was properly refused.

Error from City Court of Floyd County; W. J. Nunnally, Judge.

Action between Lee Towns and Dollie Wells. Judgment for the latter, motion for a new trial denied, and the former brings error. Affirmed.

Harris & Harris, of Rome, for plaintiff in error.

W. B. Mebane, of Rome, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

§—For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(24 Ga. App. 237)

**COX v. HARRISON.** (No. 10532.)(Court of Appeals of Georgia, Division No. 1.  
Oct. 9, 1919.)*(Syllabus by the Court.)***DISMISSAL OF PETITION ON GENERAL DEMUR-  
RER.**

The judge who tried this case did not err in disallowing the proffered amendment to the petition, and in sustaining the general demurrer and dismissing the petition.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Cleveland Cox against F. E. Harrison. General demurrer to petition sustained, and petition dismissed, and plaintiff brings error. Affirmed.

S. C. Crane, of Atlanta, for plaintiff in error.

B. H. Hill, of West Point, and H. A. Allen, of Atlanta, for defendant in error.

**BLOODWORTH, J.** Judgment affirmed.

**BROYLES, C. J., and LUKE, J.,** concur.

(24 Ga. App. 222)

**TURNER et al. v. TORPHY.** (No. 10362.)(Court of Appeals of Georgia, Division No. 1.  
Oct. 9, 1919.)*(Syllabus by the Court.)***CERTIORARI**  $\Leftrightarrow$  29—**GRANT AFTER NONSUIT AND  
REMAND FOR NEW TRIAL PROPER.**

In the trial court, as shown by the answer to the writ of certiorari, the evidence of the plaintiff was sufficient to have carried her case to a jury; and it was error to award a nonsuit. It was not error for the judge of the superior court to sustain the certiorari and remand the case for a new trial.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by J. B. Torphy against J. T. Turner and others. Judgment of nonsuit, and from a judgment sustaining a certiorari and remanding the case for a new trial, defendants bring error. Affirmed.

Paul L. Lindsay, of Atlanta, for plaintiffs in error.

Guy Parker and Bryan & Middlebrooks, all of Atlanta, for defendant in error.

**LUKE, J.** Judgment affirmed.

**BROYLES, C. J., and BLOODWORTH, J.,** concur.

(24 Ga. App. 207)

**HUTCHINS v. WATKINS et al.** (No. 10313.)(Court of Appeals of Georgia, Division No. 1.  
Oct. 9, 1919.)*(Syllabus by the Court.)***APPEAL AND ERROR**  $\Leftrightarrow$  1005(2)—**DENIAL OF  
MOTION FOR NEW TRIAL ON GENERAL  
GROUNDS AFFIRMED.**

The motion for new trial in this case contained the usual general grounds only, and, "there being evidence to sustain the verdict, this court cannot disturb the finding of the jury by overruling the refusal of the trial judge to grant a new trial upon the ground that the verdict was contrary to evidence or without evidence to support it. *Davis v. Kirkland*, 1 Ga. App. 5, 58 S. E. 209; *Stricklin v. Crawley*, 1 Ga. App. 130, 58 S. E. 215; *Charles v. Brooker*, 1 Ga. App. 219, 58 S. E. 218; *Daughtry v. Savannah & Ry. Co.*, 1 Ga. App. 393, 58 S. E. 230; *Edge v. Thomas*, 9 Ga. App. 559, 71 S. E. 875." *McCarty v. Keys*, 19 Ga. App. 494, 91 S. E. 875 (1); *Bradham v. State*, 21 Ga. App. 510, 94 S. E. 618, and cases cited.

Error from Superior Court, Crisp County; E. F. Strozler, pro hac, Judge.

Action between P. S. L. Hutchins and D. L. Watkins and others. Judgment for the latter, motion for new trial denied, and the former brings error. Affirmed.

J. T. Hill, of Macon, for plaintiff in error.  
Crum & Jones, of Cordele, for defendants in error.

**BLOODWORTH, J.** Judgment affirmed.

**BROYLES, C. J., and LUKE, J.,** concur.

(24 Ga. App. 217)

**BLOUNT v. LYNCH.** (No. 10359.)(Court of Appeals of Georgia, Division No. 1.  
Oct. 9, 1919.)*(Syllabus by the Court.)***1. VENDOR AND PURCHASER**  $\Leftrightarrow$  349—**DEMUR-  
RER TO RETURN IN ACTION FOR BREACH OF  
OPTION CONTRACT OVERRULED.**

The court did not err in overruling the general demurrer to the plaintiff's petition.

*(Additional Syllabus by Editorial Staff.)***2. VENDOR AND PURCHASER**  $\Leftrightarrow$  18(1)—**INADE-  
QUACY OF CONSIDERATION NOT DEFEATING  
OPTION CONTRACT.**

The mere inadequacy of the consideration named in an option contract for the sale of land will not of itself avoid the contract.

**3. VENDOR AND PURCHASER**  $\Leftrightarrow$  18(1)—**EFFECT  
OF DEFAULT IN PAYMENT ON OPTION CON-  
TRACT.**

That the considerations named in an option contract for the sale of land had not been paid

would not necessarily defeat the contract or render it less enforceable.

**4. CONTRACTS  $\Leftrightarrow$  279(1)—WAIVER OF TENDER OF MONEY OR PERFORMANCE.**

Where a contract requires a tender of money or a performance of some obligation, the party bound may be relieved, and the tender and obligation held to have been waived, where the other party repudiates the contract by action or word, and takes a position which would render tender or performance useless or impossible.

**5. TENDER  $\Leftrightarrow$  5—WAIVER BY OBSTRUCTION OR PREVENTION.**

If the party to whom a tender is to be made obstructs or prevents a tender, the tender will be deemed to have been waived.

Error from Superior Court, Fulton County; J. D. Humphries, Judge.

Suit by John H. Lynch against M. A. Blount. Demurrer to petition overruled, and defendant excepts and brings error. Affirmed.

Daley, Chambers & Daley and Westmoreland, Anderson & Smith, all of Atlanta, for plaintiff in error.

Anderson, Rountree & Crenshaw, of Atlanta, for defendant in error.

LUKE, J. John H. Lynch sued Mrs. Blount, alleging, in substance, that on July 19, 1917, the defendant executed an option to him as follows:

"That for and in consideration of the sum of one (\$1.00) dollar in hand paid, the receipt whereof is hereby acknowledged, the said Mrs. Mary A. Blount has granted, bargained, sold, and conveyed, and by these presents does hereby grant, bargain, sell, and convey, to the said John H. Lynch, his heirs or assigns, an option for a period of thirty (30) days from the date hereof [July 19, 1917] to purchase on the terms specified hereinafter the following described property," describing certain land. "The terms upon which this option is given are as follows: (1) The payment by the said John H. Lynch, within thirty days from the date hereof, of the sum of seven hundred (\$700.00) dollars in cash; (2) the assumption by the said John H. Lynch, or his assigns, of the loan now on said property, amounting to the sum of \$6,750.00 with accrued interest, and balance of purchase price, to wit, \$4,250.00, at the rate of \$100.00 per month, with interest at the rate of 7 per cent. per annum; (3) the payment by the said Lynch of the amount of the unearned insurance premium now on said property; (4) the said Lynch to have the rents on the said property from the date when this option is exercised by him." Signed by the parties.

The petition alleges:

"That on or about the 10th day of August, 1917, your petitioner called to see the said Mrs. Blount, the defendant named in this suit, for the purpose of making an appointment with her to meet at such time as might be convenient, in

order that said option might be exercised by petitioner and the transaction closed in accordance with the terms thereof; that to petitioner's surprise the said Mrs. Blount at said time advised him that she would not sell said property and would not perform her contract as contained in said option; that, notwithstanding this, your petitioner, hoping that the said Mrs. Blount would carry out the provisions of her contract with him, prepared the papers which it would be necessary to have executed by the said Mrs. Blount and by himself in order to carry out said contract in accordance with the terms thereof, and carried the same, with a sufficient amount of cash to meet all the cash payments required to be paid under said option, to the home of the defendant, Mrs. Blount, on or about the 13th or 14th of August, 1917, for the purpose of tendering to her the considerations required from him under the terms of said contract; that he went to the door of the premises occupied by the said Mrs. Blount at said time, rang the door bell, and knocked upon the door loudly, but no one appeared to admit him, although he saw through the window of one of the rooms occupied by the defendant that there were persons in said room, including the defendant; that thereafter he made several efforts to be admitted to the house for the purpose of making such tender, he telephoned to the defendant a number of times, and had others telephone her for him a number of times, seeking to arrange a meeting with her, and that members of her family would answer the telephone and inform him and those who acted for him that Mrs. Blount was not at home, sometimes stating that she was in one place and sometimes stating that she was in another, such statements being wholly inconsistent with each other; that on the 17th day of August, 1917, after having made many efforts as aforesaid to communicate with the said defendant and to make due tender to her, he addressed a letter to her at her residence in the city of Atlanta, advising her of the fact that he had made previous efforts to find her, but without success, and appointing the following day, Saturday, August 18, at 12 o'clock noon, when he would call for the purpose of closing said transaction, or in any event of making tender to her of the considerations required of him under the contract; that in pursuance of such communication he did in fact call at her home at 12 o'clock noon on Saturday, August 18, 1917, then and there being prepared to make tender to her in accordance with the terms of said contract, and was there met by other members of the defendant's family, who informed him that the defendant was away from home and would not return that day; that later in the afternoon of the same day, being informed by a friend that Mrs. Blount had been seen upon the front porch of a residence in Decatur, Ga., he sought the aid of certain friends of his and went immediately to Decatur, and his friends at his request called at the house where the defendant, Mrs. Blount, was said to be, prepared to make tender for him as aforesaid, but they were not admitted into the house, and were informed by certain persons whom they found upon the front porch that Mrs. Blount was not at these premises; that your petitioner made diligent, frequent, and constant efforts, for more than a week prior to the ex-



piration of said option, to make tender of the considerations required of him under the said contract to the defendant, Mrs. Mary A. Blount, and that said defendant purposely and deliberately evaded him and refused to see him, in order to prevent a tender of said considerations being made to her by petitioner; that because of the several facts hereinbefore set forth the defendant, Mrs. Mary A. Blount, has waived the making of tender to her under the said option contract; that your petitioner was ready, willing, and able to carry out the terms of his contract with the defendant, Mrs. Mary A. Blount, and for several days prior to the expiration of said option desired and sought the right to close said contract in accordance with said option, or to tender to the defendant the considerations required of him therein; that, notwithstanding the facts hereinbefore set out, said defendant declines to carry out her contract and has breached the same; that the total purchase price to be paid by your petitioner under the terms of said contract is \$11,700 in the aggregate, plus the unearned premiums on the policies of insurance covering the premises agreed to be sold to him, which amount to about \$90.25, making a total that would have been required of him under the terms of his contract of \$11,790.25; that the true market value of the said property at the time he sought to close said contract was \$17,000, or other large sum, and that your petitioner has therefore been injured and damaged by the defendant in the sum of \$5,000, or other large sum, and he seeks to recover said sum from her on account of her breach of contract as aforesaid. Wherefore petitioner prays judgment," etc.

The defendant demurred, upon the grounds that the petition did not state facts sufficient to constitute a cause of action, that the contract was unilateral, and not binding, and that the complainant did not state facts sufficient to show an equity in the plaintiff sufficient to authorize any judgment against the defendant. The court overruled the demurrer and the defendant excepted.

[2, 3] 1. The first question to be considered is whether the agreement entered into is valid. The mere inadequacy of the consideration named in the contract would not of itself void the contract, neither would the fact that the considerations named in it had not been paid necessarily vitiate the contract or render it less enforceable. As said by the Supreme Court:

"It is just as competent for a man to bind himself to make a contract of sale as it is for him to bind himself by a contract of sale. . . . The obligation by which one binds himself to sell, and leaves it discretionary with the other party to buy, is what is termed in law an option, which is simply a contract by which the owner of property agrees with another person that he shall have a right to buy

the property at a fixed price within a certain time."

See *Black v. Maddox*, 104 Ga. 162, 30 S. E. 723; Civil Code (1910) § 4244.

Upon the question as to the amount of the consideration named in the contract, and the obligation raised to pay it, see *Southern Bell Tel. & Tel. Co. v. Harris*, 117 Ga. 1001, 44 S. E. 885. We think, in view of the precedents, by which we are controlled, that the contract is not invalid.

[1, 4] The next question to be considered is whether or not Lynch alleges facts sufficient to entitle him to maintain an action for the breach of the contract, and if there has been a breach upon the part of Mrs. Blount. Where a contract provides that there must be a tender of money or a performance of some obligation, the party bound to make the tender or perform the obligation may be relieved, and the tender and obligation held to have been waived, where the other party to the contract repudiates it, by act or word, or takes a position which would render tender or performance of the obligation imposed useless or impossible. Upon information being conveyed by the first party to the other that he was ready to perform and make good all the obligations resting upon him, so as to make the contract enforceable under its terms, and a statement or declaration by the other party that there would be no performance of the contract in any event, it would be useless to go through the ceremony of actually making a tender or further proffer. As was said by the Supreme Court in *Ansley v. Hightower*, 120 Ga. 719, 48 S. E. 197:

"A tender of money is excused where, before the expiration of the time therefor, the party to whom it is to be made makes declarations equivalent to a refusal to accept the tender if made."

[5] In addition to this, if the party to whom tender is to be made should obstruct or prevent a tender, we see no reason why in that event tender should not be held to have been waived. It would be unfair for the first party to a contract to purposely avoid and prevent the performance of a contract by the other party. We think the petition in this case sets out, if true (and for the purposes of demurrer we must take it to be true), a cause of action which entitles the plaintiff to have his cause determined by the courts.

Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 298)

**PRATER v. BAUGHMAN.** (No. 10443.)(Court of Appeals of Georgia, Division No. 2.  
Oct. 20, 1919.)*(Syllabus by the Court.)***1. BILLS AND NOTES §343, 370—FAILURE OF EXECUTORY CONSIDERATION NO DEFENSE AGAINST BONA FIDE PURCHASER.**

The failure of an executory consideration in a promissory note is not a defense against a purchaser for value before maturity, who had knowledge of the character of the consideration, but who acquired the note before the consideration had actually failed, and who had no notice, constructive or otherwise, that the consideration would fail. *Simmons v. Council*, 5 Ga. App. 386, 63 S. E. 238; *Whitten v. Railway Postal Clerks' Inv. Ass'n*, 16 Ga. App. 685, 85 S. E. 973; *Turner Lumber Co. v. Henderson Co.*, 20 Ga. App. 682, and authorities cited on page 689, 93 S. E. 301. In the instant case no facts were developed from which the jury could find that the plaintiff (the transferee of the notes sued upon) had or could be charged with notice that the consideration would fail, and the trial judge, therefore, did not err in directing a verdict for the plaintiff.

**2. OTHER CASES.**

There is nothing decided in *Adams v. Hatfield*, 17 Ga. App. 680, 87 S. E. 1099, or the other cases cited by counsel for plaintiff in error, as applied to their particular facts, in conflict with the rule laid down above.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by G. T. Baughman against Mrs. C. H. Prater. Judgment for plaintiff on a directed verdict, and defendant brings error. Affirmed.

Walter A. Sims, of Atlanta, for plaintiff in error.

Napier, Wright & Wood, of Atlanta, for defendant in error.

**STEPHENS, J.** Judgment affirmed.

**JENKINS, P. J., and SMITH, J.,** concur.

(24 Ga. App. 239)

**PERDUE & PACE v. HURST.** (No. 10538.)(Court of Appeals of Georgia, Division No. 1.  
Oct. 9, 1919.)*(Syllabus by the Court.)***1. APPEAL AND ERROR §302(1)—SUFFICIENCY OF GROUNDS OF MOTION FOR NEW TRIAL.**

The amendment to the motion for a new trial is too uncertain and indefinite to be considered by this court. It is not even stated at what time Hurst "had the deed in his possession." The ground is not understandable with-

out reference to other parts of the record, and it is a well-established rule that "each ground of the motion for new trial must be complete and understandable, without resorting to an examination of the brief of the evidence or of any other part of the record." *Morrow v. State*, 22 Ga. App. 253, 95 S. E. 934 (1), and cases cited.

**2. APPEAL AND ERROR §1005(2)—VERDICT APPROVED BY TRIAL COURT ON SUFFICIENT EVIDENCE SUSTAINED.**

No error of law is pointed out, the verdict has the approval of the trial judge, there is some evidence authorizing the verdict, and, under repeated and uniform rulings of this court and of the Supreme Court, a reviewing court is powerless to interfere. *Bradham v. State*, 21 Ga. App. 510, 94 S. E. 618, and cases cited.

Error from Superior Court, Haralson County; F. A. Irwin, Judge.

Action between *Perdue & Pace* and *A. A. Hurst*. Judgment for the latter, and the former brings error. Affirmed.

*I. N. Cheney*, of Bremen, and *Griffith & Matthews*, of Buchanan, for plaintiffs in error.

*Edwards & Edwards*, of Buchanan, for defendant in error.

**BLOODWORTH, J.** Judgment affirmed.

**BROYLES, C. J., and LUKE, J.,** concur.

(24 Ga. App. 296)

**MOORE v. SIMS.** (No. 10416.)(Court of Appeals of Georgia, Division No. 2.  
Oct. 20, 1919.)*(Syllabus by the Court.)***1. HUSBAND AND WIFE §25(1)—LIABILITY OF WIFE FOR GOODS PURCHASED BY HUSBAND.**

The mere fact that a wife may be the owner of one or more cows, which feed upon provender furnished solely upon the credit of her husband, will not render her liable for the value of such foodstuff, nor authorize a judgment against her for the same, on the theory that she was the concealed principal of her husband, when there is no evidence that he was in any way acting as her agent when the purchase was made. See *Hightower v. Walker*, 97 Ga. 748, 25 S. E. 386; *Montgomery v. Walton*, 111 Ga. 840, 36 S. E. 202; *Blount & Morel v. Dugger*, 115 Ga. 109, 41 S. E. 270; *Cornelia Planing Mill Co. v. Wilcox*, 129 Ga. 522, 59 S. E. 223.

**2. MOTION FOR NEW TRIAL.**

There being no evidence to authorize the verdict in favor of the plaintiff, and the case being remanded solely for this reason, it is unnecessary to pass upon the errors alleged in the amendment to the motion for a new trial.

for, if such errors were committed, they will probably not occur on another trial.

Error from Superior Court, Barrow County; A. J. Cobb, Judge.

Suit by F. L. Sims against Adeline Moore. Judgment for plaintiff, motion for new trial overruled, and defendant brings error. Reversed.

Joseph D. Quillian, of Winder, for plaintiff in error.

R. H. Kimball, of Winder, for defendant in error.

SMITH, J. This is a suit against a wife as the undisclosed principal of her husband. The issue of fact involved in this case is whether or not the husband purchased certain cow food on his own account or as agent for his wife. The verdict of the jury being adverse to the defendant, she made a motion for a new trial, which was overruled, and she excepted.

[1] The plaintiff testified that the defendant owed him \$61.75 on a just, due, and unpaid account; that the account represented foodstuff which the defendant's cows ate; that the defendant and her husband lived on his place, and that when they came there the cows were so thin they could hardly walk; that the cows used his pasture, and Dick Moore, the defendant's husband, bought the foodstuff from him, which was fed to the cows; that the defendant told him that the cows did not belong to either her or her husband. On cross-examination the witness testified that he did not sell the food in question to the defendant, but that he sold it to her husband, and booked it to him; that the defendant "never agreed to pay for it; she never said anything about it to me; I could not swear that she knew on what basis the food was bought by Dick from me; I could not swear she knew that Dick was buying this foodstuff on the credit," but that the defendant's cows ate it; that he thought the cows belonged to Dick until he was informed to the contrary by the defendant.

G. W. Woodruff testified that the defendant and her husband lived on his place the year before they moved to the plaintiff's farm, and that defendant's husband told him he wanted to buy a cow for her, and that he had heard that the cow was paid for with defendant's money. The defendant testified that she had never bought anything from the plaintiff in her life, and had never authorized her husband or any one else to buy anything from him on credit; that she never promised to pay the plaintiff the account sued on, and never authorized any one else to promise him she would pay it; that she did not know anything about her husband's purchase from the plaintiff, and did not know on what

terms the foodstuff was sold him—whether on credit or for cash.

[2] From these facts, and all reasonable deductions therefrom, we do not think that there was any evidence, either direct or circumstantial, to show the husband's agency in contracting the debt sued upon, and the court therefore erred in overruling the motion for a new trial on the general grounds alone.

Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(24 Ga. App. 281)

**GUY v. NATIONAL CITY BANK OF MEMPHIS.** (No. 10700.)

(Court of Appeals of Georgia, Division No. 1.  
Oct. 14, 1919.)

*(Syllabus by the Court.)*

**LOTTERIES**  $\S$ 3—**ADVERTISING SCHEME NOT VIOLATION OF STATUTE OR BASED ON ILLEGAL CONSIDERATION.**

Mrs. Guy was sued on notes executed by her, payable to the Partin Manufacturing Company. She pleaded as follows: "The notes sued on are based on an illegal and criminal transaction, for the same were taken by the Partin Manufacturing Company, the consideration being illegal, and such a contract being contrary to the laws of the state of Georgia. Defendant says that in December, 1918, she was the proprietor of a drug store in Buena Vista, Ga., known as the City Drug store, conducted by her agents, and that she was engaged in selling drugs and various sundries usually found in a country drug store, and doing an annual business of about \$15,000; that she was approached by the Partin Manufacturing Company, who represented that they could increase the business of the said store from \$15,000 per annum to at least \$22,000 per annum, under an advertising scheme which was as follows: The Partin Manufacturing Company was to furnish defendant with such literature, stationery, etc., as was necessary to carry on its trade-boosting scheme. Defendant was to issue to each purchaser voting cards with each purchase made. Each purchaser was to receive 100 votes for each \$1 purchase. One hundred votes were to be issued to each customer who paid \$1 on an account contracted after the campaign started. The advertising system was to continue for one year. At the end of such period the Partin Manufacturing Company was to furnish the successful winners of the prizes offered for the candidate who received the highest number of votes six prizes, to be selected by the successful candidate, as follows: The candidate receiving the most votes would receive the winner's chance of an automobile, either a Palmer, Argo, Metz, Saxon, five-passenger Ford, or five-passenger Emerson, according to the choice of the parties winning, the automobile being furnished to the winner by the Partin Manufacturing Company.

The candidate who received the next highest number of trade votes was to be awarded by the Partin Manufacturing Company a grafanola; the third prize being a French ivory set; the fourth prize being a ladies' gold fancy lavalier and chain; the fifth prize a mahogany finished vacuum sweeper; sixth prize a three-piece carving set. Defendant says that the Partin Manufacturing Company was to send a representative, who was to assist in getting candidates and helping to start the trade-boosting campaign. The candidates were to enlist their friends in making purchases at defendant's store, so as to secure from defendant's customers the trade balance issued to them, so that the candidates could use them in procuring the highest number of votes which would enable them to win the prizes. Each candidate was to sell coupon books or trade cards, which would be redeemable in merchandise at defendant's store. For each \$1 book or card a candidate sold, such candidate was to receive 1,000 votes, and for each \$5 card or book sold and remitted for, the candidate was to receive 10,000 votes. The customer was permitted to give his trade votes to any candidate for the various prizes, and to vote them for any candidate, or she or he might be a candidate. At the close of the campaign, when the final count was made, the person having the highest number of votes to his or her credit would be pronounced the winner of the automobile, the next in standing was to be awarded the second prize, and so on. The representative of the Partin Manufacturing Company was to induce as many persons as possible to compete for the prizes to be given by the Partin Manufacturing Company. The advertising scheme of the Partin Manufacturing Company was to enlist the competition of as many candidates for the six prizes to be given by them as possible, so that each and every candidate would be induced to work among their friends to patronize defendant's store, and receive the trade balance awarded to each purchaser, in order that these balances might be used by them when the prizes were distributed. By the method above described the Partin Manufacturing Company obligated and guaranteed that it would increase defendant's sales from \$15,000 to \$22,000 per year. Defendant says that for the consideration above mentioned she gave the Partin Manufacturing Company the notes sued upon. Defendant says that after executing said notes she found that the advertising scheme of the Partin Manufacturing Company was illegal and contrary to the laws of Georgia, and that it was in violation of the criminal laws of said state as emodied in section 404 of the Criminal Code of said state. Defendant says that when she made this discovery she repudiated said contract. Defendant says that, the contract between her and the Partin Manufacturing Company, being illegal, the notes sued upon are null and void, even though the plaintiff be an innocent purchaser of the same. Wherefore defendant prays judgment of the court in her behalf." The court refused to allow such defense, and sustained a demurrer thereto, and rendered judgment for the plaintiff. No valid defense was set up by the plea, and it was not error to disallow it and render judgment for the plaintiff. See *Tumlin v. Daniel Brothers Co.*, 141 Ga. 613, 81 S. E. 793. No

such scheme was shown in the plea as would be violative of law and render the consideration illegal or immoral.

Error from Superior Court, Marion County; G. H. Howard, Judge.

Action by the National City Bank of Memphis against Evie S. Guy. Demurrer to plea sustained, and judgment for plaintiff, and defendant brings error. Affirmed.

W. B. Short and Geo. P. Munro, both of Buena Vista, for plaintiff in error.

John C. Butt, of Buena Vista, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 270)

KEITH v. SIMPSON et al. (No. 10868.)

(Court of Appeals of Georgia, Division No. 1.  
Oct. 10, 1919.)

(Syllabus by the Court.)

BANKRUPTCY ~~§~~304—EVIDENCE SUFFICIENT TO SHOW SALE BONA FIDE.

Keith, as trustee in bankruptcy of J. W. Lindsey, sued him, T. N. Lindsey, and Simpson, seeking to set aside an alleged preference. The evidence showed that J. W. Lindsey bargained for the purchase of a tract of land for \$700, giving therefor one note for \$100 and one for \$600. When the \$100 note matured he was unable to pay it, and borrowed the money from T. N. Lindsey, his brother, and paid the note. Being unable to pay the \$600 note, he negotiated a trade with T. N. Lindsey, whereby his bond for title was surrendered to Simpson, the vendor, who returned his notes and executed a new bond for title to T. N. Lindsey, and accepted T. N. Lindsey's note for the \$600, and T. N. Lindsey paid for J. W. Lindsey an additional sum of \$235. The value of the land was \$1,000. Within four months of this transaction J. W. Lindsey was adjudged a bankrupt. The evidence failed to show that T. N. Lindsey knew that J. W. Lindsey was insolvent, or otherwise involved than hereinbefore pointed out. At the conclusion of the evidence the court directed a verdict for the defendant. *Held*, that there was no fraud shown, and that, inasmuch as the only conclusion that could be reached from the evidence was that the sale was bona fide and not for the purpose of defrauding creditors, it was not error to direct a verdict for defendant.

Error from Superior Court, Cobb County; N. A. Morris, Judge.

Action by J. V. Keith, trustee in bankruptcy of J. W. Lindsey, against W. T. Simpson, J. W. Lindsey, and another. Judgment for defendants on a directed verdict, and plaintiff brings error. Affirmed.

Geo. T. Gober, of Atlanta, and Howell Brooke, of Canton, for plaintiff in error.

E. W. Coleman, of Canton, for defendants in error.

LUKE, J. Judgment affirmed.

(24 Ga. App. 284)

SHALE v. ROURKE, Judge. (No. 10875.)

(Court of Appeals of Georgia, Division No. 1.  
Oct. 14, 1919.)

(Syllabus by the Court.)

1. EXCEPTIONS, BILL OF §53(1)—PROCEDURE ON REFUSAL TO CERTIFY.

It is the duty of counsel for the plaintiff in error to present to the presiding judge for his certificate a true bill of exceptions, and it is his further duty, where the judge refuses to certify the bill of exceptions tendered him, but fails to give in writing his objections thereto, to request the judge to indorse upon the bill of exceptions his reasons for his refusal, and, if the judge fails to do so, then the matter should be brought to the attention of this court. *Coleman v. Johnson*, 45 Ga. 317; *Vason & Davis v. Gardner*, 70 Ga. 517.

2. EXCEPTIONS, BILL OF §53(5) — ORAL STATEMENT OF REASONS FOR REFUSAL OF JUDGE TO SIGN BILL.

Where the judge refuses to sign the bill of exceptions tendered him, and returns it to counsel for the plaintiff in error within 10 days, without giving in writing the reasons for his refusal, but where he orally states them to counsel, and he is not requested by counsel to put them in writing, and where, further, the judge, in conformity with the last provision of section 6158 of the Civil Code of 1910, orders that notice be given to the opposite party of the fact and time of tendering the exceptions, and where the notice is given and a hearing is held, at which the judge again orally states his reasons for his refusal to certify the bill of exceptions, to wit, that it contains inaccurate and erroneous statements of the evidence, which are specifically pointed out by the judge, and where counsel for the plaintiff in error makes no effort to correct the bill of exceptions, but insists upon it being certified as tendered, the judge will not be required to sign the bill of exceptions.

Application for mandamus by J. H. Shale, trustee, to compel John Rourke, Jr., Judge, to certify a bill of exceptions. Mandamus absolute denied.

F. A. Tuten and W. B. Stubbs, both of Savannah, for applicant.

BROYLES, C. J. Mandamus absolute denied.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 208)

STEVENS v. DEKLE INV. CO. (No. 10354.)

(Court of Appeals of Georgia, Division No. 1.  
Oct. 9, 1919.)

(Syllabus by the Court.)

BILLS AND NOTES §476(1)—FACTS PLEADED SUFFICIENT TO TAKE QUESTION OF CONSIDERATION TO JURY.

Dekle Investment Company sued Stevens upon promissory notes. Stevens answered, denying indebtedness and pleading as follows: "That on or about the 1st day of October, 1914, plaintiff, acting through its duly authorized agent and manager, J. R. Dekle, and defendant entered into a parol contract whereby plaintiff on its part agreed to furnish to defendant necessary bare living expenses of defendant during the life of the contract, and in consideration of such undertaking on the part of the plaintiff defendant agreed to render his services as real estate agent in the buying and selling of real estate for plaintiff, and whereby it was mutually agreed between the parties that whatever profits be made be divided equally between plaintiff and defendant, such contract to be terminated at any time at the option of either party, and in the event no profits were made the plaintiff agreed to stand the loss of said expenses so advanced as aforesaid, and the defendant agreed to stand the loss of his said services; that in pursuance of said contract defendant rendered to plaintiff his services in the buying and selling of real estate for the plaintiff from the date of the contract to the 27th day of April, 1915, at which time said contract was terminated by mutual consent of plaintiff and defendant, and during such time plaintiff advanced to defendant the sum of \$194.71 to cover the necessary bare living expenses of defendant during such time as contemplated by the parties in pursuance of said contract; that the said notes sued on were executed by the defendant to the plaintiff for the sole purpose of preserving a record of the amount advanced to the defendant by plaintiff to cover the necessary living expenses of defendant during the life of said contract, and that there was no consideration whatever moving from the plaintiff to the defendant for the execution of said notes by the defendant. During the life of said contract, defendant's bare living expenses did actually amount at least to the said sum of \$194.71; that during the life of said contract defendant did actually render to plaintiff his services as real estate agent of plaintiff in the buying and selling of real estate as in purview of said contract. Although defendant performed his part of said contract and all the services contemplated by the same, no profits were realized. By reason of the foregoing facts, said notes were executed without any consideration whatever, and are not obligations binding this defendant." The plaintiff demurred to the plea, upon the ground that it did not set forth a good defense to the suit, and that it sought to vary the terms of a written instrument, and to abrogate an unconditional contract in writing by alleging a contemporaneous parol contract. The court sustained the demurrer and struck the plea, and rendered judgment against the defendant.

We think the facts pleaded were sufficient to have permitted the defendant to submit to the court the question as to the consideration of the notes.

Error from City Court of Valdosta; J. G. Cranford, Judge.

Suit by the Dekle Investment Company against J. G. Stevens. Demurrer to plea sustained, and plea stricken, and judgment for plaintiff, and defendant brings error. Reversed.

Franklin & Langdale, of Valdosta, for plaintiff in error.

Dan R. Bruce, of Valdosta, for defendant in error.

LUKE, J. Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 235)

**SMITH v. SPENCER-DOWLER CO.**  
(No. 10499.)

(Court of Appeals of Georgia, Division No. 1.  
Oct. 9, 1919.)

*(Syllabus by the Court.)*

**INTOXICATING LIQUORS**  $\S$  256—**TITLE OF PURCHASER AT CONDEMNATION SALE OF STOLEN CAR CARRYING LIQUOR.**

The facts of this case show that an automobile was stolen in the city of Chattanooga, and was subsequently seized in the county of Cobb, and that intoxicating liquors were contained in it and being transferred by it. Condemnation proceedings were had against the car, and under such proceedings it was duly sold. The true owner of the car subsequently located it and instituted trover proceedings for its recovery. The evidence in the case established the ownership of the car, and it was conclusive that the true owner had lost it by theft, and had no knowledge that any one was illegally transporting liquor in it. A verdict was returned in his favor, the defendant's motion for new trial was overruled, and the movant excepted. The defendant contended that, notwithstanding the fact that the car was stolen and the owner had no knowledge of the illegal use to which the thief put it, the fact that the car was condemned and sold under the condemnation proceeding forever barred the owner from claiming the car. We do not agree with this contention. The thief obtained no title to the car, and the purchaser at the sale got no better title than the possessor had at the time of its seizure. *Lawless v. Orr*, 122 Ga. 276, 50 S. E. 85; *Campbell v. Hutcheson*, 23 Ga. App. 111, 97 S. E. 555. The court did not err in overruling the motion for a new trial.

Error from Superior Court, Newton County; C. W. Smith, Judge.

Trover by the Spencer-Dowler Company against G. T. Smith. Judgment for plaintiff, motion for new trial denied, and defendant brings error. Affirmed.

Rogers & Knox, of Covington, for plaintiff in error.

King & Johnson, of Covington, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 259)

**GROW v. SOLOMON.** (No. 10481.)

(Court of Appeals of Georgia, Division No. 1.  
Oct 10, 1919.)

*(Syllabus by the Court.)*

**LOGS AND LOGGING**  $\S$  3(1)—**DESCRIPTION IN DEED OR TIMBER LEASE TOO INDEFINITE TO IDENTIFY LAND.**

The original deed or timber lease, and which was the basis of an action for breach of warranty of title to standing timber, contained the following description of the timber: "All of the timber of every description except (oak and hickory) now standing or growing in or on the swamp and flat creek lands of Spring creek, where the same runs through 169 acres off of the south side of lots of land 149 one forty-nine, and one seventy-one (171) in the thirteenth district (13th) of Miller county, Georgia, except such timber as may be on thirty-one (31) acres of lots of land in the southeastern corner of said lot number 149, belonging to Mrs. Eliza Stanton. \* \* \* Also excepting that portion of lot 171 included under fence J. S. Bush." *Held*, the description is too indefinite and uncertain, even when aided by the extrinsic documentary evidence attached to the petition, to afford any means of identifying the exact body of timber which the maker of the deed intended to convey. The deed, therefore, did not pass title to any of the timber; and the suit should have been dismissed on the general demurrer interposed. See, in this connection, *Huntress v. Portwood*, 116 Ga. 351, 42 S. E. 513; *Crawford v. Verner*, 122 Ga. 814, 50 S. E. 958; *McSwain v. Ricketson*, 129 Ga. 176, 58 S. E. 655; *Youmans v. Moore*, 144 Ga. 375, 87 S. E. 273.

Error from Superior Court, Miller County; W. C. Worrill, Judge.

Action by S. H. Solomon against R. W. Grow. General demurrer to petition overruled, and defendant brings error. Reversed.

P. D. Rich and W. I. Geer, both of Colquitt, for plaintiff in error.

N. L. Stapleton, of Colquitt, for defendant in error.

BROYLES, C. J. Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 252)

**HARRIS v. COHUTTA BANKING CO.**  
(No. 10333.)(Court of Appeals of Georgia, Division No. 1.  
Oct. 10, 1919.)*(Syllabus by the Court.)***DIRECTION OF VERDICT.**

The case of Leonard v. Cohutta Banking Co., 21 Ga. App. 777, 95 S. E. 113, was based on a note given for stock in the Cosmopolitan Life Insurance Company. The same is true in this case. The issues raised by the pleas in the Leonard Case are largely the same as those in this case, though each has some plea not common to the other. As far as the issues in the two cases are the same, they are settled by the opinion in the Leonard Case, and there is nothing additional in the pleas in this case that would authorize us to render a different opinion, and we hold that the court did not err either in its rulings on the pleadings or in directing a verdict for the plaintiff.

Error from Superior Court, Murray County; Moses Wright, Judge.

Action by the Cohutta Banking Company against J. F. Harris. Judgment for plaintiff on a directed verdict, and defendant brings error. Affirmed.

A. W. Fite, of Cartersville, and Maddox, McCamy & Shumate, of Dalton, for plaintiff in error.

Little, Powell, Smith & Goldstein, of Atlanta, W. E. Mann and W. C. Martin, both of Dalton, and C. N. King, H. H. Anderson, and R. N. Steed, all of Chatsworth, for defendant in error.

**BLOODWORTH, J.** Judgment affirmed.

**BROYLES, C. J., and LUKE, J.,** concur.

(24 Ga. App. 265)

**D. R. WILDER MFG. CO. v. ELDER.**  
(No. 10630.)(Court of Appeals of Georgia, Division No. 1.  
Oct. 10, 1919.)*(Syllabus by the Court.)***FINDING OF JUDGE OF MUNICIPAL COURT OF ATLANTA—OVERRULING OF CERTIORARI.**

A trial by jury was waived, and this case was submitted to one of the judges of the municipal court of Atlanta, and he passed upon the case without the intervention of a jury. There is a sharp conflict in the evidence. The

judge who tried the case saw and heard the witnesses. The judge of the superior court overruled the petition for certiorari, thus approving the finding of the judge of the municipal court. We cannot say that the judge of the superior court erred in his rulings, and the judgment is affirmed.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action between the D. R. Wilder Manufacturing Company and J. T. Elder. Judgment for the latter in the municipal court of Atlanta on a trial without a jury, petition for certiorari overruled, and the former brings error. Affirmed.

Little, Powell, Smith & Goldstein, of Atlanta, for plaintiff in error.

George Westmoreland and Bell & Ellis, all of Atlanta, for defendant in error.

**BLOODWORTH, J.** Affirmed.

**BROYLES, C. J., and LUKE, J.,** concur.

(24 Ga. App. 274)

**BOWMAN v. STATE.** (No. 10541.)(Court of Appeals of Georgia, Division No. 1.  
Oct. 14, 1919.)*(Syllabus by the Court.)***MOTION FOR NEW TRIAL—VERDICT APPROVED BY TRIAL JUDGE.**

In the light of the qualifying notes of the trial judge, and when the entire evidence is considered, there is nothing in either of the two grounds of the amendment to the motion for a new trial which would authorize this court to set aside a verdict supported by the evidence and approved by the trial judge.

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Proceeding between the State and Everett (alias Evidge) Bowman. From a judgment on a verdict approved by the trial judge, Bowman brings error. Affirmed.

John A. Fort, of Americus, for plaintiff in error.

Jule Felton, Sol. Gen., of Montezuma, for the State.

**LUKE, J.** Judgment affirmed.

**BROYLES, C. J., and BLOODWORTH, J.,** concur.

(24 Ga. App. 207)

**WALKER v. RAWLS.** (No. 10304.)(Court of Appeals of Georgia, Division No. 1.  
Oct. 9, 1919.)*(Syllabus by the Court.)***OVERRULING OF CERTIORARI.**

The judge of the superior court did not err in overruling the certiorari and in affirming the judgment of the court below.

Error from Superior Court, Fulton County;  
J. T. Pendleton, Judge.

Action between C. R. Walker and H. M. Rawls. Judgment for the latter, certiorari overruled, and judgment of court below affirmed, and the former brings error. Affirmed.

Moore & Pomeroy and J. C. Savage, all of Atlanta, for plaintiff in error.

Horace Russell, of Atlanta, for defendant in error.

**BLOODWORTH, J.** Judgment affirmed.

**BROYLES, C. J., and LUKE, J.,** concur.

(24 Ga. App. 259)

**TATUM v. PADROSA.** (No. 10457.)(Court of Appeals of Georgia, Division No. 1.  
Oct. 10, 1919.)*(Syllabus by the Court.)***1. LANDLORD AND TENANT**  $\Leftrightarrow$ 300(2)—**TERMINATION OF TENANCY AT WILL BY PURCHASER FROM LESSOR.**

A contract creating the relation of landlord and tenant for a time longer than one year by parol agreement has the effect of creating only a tenancy at will. Civ. Code 1910, § 3693. In order to terminate a tenancy at will it is necessary that the landlord give to the tenant two months' notice. Civ. Code 1910, § 3709. A purchaser of realty from a landlord during the term of a tenant at will is entitled, upon notice as prescribed by law, to terminate the tenancy, and thereafter to dispossess the tenant. See Willis v. Harrell, 118 Ga. 906, 45 S. E. 794.

**2. APPEAL AND ERROR**  $\Leftrightarrow$ 1047(5)—**EVIDENCE**  $\Leftrightarrow$ 368(1)—**PRODUCTION OF PAPER IN POSSESSION OF WITNESS.**

Where it is shown that a paper which would afford evidence material to the issue is in court, in the possession of a witness, it is the duty of the judge to require its production instantaneously, unless it appear that the evidence sought is privileged. In this case the alleged error of the judge in directing that certain papers be produced was cured; for the record shows that, when the judge directed the production of the papers, counsel for the defendant, who had objected to their production, waived the objection by stating in open court: "I have no objection to showing them [referring to the papers]. We

have no secrets." See Rylee v. Bank of Stathan, 7 Ga. App. 489, 67 S. E. 383.

**3. LANDLORD AND TENANT**  $\Leftrightarrow$ 306—**SUMMARY EVICTION—COUNTER AFFIDAVIT—ISSUE.**

Upon the issue made by the filing of a counter affidavit to a summary proceeding to evict a tenant, the only question to be determined is tenancy or no tenancy, and the question as to the landlord's title is not involved. See Patrick v. Cobb, 122 Ga. 80, 49 S. E. 806.

**4. TRIAL**  $\Leftrightarrow$ 68(3)—**REFUSAL TO REOPEN CASE AFTER ARGUMENT.**

The court did not err in refusing to permit the plaintiff to reopen the case after both sides had closed and arguments had been made by both parties; especially was it not harmful to the defendant, the party excepting to the refusal.

**5. OVERRULING OF MOTION FOR NEW TRIAL.**

The charge of the court fully and fairly submitted the issue; the evidence authorized the verdict; and for no reason assigned did the court err in overruling the motion for a new trial.

Error from Superior Court, Glynn County;  
J. P. Highsmith, Judge.

Summary proceeding between K. V. Tatum and Benito Padrosa for eviction, with counter affidavit. Judgment for the latter, and the former brings error. Affirmed.

E. H. Williams, of Brunswick, for plaintiff in error.

Max Isaac, of Brunswick, for defendant in error.

**LUKE, J.** Judgment affirmed.

**BROYLES, C. J., and BLOODWORTH, J.,** concur.

(24 Ga. App. 287)

**LEMMONS v. STATE.** (No. 10654.)(Court of Appeals of Georgia, Division No. 1.  
Oct. 10, 1919.)*(Syllabus by the Court.)***SUFFICIENCY OF EVIDENCE—MOTION FOR NEW TRIAL.**

The verdict was amply authorized by the evidence, and none of the grounds of the amendment to the motion for a new trial shows cause why it should be set aside.

Error from Superior Court, Fulton County;  
John D. Humphries, Judge.

Proceeding between the State and Mabel Lemmons. From the judgment, and the overruling of her motion for a new trial, she brings error. Affirmed.

Harvey Hill and Jas. E. Garst, both of Atlanta, for plaintiff in error.

Jno. A. Boykin, Sol. Gen., and E. A. Stephens, both of Atlanta, for the State.

**BROYLES, C. J.** Judgment affirmed.

**LUKE and BLOODWORTH, JJ.,** concur.



(24 Ga. App. 297)

**JAMES v. SULLIVAN.** (No. 10417.)(Court of Appeals of Georgia, Division No. 2.  
Oct. 20, 1919.)*(Syllabus by the Court.)***COSTS \$260(4)—DAMAGES AWARDED ON APPEAL FOR DELAY.**

Upon the call of this case, there being no representation for the plaintiff in error, by brief or otherwise, and it being plainly apparent that the writ of error was prosecuted for delay only, the motion of the defendant in error that the record be opened, the judgment therein affirmed, and damages of 10 per cent. for delay be awarded him, is granted. Civ. Code 1910, § 6249.

Error from Superior Court, Douglas County; A. L. Bartlett, Judge.

Action between W. A. James and Henrietta Sullivan, guardian. Judgment for the latter, and the former brings error. Affirmed with damages.

J. R. Hutcheson and Astor Merritt, both of Douglasville, for defendant in error.

**STEPHENS, J.** Judgment affirmed with damages.

**JENKINS, P. J., and SMITH, J.,** concur.

(24 Ga. App. 251)

**COLLIER v. HOLLAND.** (No. 10328.)(Court of Appeals of Georgia, Division No. 1.  
Oct. 10, 1919.)*(Syllabus by the Court.)***NEW TRIAL \$70, 105—NEWLY DISCOVERED CUMULATIVE AND IMPEACHING EVIDENCE NOT GROUND FOR NEW TRIAL.**

In the order overruling the motion for new trial the judge said: "In my opinion no error of law was committed by the court in the trial of said case, and under the following decisions, to wit: *Hardin v. Stansel*, 13 Ga. App. 22, 78 S. E. 681; *Graves v. Hunnicutt*, 8 Ga. App. 99, 68 S. E. 558; *Doonan v. Ives & Krouse*, 73 Ga. 295(3); *Mousseau et al. v. Dorsett*, 80 Ga. 506, 5 S. E. 780; *Hill v. Wheeler*, 2 Ga. App. 349, 58 S. E. 502—the evidence authorized the verdict rendered. As to the newly discovered evidence of *Pleas. M. Todd* as set out in the amended motion for new trial, it is only cumulative in its nature, and movant contended in his testimony that the facts set out in the affidavit of *Todd* were correct. It could only be regarded as evidence corroborating movant and impeaching in its character, and under section 6086 of the Civil Code (of 1910) and authorities in connection therewith, does not authorize the granting of a new trial. Under the evidence in this case the jury was authorized to reach the conclusion that the plaintiff, J. H. Holland, was the procuring cause that brought

about the sale, and under the principle that a laborer is worthy of his hire, especially where movant at the time the sale was being closed said to the plaintiff, 'I will treat you right about it'; therefore I overrule the motion for new trial."

So far as appears from the motion for new trial, we agree with the trial judge that "no error of law was committed by the court in the trial of said case." Not one of the several grounds of the motion shows any cause which requires the grant of a new trial.

Error from Superior Court, Morgan County; J. B. Park, Judge.

Action by T. H. Holland, administrator, against W. A. Collier. Judgment for plaintiff, motion for new trial denied, and defendant brings error. Affirmed.

Albert G. Foster, of Madison, for plaintiff in error.

Williford & Lambert, of Madison, for defendant in error.

**BLOODWORTH, J.** Judgment affirmed.

**BROYLES, C. J., and LUKE, J.,** concur.

(24 Ga. App. 290)

**KLEIN & SON v. VANDIVER.** (No. 10347.)(Court of Appeals of Georgia, Division No. 2.  
Oct. 20, 1919.)*(Syllabus by the Court.)***SALES \$479(6, 7)—LOSS OF PROPERTY CONDITIONALLY SOLD.**

This is an action of bail trover filed in the municipal court of Atlanta for the recovery of a certain diamond stud. The case was tried before the chief judge of that court without the intervention of a jury. The evidence was brief, that of the plaintiff being as follows: "My name is Jno. D. Allen. I work in the office of Douglass & Douglass. I called upon Mr. Vandiver and demanded the return of the property described in the petition. I do not know whether Mr. Vandiver had the property or not." The plaintiff then introduced the contract and notes, and rested; whereupon the defendant testified: "My name is H. F. Vandiver. I am the defendant in this case. I purchased the property described in the petition. At the time this suit was brought I did not have the stud. I lost the same while in bathing. I have not converted the stone. Plaintiff was advised of these facts prior to the institution of this suit." This was the entire evidence as submitted before the trial judge, who thereupon rendered judgment in favor of the plaintiff. A motion for a new trial was then made, and, upon the same being overruled, the case was taken to the superior court of Fulton county by writ of certiorari. The judge of the superior court decided in favor of the original defendant by sustaining the certiorari and ordering a new trial. Plaintiff excepts to this judgment of the superior court, and contends

that the trial judge did not err in finding in his favor; that the evidence showed that the diamond stud in controversy was sold upon a contract reserving title, regularly executed; and that, even if it were true, as contended by the defendant, the vendee, that he had lost the diamond stud while in bathing, the trial judge was nevertheless authorized to find that this did not relieve him from liability in an action of trover. Section 4123 of the Civil Code 1910 reads: "Where property is sold and delivered, but title is not to pass until payment in full of the purchase money, and the property is lost, damaged, or destroyed without the vendee's fault, he is entitled to a rescission of the contract or to an abatement in the price, unless it is otherwise agreed in the contract of sale." Under the provisions of the Code just quoted, the contention of the defendant would be sound only in the event that he showed that the loss of the property was caused without fault on his part, and the burden of establishing this was upon him. Whether or not he did so was a question of fact under the undisputed evidence, to be determined by the trial judge sitting as both court and jury. His finding that the defendant had failed to carry this burden is, in our opinion, not only abundantly authorized, but demanded by the evidence. Consequently the trial judge did not err in refusing the motion for a new trial, and the judgment of the superior court sustaining the certiorari and ordering a new trial is therefore reversed.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action of bail trover by Klein & Son against H. F. Vandiver. Judgment for plaintiff in the municipal court of Atlanta, motion for new trial denied, certiorari sustained and new trial ordered, and plaintiff brings error. Reversed.

Douglas & Douglas, of Atlanta, for plaintiff in error.

Moore & Pomeroy and J. C. Savage, all of Atlanta, for defendant in error.

JENKINS, P. J. Reversed.

STEPHENS and SMITH, JJ., concur.

(24 Ga. App. 266)

DURHAM v. STATE. (No. 10642.)

(Court of Appeals of Georgia, Division No. 1.  
Oct. 10, 1919.)

(Syllabus by the Court.)

CRIMINAL LAW §1160—REVIEW OF RULING ON MOTION FOR NEW TRIAL.

The motion for a new trial in this case contains the usual general grounds only; there is some evidence to support the verdict, which has the approval of the judge who tried the case, and this court will not interfere.

Error from City Court of Floyd County; W. J. Nunnally, Judge.

Proceeding between the State and E. B. Durham, and, from the judgment and the overruling of his motion for a new trial, Durham brings error. Affirmed.

Harris & Harris and W. B. Mebane, all of Rome, for plaintiff in error.

J. F. Kelly, Sol., of Rome, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 274)

BROOKS v. STATE. (No. 10449.)

(Court of Appeals of Georgia, Division No. 1.  
Oct. 14, 1919.)

(Syllabus by the Court.)

INSTRUCTIONS ON DECREE OF HOMICIDE—SUFFICIENCY OF EVIDENCE.

The court did not err in charging the jury on voluntary manslaughter, or in the failure to charge on involuntary manslaughter in the commission of a lawful act without due caution and circumspection; there is evidence to support the verdict, and the judgment is affirmed.

Error from Superior Court, Thomas County; W. E. Thomas, Judge.

George Brooks was convicted of an offense, and he brings error. Affirmed.

Eldon L. Joiner, of Thomasville, for plaintiff in error.

Clifford E. Hay, Sol. Gen., of Thomasville, for the State.

LUKE, J. Affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 271)

ODUM v. STATE. (No. 10331.)

(Court of Appeals of Georgia, Division No. 1.  
Oct. 14, 1919.)

(Syllabus by the Court.)

1. CRIMINAL LAW §938(1), 941(1), 942(1)—NEWLY DISCOVERED IMPEACHING EVIDENCE.

(a) "Newly discovered evidence, which is merely cumulative or impeaching in its character, will not constitute a good ground of a motion for a new trial."

(b) "Though the witness sought to be impeached by newly discovered evidence was the only witness against the prisoner upon a vital point in the case, if the sole effect of the evidence would be to impeach the witness, a new trial will not be granted."

(c) "Whether an extraordinary motion, based upon the ground of newly discovered testimony, should be granted or refused rests largely in the sound discretion of the court."

## 2. CRIMINAL LAW §938(1)—NEWLY DISCOVERED IMPEACHING EVIDENCE.

The only effect of the alleged newly discovered evidence in this case would be to impeach the chief witness for the state and show that she was not a virtuous woman. This was a matter in issue when the case was tried by the jury. The alleged newly discovered evidence is both impeaching and cumulative, and under the above rulings this court cannot say that the trial judge abused his discretion in overruling the extraordinary motion for a new trial.

Error from Superior Court, Bacon County; J. I. Summerall, Judge.

Will Odum was convicted of an offense, his extraordinary motion for a new trial was overruled, and he brings error. Affirmed. See, also, 94 S. E. 257.

J. Mark Wilcox, of Hazlehurst, for plaintiff in error.

M. D. Dickerson, Sol. Gen., of Douglas, and A. B. Spence, Sol. Gen., of Waycross, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 269)

DARBY v. STATE. (No. 10666.)

(Court of Appeals of Georgia, Division No. 1. Oct. 10, 1919.)

*(Syllabus by the Court.)*

## 1. CRIMINAL LAW §1156(3) — EXTRAORDINARY MOTION FOR NEW TRIAL FOR NEWLY DISCOVERED EVIDENCE.

The grant or refusal of an extraordinary motion for a new trial, based upon the ground of newly discovered testimony, rests largely in the sound discretion of the trial judge; and this court will not interfere with the exercise of that discretion, where the newly discovered evidence is largely impeaching and cumulative in character, and where it does not appear that such an extraordinary state of facts was shown by the affidavits submitted upon the hearing of the extraordinary motion as would probably produce a different result if a new trial should be granted. *Rogers v. State*, 129 Ga. 589, 59 S. E. 238; *Thomas v. State*, 19 Ga. App. 242, 91 S. E. 287.

## 2. OVERRULING OF EXTRAORDINARY MOTION FOR NEW TRIAL—DISCRETION.

It does not appear from the record that the trial judge, in overruling the extraordinary motion for a new trial, abused, or failed to exercise, the discretion vested in him.

Error from Superior Court, Toombs County; R. N. Hardeman, Judge.

Proceeding between the State and W. L. Darby. From the judgment, and the denial of his extraordinary motion for a new trial, Darby brings error. Affirmed.

See, also, 96 S. E. 707.

Chas. W. Sparks, of Vidalia, G. W. Lankford and Giles & Sharp, all of Lyons, and Hines, Hardwick & Jordan, of Atlanta, for plaintiff in error.

Walter F. Grey, Sol. Gen., of Sylvania, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 276)

STEELE v. STATE. (No. 10670.)

(Court of Appeals of Georgia, Division No. 1. Oct. 14, 1919.)

*(Syllabus by the Court.)*

## 1. DISTURBANCE OF PUBLIC ASSEMBLAGE §1 — CONGREGATION ASSEMBLED FOR WORSHIP.

Section 412 of the Penal Code penalizes any disturbance of a congregation of persons lawfully assembled for divine worship, either during the service or while they are dispersing after the conclusion of the service, and until all of the congregation have left the church building and the church grounds. *Brown v. State*, 14 Ga. App. 21, 80 S. E. 28; *Minter v. State*, 104 Ga. 743, 30 S. E. 989.

## 2. DISTURBANCE OF RELIGIOUS SERVICES.

In the instant case the evidence authorized the jury to find that the congregation of persons disturbed by the defendant was lawfully assembled for divine service, and that the disturbance occurred before all of the congregation had left the church grounds.

Error from City Court of Sparta; R. W. Moore, Judge.

Jerry Steele was convicted of disturbing a congregation lawfully assembled for divine service, and he brings error. Affirmed.

John C. Lewis and Wiley Lewis, all of Sparta, for plaintiff in error.

R. L. Merritt, Solicitor, of Sparta, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

§ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(24 Ga. App. 248)

**ATLANTIC COAST LINE R. CO. v. STOVALL-PACE CO. (No. 10317.)**(Court of Appeals of Georgia, Division No. 1.  
Oct. 10, 1919.)*(Syllabus by the Court.)***1. DISMISSAL OF BILL OF EXCEPTIONS.**

The motion to dismiss the bill of exceptions is overruled.

**2. CARRIERS §184—LIABILITY OF TERMINAL CARRIER FOR LOSS OF GOODS.**

Stovall-Pace Company brought suit against the Atlantic Coast Line Railroad Company, the last of certain connecting carriers, for the loss of a certain box of goods shipped from East Dedham, Mass., to Augusta, Ga., alleging that "the defendant received the goods described in paragraph 3 of plaintiff's complaint, from its connecting carrier, the said goods being in good order, but that said defendant has never delivered said goods to petitioner." A demurrer to the petition alleged in part that the petition should be dismissed "because under the Interstate Commerce Act the original carrier is alone responsible." The plaintiff did not expressly declare upon the state or federal statute, but merely pleaded the facts relied on to show liability against the last connecting carrier. The allegations were sufficient to show that the loss was caused by negligence of the defendant. "The wrong here complained of was committed by the defendant, not by the initial company, and the plaintiff is not excluded from suing the wrongdoer." The demurrer was properly overruled. *Southern Railway Co. v. Morris*, 147 Ga. 729, 95 S. E. 284 (1); *Western & Atlantic Railroad Co. v. White Provision Co.*, 142 Ga. 246, 82 S. E. 644 (2); *Cincinnati, etc., Ry. Co. v. Quincey & Rogers*, 19 Ga. App. 167, 91 S. E. 220; *Atlantic Coast Line R. Co. v. Thomasville Live Stock Co.*, 13 Ga. App. 102, 78 S. E. 1019 (1).

**3. MOTION FOR NEW TRIAL.**

The fourth ground of the amendment to the motion for new trial is but an amplification of the general grounds.

**4. APPEAL AND ERROR §302(1, 3)—AMENDMENT TO MOTION FOR NEW TRIAL INSUFFICIENT ON REVIEW OF OBJECTION TO EVIDENCE.**

The amendment to the motion for new trial, filed on December 21, 1918, cannot be considered by this court for two reasons:

(a) "A ground of a motion for new trial based upon the admission of evidence should state what objection was made thereto when it was offered at the trial, and should affirmatively show that the objection was then urged; otherwise no question is raised for determination." *Hixon v. Myers*, 144 Ga. 408, 87 S. E. 475 (2); *Whiddon v. Salter*, 144 Ga. 77, 86 S. E. 243 (2).

(b) "Grounds of a motion for a new trial which are incomplete, and cannot be understood without resorting to an examination of the brief of evidence, fail to present any question for decision. *Head v. State*, 144 Ga. 383, 87 S. E. 273; *Sims v. Sims*, 131 Ga. 262, 62 S. E. 192." *Smiley v. Smiley*, 144 Ga. 546, 87 S.

E. 668; *Daniel v. Schwarzweiss*, 144 Ga. 81, 86 S. E. 239.

**5. CARRIERS §185(1)—LOSS OF GOODS—EVIDENCE OF VALUE—VERDICT.**

Defendant urges that a new trial should be granted on the general grounds because no value of the lost box of goods was shown. An examination of the evidence reveals the fact that this contention is true, and for this reason the verdict is without evidence to support it, and the judgment must be reversed.

Error from City Court of Richmond County; J. C. C. Black, Jr., Judge.

Suit by the Stovall-Pace Company against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

W. K. Miller, of Augusta, for plaintiff in error.

John J. Jones, of Augusta, for defendant in error.

BLOODWORTH, J. Reversed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 252)

**THOMAS v. HINES, Director General.**  
(No. 10419.)(Court of Appeals of Georgia, Division No. 1.  
Oct. 10, 1919.)*(Syllabus by the Court.)***MASTER AND SERVANT §112(1) — PETITION FOR INJURIES TO SERVANT NOT STATING CAUSE OF ACTION.**

Judge Meldrim, in his order sustaining the demurrer to the petition in this case, says:

"In the view which I take of this case I do not deem it necessary to decide the issues raised by the demurrer, except the ground that the petition fails to set out a cause of action. It appears that the defendant railway had repair yards in which there were tracks known as 2 and 3. On track No. 2 there was a bad-order car, from which it was necessary to remove a pair of wheels and 'carry them to the wheel press, get a new pair from the wheel press, and carry them back to the car to be placed under the car.' The gang of men of which plaintiff was a member having removed the old wheels and taken them to the wheel press, and the new wheels having been moved down to No. 3 track to a place nearly opposite the out of order car, it became necessary to move the wheels from No. 3 track onto No. 2 track, and then to be rolled under the car. As plaintiff stepped inside of track No. 2 he stepped on a broken bolt. This bolt was iron, round, three-fourths of an inch in diameter and from 8 to 12 inches long. It rolled, caused his foot to give way, he fell, and the wheel ran on his foot, crushing it. The place where the accident occurred was 'in the freight repair

track department' in the 'yards' of the defendant.

"1. The place where the accident occurred was in a railway yard, where repair work was going on, and when [where?] the work in its progress necessarily changes the character for safety of the place. The rule of a reasonably safe place to work does not therefore apply.

"2. The plaintiff had just before the accident passed through that part of the yard and over or very near the draft bolt, when he removed the wheels from under the car on No. 2 track and took them to the wheel press. The bolt was inside of No. 2 track. The out of order car was on that track. The old wheels were taken out of that car on No. 2 track. The new wheels were put in that car on the same track. The bolt was there when plaintiff removed the old wheels, or it got there in some way in the brief interval of removing one pair of wheels and putting in the new pair. This is highly improbable. The clear conclusion is that this broken bolt was in the repair yard, between the rails of No. 2 track, when plaintiff removed the old wheels, and that he did not notice it. That he had equal opportunity with the master to have seen it goes without saying. He simply stepped back over the rail of No. 2 track, on the bolt, without looking, and the wheel rolled on his foot. It is a physical impossibility to keep a repair yard, where work is going on, free from bolts, nuts, and the like. If the plaintiff did not see the bolt when he went by it, it is not reasonable to suppose that the master would have seen it. To have inspected a repair yard, and to have removed from between repair tracks a broken bolt, would have required the most extraordinary care, and this is not required of the master. While it is the duty of the master to inspect, and while this is a continuing duty, yet nevertheless there must be a reasonable time for inspection and time to remedy an evil after its discovery. There is not the slightest suggestion as to how the bolt got there, or how long it had been there.

"Plaintiff relied on the case of *Fenelon v. Railway*, 143 Ga. 26 [84 S. E. 57]. The report of the case is meager, but it does appear that in that case the bolt had been allowed to remain partly on a rail, in violation of a rule of the company. In the instant case there is no averment as to the violation of a rule. In the *Fenelon* Case it appears that the accident was at night, and it does not appear that *Fenelon* had equal opportunity with the master to have known of the defect. In the instant case the plaintiff had equal opportunity with the master of seeing the bolt. Plaintiff also relies on *Southern Ry. Co. v. Puckett*, 16 Ga. App. 552 [85 S. E. 809]. By reference to page 554 of that case [(16 Ga. App.) to page 811 of 85 S. E.] it will be seen that certain rules were introduced, and it was because of the violation of these rules that the defendant was held liable. A reference to the *Puckett* Case shows that there is no real similarity in the facts of that case and the instant case. The other two cases cited by counsel for plaintiff are 244 U. S. 571 [37 Sup. Ct. 703, 61 L. Ed.

1321, Ann. Cas. 1918B, 69], which is the *Puckett* Case decided in 16 Ga. App. 552, supra, and affirmed, and the case of *Railroad v. Thompson*, 236 Fed. 1 [149 C. C. A. 211]. In the latter case it appears that the plaintiff was injured by stepping on a piece of slag the size of a coconut. The rule of the company 'required that the yard should be kept clear of such slag.' The case is essentially different from the one at bar. In my opinion, no cause of action is shown, and the general demurrer is sustained."

Without committing ourselves to all that the careful and capable judge has written in the above order, we are clearly convinced that his conclusion is correct.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Action by William Thomas against W. D. Hines, Director General. Demurrer to petition sustained, and plaintiff brings error. Affirmed.

Oliver & Oliver, of Savannah, for plaintiff in error.

Lawton & Cunningham, of Savannah, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 277)

CARSON et al. v. AYERS. (No. 10425.)

(Court of Appeals of Georgia, Division No. 1. Oct. 9, 1919.)

(Syllabus by the Court.)

APPEAL AND ERROR  $\S$ 977(4) — REVIEW OF GRANT OF FIRST NEW TRIAL.

This is the first grant of a new trial, and the verdict not being demanded by the evidence under the provisions of section 6204 of the Civil Code of 1910, and the unbroken precedent of the Supreme Court and of this court, the judgment granting a new trial cannot be disturbed.

Error from Superior Court, Franklin County; W. L. Hodges, Judge.

Action between J. L. Carson, Jr., and others, trustees, and Rau Ayers. Verdict and judgment for the former, new trial granted, and the former bring error. Affirmed.

W. A. Stevenson, of Commerce, for plaintiffs in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

$\S$ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(24 Ga. App. 285)

**JACKSON v. CHAMBERS.** (No. 10288.)(Court of Appeals of Georgia, Division No. 2.  
Oct. 20, 1919.)*(Syllabus by the Court.)***TORTS**  $\Rightarrow$  26(1)—PETITION SHOWING TORT NOT DEMURRABLE.

The petition in this case plainly set out an action for damages sounding in tort, and the recital therein of a contract may be treated merely as showing the relationship of the parties. The court erred in sustaining the demurrer interposed and in dismissing the petition. *Payne v. Watters*, 9 Ga. App. 265, 70 S. E. 1114.

Error from City Court of Carrollton; James Beall, Judge.

Action by Wilburn Jackson against G. W. Chambers. Demurrer to petition sustained, and petition dismissed, and plaintiff brings error. Reversed.

Emmett Smith and Buford Boykin, both of Carrollton, for plaintiff in error.

Leon Hood and H. C. Strickland, both of Carrollton, for defendant in error.

STEPHENS, J. Judgment reversed.

JENKINS, P. J., and SMITH, J., concur.

(24 Ga. App. 205)

**GUARANTY MUTUAL LIFE & HEALTH INS. CO. v. OLIVER.** (No. 10324.)(Court of Appeals of Georgia, Division No. 1.  
Oct. 9, 1919.)*(Syllabus by the Court.)***AFFIRMANCE OF JUDGMENT.**

We think the judgment of the judge of the superior court is correct, and the same is affirmed.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Action between the Guaranty Mutual Life & Health Insurance Company and Sam Oliver. Judgment for the latter, and the former brings error. Affirmed.

F. B. Pettie and J. Gordon Dingle, both of Savannah, for plaintiff in error.

Frederick A. Tuten and W. B. Stubbs, both of Savannah, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 234)

**ALLGOOD v. MONROE OIL & FERTILIZER CO.** (No. 10476.)(Court of Appeals of Georgia, Division No. 1.  
Oct. 9, 1919.)*(Syllabus by the Court.)***1. MASTER AND SERVANT**  $\Rightarrow$  238(3)—EVIDENCE SUSTAINING DEFENSE OF CONTRIBUTORY NEGLIGENCE OF SERVANT.

The evidence in this case discloses that the plaintiff undertook to put a belt on a fast revolving pulley, and in so doing was injured. The evidence also discloses that there was a safe way to put the belt on the pulley, and the safe way was known to the plaintiff. The evidence is without contradiction that the plaintiff had a choice of two ways of putting the belt on the pulley, one a dangerous way and the other a safe way. The plaintiff chose the dangerous way. The plaintiff having selected the dangerous way, he cannot recover of the employer for his injuries thus sustained, although his conduct in selecting that way may not have amounted to actual rashness. See *Belk v. Lee Roy-Myers Co.*, 17 Ga. App. 684, 87 S. E. 1089, and cases cited.

**2. MASTER AND SERVANT**  $\Rightarrow$  289(1)—EVIDENCE INSUFFICIENT TO MAKE OUT PRIMA FACIE CASE FOR INJURED SERVANT.

The evidence fails to make out a prima facie case. The plaintiff had months of experience around the machinery where he was injured, and his injury was due to his own negligence, not contributed to in any way by the defendant. *Commercial Guano Co. v. Neather*, 114 Ga. 416, 40 S. E. 299; *Crown Cotton Mills v. McNally*, 123 Ga. 35, 51 S. E. 13; *Cawood v. Chattahoochee Lumber Co.*, 126 Ga. 159, 54 S. E. 944. For no reason assigned was it error for the court to direct a verdict for the defendant.

Error from Superior Court, Walton County; Andrew J. Cobb, Judge.

Action by J. G. Allgood against the Monroe Oil & Fertilizer Company. Judgment for defendant on a directed verdict, and plaintiff brings error. Affirmed.

A. H. Davis, of Atlanta, and W. O. Dean, of Monroe, for plaintiff in error.

Robt. L. Cox and Walker & Roberts, all of Monroe, and Robt. P. Jones, of Atlanta, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(125 Va. 708)

**ELY v. GRAY.**(Supreme Court of Appeals of Virginia.  
Sept. 17, 1919.)**1. APPEAL AND ERROR ⇨1039(17)—FAILURE TO VERIFY PLEA NOT GROUND FOR REVERSAL.**

That special pleas which were unverified were filed by defendant is no ground for reversal.

**2. APPEAL AND ERROR ⇨1039(5)—FILING OF IMMATERIAL PLEAS HARMLESS ERROR.**

In an action on a note, where defendant pleaded *nil debet*, *non est factum*, and two additional special pleas, setting up that plaintiff had fraudulently induced the maker to sign and seal a blank sheet of paper, the filing of such pleas was not prejudicial, though no evidence was introduced, where the whole defense was that the note was a forgery.

**3. PLEADING ⇨192(1)—DEFECTIVE BILL OF PARTICULARS NOT GROUND OF DEMURRER.**

A bill of particulars or statement of grounds of defense being no part of the pleadings, defects therein cannot be reached by demurrer, or by objections equivalent to a demurrer.

**4. PLEADING ⇨324—FILING OF STATEMENT OF GROUNDS OF DEFENSE.**

In an action on a note, where defendant pleaded *nil debet* and *non est factum*, and plaintiff moved for a bill of particulars, the filing of a statement of grounds of defense, which set up that the note was a forgery and was executed by plaintiff to carry out a general scheme of fraud, is no ground for complaint.

**5. EVIDENCE ⇨138—OF OTHER TRANSACTIONS PART OF GENERAL SCHEME ADMISSIBLE.**

In an action on a note, where defendant claimed that it was a forgery, and had been forged by plaintiff in pursuance of a general scheme to defraud, in pursuance of which he forged other notes, testimony that plaintiff told the witness other persons were indebted to him, when they were not, etc., is admissible in support of defendant's general claim that plaintiff was forging notes, for there is an inference that, if persons were indebted to plaintiff, he would hold their notes.

**6. EVIDENCE ⇨138—LATITUDE TO SHOW GENERAL SCHEME TO DEFRAUD.**

In an action on note, where defendant asserted that it was a forgery, and claimed that it was forged by defendant in pursuance of general scheme of fraud, great latitude of proof is allowed, and evidence that defendant had forged other notes is admissible to establish his general scheme.

**7. EVIDENCE ⇨117—ADMISSIBLE, THOUGH REMOTE, IN CONNECTION WITH OTHER EVIDENCE.**

In action on a note, where defendant asserted that it was a forgery, and that plaintiff had forged it in pursuance of a general scheme of fraud, testimony that plaintiff claimed to have notes in various amounts against two, who denied any such were ever in existence, though relating to plaintiff's assertions some years prior to the date of note sued on, is not ob-

jectionable on the ground of remoteness, where there was other evidence tending to show at more recent dates plaintiff still claimed to have such notes.

**8. APPEAL AND ERROR ⇨1050(1)—ADMISSION OF IMMATERIAL EVIDENCE HARMLESS ERROR.**

In an action on a note, where defendant claimed it was a forgery and asserted that plaintiff was guilty of a general scheme to defraud, the admission of testimony that plaintiff showed the witness another note signed as surety by defendant's intestate, the alleged maker, without any showing to impeach genuineness of such instrument, *held* harmless.

**9. WITNESSES ⇨177—COMPETENCY AS TO TRANSACTIONS WITH PERSONS SINCE DECEASED.**

In an action against administratrix on a note claimed to have been executed by her intestate, where she asserted that it was a forgery, and had been prepared by plaintiff in pursuance of a general scheme to defraud, and offered evidence to show that plaintiff claimed to hold notes against two persons, when in fact he did not, *held* that, under Code, § 3346, subd. 2, plaintiff was not a competent witness to deny such evidence.

**10. APPEAL AND ERROR ⇨1002—VERDICT ON CONFLICTING EVIDENCE CONCLUSIVE.**

A verdict on conflicting evidence is conclusive on appeal.

Error to Circuit Court, Lee County.

Action by T. P. Ely against one Gray, the administratrix of G. C. Duff, deceased. There was a judgment for defendant, and plaintiff brings error. Affirmed.

J. C. Noel, of Pennington Gap, for plaintiff in error.

Davidson & Robinett and Pennington & Cridlin, all of Jonesville, for defendant in error.

**KELLY, J.** This is an action of debt, brought by T. P. Ely against G. C. Duff's administratrix on a negotiable promissory note under seal for \$1,055, bearing the signature of Duff and payable to the order of Ely. The defense relied upon was that the signature to the note, the body of which was wholly in the handwriting of Ely, was a forgery. There was a verdict and judgment below in favor of the defendant.

There are 10 assignments of error, some of which are practical duplications of others. In the petition for the writ of error, which constitutes the only brief furnished by the plaintiff in error, no authorities are cited by the learned counsel in support of any of the propositions advanced.

1. The record shows that the defendant pleaded *nil debet*, *non est factum*, and two additional special pleas in writing, and error is assigned to the action of the trial court

in permitting these two special pleas to be filed.

Special plea No. 1 was to the effect:

"That the said plaintiff applied to the said G. C. Duff in his lifetime, and requested him to become surety for said plaintiff on a note to be executed by the said plaintiff as principal and the said G. C. Duff as surety; that the said plaintiff represented to the said G. C. Duff that he did not know from whom he could secure the money, and induced the said G. C. Duff to sign his name on a blank piece of paper on which was written two seals, one above the other; the said G. C. Duff signed on the line in front of the last seal, the said plaintiff representing to the said G. C. Duff that he would sign his name in front of the first of the said seals, and when he found a person who would loan him the money that he, the said Ely, would then write out the note for such amount as was secured and payable to the person from whom he obtained the same; and the said defendant says that the said plaintiff wickedly, and with intent to cheat and defraud the said G. C. Duff, and in a secret place away from the said G. C. Duff, wrote out the said supposed note sued over the signature of said G. C. Duff; and the said defendant further says that the said supposed instrument sued on was without consideration, and is void for lack of consideration, and on account of the fraud perpetrated by the said plaintiff aforesaid."

Special plea No. 2 averred:

"The plaintiff, with a view to avoid the payment of taxes, failed and refused to make out and deliver a list and statement as provided by the statutes and laws of Virginia to the commissioner of the revenue, whereby the supposed obligation sued on might be legally and properly taxed, in the manner provided by the law."

No evidence whatever was introduced to support the averments contained in either of the special pleas, and therefore, if the filing of the same constituted reversible error, it was only because of their presence in the record.

The bill of exceptions does not disclose the grounds of objections to these pleas, but the objections as presented to us are that the pleas were not sworn to, that they represented no issue that could not have been proved under the general issue, and that they tended to confuse and prejudice the jury.

[1, 2] The fact that there was no verification of the pleas is not in itself a ground of reversal (Grayson v. Buchanan, 88 Va. 251, 257, 13 S. E. 457), and we have no difficulty in holding that there is no other ground upon which their admission can be said to have been prejudicial to the plaintiff. No evidence thereunder having been offered, the only possible reason upon which to base a complaint against them is that they improperly injected into the case damaging and unsupported charges against the plaintiff. If it be true, as the objection concedes, that the

matters set up were provable under the general issue, then, the objection carries its own refutation. *Sutherland v. Wampler*, 119 Va. 800, 802, 89 S. E. 875. Whether this concession is warranted or not, the fact is that the real defense and the evidence introduced to sustain it, while not in accord with either of the special pleas, imputed to the plaintiff a straight-out forgery of the instrument sued on, thus involving him in a charge implying certainly as much moral turpitude as the special averments complained of. When pleas are improperly admitted, but no evidence offered in support thereof, the error will not be ground of reversal, if it appears, as it does here, that the plaintiff could not have been injured thereby. *Bank v. Kimberland*, 16 W. Va. 555, 557; *Amos v. Stockert*, 47 W. Va. 109, 84 S. E. 821, 826; *Tower v. Whip*, 53 W. Va. 158, 44 S. E. 179, 181, 63 L. R. A. 937. The opinion of this court in *Hopkins v. Richardson*, 9 Grat. (50 Va.) 485, in so far as it conflicts with the conclusion here announced, does not commend itself to us as sound, is out of harmony with the doctrine of harmless error prevailing in this jurisdiction, and is disapproved.

[3, 4] 2. It is next insisted that the court erred in permitting the defendant to file the following statement of her grounds of defense:

"That the plaintiff had forged the note or instrument sued upon; that he, in an attempt to carry out a general scheme of fraud, had not only forged the note sued upon, but that he had forged other notes on other parties, to wit, notes on Vass Banner, a note or notes on J. F. Witt, another note on John B. Pennington, with G. C. Duff as surety thereon, for \$500, and that he had forged the name of G. C. Duff as surety on a note which plaintiff held against Wade Ladd and Bertha Ladd."

This statement was tendered and allowed to be filed in response to the plaintiff's motion and the court's consequent order requiring the defendant to file a bill of particulars showing the grounds of her defense. The record does not disclose the reasons assigned by the plaintiff in the lower court for his objections to this statement, but, as urged here, they are:

"That there was no proper plea upon which to base such a bill of particulars, and because the same could only tend to confuse and prejudice the jury."

A bill of particulars, or a statement of the grounds of the defense, being no part of the pleadings, defects therein cannot be reached by demurrer, or, as is true here, by objections equivalent to a demurrer. *Geo. Campbell Co. v. Geo. Angus Co.*, 91 Va. 438, 22 S. E. 167; *Columbia Accident Association v. Rockey*, 93 Va. 678, 25 S. E. 1009; *King v. N. & W. R. Co.*, 99 Va. 625, 39 S. E. 701. It is, of course, conceivable that a bill of particulars containing improper allegations might



be so exploited before a jury as to constitute reversible error, but nothing of that character occurred in this case.

Furthermore, not only was the scope of the defendant's pleadings broad enough to warrant the introduction of evidence in proof of the facts set up in the grounds of the defense, but some such evidence was in fact introduced and was properly admitted, as appears from what is said in the course of this opinion concerning the other assignments of error.

[5] 3. There were a number of exceptions to the rulings of the trial court in the admission of testimony, the disposition of which in this court will require a somewhat detailed recital of parts of the evidence.

The defendant introduced as a witness Mrs. Sallie Wygal, who testified that in the summer or early fall of the year 1915 the plaintiff stated to her that Vass Banner and J. F. Witt owed him some money; that she did not know that he said he had notes against these parties; that as best she could remember he said Witt owed him \$1,000; that she told him she wanted to borrow some money, and he said, if he could collect it, he would lend it to her; that he claimed to be getting 10 per cent. interest from Witt, but would charge her 6 per cent.

J. F. Witt was introduced, and testified that he never owed Ely \$1,000, or any other sum; that he had been owing Ely's brother \$1,500 for three or four years, which he had repaid in three installments, the last one being paid shortly before the trial; that so far as he could remember he had never borrowed any money from, or executed any notes to, the plaintiff.

J. F. Flanary testified that in the summer of 1913 the plaintiff showed him three notes, one for \$285, one for \$300, and one for an amount which he did not remember, all payable to the plaintiff, and bearing the signature of Vass Banner.

There was further testimony on behalf of the defendant as follows: (1) By the witness A. P. Skidmore, that the plaintiff told him that he had a note on Vass Banner for \$1,500, and was likely to become the owner of the Jeans farm, owned by Banner, adjoining that of the plaintiff; (2) by the witness John Collier, that the plaintiff, while trying to borrow some money from Collier, had told him that he had a note against Vass Banner for \$1,500; (3) by the witness Wright Collier, that Ely, on an occasion when he was renewing a note which he owed to Wright Collier, told him that Banner owed him \$1,100; (4) by the witness Harrison Phipps, that the plaintiff had told Phipps that Banner was indebted to him, and he was going to become the owner of the Jeans place, adjoining him; (5) by the witness Wm. Phipps, that Ely told him that Banner owed him \$1,500, adding, "I have got to call on

him at once; if he don't pay me, I am going to take possession of the Jeans farm"; (6) by the witness Vass Banner, that he had never owed the plaintiff any of the notes or sums of money mentioned in the above-recited testimony; that the only note he ever gave him was one for \$69.75 in 1913, which had been paid; that, having heard some reports about Ely's claim in regard to the aforesaid notes and after the present suit was brought, he approached Ely in regard to the matter, and Ely said that he had not made the statements, and agreed to go before a justice and make an affidavit accordingly, and, not finding the justice, went before the deputy clerk, and made oath that Banner did not owe him any of the amounts in question; (7) by the witness J. M. Wollver, that a short time after the death of G. C. Duff the plaintiff claimed to have a debt against the Duff estate for \$500, and afterwards stated that the amount was \$1,000.

There was also evidence on behalf of the defendant tending to show that G. C. Duff, a man 84 years of age at the time of his death, was in comfortable circumstances, and not in the habit of borrowing money, and that at about the date of the note sued on Ely himself was embarrassed financially and made several efforts to borrow money. M. O. Combs, the county treasurer, testified that on January 6, 1916, the plaintiff, who was acting as his deputy, owed him about \$1,300, and that at different times he was pressing the plaintiff for settlement.

(a) It is urged upon us that the court erred in admitting the testimony of Mrs. Wygal, and the reason assigned is that what she said did not prove or tend to prove that the plaintiff ever held or claimed to hold a note against J. F. Witt or Vass Banner.

It is true that Mrs. Wygal did not undertake to say that the plaintiff claimed to hold notes for the indebtedness he asserted against Witt and Banner, but it can hardly be said that his statement to her did not imply the existence of such notes. Men do not generally have outstanding debts due them, and on which they are collecting interest, without taking notes therefor. The usual course of business is to the contrary. Furthermore, so far as the objection relied upon affects what Mrs. Wygal said about Vass Banner, it cannot be very seriously regarded, because there is an abundance of uncontradicted evidence from other witnesses, showing that Ely did claim that he had notes on Banner, some of which he actually exhibited to the witnesses, and all of which are shown to have to have been fraudulent.

It is perhaps but fair to the plaintiff to say that he offered to testify in his own behalf, and that, if the court had held him to be a competent witness, he would have testified in flat denial of practically all the evi-

dence in regard to his claim of notes and indebtedness against other persons. His evidence, of course, was not before the jury. Whether his standing before them would have been improved by such a statement from him, in the face of the array of witnesses against him, is a question which suggests itself, but is not very material to the decision of the case.

[8, 7] As to the plaintiff's alleged claim of indebtedness against Witt, Mrs. Wygal was the only witness, and if there were no other evidence to support the defendant's theory of a general fraudulent motive and scheme on the part of the plaintiff, her testimony as to the Witt debt would not be competent. Taken with the evidence as a whole, however, it presented to the jury a circumstance proper for their consideration.

The issue upon which the case was fought out before the jury was whether the note sued on was genuine. The defendant claimed that the signature had been forged, and averred that this forgery was a part of a general scheme of fraud, pursuant to which the plaintiff had forged not only the note in question, but notes on other parties. In cases of this character the trial courts are confronted with the delicate and difficult task of supervising the evidence in such manner as, on the one hand, to protect the party charged with fraud against the building up of an imaginary and fictitious theory, and, on the other hand, to permit a full and free investigation of the charge as made. A careful consideration of the record satisfies us that the circuit court in the instant case has met and discharged this duty with skill and fairness.

In actions involving charges of fraud, seldom capable of establishment by direct proof, large latitude should be and always is allowed in the admission of circumstantial evidence, and objections thereto for irrelevancy are not favored. Evidence of other similar frauds committed by the same party at or near the same time is admissible. 1 Jones on Ev. (Horwitz, 1913 Ed.) § 143; 1 Wig. on Ev. § 304; Piedmont Bank v. Hatcher, 94 Va. 229, 331, 26 S. E. 505; Lowance v. Johnson, 75 W. Va. 784, 84 S. E. 937, 940; Castle v. Bullard, 64 U. S. (23 How.) 172, 16 L. Ed. 426, 428; Butler v. Watkins, 80 U. S. (13 Wall.) 456, 20 L. Ed. 629; Mutual Life Insurance Co. v. Armstrong, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997.

The rules of evidence recognized in the foregoing authorities and applicable to the instant case are well summarized in the following extract from Jones on Evidence, supra (section 142, p. 720):

"Actual fraud is always attended by an intent to defraud, and the intent may be shown by any evidence that has a tendency to persuade the mind of its existence. If a motive exist prompting to a peculiar line of conduct,

and it be shown that in pursuing that line a defendant has deceived and defrauded one person, it may justly be inferred that similar conduct toward another, at or about the same time, and in relation to a like subject, was actuated by the same spirit."

(b) It is true, as pointed out by counsel for the plaintiff in error, that the witness Flanary fixed the time of his conversation with the plaintiff concerning certain notes on Vass Banner about 2½ years prior to the date of the note sued on, but other evidence in the case tends to show that subsequently and at more recent dates he was still claiming to have notes in various amounts against Banner, which Banner testified were never in existence, and which the plaintiff in his affidavit before the deputy clerk admitted he did not hold. The testimony given by Flanary, therefore, was not too remote to be considered by the jury along with the other facts and circumstances in the case.

We may well conclude the discussion of this branch of the case with the following extract from the opinion of the Supreme Court of the United States in *Castle v. Bullard*, supra:

"Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to testimony on the ground of irrelevancy are not favored, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other. Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof. Applying these principles to the several exceptions under consideration, it is clear that no one of them can be sustained."

[8] (c) It is insisted that the court erred in permitting the witness James Collinsworth, whose evidence has not heretofore been mentioned, to testify, as he did, that the plaintiff had showed him a note signed by John B. Pennington with G. C. Duff as surety for \$500, payable to the plaintiff, and that at the time of this occurrence Pennington and Duff were both dead. The objection urged to this evidence is that there was nothing else before the jury to show that the plaintiff ever had such a note, and nothing to show that, if he did have it, the note was a forgery. The state of evidence before the jury in this regard is correctly recited in the objection; but it is difficult to see how the testimony in question could have prejudiced the plaintiff. The mere fact that he had shown the witness a note on Pennington and Duff, unaccompanied by anything to impeach its genuineness, was immaterial, and should have been excluded; but it was harmless so far as the plaintiff was concerned. If there was any inference to be fairly drawn from

it, that inference would have been that the defendant had made a charge against the plaintiff which he was unable to support by proof, and, as said in *Amos v. Stockert*, supra, the natural tendency of a failure to produce such proof would have been to create sympathy for the plaintiff.

[9] 4. The plaintiff was offered as a witness in his own behalf for the purpose of rebutting and denying the testimony of Flanary, Collinsworth, Collier, and others, who had testified as hereinbefore set out to certain conversations with him. The court upon objection by the defendant, declined to permit the witness to testify on the ground that the death of G. C. Duff rendered him incompetent. It is contended that the plaintiff's testimony would have related only to collateral issues raised by defendant's evidence, in no way connected with the alleged note executed to Ely by Duff, and that the action of the court therefore was erroneous. The question is settled to the contrary of this contention by section 3346, subsection 2, of the Code, and by the decisions of this court construing the same. The execution of the note constituted the sole contract or transaction which was the subject of the investigation within the meaning of the statute. The general rule, clearly embracing the testimony here involved, is that the test of competency under the statute is to be found, not in the fact as to which the party is called to testify, but in the contract or other transaction which is the subject of the investigation; and if such contract or other transaction was with a person who has since died, the other party cannot be allowed to testify at all as to any fact in the case. *Mason v. Wood*, 27 Grat. (68 Va.) 783; *Grigsby v. Simpson*, 28 Grat. (69 Va.) 348; *Morris' Ex'r v. Grubb*, 30 Grat. (71 Va.) 286; *Carter v. Hale*, 32 Grat. (73 Va.) 115; *Mutual Life Insurance Co. v. Oliver*, 95 Va. 445, 448, 28 S. E. 594. This result would seem to follow logically from the settled general rule that a witness cannot be competent for one purpose and incompetent for another. *Stephens v. Read*, 19 Grat. (60 Va.) 1; *Carter v. Hale*, supra; *Brock v. Brock*, 92 Va. 173, 23 S. E. 224; *Hoge v. Turner*, 96 Va. 631, 32 S. E. 291.

In *Wright v. Collins*, 111 Va. 806, 69 S. E. 942, a case in which Collins, one of the parties to the transaction which was the subject of investigation, was dead, and in which the administrator had testified to certain statements made by Wright (one of the adverse surviving parties) after the death of Collins, it was held that Wright was competent as a witness to deny the statements thus imputed to him. The decision in that case was based upon a construction of the statute as it existed prior to the enactment of sec-

tion 3346 in its present form; the reasoning of the court being that Wright would have been competent under the former statute for the purpose for which he was introduced, and that the change in the statute could not be construed to impose any disqualification on a witness which had not theretofore existed. The decision was in express terms limited to the precise issue in the case.

That there is reason to doubt the expediency and justice of the rule as thus laid down cannot be doubted, and is conceded in some of the decisions cited above. The Code of 1919, becoming effective in January, wholly changes the law of evidence in this respect. 5 Va. L. Reg. 125. The application of the rule in the instant case, as already pointed out, has perhaps not worked any hardship. A local jury would have been slow in giving credence to the plaintiff's testimony, in contradiction of such a large number of unimpeached witnesses who have testified against him.

[10] There was a motion for a new trial, based upon the alleged errors already disposed of, and also upon the ground that the verdict was contrary to the law and the evidence. With reference to the latter ground it need only be said that the evidence as to the genuineness of the signature on the note was conflicting, involving much expert and semi-expert testimony, and that upon this, as well as upon the collateral issues in the case, the controversy was peculiarly one for decision by the jury. Their finding either way upon these questions would have been binding upon us, and we cannot disturb the verdict. The judgment must be affirmed.

Affirmed.

(125 Va. 621)

#### CITY OF RADFORD v. BROOKS.

(Supreme Court of Appeals of Virginia. Sept. 17, 1919.)

#### 1. PLEADING ~~6~~40—TIME FOR FILING OF DECLARATION.

The one-month period "after process is returned executed" within which declaration or bill is required to be filed under Code 1904, § 3241, is to be computed from the return day, and not from a previous day on which the process may have been served.

#### 2. DISMISSAL AND NONSUIT ~~6~~81(5)—REINSTATEMENT OF CASE DISMISSED DURING VACATION.

Where clerk dismissed suit during vacation without authority to so do, court during following term properly reinstated case, under Code 1904, § 3293.

#### 3. PLEADING ~~6~~6—ALLEGATION OF MATTERS OF LAW JUDICIALLY NOTICED NOT PROPER.

It is the function of the declaration to set out facts, and not matters of law of which the court takes judicial notice.

**4. PLEADING**  $\S$ 192(3)—UNNECESSARY ALLEGATION OF LEGAL DUTY NOT GROUND OF DEMURRER.

Allegation of a legal duty, though not unusual, is not essential, and, if wrongly stated, is not a ground of demurrer.

**5. TRIAL**  $\S$ 156(1)—EFFECT OF DEMURRER TO EVIDENCE.

Demurrer to the evidence submits the case to the court on the law and the evidence, and court's attention can be drawn to erroneous statement of legal duty in declaration.

**6. TRIAL**  $\S$ 256(14)—INSTRUCTION TO CURE ERRONEOUS ALLEGATION OF LEGAL DUTY.

If erroneous allegation of legal duty in declaration affects the measure of damages, the correct practice is to have court instruct jury on the subject.

**7. MUNICIPAL CORPORATIONS**  $\S$ 768(1)—LIABILITY OF CITY FOR DEFECTIVE SIDEWALK.

Where sidewalk was out of repair and in unsafe condition, a part thereof having been entirely removed and a number of boards missing, city was negligent in not making repairs, and was liable to pedestrian who tripped and was injured because of sidewalk's defective condition.

**Error to Corporation Court of Radford.**

Action by Ellen M. Brooks against the City of Radford. Judgment for plaintiff, and defendant brings error. Affirmed.

Harless & Colhoun, of Christianburg, and H. C. Tyler, of East Radford, for plaintiff in error.

H. C. Gilmer, of Pulaski, for defendant in error.

**WHITTLE, P.** The defendant in error, Ellen M. Brooks, brought this action against the plaintiff in error, the city of Radford, to recover damages for personal injuries sustained by her in falling while walking along a defective board sidewalk, on one of its streets. The accident is ascribed to the negligence of the defendant in failing to exercise ordinary care to keep the sidewalk in a reasonably safe condition. The defendant demurred to the plaintiff's evidence, and brings error to the action of the trial court in overruling the demurrer and rendering judgment for the plaintiff.

1. The first assignment of error involves the ruling of the court at the June term, 1918, in reinstating the case on the docket after it had been dismissed by the clerk at rules for the alleged failure of the plaintiff to file her declaration within the time prescribed by section 3241 of the Code.

[1, 2] The facts in relation to that assignment are these: Process was issued March 28, 1918, returnable to second April rules,

April 15, 1918; it was executed March 28, 1918, and on that day, with the fact of its service indorsed thereon, was delivered by the officer to the clerk; the declaration not having been filed on the return day, April 15, 1918, the clerk on that day entered in the rule book, "Process returned executed and continued"; and at the first May rules, May 6, 1918 (after the lapse of only 21 days from the return day), the clerk entered an order dismissing the suit for want of declaration. This order of the clerk was plainly without authority. He was acting under section 3241 of the Code, which is as follows:

*"When Clerk to Dismiss Suit.—If one month elapse after the process is returned executed as to any one or more of the defendants, without the declaration or bill being filed, the clerk shall enter the suit dismissed although none of the defendants have appeared."*

This means after the "return day" to which process is returned executed—that is, the day to which the defendant is ordered to appear—and from that time he has one month within which to file his declaration. In other words, the time is to be computed from the return day and not from a previous day on which the process may have been served. The clerk's own record shows that he treated the second April rules as the return day, for on that day he entered on the rule book, "Process returned executed and continued." But notwithstanding the fact that the declaration was filed on May 10, 1918, the clerk made an order dismissing the suit the first May rules, May 6, 1918, less than one month after the return of the process to second April rules. Hence, when the motion was made at the June term, 1918, to reinstate the case, the court by authority of section 3293 of the Code rightly took cognizance of the proceedings in the clerk's office during the preceding May-June vacation, and, treating the order of the first May rules dismissing the suit as a nullity, reinstated the case. The clerk thereupon noted the filing of the declaration at the second May rules, as he should have done in the first instance, and the case was regularly matured for hearing.

2. The second assignment of error is to the action of the court in overruling the demurrer to the amended declaration, in that it alleges a higher degree of care on the part of the city in the matter of maintaining the board sidewalk than is imposed by law.

[3, 4] The objection is without merit. It is the function of the declaration to set out facts, and not matters of law of which the court takes judicial notice. The allegation of a legal duty, though not unusual, is not essential, and if wrongly stated is not a ground of demurrer.

This question has quite recently received

the consideration of this court in the case of *E. I. Du Pont de Nemours & Co. v. Snead's Adm'r*, 124 Va. —, 97 S. E. 812, where it was said:

"It is wholly unnecessary for B. to say anything about the law of the case, or what were the respective rights and duties of the parties in the premises. This is a matter of law of which the court takes judicial notice. If the defendant wishes to contest the law upon the facts stated in the declaration, he must do so by demurrer. If he wishes to contest the fact or facts, he must do so by appropriate pleading. But the existence of the legal duty need not be stated in the declaration, and its omission does not render the declaration faulty. What must be stated are the facts out of which the legal duty arises. When these are stated, the court will apply the law arising thereon."

[5, 6] The demurrer to the evidence submits the case to the court on the law and the evidence, and the court's attention can be drawn to the alleged erroneous statement of the law; and, if the allegation affects the measure of damages, the correct practice is to instruct the jury on the subject. *City of Richmond v. McCormack*, 120 Va. 552, 91 S. E. 767.

3. The remaining assignment is to the court's action in overruling the defendant's demurrer to the plaintiff's evidence and rendering judgment for the damages assessed by the jury.

[7] The evidence we think presents a plain case for recovery. The defendant introduced no evidence, and the evidence for the plaintiff showed a failure on the part of the defendant to use ordinary care to keep the board walk in question in a reasonably safe condition for the use of pedestrians. Part of the sidewalk on account of its condition had been removed entirely, and at the place of the accident it was out of repair and unsafe. A number of the boards were missing, and the court was well warranted in finding that if the missing boards had been replaced the accident would not have occurred. It happened in this way: Plaintiff stepped on a board adjoining one of these vacant spaces, and the board, not being securely nailed, turned, and her foot slipped into the open space, causing her to trip and fall violently upon the walkway, suffering the injuries for which she sued. It is needless to go into further detail. The negligence of the city in failing to repair the walkway is not and cannot be denied; and the character and extent of plaintiff's injuries were clearly proved, and the damages awarded by the jury were reasonable.

We find no reversible error in the judgment, and it must be affirmed.

Affirmed.

(125 Va. 656)

COX et al. v. HAGAN.

(Supreme Court of Appeals of Virginia.  
Sept. 17, 1919.)

1. **BILLS AND NOTES** ¶371 — **PAROL EVIDENCE TO SHOW RELATIONSHIP OF PRINCIPAL AND SURETY.**

While, as between themselves, parol evidence is admissible to show the actual relations to one another of apparent joint makers of a note, as that the relationship of surety in truth exists as to one or more of them, yet such evidence is admissible only against parties having knowledge of such relationship at the time they entered into the contract, and is not admissible against an innocent purchaser.

2. **PLEADING** ¶142, 290(3) — **FAILURE TO VERIFY OR STATE AMOUNT OF SET-OFF.**

A plea not verified by affidavit and not alleging "the amount to which" defendant "is entitled, by reason of the matters contained in the plea," as required by Code 1904, § 3299, relating to plea of set-off, is insufficient as against a general objection.

3. **PLEADING** ¶8(1)—**ALLEGATIONS OF PLEA OF CONCLUSIONS OF LAW WITHOUT FACTS INSUFFICIENT.**

A plea alleging mere conclusions of law, without alleging facts from which those conclusions are sought to be drawn, with sufficient detail and certainty to apprise plaintiff of the nature of the defense and to enable the court upon facts admitted or found to decide whether the matter relied on constituted a valid claim to the relief sought, was properly rejected.

4. **PLEADING** ¶136 — **REFUSAL OF SPECIAL PLEA OF MATTER ALLOWABLE UNDER GENERAL ISSUE.**

A special plea, that plaintiff claiming to be surety on a note was entitled to recover only such costs of collection as he in fact paid and was regularly bound to pay his own attorney, was properly disallowed, since such defense could have been made under the general issue thereon.

5. **BILLS AND NOTES** ¶126—**INDORSER PAYING NOTE MAY RECOVER COSTS OR ATTORNEY'S FEES.**

Where the makers and indorsers of a note agreed therein to pay costs of collection and 10 per cent. attorney's fees in case of nonpayment at maturity, although plaintiff, indorser, may not have paid the payees or indorsees any costs of the collection or attorney's fees because of default of makers or other prior parties, if the plaintiff after payment had to place the note with an attorney for collection, he was entitled to recover of the makers and prior parties the amount of such expense of costs of collection or attorney's fees.

6. **EVIDENCE** ¶423(6)—**PAROL EVIDENCE ADMISSIBLE TO SHOW RELATION OF PARTIES TO NOTE.**

As between parties liable upon a note, having knowledge of their true relations one to another, parol evidence is admissible to show the true relationship, regardless of where the sig-

natures appear on the note, whether as makers or indorsers, and under Negotiable Instruments Law, § 2841a, subsec. 68, indorsers are liable prima facie in the order of their indorsement, but evidence is admissible to show that as between or among themselves they have agreed otherwise.

**7. BILLS AND NOTES** ⚡473 — **SUFFICIENCY OF PLEA IN ACTION BY INDORSER.**

A plea by defendants, sued on a note by an indorser, that they were also only indorsers, was fatally defective because not containing the further allegation that plaintiff and defendants had agreed at the time of the execution and indorsement of the note that they should be jointly liable as sureties for the true makers, or allegations to such effect.

**8. PLEADING** ⚡8(5)—**SUCCESSIVE LIABILITY OF INDORSERS.**

A plea by defendants, sued as makers of a note, that the plaintiff, an indorser, was only entitled to recover the "pro rata amount due by these defendants as indorsers, because each indorser assumes the same liability as every other," is a mere conclusion of law and erroneous; in view of Code 1904, § 2841a, subsec. 68, under which the liability of indorsers, in the absence of special agreement, is successive and not joint.

**9. JUDGMENT** ⚡273(1) — **ENTRY NUNC PRO TUNC NOT PERMITTED ON NEGLIGENCE OR MISAPPREHENSION OF PARTIES.**

Where a final judgment ought to be, but owing to the court's delay has not been, entered, the court, if it has such power, uses the papers, proceedings, and evidence in the case as the same existed at the time to which the order or decree is proposed to relate back, as the basis of its action and enters the decree to which the party was then entitled, but may not do so where the delay was imputable to any negligence or even misapprehension of the parties.

**10. JUDGMENT** ⚡273(1) — **MOTIONS** ⚡56 (2)—**JUDGMENT OR ORDER NUNC PRO TUNC.**

The power to affect the operation of a judgment or order, or change its import by a judgment or order nunc pro tunc, should be exercised with caution and circumspection.

**11. JUDGMENT** ⚡273(4) — **RIGHT TO ENTER JUDGMENT OR ORDER NUNC PRO TUNC.**

In view of Code 1904, § 3567, providing that the lien of a judgment shall in no case relate back to a time prior to that on or at which the judgment was rendered, the courts do not possess the power to enter nunc pro tunc judgments in cases where suitors have done all in their power to have the cause decided, but owing to the delay of the court no final judgment has been entered, but only in cases where, from accident or mistake of the court officers, the judgment or order entered had never been entered upon the records.

**12. APPEAL AND ERROR** ⚡1177(2) — **ON ERRONEOUS ENTRY OF JUDGMENT NUNC PRO TUNC NEW TRIAL GRANTED IN SUPREME COURT.**

Where the only error in the record of a case was the entry of a nunc pro tunc judgment,

which might be cured by the entry of the same judgment by Supreme Court to take effect as of the date in fact entered by the court below, yet, where plaintiffs in error claim to have several substantial defenses attempted to be set up by rejected special pleas, the defects in which are formal, a new trial should be granted.

**13. BILLS AND NOTES** ⚡474—**SPECIAL PLEA OF MATTER WHICH MIGHT BE SET UP BY GENERAL DENIAL.**

In view of Code 1904, § 3299, relating to special pleas of set-off, the defense that the amount claimed by plaintiff, indorser of a note, as attorney's fees, is unreasonable in amount and unconscionable, can be made by special plea; although, the contract not being under seal, the matter could be set up by general denial.

**14. BILLS AND NOTES** ⚡474 — **SUFFICIENCY OF PLEA OF UNCONSCIONABLE AMOUNT OF ATTORNEY'S FEES.**

A special plea, under Code 1904, § 3299, that amount claimed by plaintiff, indorser of a note, for attorney's fees, is unreasonable in amount and unconscionable, should allege the amount to the extent of which the defendant claims the same is unreasonable or unconscionable, and also the facts on which such claim is based with sufficient detail and certainty to apprise plaintiff and the court of the nature of the defense.

**15. BILLS AND NOTES** ⚡537(1) — **SPECIAL PLEA OF SET-OFF FOR COURT WHERE FACTS ARE ADMITTED.**

In an indorser's action upon a note, where defendants pleaded under Code 1904, § 3299, that the amount claimed for attorney's fees was unreasonable and unconscionable, if the pleaded facts are admitted, the sufficiency of the defense, including the determination of the amount that should be recovered, is for the determination of the judge, while, if the issue upon the plea be one of fact, it must be tried by the jury under proper court instructions, unless all matters of fact and law are submitted for the judge's decision under the statute by consent of the parties.

**16. BILLS AND NOTES** ⚡534 — **REASONABLE AMOUNT OF ATTORNEY'S FEES.**

Upon the issue being made as to the amount recoverable under the attorney's fee provision of a note sued upon by indorser, the judge should allow only a reasonable amount considering the attorney's services actually performed in collecting the debt, in view of the customary charges of the profession in the locality for such services, not exceeding the maximum stipulated in the obligation, and, where the services of an attorney were not in fact employed by the holder, no attorney's fee should be allowed.

**17. BILLS AND NOTES** ⚡126 — **"COSTS OF COLLECTION" RELATE TO ATTORNEY'S FEES, NOT COSTS OF ACTION.**

In a note providing that "the makers or indorsers \* \* \* agreed to pay costs of collection, or ten per cent. attorney's fees in case payment shall not be made at maturity," the

words "costs of collection" do not refer to costs of suit, which are recoverable by law, but to the "attorney's fee" for services in making or attempting collection; such agreement being valid and enforceable to the extent of a reasonable attorney's fee, not exceeding the percentage named in the note.

[Ed. Note.—For other definitions, see Words and Phrases, Costs of Collection.]

Error to Circuit Court, Scott County.

Action by C. F. Hagan against R. W. Cox and others. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

This action at law was instituted in the court below by the defendant in error, Hagan (hereinafter referred to as plaintiff, or as plaintiff in the court below), by the following notice of motion for judgment:

"To R. W. Cox, L. F. Cox, Mrs. R. W. Cox, Mary Cox, G. B. Bickley and R. E. Bickley:

"You and each of you are hereby notified that on the 1st day of the next term of the circuit court for Scott county (being the September term, 1917), I will move the circuit court for Scott county for a judgment against you and each of you for the sum of \$2,750.00 with interest thereon from the 28th day of June, 1917, until paid, the same being due by you to me on account of a certain note executed by all of you as makers, payable to Head & Sloan, bearing date December 28th, 1916, and due six months after date for the sum of \$2,500.00 which said note was indorsed by me and which note not having been paid at maturity by either of you as you had agreed demand was made upon me for payment thereof and payment thereof was accordingly made by me on the 29th day of June, 1917, by the terms of which note it is provided that all homestead exemptions are waived and in which you and each of you agreed to pay 10 per cent. attorney's fees for collection in case payment thereof should not be made at maturity, and by reasons of said note and the provisions thereof, and the nonpayment thereof by you and the payment thereof by me to the holder thereof, and by reason of said note having been placed in the hands of attorneys for collection and action hath accrued to me to have and demand of you the said sum of \$2,750.00 above mentioned, which said note is in the following words and figures, to wit:

"Gate City, Va., Dec. 28, 1916.

"\$2,500.00. Due June 28th, 1917.

"6 months after date we, or either of the makers or indorsers, value received, promise to pay to the order of Head & Sloan twenty-five hundred dollars.

"Negotiable and payable at the People's National Bank of Gate City, Virginia, with six per cent. interest after maturity.

"The makers and indorsers of this note hereby waive presentment, protest and notice of dishonor, and consent that the time of payment may be extended without notice thereof and hereby waive the benefit of their homestead exemptions as to this obligation; and further agree to pay costs of collection, or ten per cent.

attorney's fee in case payment shall not be made at maturity.

R. W. Cox.

"L. F. Cox.

"Mrs. R. W. Cox.

"Mary Cox.

"G. B. Bickley.

"R. E. Bickley."

"Which said note was indorsed as follows:

"C. F. Hagan,

"Head & Sloan,

"By D. C. Sloan,"

"Respectfully, Charles F. Hagan.

"By Robert L. Pennington, Attorney."

On the calling of said notice of motion for judgment the defendants, L. F. Cox and Mary Cox, offered two special pleas, designated as plea No. 1 and plea No. 2, which are as follows:

#### Plea No. 1.

"This day came the defendants L. F. Cox and Mary Cox, by counsel, and say that the plaintiff ought not further to have and to maintain his action against them at this time because the said note, and the sum demanded in the notice, is the note and the amount due and owing by the Sulphur Springs Lumber Company, a partnership composed of R. W. Cox and G. B. Bickley, and said money was put and placed into the business of the said Sulphur Springs Lumber Company and was used therein, and these defendants further say that the said firm of the Sulphur Springs Lumber Company and the members of said firm, viz.: R. W. Cox and G. B. Bickley, have been duly adjudged bankrupts, by the District Court for the Western District of Virginia, and the said proceeding is now pending in said court. These defendants further say that the said note was filed as a part of the indebtedness of said partnership and the members thereof. These defendants are only sureties on said notes, and the plaintiff recognized the truth of this plea by filing the said note, or proof thereof with the Referee in Bankruptcy, to whom the aforesaid bankruptcy proceeding was referred.

"The foregoing plea was sworn to before me, September 5th, 1917.

D. C."

#### Plea No. 2.

"This day came the defendants L. F. Cox and Mary Cox, by counsel, and say that the plaintiff ought not to have and to maintain his action for the ten per centum attorney demanded in said notice because the said sum demanded is unreasonable, unjust, inequitable, unfair and oppressive. And this defendants are ready to verify."

The plaintiff thereupon objected to the filing of such pleas, and the court sustained the objection, to which action of the court the two defendants, who are the plaintiffs in error, excepted. The record does not disclose whether any specific grounds of objection to the pleas were assigned before the court below, or whether such specification was asked for there by the plaintiffs in error.

Upon such objection to the pleas being sustained as aforesaid, the plaintiffs in error did not plead the general issue or interpose a de-

murrer or any other plea in defense of the action or attempt to do so, at that time or during that term of the court.

The other defendants interposed no defense whatever to the action, and the following entry was made by the clerk on the court docket:

"C. F. Hagan v. L. F. Cox et al. Notice of Motion.

"Judgment against Mrs. R. W. Cox and R. E. Bickley (see papers).

"(Order entered at September term, 1917.)"

And on a subsequent day of the same term of court, to wit, on Thursday, September 13, 1917, judgment was entered in favor of the plaintiff against the defendants, Mrs. R. W. Cox and R. E. Bickley, "for the sum of twenty-five hundred dollars (\$2,500.00), with interest from the 28th day of June, 1917, until paid and the costs of this suit, together with ten (10) per cent. attorney's fee thereon."

No other order was entered and no other memorandum was made concerning the case by the clerk or judge at that term of the court.

At the January term, 1918, of the court, the plaintiff moved the court to enter a nunc pro tunc order, giving judgment in his favor against the defendants who are the plaintiffs in error.

The record does not disclose on what ground such motion was made.

When the plaintiff by counsel asked the court at its January term for such nunc pro tunc order, the plaintiffs in error offered and asked the court before such order was entered to be allowed to file two additional pleas, designated plea No. 3 and plea No. 4, which are as follows:

#### Plea No. 3.

"The defendants L. F. Cox and Mary Cox come, and say that the plaintiff ought not to have and to maintain his action for the ten per centum attorney's fee in the notice of motion for judgment demanded, because the said notice shows that said C. F. Hagan is an indorser of the note sued on, and does not show that he paid nor that he was legally bound to pay said attorney's fee. And of this they put themselves upon the country and this they are ready to verify."

#### Plea No. 4.

"The defendants come and say that the said C. F. Hagan ought not to have and to maintain his action for the sum in the notice demanded, because the said note was executed by R. W. Cox and G. B. Bickley and these defendants were only indorsers on the note as was the plaintiff. The note was executed for the benefit of the Sulphur Springs Lumber Co., composed of R. W. Cox and G. B. Bickley, and the money procured went into the business of said company. The plaintiff knew at the time that these defendants were only indorsers and jointly liable with him. The plaintiff is only entitled to recover the pro rata amount due by these de-

fendants as indorsers, because each indorser assumes the same liability as every other. And this they are ready to verify."

The plaintiff thereupon objected to the filing of such pleas, and the court sustained the objection.

The record is the same in its lack of disclosure, with respect to whether any specific grounds of objection were assigned before the court below to these pleas or were called for there by the plaintiffs in error, as is noted above with regard to the pleas Nos. 1 and 2 aforesaid. The record is also the same upon the point that, upon the objection to pleas Nos. 3 and 4 being sustained, the plaintiffs in error interposed no further defense to the action. And, so far as the record discloses, there was not at any time a trial of the case as if upon any issue joined.

The court thereupon at the January term, 1918, on said motion of the plaintiff, entered the nunc pro tunc order under review as an order which "should have been entered at the September term, 1917," which order rendered judgment in favor of the plaintiff against the plaintiffs in error for the sum of \$2,750 "with interest from the 28th day of June, 1917, until paid, and the costs of this action, the amount claimed in the plaintiff's notice of motion."

W. S. Cox, of Gate City, for plaintiffs in error.

R. L. Pennington, of Bristol, for defendant in error.

SIMS, J. (after stating the facts as above). The material questions raised by the assignments of error will be disposed of in their order as stated below.

[1] 1. Was there error in the action of the court below in sustaining the general objection of the plaintiff to special plea No. 1 set forth in the statement preceding this opinion?

The question must be answered in the negative.

The plea is, in substance, that, although the signatures of the plaintiffs in error appear on the note in said suit as comakers, they were not in fact principal obligors but sureties only for certain comakers of the note; the latter being in truth the principal obligors. The plea, however, does not allege that the plaintiff had any notice of such suretyship relation of the parties before he indorsed the note. Now, while as between themselves parol evidence is admissible to show the actual relations to one another of apparent joint makers of a note, as that the relationship of surety in truth exists as to one or more of them (8 Cyc. [K] pp. 262, 263; 8 C. J., § 106, p. 70) yet such evidence is admissible only against parties having knowledge of such relationship at the time of the entering into the contract by them (*Id.*, p. 264). "If a person sign a note as maker, but is, in



fact, a surety, and there is nothing on the face of the note to show his true relation, he will be treated and considered as a principal, with respect to all who have no notice of the suretyship." 3 R. C. L., § 354, p. 1138. See, also, 8 C. J. § 105, pp. 69, 70.

The plaintiff was the last indorser on the note, other than the payees and indorsees thereof named therein and paid and took up the note upon default as set forth in the statement preceding this opinion. " \* \* \* An indorser of a note who, upon the default of the maker, satisfies the demands of the indorsee, and takes up the note, becomes the lawful holder and may enforce the terms of the contract against all prior indorsers \* \* \* as well as against the maker. \* \* \*" 3 R. C. L. § 337, p. 1121. It is therefore immaterial, so far as the plaintiff's right of action was concerned, whether the plaintiffs in error were makers or indorsers of or sureties on the note. As to the plaintiff they were all principal obligors, unless indeed there had been an agreement between themselves and the plaintiff that their obligation should be otherwise, which the plea, as aforesaid, does not allege. Hence the plea under consideration interposed no valid defense to the action, and for that reason, there was no error in the action of the court below in refusing to allow it to be filed.

[2, 3] 2. Was there error in the action of the court below in sustaining the general objection of the plaintiff to special plea No. 2 set forth in the statement preceding this opinion?

This question must be answered in the negative for several reasons.

(a) The plea is not verified by affidavit as required by the statute under which it was filed. See section 3299 of the Code. *Watkins v. Hopkins*, 13 Grat. (54 Va.) 743.

(b) The plea does not allege "the amount to which he" (the defendant) "is entitled by reason of the matters contained in the plea," as is required by such statute. *Tyson v. Williamson*, 96 Va. 636, 32 S. E. 42; *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 239, 37 S. E. 851.

(c) The plea is bad because it violates the rule against the allegation of mere conclusions of law and does not allege the facts from which those conclusions are sought to be drawn with sufficient detail and certainty to apprise the opposite party of the nature of the defense and to enable the court upon the facts admitted or found to decide whether the matter relied on constituted a valid claim to the relief sought. *Burners v. Keran*, 24 Grat. (65 Va.) 42; *Watkins v. Hopkins*, supra, 13 Grat. (54 Va.) 743.

[4] 3. Was there error in the action of the court below in sustaining the general objection of the plaintiff to special plea No. 3 set forth in the statement preceding this opinion?

This question must be answered in the negative.

If the plea here under consideration means to allege that the plaintiff was entitled to recover only such costs of collection as he in fact paid and was legally bound to pay his own attorney, that defense could have been as well made under a plea of the general issue as by special plea. There was therefore in such case no error in the action of the court in refusing to allow such special plea to be filed.

[5] If the plea means to allege that the plaintiff was entitled to recover only such costs of collection or attorney's fee as he paid and was legally bound to pay to the payee or indorsees of the note who held it at the time the plaintiff paid the note, this position is not sustained by the provisions of the note aforesaid on the subject. Such provisions constitute the terms of the contract on that subject which the plaintiff as lawful holder of the note after its payment by him had the right to enforce against the makers and all prior indorsers of the note. The note expressly provides that—

"The makers and indorsers of this note \* \* \* agree to pay costs of collection or ten per cent. attorney's fee in case payment shall not be made at maturity."

Therefore although the plaintiff may not have paid the payees or indorsees of the note any costs of collection or attorney's fee, yet if by reason of the default of the makers of or other prior parties to the obligation, the plaintiff after the payment of it by him aforesaid had to place the note in the hands of an attorney for collection, as he alleges in the notice for judgment was done, he was entitled to recover judgment against the makers of and prior parties to the obligation for such an amount of expense incurred by him of costs of collection or attorney's fee as the contract when properly construed provides for. For this reason also the court below was right in refusing to allow the plea under consideration to be filed.

[6-8] 4. Was there error in the action of the court below in sustaining the general objection of the plaintiff to special plea No. 4 set forth in the statement preceding this opinion?

This question must be answered in the negative.

This plea is, in substance, the same as special plea No. 1 above mentioned, except that it alleges that the plaintiff knew of the suretyship alleged at the time the note was executed, and that the plaintiffs in error were in truth merely indorsers of the note. While there is much conflict among the authorities on the subject, the prevailing rule seems to be that as between the parties liable upon a note having knowledge of their true relations one to another, parol evidence

is admissible to show such true relationship regardless of where the signatures appear on the note, whether as maker or indorsers and regardless of the order of sequence of the indorsements. 8 Cyc. (K) pp. 262, 263; 3 R. C. L., § 338, p. 1123. And by statute with us (subsection 68 of section 2841a of the Negotiable Instrument Law), it is provided as follows:

"As respects one another, indorsers are liable prima facie in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise."

The plea under consideration would therefore have been a good plea if it had contained the further allegation that the plaintiff in the court below and the plaintiffs in error had agreed at the time of their execution or indorsement of the note that they should be jointly liable as sureties for the true makers and principal obligors, or allegations to that effect. The plea, however, contains no such allegation, and it is fatally defective because of the lack of such allegation. The plea does allege that the "plaintiff knew at the time that these defendants were only \* \* \* jointly liable with him," and that "the plaintiff is only entitled to recover the pro rata amount due by these defendants as indorsers, because each indorser assumes the same liability as every other." But this is a mere conclusion of law and an erroneous one. The long and universally established rule at common law is that " \* \* \* the liability of indorsers, in the absence of special agreement, is successive and not joint." 3 R. C. L., § 349, p. 1135. This rule has become a part of our statute law as aforesaid (subsection 68 of section 2841a of the Code). It appears from the note in suit, as aforesaid, that the plaintiff is the last indorser thereof, except the payees named in the note. There is no allegation in the plea under consideration that the plaintiff indorsed the note prior to the signing of it by the plaintiffs in error. Hence, taking the allegation of the plea to be true that the plaintiffs in error were mere indorsers of the note, still on the face of the record they were prior indorsers to the plaintiff. And in the absence of any allegation in the plea of an actual agreement between the parties that their liability should be otherwise, the prima facie order of liability aforesaid, now fixed by statute with us, negatives the conclusion of the plea and renders it bad.

[8, 19] 5. Was there error in the action of the court below in entering the judgment against the plaintiffs in error by a nunc pro tunc order?

This question must be answered in the affirmative.

As laid down by the authorities on the subject which are relied on by the plaintiff in the court below:

"There are two classes of cases in which it has been held proper to enter judgments and decrees nunc pro tunc. The first class embraces those cases in which the suitors have done all in their power to place the cause in a condition to be decided by the court, but in which, owing to the delay of the court, no final judgment has been entered. The second class embraces those cases in which judgment though pronounced by the court, have, from accident or mistake of the officers of the court, never been entered on the records of the court." Note in 4 Am. St. Rep. at pages 828-830.

See, to same effect, *Freeman on Judgments* (4th Ed.) § 57.

The order in the instant case must be sustained, if at all, as having been entered in the first class of cases above mentioned. In such class of cases the court uses the papers and proceedings and evidence in the case, as the same existed at the time to which the order or decree is proposed to relate back, as the basis of its action, and acts on such record at the subsequent time when the motion for the nunc pro tunc order or decree is made. The court enters "now for then" such order or decree as it finds from such record the party moving for the nunc pro tunc order was "then" entitled to.

It will be at once perceived that such practice, if generally pursued, would greatly tend to destroy that confidence which is, and of right ought to be, reposed in the verity of judgments. Accordingly the authorities hold that "the power to affect their operation or change their import by judgments or orders nunc pro tunc should be exercised with caution and circumspection" (15 R. C. L. § 63, p. 622); and we find it laid down by the very authorities relied on by the plaintiff that "no case could be ranked among the first class in which the delay to render or enter judgment was imputable to any negligence or even misapprehension of the parties" (*Freeman on Judgments*, § 57); and that the practice of entering such judgments in the first class of cases was confined "chiefly, if not exclusively, to those cases where, after trial and submission of a case, one of the parties died. \* \* \* That "as the suitor, who brought his action on to trial and caused it to be heard and submitted, had manifestly been guilty of no laches, the court protected him from any prejudice he might suffer by the death of his adversary after such submission and instead of permitting the action to abate, directed the judgment to be given effect, of necessity, as far back as the day of submission." Id. § 57. In the note in 4 Am. St. Rep., supra, at page 830, it is also said, it is true, that while the cases in which nunc pro tunc judgments are ordered without any judgment actually rendered by the court nearly always arise from the death of one of the parties, yet "they are not always restricted to that cause." But the only

other character of cases cited in which such a judgment has been entered is that of *Springfield v. Worcester*, 2 Cush. (Mass.) 52, where, "while judgment was suspended to permit a hearing of reserved questions of law, the statute upon which the action was brought was repealed without a saving clause. \* \* \* Under these circumstances, the court ordered a judgment to be entered as of a day prior to the date of the repeal of the statute."

[11] But the better rule seems to be that in such case the court had no jurisdiction to enter such a nunc pro tunc order. 15 R. C. L. § 63, p. 622. And as to the need of nunc pro tunc judgments or decrees to protect suitors from prejudice they might otherwise suffer by the death of adversaries that was met at common law by the fiction of making judgments bear date as of the first day of the term, if the case was so matured on docket that judgment might have been entered on that day, upon the theory that the entire term of court is in contemplation of law but one day. 15 R. C. L. § 57, pp. 617, 618. This fiction of the law has been long regulated by statute with us. Section 3567 of the Code; 2 Barton's Chy. Pr. pp. 917, 918, 928; Burks' Pl. & Pr. p. 607. Prior to the amendment of section 3567 aforesaid, by Acts of 1897-98, p. 507 (subject to certain statutory provisions concerning the docketing thereof in order to affect purchasers for valuable consideration without notice), the lien of a judgment entered in court in a cause on docket and so matured that judgment might have been rendered on the first day of the term, although entered after the commencement of the term, related back to the first day of the term. But since such amendment such statute has provided that—

"The lien of a judgment shall in no case relate back to a day or other time prior to that on or at which the judgment was rendered."

See 2 Pollard's Code, 1904, § 3567, and note and authorities there cited.

In view of the history of the subject and of the last-mentioned statutory provision, we are of opinion that, whatever may be true of other jurisdictions, with us the courts no longer possess the power to enter nunc pro tunc judgments in cases falling within the first class, but only possess such power in cases falling within the second class above mentioned. That is to say, we are of opinion that with us "the office of a judgment nunc pro tunc is to record some act of the court done at a former time which was not then carried into the record, and the power of the court to make such entries is restricted to placing upon the record evidence of judicial action which has been actually taken. It may be used to make the record speak the truth, but not to make it speak what it did not speak but ought to have

spoken. If the court has not rendered a judgment that it might or should have rendered, \* \* \* it has no power to remedy these errors or omissions by ordering the entry nunc pro tunc of a proper judgment. \* \* \* In all cases" (in this state, certainly since said statute of the Acts of 1897-98 was enacted) "the exercise of the power to enter judgment nunc pro tunc presupposes the actual rendition of a judgment and a mere right to a judgment will not furnish the basis for such an entry." 15 R. C. L. § 64, pp. 622, 623.

[12] The judgment under review was therefore erroneous and must be reversed.

This being the only error we find in the record, it might be cured by entry of the same judgment by us to take effect as of the date on which it was in fact entered by the court below. But in view of the fact that the plaintiffs in error claim to have several substantial defenses attempted to be set up by the special pleas aforesaid and of the fact that the defects in such pleas are formal, we feel that the plaintiffs in error should have an opportunity to amend such pleas and thus properly present such defenses to the plaintiff's demand, should they be so advised. We shall therefore grant a new trial of the case.

Having reached the above conclusion, it becomes necessary for us to refer to certain questions in connection with the attorney's fee provision in the note in suit, which are raised in the brief for the plaintiff (the defendant in error), and, also, to pass upon the proper construction which should be given to the provisions in the note in suit on the subject of the costs of collection and the attorney's fee therein mentioned about which question is also raised in the brief for plaintiff; since both subjects are likely to give rise to the same questions on a new trial.

[13] 6. The first questions next above referred to are whether the defense, that the amount claimed by a plaintiff as attorney's fee under the obligation sued on and provided for therein is unreasonable in amount or unconscionable, can be made by special plea under section 3299 of the Code? And, if so, how the issue made by the plea should be tried, whether by the court without or with a jury?

Section 3299 aforesaid, so far as material, provides as follows:

"In any action on a contract, the defendant may file a plea, alleging any such failure in the consideration of the contract, or fraud in its procurement, or any such breach of any warranty to him of the title or the soundness of personal property, for the price or value whereof he entered into the contract, or any other matter as would entitle him either to recover damages at law from the plaintiff, \* \* \* or to relief in equity, in whole or in part, against the obligation of the contract; \* \* \* and \* \* \* alleging the amount to which he is entitled by reason of the matters contained in the

plea. Every such plea shall be verified by affidavit."

We are of opinion that the defense in question can be made by such plea, although there is no necessity therefor. Where the contract in suit is not under seal and the defendant seeks no recovery of any excess over the plaintiff's demand, the defense can be set up under the general issue of non-assumpsit, if the action be one in assumpsit (Burks' Pl. & Pr. § 739, pp. 448-452), and the issue made by a general denial of the facts alleged in the notice in the case in judgment is not less comprehensive.

The connection of the language of the statute is such that the words "or any other matter" do not refer to matters of the same kind previously mentioned in the statute except in one particular, namely, in the particular that they must contain the feature of being "matters directly connected with and injuries growing out of the contract sued on." *American Mang. Co. v. Va. Mang. Co.*, 91 Va. 272, at pages 281, 282, 21 S. E. 466, at page 467. As plainly set forth in the statute itself, they are "any other matter as would entitle him [the defendant] to recover damages at law from the plaintiff \* \* \* or to relief in equity, in whole or in part, *against the obligation of the contract.*" (Italics supplied.) That the matters allowed to be pleaded under such statute must be such as would entitle the defendant to the recovery or relief mentioned against the obligation of the contract sued on is, plainly, the only restrictive meaning which is imposed by the ejusdem generis rule, when that rule is properly applied to the words "any other matter." Such rule, as said by this court in *Commonwealth v. Werth*, 116 Va. at page 607, 82 S. E. at page 695, Ann. Cas. 1916D, 1263, "is only a rule of construction, and intended to throw light on a statute of otherwise doubtful import, and has no application where the language of the statute plainly manifests a contrary purpose. In such case the obvious intention of the Legislature must be given effect rather than defeated by the misapplication of a rule." The language of the statute under consideration, beginning with the words "or any other matter," etc., was not in the statute when the preceding portion of it was first enacted. Such language was added by Act of March, 1873 (Acts 1872-73, p. 196), so that the purpose of the statute could be fully accomplished. That purpose plainly is to allow all matters in controversy between the plaintiff and defendant arising out of the same cause of action—i. e., all matters of recoupment—to be disposed of in one action at law, so as to avoid the necessity of a separate suit having to be brought by the defendant, whether at law or in equity, to determine any such matter. *American Mang. Co. v. Va. Mang. Co.*, supra, 91 Va. 272, at page 282, 21 S. E. 466; 1 Bar-

ton's Law Pr. p. 514 et seq.; 4 Minor's Inst. 706 et seq.

[14] If defense by way of special plea under section 3299 of the Code be adopted, the plea should allege the amount to the extent of which the defendant claims the attorney's fee in question is unreasonable or unconscionable, and should also allege the facts on which such claim is based with sufficient detail and certainty to apprise the plaintiff of the nature of the defense and to enable the court on the facts being found or admitted, to decide whether the matter relied on constitutes a valid claim to the relief sought. And the plea should be verified by affidavit.

[15] As to the procedure upon the plea: The procedure should be the same as upon a plea under such statute of any other matter pleadable thereunder. If the issue upon the plea is such that the facts pleaded are admitted, the sufficiency of the defense, including the determination of what amount should be recovered as an attorney's fee, is for the determination of the judge. If the issue upon the plea is one of fact, that issue must be tried by jury, subject to such proper instruction as may be given by the judge including instruction as to what amount may be recovered as an attorney's fee under such a state of facts as may be found by the jury to exist, unless all matters of fact as well as of law are submitted for decision to the judge under the statute in such case made and provided or by consent of parties, in which latter case the determination of the amount recoverable as a reasonable attorney's fee, as well as of the facts in the case, is for the judge.

In other words, in every case, the facts being admitted or found, the determination of what may be recovered as an attorney's fee under a provision in the obligation in suit creating the obligation of payment of such a fee, is for the judge of the trial court in an action at law, and, of course, is also for such judge where the question arises in a suit in equity.

[16] Further, the judge, upon the issue being made as to what amount is recoverable under the attorney's fee provision aforesaid, should allow only such an amount as may be reasonable, considering the services of the attorney actually performed in and about the collection of the debt in view of the customary charges of the profession in the locality for such services, not exceeding the maximum amount stipulated in the obligation. And where the services of an attorney are not in fact employed by the holder of the obligation, and the latter party seeks such recovery, no recovery should be allowed of any attorney's fee. *Bank v. Wood*, 125 Tenn. 6, 140 S. W. 31; 2 Va. Law Reg. (N. S.) 321; *Triplett v. Bank*, 121 Va. 189, 92 S. E. 897; *Colley v. Summers, etc., Co.*, 119 Va. 439, 89 S. E. 906, Ann. Cas. 1917D, 375.

The question remaining for our considera-

tion, as likely to arise upon a new trial of the case, is as follows:

[17] 7. What is the proper construction of the obligation in the note in suit on the subject of the attorney's fee?

The obligation of the note is in the following form:

"The makers and indorsers of this note hereby \* \* \* agree to pay costs of collection or ten per cent. attorney's fee in case payment shall not be made at maturity." (Italics supplied.)

"Costs of collection" refers, not to costs of suit, which are recoverable by law, but to the "attorney's fee" for services in making or attempting to make collection. 3 R. C. L. § 83, pp. 895, 896. The proper construction of the provision in the note under consideration therefore is that the makers and indorsers of the note agreed to pay the lawful holder thereof such reasonable attorney's fee as such holder may actually incur for services of attorney in making collection thereof, not exceeding the 10 per cent. maximum stipulated, payment of the note not having been made by the former in accordance with their obligation. Such an agreement is the same in substance as if it had been to pay such reasonable attorney's fee for collection actually incurred by the lawful holder of the note, up to but not exceeding 10 per cent. of the amount of the debt due to the holder of the note, principal and interest, in case of non-payment of the note as aforesaid at maturity. The rule in this state is, in effect, that such a contract is valid and enforceable to the extent of a reasonable attorney's fee, incurred as aforesaid, not exceeding the percentage named in the note. *Colley v. Summers, etc., Co.*, supra, 119 Va. 439, 89 S. E. 906, Ann. Cas. 1917D, 375; *Triplett v. Bank*, supra, 121 Va. 189, 92 S. E. 897.

Because of the error of the court below in entering the judgment under review nunc pro tunc, the same will be set aside and annulled, with leave to the plaintiffs in error to amend their pleadings or to plead anew, and a new trial may be had by the plaintiffs in error, if they are so advised, not in conflict with the views expressed in this opinion.

Reversed and remanded.

(125 Va. 546)

BARNETT et al. v. CLOYD'S EX'RS.

(Supreme Court of Appeals of Virginia. Sept. 17, 1919.)

1. VENDOR AND PURCHASER ⇨172—VENDEE IN POSSESSION ON DEFERRED PAYMENTS LIABLE FOR INTEREST.

Where an executory contract for the sale of land fixes a date for completion and is silent as to interest on unpaid purchase money, and also as to when possession shall be taken,

the vendee, if he takes possession prior to completion of the contract without any new consideration, must pay interest on the unpaid purchase money from the date on which he takes possession, and the mere fact that the vendor may subsequent to the contract assent to such advanced taking of possession does not alter the rule.

2. VENDOR AND PURCHASER ⇨172—LIABILITY FOR INTEREST ON DEFERRED PAYMENTS.

Where a contract for sale of land mentions no precise dates for payment of deferred installments of purchase money, and makes such due dates dependent on the doing of some act by the vendor for the performance of which no time is limited, and the vendee is let into possession prior to the doing of such act, either by the contract itself or the subsequent assent of the vendor, the vendee must pay interest on the unpaid purchase money.

3. VENDOR AND PURCHASER ⇨172—LIABILITY FOR INTEREST ON UNPAID INSTALLMENTS.

Where a contract for sale of land fixes times for payment of deferred installments and provides that payment shall not be made until the vendor has performed some act for perfecting title, the vendee being let into possession must pay interest on the installments from the date of payment fixed, notwithstanding the vendor has failed to perfect the title, and the only way for the vendee to avoid payment of interest is by depositing the money in a bank or otherwise, and notifying the vendor of such deposit.

4. VENDOR AND PURCHASER ⇨172—LIABILITY FOR INTEREST ON DEFERRED PAYMENTS.

Courts of equity will no more than courts of law make contracts for the parties, and where a contract for the sale of land fixes a date for the taking of possession by the vendee, and a date for payment of the purchase money, and is silent as to interest on payments or deferred payments, the vendee is under no obligation to pay interest on deferred payments.

5. SPECIFIC PERFORMANCE ⇨16—RELIEF REFUSED FOR INEQUITABLE RESULTS OF ENFORCEMENT.

One who seeks the aid of a court of equity to enforce specific performance of a contract submits himself to the rule that he who asks equity must do equity, and if the contract sought to be enforced was entered into by the defendant vendor, under a misapprehension which was induced by the purchaser, so that it would be inequitable to enforce the same, relief will be refused unless it can be granted on conditions that will obviate the inequality.

6. EVIDENCE ⇨434(11)—PAROL EVIDENCE TO SHOW FRAUD ADMISSIBLE IN ACTION FOR SPECIFIC PERFORMANCE.

Where, in a suit to enforce specific performance of a contract to sell lands, defendants asserted that the contract was entered into by their testator, the vendor, under a misapprehension caused by the purchasers, parol evidence is admissible to show the existence of the misapprehension, and that it was induced by the purchasers.

**7. VENDOR AND PURCHASER —172—SPECIFIC PERFORMANCE DENIED WITHOUT PAYMENT OF INTEREST ON DEFERRED PAYMENTS.**

In suit to compel specific performance of a contract for the sale of land, embodied in an option contained in a lease, which provided for payment on or about a fixed date of a portion of the purchase money and payment of the balance thereafter, *held*, that specific performance will not be enforced without payment by the purchasers of interest on deferred payments where they went into possession as lessees and continued the possession on exercising the option and making the down payment, and the vendor signed the contract under a misapprehension as to interest brought about by one of the purchasers.

Appeal from Circuit Court, Montgomery County.

Suit by one Barnett and another against Cloyd's Executors. From a decree for defendants, complainants appeal. *Affirmed*.

This is a suit in equity which was instituted in the court below by the appellants, the vendees, to compel the specific performance by appellees, the vendors, of a certain executory contract of sale of certain real estate.

The real estate consists of a valuable farm, with dwelling house and other improvements thereon giving it a considerable rental value.

The contract of sale, in so far as it is embodied in writing, is an option to purchase said farm, and is contained in one clause of a lease in writing of said farm by appellee as parties of the first part to appellants as parties of the second part, dated October 25, 1914, for a period of one year next ensuing, expiring with October 25, 1915.

The contract of sale, as set forth in such writing, is as follows:

"For and in consideration of this lease the said parties of the first part do agree with the said parties of the second part that they may have the exclusive right to purchase the said property at any time that they may elect to do so until the first of September, 1915, for the stipulated sum of thirty thousand (\$30,000.00) dollars, on terms of not less than \$5,000 cash, and a sum of not less than \$12,000 dollars by April 1st, 1917, and the balance not later than three years additional time from April 1st, 1917."

The vendee paid the \$5,000 cash payment on August 31, 1915, and the contract of sale which the bill seeks to enforce is said clause in writing and certain additional cotemporaneous parol agreements not embodied in the writing aforesaid, namely: An agreement by the vendors fixing October 26, 1915, for the completion of the contract of sale on their part by delivery of a deed conveying the farm to vendees, and an agreement by the vendees to execute and deliver as of the same date their bonds evidencing their obligation for the deferred payments of the purchase

money and also to execute a deed of trust conveying said farm as security for the payment of such bonds.

The vendors (the appellees) admit that the terms just mentioned were parts of the cotemporaneous parol contract of sale which were not reduced to writing, and they claim that there was a further portion of such agreement which was not expressly embodied in said writing, namely, that the vendees were to pay and said bonds were to provide for the payment of legal interest on said deferred payments of purchase money from said date, October 26, 1915, fixed for the completion of the contract as aforesaid, and they claim also that such writing should in this suit be construed by a court of equity as if it did contain such an express stipulation. The vendees (the appellants) take issue upon these positions of the appellees, and they constitute the issues in the cause.

The further material facts in the case, as clearly established by a preponderance of the evidence, are as follows:

At the time said lease was delivered the vendors did not regard the clause therein on the subject of the option aforesaid as intended to set forth the complete contract between the parties on the latter subject; and the vendors unquestionably bona fide believed and understood at that time that an agreement had been reached by them with the vendees that the latter would pay interest on the deferred payments from October 26, 1915, as aforesaid, and that said option clause in the lease, although not thus expressly worded, would be construed and acted upon by the vendees as having that meaning; that Mr. Barnett, one of the vendees and appellants, at that time so expressly assured the vendors and stated to one of the vendors that that was also his understanding of the contract of sale; and that the vendors were induced to deliver the lease and option in the form it is by such assurance from Mr. Barnett.

Mr. Simpson, the other appellant, in his testimony claims that the subject of interest was never mentioned between the vendors and vendees in the negotiations which culminated in the lease and option aforesaid; that he did not know of the belief and understanding aforesaid with which the vendors delivered the written agreement, or of the assurance which his covendee, Mr. Barnett, gave on that occasion as aforesaid; and hence he claims that the bare terms of the lease must govern the aforesaid subject of interest. But the preponderance of the evidence establishes the fact that Mr. Simpson is mistaken in his recollection. That the subject of interest was never mentioned in the negotiations aforesaid; the preponderance of the evidence being that it was mentioned and expressly stipulated for by the vendors in the

negotiations aforesaid with Mr. Simpson himself.

The decree under review granted the prayer of the appellants and vendees for the specific enforcement of said contract of sale and that the vendors (the appellees) be required to convey said farm to the vendees as of October 26, 1915, only upon condition that the vendees shall submit to the payment of interest on the deferred payments aforesaid, from October 26, 1915, on the first deferred payment which is now past due, and shall include obligation therefor in the bond evidencing and in the deed of trust securing the payment of the second deferred payment not yet due.

H. C. Tyler, of East Radford, and Harless & Colhoun, of Christianburg, for appellants.

H. C. Gilmer and John S. Draper, Jr., both of Pulaski, for appellees.

SIMS, J. (after stating the facts as above).

[1] 1. There is a well and long established rule in equity that where an executory contract of sale of real estate fixes a date for the completion of the contract and is silent as to interest on unpaid purchase money and is also silent as to when possession is to be taken by the vendee, if the latter, without any new consideration therefore moving from him, takes possession prior to the completion of the contract, he must pay interest on the unpaid purchase money from the date on which he takes possession. In such case equity, in the absence of any express agreement of the parties on the subject, implies a promise on the part of the vendee to pay such interest. This is done on the ground that the vendee enters into possession and takes the rents and profits, or other benefit of the purchase, before he is entitled thereto under the contract of sale, and ex æquo et bono he should pay interest as aforesaid from such time in compensation for the benefit of possession thus taken in advance of the right thereto under the contract. 39 Cyc. 1630; Seldon v. James, 27 Va. (6 Rand.) 465, 470; Brockenborough v. Blythe, 3 Leigh (30 Va.) 619, 638; Fludyer v. Cocker, 12 Ves. Jr., 25; Sugden on Vendors (14th Ed., 8th Am. Ed.) §§ 1, 2, 3, 4, 6, 7, et seq., pp. 314-317 et seq., and English and American cases cited; 18 Am. & Eng. Ency. Law (2d Ed.) pp. 167, 168; 29 Am. & Eng. Ency. Law, pp. 707-709, and cases cited; Oliver v. Hallam, 1 Grat. (42 Va.) 298; Bailey v. James, 11 Grat. (52 Va.) 468, 62 Am. Dec. 659. The mere circumstance that the vendor subsequent to the contract of sale may assent to such advance taking of possession does not alter the rule; for in such case, there being no new consideration moving from the vendee to the vendor to support such assent, equity will not imply that it was given for naught.

[2] The rule just mentioned has been extended by the authorities to cover cases in

which the contract of sale mentions no precise date or dates for the payment of the deferred payments of the purchase money, and makes such due date or dates dependent upon the doing of some act by the vendor for the performance of which no time is limited by the contract of sale, and the vendee is let into the possession of the estate prior to the doing of such act, either by the contract of sale itself or by subsequent assent of the vendor, and fails to make the payments on the dates prescribed therefor by the contract. Sugden on Vendors, supra, § 4, p. 316; Oliver's Ex'r v. Hallam's Adm'r, 1 Grat. (42 Va.) 298; Cohen v. Jenkins, 100 S. E. 678, decided at this term of court.

[3] The same rule has been alike extended to apply to cases in which the contract of sale fixes the date for the taking of possession by the vendee and mentions certain dates for the payment of the deferred payments of purchase money, where the same contract, however, also contains the additional provision that the payments shall not be demanded by the vendor until he has done some act for the performance of which no time is limited by the contract of sale (Brockenborough v. Blythe's Ex'rs, 3 Leigh [30 Va.] 619); and also where the contingency arises after such contract of some difficulty with respect to the title, and the vendee, having taken, continues to hold possession of the estate notwithstanding the difficulties as to title pending their removal, and fails to make the payments on the dates prescribed therefor by the contract (Seldon v. James, 6 Rand. [27 Va.] 465, 470, 471; Hundley v. Lyons, 5 Munf. [19 Va.] 342, 7 Am. Dec. 685). In such cases where the act in question is finally performed by the vendor, or the objections to the title prove unsubstantial, it is held that the vendee must pay interest on the deferred payments of purchase money—not from the time of his taking possession of the estate, however, for that would be in contravention of the express contract giving him such right of possession—but from the dates mentioned in the contract of sale for such payments.

In all of the cases above alluded to there occurs a failure of the vendee to make the payments of purchase money at the times at which, when the contract of sale was entered into, they were expected to be made, as either impliedly understood by the parties or as expressly stipulated in the contract of sale. That is to say, in all of such cases the vendee is in default in making such payments, and he is held bound to pay interest on such payments from the time of such default. Further—

In the cases to which the rule above mentioned is applicable, it is well settled that the delay in making title being due to the negligent fault of the vendor will not excuse the vendee from paying interest as aforesaid, and that the only way of escape for the ven-

dee from the payment of such interest is for him to set aside, by deposit in bank or otherwise, the money to meet the deferred payments, and notify the vendor that he has done so. *Sugden on Vendors*, supra, § 3, p. 317, and authorities cited. But if the delay be due to the willful default of the vendor, such rule does not apply. *Atchison, etc., R. Co. v. Chicago, etc., R. Co.*, 162 Ill. 632, 44 N. E. 823, 35 L. R. A. 167.

[4] 2. But the courts will not in equity, any more than at law, make contracts for parties, and the rule in equity above adverted to has no application where the contract of sale fixes a date for the taking of possession by the vendee and a date or dates for the payment of the purchase money and is silent as to interest on such payment or payments, and the vendee does not take possession prior to the date fixed therefor, and does not fail to make the payments on the dates prescribed therefor, by the contract. In such case the rule is equally well settled in equity as at law that no obligation of the vendee to pay interest on the deferred payments of purchase money will be implied, nor does such liability for interest arise as damages recoverable by the vendor, except from the date or dates on which the same becomes due and payable in accordance with the terms of the obligation. 22 Cyc. 1536, 1539, 1540; 39 Cyc. 1569, 1572, 1573; 16 Am. & Eng. Ency. Law (2d Ed.) 991, 992, 1002, 1041; *Buchanan v. Leeright*, 11 Va. (1 Hen. & M.) 211; *Chapman's Adm'r v. Sherherd's Adm'r*, 65 Va. (24 Grat.) 383; *Kent's Adm'r v. Kent's Adm'r*, 69 Va. (28 Grat.) 845; *Roberts' Adm'r v. Cocke*, 69 Va. (28 Grat.) 207; note to 68 Va. Rep. Ann. 586 et seq.; *McVeigh's Ex'r v. Howard*, 87 Va. 599, 13 S. E. 31; *Morley v. Lake Shore Ry. Co.*, 146 U. S. 168, 13 Sup. Ct. 54, 36 L. Ed. 925; *Minaud v. Beans*, 64 Pa. 411; *McKenna v. Sterrett*, 6 Watts (Pa.) 162; *Nettleton v. Caryl*, 14 Pa. Super. Ct. 443.

[5-7] 3. It is unnecessary, however, for us to determine, in the case before us, whether the contract of sale falls within the rule first or the rule last above mentioned. It may be conceded that in accordance with the evidence in the record the mind of none of the parties ever assented to a contract of sale which was silent as to the date when the vendees were to take possession; that the silence of the written contract of sale on the subject of interest was not due to a mutual mistake of all of the parties, since Simpson certainly intended that it should be silent on that subject; and that the contract of sale as embodied in writing, when construed along with the lease of which it was a part, must be held to have fixed a date for the taking of possession by the vendees as purchasers, namely, October 26, 1915, being the day immediately following the end of the demise under the lease. But this would not be conclusive of the case in favor of the appellants.

It is too well settled to need any extended statement that a plaintiff who seeks the aid of a court of equity to enforce specific performance of a contract submits himself to the rule that he who asks equity must do equity; and that, if the contract sought to be enforced was entered into by the defendant under a misapprehension which was induced by the plaintiff so that it would be inequitable and unfair to the defendant to enforce it in accordance with its strict terms, the court will refuse the relief asked, unless the granting of it can be accomplished with conditions which will obviate that result—in which case the granting of the relief upon such conditions is the proper course for the court to pursue. And parol evidence is admissible to show the existence of such misapprehension and that it was induced by the plaintiff. 2 *Pomeroy's Eq. Jur.* (3d Ed.) § 860; 4 *Pomeroy's Eq. Jur.* (3d Ed.) §§ 1404, 1405; *Willard v. Tayloe*, 8 Wall. 557, 19 L. Ed. 501, 504; *Halsey v. Montelro*, 92 Va. 589, 24 S. E. 258; *Waterman on Spec. Perf. of Contracts*, § 158, pp. 208, 209, § 361, pp. 484, 485, § 367, p. 491; *So. Ry. Co. v. Franklin*, 96 Va. 708, 32 S. E. 485, 44 L. R. A. 297.

As said in 2 *Pomeroy's Eq. Jur.* § 860, supra:

"Wherever the defendant's mistake was, either intentionally or not, induced or made probable or even possible, by the acts or omissions of the plaintiff, then, on the plainest principles of justice, such error prevents a specific performance of the agreement"—in accordance with its precise terms.

And again in the same section of the learned work just quoted, it is said:

"It is \* \* a well-settled rule, that in suits for the specific enforcement of agreements, even when written, the defendant may by some means of parol evidence show that through the mistake of \* \* either of the parties, the writing does not express the real agreement, or that the agreement was entered into through a mistake as to the subject matter or as to its terms."

These statements of the law are especially applicable in the case before us, as it appears from the statement of facts preceding this opinion that the appellants by the positions taken in their bill and in their testimony admit that the option clause in the lease was not intended to embody all the terms in detail of the entire contract of sale; that the appellees, at the time they delivered the lease and option in writing, were unquestionably under the bona fide belief that such written contract was not intended to embody all the terms of sale; that the detail as to the obligation of the appellants to pay interest was understood and agreed to by the appellants notwithstanding the language of such writing; and that appellees were induced to deliver the contract in that shape by the assurance of one of appellants to one of the appellees, given at the time, that that was also his



understanding and construction of the contract. And such being the case, even if the contract as embodied in writing would have been in itself equitable and fair, had it been freely entered into and delivered by the appellees without misapprehension or mistake as to its nature or consequences, it is manifest that it would work a great hardship and injustice upon appellees to enforce it in accordance with its strict terms as written. Even if the appellant Simpson was not aware before the suit was brought of the assurance aforesaid given appellees by his associate vendee, by which the appellees were induced to deliver the contract in writing in its existing form, it would be most inequitable and unjust to allow him to reap the fruit of such assurance without being required to make it good by living up to it. That is amply sufficient ground to sustain the decree under review in so far as it affects the appellant Simpson; and, of course, the appellant Barnett, who gave such assurance, has no standing in a court of equity to ask for the enforcement of a contract at variance with that assurance.

The decree under review will therefore be **Affirmed**.

(125 Va. 635)

### COHEN v. JENKINS.

(Supreme Court of Appeals of Virginia. Sept. 17, 1919.)

#### 1. LIMITATION OF ACTIONS § 85(2)—BAR OF JUDGMENT ON FIRM DEBT.

Under Code 1904, § 2933, a judgment against two copartners recovered in 1896 is barred by 1918 as to the one remaining in the state, where the original execution was returned no property found, and a second execution issued in 1900 was never returned, notwithstanding the other copartner removed to and was residing in a foreign state when the second execution was issued; there being no attempt on the part of the remaining copartner to obstruct or delay collection of the judgment.

#### 2. MORTGAGES § 424—ENFORCEMENT DENIED AFTER 20 YEARS' DELAY.

Twenty years' delay in enforcing a deed of trust after accrual of right of action will bar the same, Code 1904, § 2934, making such delay an absolute bar to any proceeding to enforce a deed of trust or mortgage.

#### 3. LIMITATION OF ACTIONS § 85(2)—ABSENCE OF DEBTOR DOES NOT BAR RUNNING OF STATUTE AGAINST MORTGAGE.

The absence of a debtor from the state creates no obstruction of the right to enforce a deed of trust on property situated within the state, and hence will not, under Code 1904, § 2933, excuse the effect of 20 years' delay in enforcement which is made a bar by section 2935 to any action for enforcing such obligation.

#### 4. VENDOR AND PURCHASER § 172—LIABILITY FOR INTEREST ON DEFERRED PAYMENTS.

Where a purchaser went into possession under an agreement that a deferred payment should be made when title to the property had been satisfactorily cleared, *held*, that the purchaser who retained the money was bound to pay interest on the amount from the time he went into possession, particularly where the title was marketable at the time he went into possession.

**Appeal from Circuit Court, Tazewell County.**

**Suit by W. E. Jenkins against one Cohen.** There was a decree for complainant, and defendant appeals. **Affirmed.**

J. Powell Royall, of Tazewell, and L. J. Holland, of Bluefield, W. Va., for appellant.

Butts & Minter, of Logan, W. Va., and T. C. Bowen, of Tazewell, for appellee.

PRENTIS, J. W. E. Jenkins, claiming title to a storehouse and lot in Pocahontas, Va., contracted in writing to sell it to B. M. Cohen for \$4,000, of which \$3,000 was to be paid in cash on the day after the council of the town of Pocahontas granted Cohen a license to sell whisky in the building, and \$1,000 to be paid "when the title to said property had been satisfactorily cleared." The liquor license was granted to Cohen, and Jenkins and his wife, on June 15, 1914, conveyed the property to him, the deed acknowledging the payment of \$3,000, part of the purchase price in cash, and as to the balance of the purchase money using this language:

"The sum of one thousand dollars, which is yet to be paid by the party of the second part to the parties of the first part (when said parties of the first part shall have satisfactorily cleared and remedied the title to the lot of land herein described from all judgments, liens, claims, imperfections and defects). \* \* \*

It provides for immediate possession by the vendee and also contains this language:

"It is understood and agreed by and between all the parties hereto that there are certain judgments and trust deeds which are at present liens upon the property described, and that there are certain defects in the title of the said W. E. Jenkins, all of which said parties of the first part covenant and agree to satisfactorily remedy and cure within the next — months from the date, and in the meantime said party of the second part is withholding the sum of one thousand dollars (\$1,000.00) of the purchase money on said property until the parties of the first part shall have complied with this covenant and agreement and upon such compliance said party of the second part is to immediately pay the said male grantor the said \$1,000.00 balance of said purchase money as aforesaid."

The vendee took possession of the property, conducted the liquor business there for two

years, and since then has rented it to a tenant for \$50 per month. He has always claimed, however, that there were defects and imperfections in the title and therefore has refused to pay the balance of the purchase money due, and the vendor instituted this suit therefor alleging the nonresidence of the vendee, and praying that an attachment in equity be levied on the property which he had conveyed.

The cause was referred to a commissioner, who reported that the title is marketable, that the property is free of liens, and that the vendee should pay the balance of the purchase money with interest from the date of the conveyance, June 15, 1914. From this decree this appeal was allowed the vendee.

[1] The liens which the vendee insists existed at the time of the conveyance, and still exist, are two old deeds of trust and certain judgments against W. E. Jenkins rendered from 1893 to 1896. The commissioner reports that none of these judgments are now liens, that in all cases where executions were issued they have been returned more than 20 years and are hence barred by the statute; that the last of them was barred during the year 1916. The only one of these judgments as to which any particulars are given is that of Spragins Buck & Co., against F. E. Catlett and W. E. Jenkins, merchants and partners trading as Catlett & Jenkins, recovered at the December term, 1896, docketed December 30, 1896, for \$206.50, with interest from January 11, 1896, and \$8.40 costs. Execution was issued on this judgment December 23, 1896, and returned "no property found," January 22, 1897. A second execution was issued May 5, 1900, which never has been returned. The commissioner reported this judgment barred, and in our opinion there can be no doubt that it was barred long before this suit was instituted in January, 1918. In addition to this, it further appears that on May 28, 1918, Jenkins paid Spragins Buck & Co. \$50 in full settlement of all claims.

It is claimed that because F. E. Catlett, who was one of the judgment debtors, removed to West Virginia in the year 1901, where he died about June or July of that year, therefore the statute ceased to run against this judgment from the time of such removal, and *McClanahan v. N. & W. Ry. Co.*, 118 Va. 388, 87 S. E. 731, is cited. That case and the doctrine there announced does not support this contention, because there it was the title and interest of the judgment debtor who had removed from the state, against which the lien was asserted, while here there is no claim that Catlett has any title to or interest in this land which can be subjected to the lien of this judgment. It is the title and interest of W. E. Jenkins, acquired long after the date of the judgment, which it is here claimed can be subjected, and there is no intimation that Jenkins in any way or at any time ever obstructed the collection of this judg-

ment within the meaning of section 2933 of the Code, as construed in the case referred to.

That section (2933) contains this proviso:

"But this section shall not avail against any other person than him so obstructing, notwithstanding another might have been jointly sued with him if there had been no such obstruction."

As to this proviso this is said in the case of *McClanahan v. N. & W. Ry. Co.*, supra:

"Had the sentence stopped with the words 'so obstructing,' the argument in their favor would certainly have been stronger; but it does not stop there, but proceeds, 'notwithstanding another might have been jointly sued with him if there had been no such obstruction,' which shows clearly, we think, that the Legislature had in mind a suit in which there was more than one defendant, one of whom left the commonwealth, we will say, and by so departing obstructed the plaintiff in the prosecution of his right, while the other remained in the commonwealth and did no act to obstruct the remedy as to himself."

If we correctly interpret this language, the opinion in that case accords with the view which we have just expressed.

[2, 3] As to the two deeds of trust, it appears that the right to enforce one of them accrued on the 10th day of May, 1894, and hence was barred on the 10th day of May, 1914, and the right to enforce the other accrued on the 14th day of May, 1895, and hence was barred on the 14th day of May, 1915. Code, § 2935. It is claimed as to these deeds of trust that one Isaac Katzen, who executed one of them, moved out of the state several years ago and then returned, and that Catlett, who joined in executing one of them, moved to West Virginia, as above stated, and *McClanahan v. N. & W. Ry. Co.*, supra, is relied upon.

In our opinion this contention is unsound. The statute, Code, § 2935, provides that no deed of trust or mortgage hereafter given to secure the payment of money, and no lien hereafter reserved to secure the payment of unpaid purchase money, shall be enforced after 20 years from the time when the right to enforce the same shall have first accrued. This creates an absolute bar to any proceeding for the enforcement of a deed of trust or mortgage after 20 years from the time the right to enforce it accrued (except those executed by a corporation or otherwise expressly excluded by the statute), and the language creating that absolute bar is so clear as to need no elucidation. Section 2933 of the Code, which excludes the time during which a person obstructs a right by leaving the state, etc., has no application to liens created by such deeds of trust or mortgages. The absence of the debtor from the state in such cases creates no obstruction of the right to subject the property to such liens by every way and means which would be available if the debtor were in the state. There is also

uncontradicted testimony showing that both of these debts have been paid.

[4] The other question is as to whether the \$1,000 deferred purchase money should bear interest. There is some confusion in the authorities, but we do not regard the question as an open one in Virginia.

This is said in *Selden v. James*, 6 Rand. (27 Va.) [470] 521:

"The appellant was always ready and willing to pay the money, if he could have gotten indemnity. Without stopping to inquire whether he had a right to require such indemnity in an executed contract like this, it is obvious to remark that, according to the best-settled rules, the statement that he was ready and willing to pay is wholly insufficient to protect him from the payment of interest. He was then in possession of the land, receiving the issues and profits; he was also in possession of the money, the price of the land, and it must be a strong and clear case which could protect him, under these circumstances, from paying interest; a case showing that he had a right to retain the money, that he did in fact keep it useless and unproductive by him, and that he gave the other party notice that it was thus unproductive. This is settled in many cases"—referring to *Powell v. Martyr*, 8 Ves. 146; *Sugden on Vendors*, p. 319; *Brockenbrough v. Blythe's Ex'r*, 3 Leigh. (30 Va.) 638; *Kershaw v. Kershaw*, 22 Law Times Rep. (N. S.) 651.

In *Oliver's Ex'r v. Hallam's Adm'r*, 1 Grat. (42 Va.) 304 [298], this is held in a case in which no opinion was handed down:

"A vendee put into possession of the land purchased, [is] bound to pay interest on the balance of purchase money unpaid, though, by the contract, the vendor binds himself to make said vendee a good and lawful title to the land before he calls upon him for the unpaid purchase money, or though the vendee's contract is to pay the balance of the purchase money when a good title to the property is made to him."

That case is precisely like this case, and, unless we are prepared to overrule it, is decisive. This rule has existed so long in Virginia as to become a rule of property which we should not now disturb. *Barnett v. Cloyd's Ex'rs* (this day decided) 100 S. E. 674. It is followed in West Virginia. *Steenrod v. Railroad Co.*, 27 W. Va. 1; *Hoard v. Railroad Co.*, 59 W. Va. 96, 53 S. E. 278, 8 Ann. Cas. 929. The text-writers also generally recognize it. *Maupin on Marketable Titles to Real Estate*, § 324, p. 766; *Warvelle on Vendors*, vol. 1 (2d. Ed.) § 180, p. 227.

The inquiry is not as to which party is at fault and therefore to be penalized, but simply what is fair and just to both parties. A vendee put in possession without having paid all of the purchase money promised, as a general rule, in the absence of express contract relieving him from interest, is held not entitled to retain all of the rents, profits, and

use of the property and at the same time to be relieved from interest upon the unpaid purchase money of which he also has the use. The rents and profits generally exceed the interest, and this is true in this instance. If he does not desire to pay such interest, his remedy is clearly pointed out. He may, if he wishes to do so, set the money aside by deposit in bank, or otherwise, for the purpose of paying the debt, and notify the creditor that he has done so, and thus, where he is not in default, relieve himself from the payment of interest. If he does not do so, the inference is that he is using the money for his own benefit, and it is therefore held that in good conscience he ought to pay interest thereon. The trial court followed the settled law in Virginia.

Affirmed.

(85 W. Va. 11)

**BOARD OF COM'RS OF OHIO COUNTY v. CLEMENS et al. (No. 3777.)**

(Supreme Court of Appeals of West Virginia. Oct. 21, 1919.)

(Syllabus by the Court.)

1. ATTORNEY AND CLIENT ⇐91—PRINCIPAL AND SURETY ⇐104(1) — ATTORNEY HAVING POWER TO AGREE TO A CONTINUANCE, SURETY IS NOT DISCHARGED THEREFOR.

An attorney at law, employed to prosecute or defend a suit, has implied authority to agree to a continuance thereof, when such continuance is in the interest of his client, or in the attorney's judgment will expedite a hearing, and such continuance is not an extension of the time of payment, and does not discharge a surety.

2. PRINCIPAL AND SURETY ⇐59—CONTRACT OF CORPORATION INSURER CONSTRUED IN FAVOR OF OBLIGEE.

Although a voluntary surety is a favorite of the law, and entitled to stand on the strict letter of his contract, the rule of strictissimi juris does not apply to a corporation organized to enter into bonds and undertakings for a profit. Such companies are essentially insurers, and their contracts, being usually expressed in terms prescribed by themselves, should be construed most strongly in favor of the obligee therein.

**Error to Circuit Court, Ohio County.**

Action by the Board of Commissioners of Ohio County against W. M. Clemens, ex-sheriff, etc., the Citizens' Trust & Guaranty Company of West Virginia, and others. Judgment for plaintiff, and defendant Citizens' Trust & Guaranty Company of West Virginia brings error. Affirmed.

Hubbard & Hubbard, of Wheeling, for plaintiff in error.

David A. McKee, of Wheeling, for defendant in error.

WILLIAMS, J. The board of commissioners of Ohio county recovered a judgment against W. M. Clemens, ex-sheriff of said county, and the Citizens' Trust & Guaranty Company, his surety, in an action on his official bond, and the surety brings this writ of error, claiming that it should have been discharged from liability, because a continuance of the case for 30 days was taken by agreement between the attorneys for plaintiff and the principal debtor, respectively, without its knowledge or consent.

Defendant Clemens was sheriff of Ohio county from the 1st of January, 1909, to the 31st of December, 1912. After his term of office ended, an audit was made of his accounts by J. H. Otto, under the direction of the state tax commissioner's office, which showed a balance of public funds in his hands due to the board of commissioners of Ohio county, and this action was brought to recover that balance. The items sought to be recovered are 15 per cent. of the fees required to be paid to and collected by the sheriff as county treasurer, commissions improperly deducted on miscellaneous settlements, and interest. The action was begun by notice of motion for judgment.

The Citizens' Trust & Guaranty Company of West Virginia, the surety, filed a special plea on the 23d of September, 1916, admitting its suretyship on the bond sued on, and alleging that, in disregard of its persistent demands upon plaintiff to proceed with due diligence to prosecute such claims as it might have against the sheriff based on said bond, and in disregard of the court's order made on the 25th of May, 1916, referring the cause to a commissioner, and ordering the testimony to be taken and the commissioner's report completed and filed on the first day of the next term, which was the 5th day of September, 1916, plaintiff and the principal defendant agreed before that time, without the surety's knowledge or consent, to defer the taking of testimony until the next October, thus staying the proceedings for more than 30 days.

Neither party requiring a jury and both parties agreeing thereto, all matters of law and fact were submitted to and decided by the court. On the 3d of December, 1917, it heard the cause upon the aforesaid special plea, general replication thereto, the commissioner's report, and exceptions thereto by defendant Clemens, and sustained his exceptions in respect to certain items, and found against the surety on the issue raised by its special plea, and rendered judgment against both principal and surety for \$8,196.65, with interest thereon from the 1st of December, 1917, until paid.

After the cause was referred to a commissioner the prosecuting attorney, who was counsel for plaintiff, agreed with counsel representing the sheriff that the taking of testimony might be deferred until October fol-

lowing, for the reason, as then suggested by the attorney for said Clemens, that a great deal of time could be saved by thus allowing time to Mr. Welch, who had been chief deputy for said sheriff, to go over the audit made by the state; that in all probability defendant would admit a great many items therein charged, and thus dispense with the necessity of taking evidence to prove them. The effect of this continuance was to carry the case over the term at which the commissioner had been directed to file his report. The surety insists that the continuance was in effect an extension of time to the principal debtor, and, being granted without its consent, operated to discharge it from liability. We do not think so, for two reasons:

First, because it does not appear that the plaintiff consented, nor that the prosecuting attorney had authority to bind it by an agreement to extend time of payment.

Second, because a different rule respecting liability applies to a surety company, who becomes surety for another for a valuable consideration, than is generally applied to a mere voluntary surety.

[1] The agreement between attorneys for the respective parties to continue the time for taking testimony was apparently for the purpose of expediting the hearing. As counsel for plaintiff, the prosecuting attorney had the right and implied authority to make such an agreement. Thornton on Attorneys at Law, p. 486. Stipulations between opposing counsel, necessary or incidental to the management of the suit, are within the implied authority of the attorney and are binding on his client. 2 R. C. L. 989; 6 C. J. 702. While, generally speaking, an attorney at law has control over the conduct of a suit, and may bind his client by an agreement made in his interest to continue the case, he has no implied power to grant an extension of time of payment, nor will an unauthorized extension by him discharge a surety. Hall v. Presnell, 157 N. C. 290, 72 S. E. 985, 39 L. R. A. (N. S.) 62, Ann. Cas. 1913B, 129; Jerauld v. Trippett, 62 Ind. 122; Haselton v. Florentine Marble Co. (C. C.) 94 Fed. 701. Moreover, it does not appear that the continuance occasioned any loss to appellant.

[2] A voluntary surety is a favorite of the law, and he is generally entitled to insist on the very letter of his contract. But the doctrine of strictissimi juris does not apply to corporations organized to enter into bonds or undertakings for a profit. Although such companies sometimes call themselves surety companies, their business is essentially that of insurer, and their contracts, being usually expressed in terms prescribed by themselves, should be construed most strongly in favor of the obligee therein. 32 Cyc. 307.

An extension of time will not relieve a surety company on a bond, unless the extension exceeds the time limited in the bond

for bringing suit thereon, nor unless the surety company is thereby made to suffer material harm. *Philadelphia v. Fidelity, etc., Deposit Co.*, 231 Pa. 208, 80 Atl. 62, 23 Ann. Cas. 1085, and cases cited in note at page 1087; *Brown v. Title Guaranty & Surety Co.*, 232 Pa. 337, 81 Atl. 410, 38 L. R. A. (N. S.) 698; *Guaranty Co. v. Pressed Brick Co.*, 191 U. S. 416, 24 Sup. Ct. 142, 48 L. Ed. 242; *Hormel & Co. v. American Bonding Co.*, 112 Minn. 288, 128 N. W. 12, 33 L. R. A. (N. S.) 513, and numerous cases cited in note; *Western Casualty & Co. v. Board of County Commissioners of Muskogee County, (Okla.)* 159 Pac. 655, L. R. A. 1917B, 977.

We affirm the judgment.

(85 W. Va. 15)

ROLLYSON v. BOURN et al.

(Supreme Court of Appeals of West Virginia.  
Oct. 21, 1919.)

(Syllabus by the Court.)

1. SPECIFIC PERFORMANCE ¶8 — COMPLETE AND PERFECT CONTRACT OF SALE OF REALTY ENFORCED.

Specific performance of a complete and perfect contract of sale of real estate will be decreed as a matter of right and of course, upon a proper application thereof, in the absence of conduct or circumstances rendering specific performance inequitable or unjust.

2. SPECIFIC PERFORMANCE ¶8—DISCRETION OF TRIAL COURT IN REFUSING PERFORMANCE NOT ARBITRARY.

The discretion of a trial court to refuse specific performance of a contract for the sale of real estate, on account of defects or circumstances relied upon by way of defense, is a sound and reviewable discretion, not an arbitrary one.

3. SPECIFIC PERFORMANCE ¶92(1) — LIENS AND INCUMBRANCES KNOWN TO VENDEE AT TIME OF CONTRACT NO DEFENSE.

In the case of a contract in which time of performance is not made an essential element, and in which there is no stipulation against the existence of incumbrances upon the land, the existence of vendors' and trust deed liens not exceeding the amount of the unpaid purchase money and known to the vendee at the date of the execution of the contract, and reasonable delay in removal thereof by the vendor, acquiesced in by the vendee, do not release the latter from the contract, nor constitute tenable ground of defense to procedure for specific performance.

4. MORTGAGES ¶138 — VENDOR AND PURCHASER ¶134(2) — LIEN OF TRUST DEED PAYABLE UNDER UNPAID PRICE NO DEFENSE TO SPECIFIC PERFORMANCE.

The title of a trustee in a deed of trust securing payment of a debt is legal, but defeasible by payment of the debt by the owner of the equity of redemption or release of the lien by the holder thereof; wherefore the existence of a

deed of trust on land sold, securing a debt that can be satisfied out of unpaid purchase money in the hands of the vendee, under a contract not making time of performance essential, nor stipulating against incumbrances, does not excuse the vendee from performance of the contract.

5. VENDOR AND PURCHASER ¶165 — INSIGNIFICANT DEFICIENCIES IN QUANTITY OF LAND NO BAR TO SPECIFIC PERFORMANCE.

An insignificant deficiency in the quantity of land sold by such a contract, due to an adverse holding of a part thereof, compensable by an abatement of the purchase money, the part so held having no peculiar value, does not release the vendee from the obligation of the contract.

6. SPECIFIC PERFORMANCE ¶92(1)—VENDOR AND PURCHASER ¶144(2) — REASONABLE DELAY IN REMOVAL OF LIENS NO BAR TO SPECIFIC PERFORMANCE.

Reasonable delay on the part of a vendor in the removal of liens on land sold by executory contract in which time of performance was not made essential, the existence of the liens being known to the vendee at the date of the contract and he having taken possession of the land pending removal thereof by the vendor and consummation of the contract, does not release the vendee from the obligation of the contract, nor preclude specific performance thereof at the instance of the vendor.

7. VENDOR AND PURCHASER ¶55, 122—CONTRACT FOR EXCHANGE OF ONE TRACT AND SALE OF ANOTHER AN ENTIRE CONTRACT.

A contract for the conveyance of two pieces of property lying in the same community, literally purporting an exchange of one piece for property and sale of the other piece for money, is an entire contract, and the vendee cannot effect a partial rescission thereof, in the absence of a provision in the contract authorizing it. On the theory of rescission, he cannot retain one of the pieces and obtain absolution from his contract as to the other.

8. SPECIFIC PERFORMANCE ¶32(2), 35—CONTRACT FOR SALE OF PROPERTY ENFORCEABLE AGAINST VENDEE.

Although a contract by a husband and wife for the sale of land owned by both, not sealed nor acknowledged, is unenforceable by the vendee as to the wife, she and her husband may have specific performance thereof against him, on their tender of a deed properly executed by them, and their willingness at all times to perform the contract precludes his discharge from the obligation thereof on the ground of such defect.

Appeal from Circuit Court, Braxton County.

Suit by M. H. Rollyson against H. M. Bourn and others, with cross-bill by defendants for specific performance of a contract of sale. Decree for plaintiff, denying the prayer of the cross-bill, and defendants appeal. Reversed, and decree entered requiring specific performance of contract on conditions, and cause remanded.

Hines & Kelly, of Sutton, for appellants.  
Haymond & Fox, of Sutton, for appellee.

POFFENBARGER, J. The decree complained of enforces the lien of a deed of trust on two certain tracts of land, securing the payment of a note for \$2,200, less payments thereon amounting to \$1,100, and denies the prayer of a cross-bill answer filed by the defendants and seeking specific performance of a contract of sale of other land and prevention of enforcement of the trust deed lien, on the theory of an agreement on the part of the holder of that lien, to apply the lien debt on purchase money due from him to the defendants under the alleged contract of sale.

Whether the bill stated a good cause of action seems to be doubted by counsel for both plaintiff and defendants, but they insist that the situation disclosed by the pleadings read as a whole makes out a cause of equitable cognizance. They treat the defect in the bill as having been cured or supplied by matter disclosed by the answer. Inasmuch as the question is one of procedure, not jurisdiction, and the parties desire a decree determining their rights, there is no occasion for an inquiry as to the technical correctness of the procedure or the sufficiency of the pleadings in point of form. The bill ought to have set up the agreement relied upon in the answer, and the controversy growing out of it, as constituting an impediment to a sale by the trustee, but this is admitted by the answer.

The deed of trust was executed by H. M. Bourn and R. H. Bourn, husband and wife, December 12, 1914, to secure payment of their \$2,200 note executed in favor of C. R. Bourn and dated May 4, 1914. Rollyson, while indebted to H. M. Bourn and R. H. Bourn for purchase money of land, bought the C. R. Bourn note subject to credits amounting to \$1,100, with the understanding that H. M. Bourn and R. H. Bourn would allow him to offset it against his indebtedness to them in the sum of \$2,100. Having attempted to rescind his purchase, and claiming he had done so, or was excused from performance of the contract, he brought this suit to enforce the lien of the deed of trust.

The debt due from him to the Bourns was part of the purchase money of a 40-acre tract of land they agreed to convey to him, along with a residence lot in Frametown, containing 4 or 5 acres. The contract bears date March 23, 1915, and literally purports an exchange of the residence lot for a tract of land at Tague, W. Va., then owned by Rollyson, and a sale to Rollyson of a 40-acre tract at Frametown, for \$2,500, of which \$400 was paid, and the balance to be paid in four equal installments of \$525, payable, with interest, in 6, 12, 18, and 24 months. Deeds were immediately executed conveying the residence lot to Rollyson, and the Rollyson

tract of land at Tague to the Bourns; but conveyance of the 40-acre tract and execution of the purchase-money notes were deferred on account of a vendor's lien and a trust deed lien on it, the former of which was uncertain as to the amount thereof. The Bourns were to ascertain the amount of it and were to remove the incumbrances, in the settlement with Rollyson or otherwise. They were not mentioned in the contract, nor was there any agreement as to covenants, other than covenants of warranty. Rollyson, however, took possession of the tract of land, held it for some time, and then abandoned it, under the impression that the existence of the liens, delay in removing them, failure to tender a proper deed, a defect in the agreement, and the alleged existence of an adverse possession of about one-half of an acre of the land by one Mollohan, legally justified rescission of the contract, or his release from the obligation thereof.

[7] His retention of the residence lot constitutes an insuperable obstacle to rescission, if the contract was entire and inseparable, for, in the absence of an agreement otherwise providing, rescission must be total. *Hutton v. Dewing*, 42 W. Va. 691, 26 S. E. 197; *Castle v. Gibson*, 77 W. Va. 116, 87 S. E. 174. Realizing this, he claims the two deals were separate and distinct, although entered into at the same time and evidenced by the same paper. This position is untenable. It cannot be assumed that the Bourns would have sold or traded only one of the two pieces of property. As both were combined in a single contract, it must be assumed that both pieces constituted the subject-matter of their side of the contract, notwithstanding the fixing of separate prices or recitals of separate considerations. *Hermann v. Goddard*, 82 W. Va. 520, 96 S. E. 792.

[8] R. H. Bourn, the wife of H. M. Bourn, owned an undivided interest in the 40-acre tract of land. She joined her husband in the contract, but it was not under seal nor acknowledged, wherefore it could not have been enforced against her. *Simpson v. Belcher*, 61 W. Va. 157, 56 S. E. 211; *Wiseman v. Crislip*, 72 W. Va. 340, 78 S. E. 107. But, if the deed tendered by her and her husband is such as the contract contemplates, that defect in the contract will not alone defeat specific performance. There was a binding contract with the husband as to the entire tract of land, upon which he could have been held by the vendee and made liable. Hence there was mutuality of contract, whether there was mutuality of remedy or not. Inasmuch as the wife comes and tenders performance, no remedy against her is necessary. Her tender of performance cures the defect in the contract. *Boyd v. Brown*, 47 W. Va. 238, 34 S. E. 907; *Central Land Co. v. Johnston*, 95 Va. 223, 28 S. E. 175; *Walker v. Owen*, 79 Mo. 563; *University v. Polk*

County, 87 Iowa, 36, 53 N. W. 1080. If the husband, having agreed to sell the land, has procured a properly executed deed conveying it and made a tender thereof, specific performance will be decreed, even though he did not have the title at the date of the contract, in the absence of any other valid ground of defense. *Armstrong v. Maryland Coal Co.*, 67 W. Va. 589, 611, 69 S. E. 195; *Bruce v. Tilson*, 25 N. Y. 198; *Oakey v. Cook*, 41 N. J. Eq. 364, 7 Atl. 495; *Watts v. Waddle*, 6 Pet. 389, 8 L. Ed. 437.

[3, 6] Within a year from the date of the contract, the Bourns tendered their deed. At that time they had paid the vendor's lien debt on the land, which amounted to only \$67, and obtained a release, but had not paid the Philip S. Perkins debt, amounting to \$850 and secured on the land by a deed of trust. It seems not to be disputed that the amount due the Bourns from Rollyson was sufficient to discharge the C. R. Bourn note and the Perkins debt, at the date of the tender of the deed. Under these circumstances, the existence of the liens did not justify repudiation of the contract. *Armstrong v. Maryland Coal Co.*, 67 W. Va. 589, 611, 69 S. E. 195; *Hudson v. Max Meadows & Co.*, 97 Va. 343, 33 S. E. 586; *Garnett v. Macon*, 6 Call (Va.) 308, 369, Fed. Cas. No. 5245. Though the contract does not mention the liens on the property, it is evident that the purchaser was aware of them, for consummation of the deal was delayed on account thereof, and, in the meantime, he took possession of the land. Nor is it shown that any change had occurred in the situation of the parties or the value of the property, that can work any material prejudice to the purchaser in the enforcement of his contract. He claims to have lost an opportunity to sell some timber from the land, by reason of failure of the vendors to clear the title and make him a deed, he being unwilling to sell the timber without perfect and unincumbered title in himself; but the timber remains on the land, and the loss of an opportunity to make an advantageous sale of it cannot be regarded as depreciation in the value of the land. Being fully protected by the purchase money in his hands, having allowed time for removal of the liens, and having suffered no material prejudice by the delay, he could not justly or equitably repudiate the contract, on account of the existence of the liens. Nor do they now constitute any obstacle to specific performance. One of them was discharged before the answer was filed, and only six days after the suit was brought, and the other more than two years before the decree was entered.

[4] Although at the dates of the contract and the filing of the answer praying cross-relief, the legal title was outstanding in a trustee, the trust deed lien was only an incumbrance susceptible of removal by payment by either vendor or vendee. No reconveyance

by the trustee was necessary. The title was held only as security for the debt, and payment and a release terminated or defeated it. The trustee's title was legal, but defeasible by payment of the debt secured by the deed of trust. *Taylor v. King*, 6 Munf. (Va.) 358, 8 Am. Dec. 746; *Harris v. Harris*, 6 Munf. (Va.) 367; *Angel v. Marshall*, 55 W. Va. 679, 47 S. E. 882.

[5] The alleged defect in the title did not justify repudiation of the contract. If there is any at all, it is insignificant. According to the vendee's own testimony, the adverse holding by Mollohan, if any, does not amount to more than one-half of an acre, and that is not shown to have any peculiar value. He can obtain substantially all he contracted for, with an abatement of purchase money for the deficiency, if there is any, and that suffices. *Creigh's Adm'r v. Boggs*, 19 W. Va. 240; *McKee v. Barley*, 11 Grat. 340; *Jackson v. Ligon*, 3 Leigh (Va.) 161; *Evans v. Kingsbery*, 2 Rand. (Va.) 131, 14 Am. Dec. 779.

[1, 2] Taken and considered together and regarded as a whole, the matters of defense specifically set up do not constitute ground for refusal of specific performance in the exercise of judicial discretion. The vendee insists upon retention of a valuable and substantial part of the contract, the conveyance of the residence lot. The vendors stand ready and able to give him practically and substantially all he contracted for. He knew the occasion of the delay, when he made the contract and acquiesced in it for a considerable period of time. Moreover, the delay has wrought no substantial prejudice or detriment to him. Time of performance was not made an essential element of the contract, nor was there any stipulation against the existence of incumbrances. When a contract is free from objection, a court of equity, upon a proper application, will decree specific performance thereof as a matter of course. *Campbell v. Fetterman's Heirs*, 20 W. Va. 398; *Ballard v. Ballard*, 25 W. Va. 470; *Conaway v. Sweeney*, 24 W. Va. 643; *W. Va. Oil, etc., Co. v. Vinal*, 14 W. Va. 637. When there are defects or circumstances relied upon by way of defense, it devolves upon the court to say whether or not they are of such substantial character as would render specific performance unjust or inequitable, and, if they are deemed to be so, it has discretionary power to refuse specific performance, but it cannot refuse such relief arbitrarily, nor upon clearly unsubstantial grounds. The discretion to be exercised by the trial court in such cases is a sound and reviewable discretion; and, in the appellate court, the element of soundness is not less essential. *Ballard v. Ballard*, 25 W. Va. 470; *West Va. Oil, etc., Co. v. Vinal*, cited; *Lowry v. Buffington*, 6 W. Va. 249.

The deed tendered by the vendors contains a provision not warranted by anything in the

contract, namely, one requiring the vendee to pay the taxes on the oil and gas in the land, one-half of which was reserved.

Our conclusion is to reverse the decree complained of, and enter a decree here, requiring specific performance of the contract set up in the cross-bill answer, subject to an abatement of purchase money on account of deficiency in the land, if any, application of the C. R. Bourn debt and its interest to partial payment of the purchase money and interest thereon from the date of the contract, and release of the deed of trust securing payment of said C. R. Bourn debt, remanding the cause for execution of the decree, and awarding costs in this court to the appellants.

(84 W. Va. 729)

STATE, for Use of FARMER, v. CITIZENS' TRUST & GUARANTY CO.

(Supreme Court of Appeals of West Virginia. Oct. 14, 1919.)

(Syllabus by the Court.)

1. PLEADING  $\S$  352—MOTION TO STRIKE OUT PLEA HAS EFFECT OF DEMURRER.

A motion to strike out a plea has the same effect upon the legal sufficiency thereof that a demurrer thereto would have had.

2. EXECUTORS AND ADMINISTRATORS  $\S$  528 (1)—EXTENT OF LIABILITY ON OFFICIAL BOND DEFINED.

A surety on the official bond of an administrator or executor, where there is no statute or stipulation in the bond to the contrary, obligates himself only to account for losses occasioned by the failure of the fiduciary to use due diligence in pursuing and collecting claims owing to the estate, and to make proper application of the assets that come into his hands.

3. EXECUTORS AND ADMINISTRATORS  $\S$  528 (5)—LIMIT OF LIABILITY OF OFFICIAL SURETY OF INSOLVENT ADMINISTRATOR.

A debt due from a personal representative to the estate which he represents is not for all purposes to be regarded as money on hand; but where at the time of his appointment and qualification such representative was insolvent and unable to pay his debt, and so continued throughout the period of his administration, there being no laches on his part, such debt is to be treated as any other debt owing to the estate, and the surety on his official bond is not liable thereon for more than could have been enforced against the principal at any time within such period.

4. EXECUTORS AND ADMINISTRATORS  $\S$  528 (5)—LIMIT OF LIABILITY OF SURETY OF INSOLVENT HUSBAND, ADMINISTRATOR OF WIFE'S ESTATE.

Where the principal in a bond given by a husband as administrator of his deceased wife, the chief assets of whose estate she acquired by

will from her deceased father, upon whose estate the husband as executor of the will also administered, but without bond, the will so providing, did not in his lifetime account for or deliver to the wife, except in part, the estate so devised and bequeathed to her, and died leaving the residue unadministered, the surety on his official bond as such administrator, when sued thereon by the administrator of the unadministered assets of the wife's estate, may, to defeat recovery, plead, rely on, and show the inability of the principal therein to pay the same to the wife's estate after her death, because of the insolvency of the principal during the entire period covered by his administration of her estate.

Certified Questions from Circuit Court, Wood County.

Action of debt by the State, for the use of C. S. Farmer, administrator de bonis non of the estate of Beulah Westerman, deceased, against the Citizens' Trust & Guaranty Company. Plaintiff's motion to strike a plea from the file denied, and ruling certified. Ruling affirmed, with direction to certify decision.

A. C. Chapman, of New Martinsville, for plaintiff.

Kreps, Russell & Hiteshew, of Parkersburg, for defendant.

LYNCH, J. Plaintiff, as administrator de bonis non of the estate of Beulah Westerman, daughter of W. S. Wiley, deceased, and wife of C. G. Westerman, deceased, who qualified and became the administrator of the estate devised and bequeathed to her by the will of her father, brought against Citizens' Trust & Guaranty Company, surety on Westerman's bond as administrator, this action of debt on the bond to recover assets belonging to her estate in the hands of Westerman unadministered at the date of his death; and to defeat recovery thereon defendant, in addition to nil debet, conditions performed, and conditions not broken, pleaded specially the insolvency of Westerman from the time he qualified as such administrator to the date of his death. This plea the court refused to strike from the file on plaintiff's motion, but did certify its ruling thereon to this court to test the correctness thereof, thus presenting the single question whether, because of such insolvency, any liability on the bond attached to the defendant as surety therein.

The decisions of this state furnish no precedent or criterion to guide us in reaching a proper conclusion upon this proposition. What is not less embarrassing, we meet at the outset a contrariety of judicial opinion wherever the question has been discussed. The facts may be gathered from the opinion in *Morris v. Westerman*, 79 W. Va. 502, 92 S. E. 567, which, so far as they are now important, are these: C. G. Westerman qualified as executor of the will of W. S. Wiley about



January 22, 1903, in Wetzel county, but without bond; the will specifically dispensing with the indemnity. Beulah Wiley took under the will the greater part of the valuable estate of her father, only part of which came into her hands, either through her husband or from any other source, at any time while her husband had charge of her father's estate. Subsequently Mrs. Westerman died, and her husband became administrator of her estate, and gave the bond on which this action is brought to enable him to qualify as such, and who did so qualify and did administer upon her estate until the date of his death, whereupon plaintiff became the administrator of the unadministered assets, and brought this action to recover from the surety on Westerman's official bond that portion of her father's estate which her husband, first as his executor and then as her administrator, had failed to turn over to her, or, after her death, to her estate.

The condition of the administration bond involved here is that the principal,

"C. G. Westerman, administrator of the estate of Beulah [or Mrs. C. G.] Westerman, deceased, shall faithfully pay the rents and profits or proceeds of said estate which may lawfully come into his hands, or to the hands of any person for him, to such person or persons as are entitled thereto, and shall in all other things well and truly discharge his duties as such administrator."

The special plea filed by defendant sets up by way of defense the following:

"That C. G. Westerman was, at the time he was appointed and qualified as administrator of the estate of Beulah Westerman, deceased, insolvent, and \* \* \* continued to be insolvent during the entire period that he was administrator, \* \* \* to wit, up until the date of his death, \* \* \* and that at no time during the said period \* \* \* could the said debt decreed [in *Morris v. Westerman*] as owing from the estate of C. G. Westerman, deceased, to the said C. S. Farmer, administrator d. b. n. of the estate of Beulah Westerman, deceased, have been collected from the said C. G. Westerman, and that at no time during the aforesaid period \* \* \* could a greater amount have been collected from C. G. Westerman upon the aforesaid debt than was actually recovered and received \* \* \* from and out of the estate of C. G. Westerman, deceased."

[1] Whether Westerman in fact was or was not insolvent when his wife died, or when he died, or in the meantime, is immaterial, so far as this discussion is concerned. For that purpose the facts set up in the plea are taken as true, for a motion to strike has, we think, the same effect upon the question of the sufficiency of a pleading as a demurrer thereto would have had. Besides, like every other material fact alleged by a pleading, Westerman's insolvency as set up in the special plea is a fact to be proved by him who relies on it by way of defense—in this in-

stance, the surety in the fidelity bond. We are dealing now only with the right of the defendant to plead and rely on insolvency to exonerate itself from the liability sought to be enforced against it, and, if it can, to sustain the plea by necessary proof, the burden of which rests upon it.

[2-4] The single question presented is whether the allegation of the insolvency of the administrator during the time covered by his administration, and his consequential inability at any time during the administration to collect the debt owed by him to the estate of his wife, constitutes a valid defense to the action instituted against the surety on his official bond. As already indicated, instead of there being a general concurrence, there is a marked lack of harmony among the judicial decisions upon the question. This confusion is largely due to the diversity of authority at the common law as to the manner of treating a debt owed by a personal representative to his decedent at the time of his appointment. Many courts by a legal fiction treat such debt as immediately liquidated and as constituting assets in the hands of the representative from the moment of his qualification, upon the theory that, as the personal representative cannot demand or receive payment of himself, or sue himself, and since he is bound to account for his own debt as for all other debts, the law presumes that he has done what he is legally bound to do, and therefore charges him with the amount as a debt paid.

What is generally known as the "Massachusetts rule" upon the subject seems to have been announced as early as 1814 in *Stevens v. Gaylord*, 11 Mass. 256, and since followed, not only in that state, but in many others, and in substance and effect, as stated at pages 268, 269, is:

"As soon as the debtor is appointed administrator, if he acknowledges the debt, he has actually received so much money, and is answerable for it. This is the result with respect to an executor, and the same reason applies to an administrator; as the same hand is to receive and pay, and there is no ceremony to be performed in paying the debt, and no mode of doing it, but by considering the money to be now in the hands of the party in his character of administrator. \* \* \* The consequence is that he and his sureties in the administration bond are liable for the amount of such a debt, in like manner as if he had received it from any other debtor of the deceased."

The rule was further extended in *Leland v. Felton*, 1 Allen, 531, to apply to debts due to the estate of a testator from the executor named in his will, though the latter was insolvent at the time he accepted the trust, and although he had never charged the debts in his account, and an account had been allowed in which they were not included, but were mentioned as notes which it had been impossible to collect, and though he had resigned

his trust, and an administrator de bonis non had been appointed in his place. The later case of *Bassett v. Fidelity & Deposit Co.*, 184 Mass. 210, 68 N. E. 205, 100 Am. St. Rep. 552, adheres to the same rule and holds that the surety on an executor's bond is liable for the full amount due the testator from an insolvent firm of which the executor was a member, although the firm and the executor were insolvent at the time the latter assumed the trust. The reasoning relating to this conclusion is that an executor or administrator is appointed for the sole purpose of enforcing in behalf of those interested in the estate the rights of the estate against others. "For that reason," says the court, "on broad principles of policy it was laid down by the common law of England that he must yield all controversy as to the debt due from himself and treat it as an asset of the estate," since "no one is bound to accept the office, and, if he elects to do so, he thereby tacitly assents to this condition." The Massachusetts court has recognized no distinction in the application of this doctrine to assignees in insolvency cases (*Benchley v. Chapin*, 10 Cush. [Mass.] 173), to guardians (*Mattoon v. Cowing*, 13 Gray [Mass.] 387), and to receivers in insolvency cases (*Commonwealth v. Gould*, 118 Mass. 300).

The Supreme Court of Oregon indorses the same doctrine in *United Brethren v. Akin*, 45 Or. 247, 77 Pac. 748, 66 L. R. A. 654, 2 Ann. Cas. 353, and holds the sureties on the bond of an executor liable for the amount of his personal debt to the estate, though they executed the bond without any knowledge of indebtedness by the executor to the decedent, or of the executor's insolvency and inability to pay the debt. This holding, however, seems to be warranted by a statute of that state, as it is perhaps by statutes of other states providing that an executor of an estate shall be liable for any claim of the testator against him, "as for so much money in his hands."

The attempt to compel the sureties of an executor or administrator, the rule being the same in each case, to pay a debt due from him to the estate administered, when, had another person not so indebted been appointed as such, he could not possibly have collected it because of the continued insolvency of the debtor, certainly may frequently be fraught with serious consequences, and for that reason ought not to be sanctioned without due consideration, especially when no warrant can be found therefor other than the legal fiction that such a debt is to be treated as so much cash belonging to the estate at the time of the appointment—a fiction adopted and approved, it is said, merely for the purpose of justice and convenience. But, if such were the purposes, its application ought not to be extended to cases where gross injustice will result. The rule necessarily must

be based upon a presumption that all men are solvent and able to pay their obligations; but since that presumption is obviously not true in fact, to enforce the rule under all circumstances may work great hardship. When applied to a case where the personal representative was insolvent at the time of his appointment and so continued until his death or discharge, a peculiar injustice might be caused by placing him in such a position that he might be charged with contempt or embezzlement for failure to pay over moneys with which he is charged, but which he has never received, since he was not able to pay, or by charging his sureties with liability beyond the faithful discharge of the duties of such personal representative, and in effect making them guarantors of such debts due the estate instead of sureties. Despite these evident hardships, there are some states which enforce the strict rule of liability against the representative and his sureties, irrespective of his continued insolvency and inability to pay. *Bassett v. Fidelity, etc., Co.*, supra; *United Brethren v. Akin*, supra; *Wright v. Lang*, 66 Ala. 389; *Arnold v. Arnold*, 124 Ala. 550, 27 South. 465, 82 Am. St. Rep. 199; *Judge of Probate v. Sulloway*, 68 N. H. 511, 44 Atl. 720, 49 L. R. A. 347, 73 Am. St. Rep. 619; *McGaughey v. Jacoby*, 54 Ohio St. 487, 44 N. E. 231; *James v. West*, 67 Ohio St. 28, 65 N. E. 156; 2 *Woerner, Amer. Law of Administration* (2d Ed.) § 311; 11 R. C. L. 118; note, 2 Ann. Cas. 355; note, 112 Am. St. Rep. 409.

But the better rule, as it seems to us, is that followed by the majority of courts, which, while treating the liability as money on hand for administration purposes, properly considered, do not so deem or treat it for all purposes, but place the duty of the fiduciary toward his own debt to the estate upon the same level as other debts due thereto. Such rule does not make of the surety a guarantor of the payment of the debt owed by the personal representative, the collection of which, had it been owed by any other, would have been excused upon proof of the continued insolvency of such debtor. Thus, as remarked by the Supreme Court of Vermont in *Lyon v. Osgood*, 58 Vt. 707, 715, 7 Atl. 5, 8:

"The extension of the legal fiction of payment, so as to make the surety liable for the executor's debt beyond his means to pay, when not guilty of laches, would often work great injustice to the surety. The surety ought not to be required to contribute from his own funds to make up an estate for the deceased, which he, in fact, was not possessed of at the time of his death. \* \* \* In the absence of laches, we think the surety is liable upon his bond for the executor's debt only to the extent of the executor's ability to pay it."

*Harker v. Irick*, 10 N. J. Eq. 269, restates the same proposition. The Supreme Court of

Kentucky in *Buckel v. Smith's Adm'r*, 26 Ky. Law Rep. 991, 82 S. W. 1001, puts the debt of an administrator or executor on the same footing as a debt owed to the estate by any other person. Besides the fiction already referred to, there is apparent no solid foundation on which to base a difference between the two liabilities. The sureties, where there is no statute to the contrary, such as necessarily would operate as notice to them, obligate themselves only to account for losses occasioned by the failure of the fiduciary to use due diligence in pursuing and collecting claims owing to the estate, and to make proper application of the assets that come into his hands. But where he was always insolvent, and for that reason wholly unable to pay a debt owed by him to the estate, upon what theory of justice, propriety, public policy, or lawful right, other than the mere fiction referred to, can the sureties be compelled to respond for such unavoidable failure?

The bond executed by deceased and his surety does not purport to impose absolute liability. Its condition is (1) that the principal shall faithfully pay the rent and profits or proceeds of the estate which may lawfully come into his hands, or to the hands of any person for him, to such person or persons as are entitled thereto; and (2) shall in all other things well and truly discharge his duties as such administrator. With respect to debts other than his own the personal representative is chargeable only with the faithful discharge of his duty to make a prompt and efficient attempt to collect them, and when such collection is rendered impossible by the insolvency of the debtor, his surety is not responsible therefor. Debts owed by the representative should be treated in the same manner, and when at the time of his appointment, and continuing until his discharge or death,

he was insolvent and unable to collect such debt from himself, his surety should not be responsible for that which no diligence could have prevented. Such is the rule followed in the great majority of states. In *re Walker's Estate*, 125 Cal. 242, 57 Pac. 991, 73 Am. St. Rep. 40; *Sanchez v. Forster*, 133 Cal. 614, 65 Pac. 1077; *State v. Gregory*, 119 Ind. 503, 22 N. E. 1; *Buckel v. Smith's Adm'r*, 26 Ky. Law Rep. 991, 82 S. W. 1001; *Sanders v. Dodge*, 140 Mich. 236, 103 N. W. 597, 112 Am. St. Rep. 399; *McCarty v. Frazer*, 62 Mo. 263; *Howell v. Anderson*, 66 Neb. 575, 92 N. W. 760, 61 L. R. A. 313; *Harker v. Irick*, 10 N. J. Eq. 269; *Baucus v. Barr*, 45 Hun, 582, affirmed in 107 N. Y. 624, 13 N. E. 939; *Matter of Piper*, 15 Pa. 533; *Rader v. Yeargin*, 85 Tenn. 486, 3 S. W. 178; *Lyon v. Osgood*, 58 Vt. 707, 7 Atl. 5; 2 *Woerner*, Amer. Law of Administration (2d Ed.) § 311; 11 R. C. L. 118; note, 2 Ann. Cas. 355; note, 112 Am. St. Rep. 409. See, also, *Wachsmuth v. Penn.*, etc., Ins. Co., 241 Ill. 409, 89 N. E. 787, 26 L. R. A. (N. S.) 411, 132 Am. St. Rep. 226.

Of course, if the personal representative was solvent when he assumed the duties of his office, and later became insolvent and unable to pay his debt, or if he was insolvent at first, but later became solvent, the surety might well be liable for a default under such circumstances, as many cases hold, though, according to the averments of the special plea, such question is not now presented. The averments of that plea, if proved upon the trial of the case, will constitute a bar to the action. No other questions are properly presented in the record for our consideration at this time.

Our order, therefore, will affirm the ruling upon the motion to strike out the special plea, and direct the certification of our decision to the circuit court of Wood county.

(178 N. C. 409)

## STOREY v. STOKES et al. (No. 393.)

(Supreme Court of North Carolina. Nov. 5, 1919.)

1. SALES  $\S$ 53(1), 88—WHEN CONTRACT PROVEN, ITS CONSTRUCTION FOR THE COURT.

What is the contract of sale between the parties is a question for the jury, but when the contract is admitted or proven its construction is a question of law for the court.

2. PRINCIPAL AND AGENT  $\S$ 174—RATIFICATION OF AGENT'S PURCHASE A QUESTION OF INTENT.

Whether the buyers of lumber approved the terms of the contract made by their agent subject to their ratification was not to be determined solely by the letters or other writings upon a legal construction of them, but on the evidence oral and written; it being a question of intention.

3. TRIAL  $\S$ 256(4)—REQUEST TO AMEND RECORD OF CONTENTIONS BY JUDGE NECESSARY.

If the different contentions as to the evidence in the case were not correctly stated by the trial judge, he should have been requested in due time to make proper amendments.

4. SALES  $\S$ 172—RAILROAD EMBARGO NO PROTECTION TO SELLERS FAILING TO DELIVER.

A railroad embargo on shipments of lumber is no protection to sellers thereof who failed to deliver, where they did not tender the lumber to the railroad for shipment, while the buyers proposed to get for them the necessary permits to avoid the embargo.

5. DAMAGES  $\S$ 40(2)—RECOVERY OF PROFITS IN ACTION FOR BREACH.

Where a contract is made with a view to future profits, they are to be deemed within the contemplation of the parties, and are recoverable in an action for breach if certain and capable of reasonable estimation.

6. DAMAGES  $\S$ 163(2)—BURDEN TO PROVE DIMINUTION OF DAMAGES FROM BREACH OF CONTRACT.

Where plaintiff proves a contract, its breach, and the loss of a certain sum resulting, the burden lies on defendant to prove anything in diminution of the damages.

7. SALES  $\S$ 418(12)—RECOVERY OF PROFITS ON FAILURE TO DELIVER.

Where the sellers of lumber in North Carolina to wholesale dealers in New York knew that the New York buyers intended to resell and were specially informed of it, the buyers for the sellers' breach were entitled to recover their ascertainable profits on resale in New York according to market prices there.

8. EVIDENCE  $\S$ 357—LETTER AS EVIDENCE IN ACTION FOR FAILURE TO DELIVER.

In an action by the buyers of lumber against the sellers for failure to deliver, a letter from the sellers, constituting part of the correspondence between the parties, and containing the sellers' own declarations about the transaction, held admissible.

9. EVIDENCE  $\S$ 354(2)—WITNESSES  $\S$ 255(7)—REFRESHMENT OF MEMORY AND CORROBORATION BY BOOK OF SALES.

In an action against the sellers of lumber for their failure to deliver, book of sales, entries in which were made under the supervision of the witness, held competent to refresh his memory and to corroborate him.

10. SALES  $\S$ 416(2)—BUYERS' INABILITY TO PERFORM CONTRACTS OF RESALE.

In an action against the sellers of lumber for failure to deliver, testimony as to plaintiff buyers' inability to perform their own contracts of resale, made in reliance on the sellers' shipment according to their contract, held competent as tending to show damages by loss of profits.

Appeal from Superior Court, Davidson County; Lane, Judge.

Action by W. M. Storey, trading as W. M. Storey Lumber Company, against C. W. Stokes and J. F. Stokes, trading as Valley Lumber Company. Judgment for plaintiff, and defendants appeal. No error.

Plaintiffs alleged: That defendants are engaged in the business of operating sawmills and selling lumber, at Newsom, N. C., and the plaintiffs are engaged in the business of buying lumber and selling the same at wholesale to the trade, at the city of New York. Plaintiffs further allege that on the 17th day of April, 1917, the plaintiffs and defendants made a contract by the terms of which contract the defendants sold to the plaintiffs a lot of lumber, as follows, to wit: 500,000 feet 1x4 and up, S2S, @ \$14.00. 2 cars 2x4-10 and up, S1S and 1E, @ \$14.00. 250,000 feet 2x4, 6, 8, 10 and 12-10 and up, S1S and 1E. And the defendants agreed to deliver said lumber to the plaintiffs f. o. b. cars on a 12-cent rate of freight to Norfolk, Va. That defendants failed to keep and perform the contract and to deliver the lumber as promised, and when they were requested by plaintiffs to do so, and because of this breach and failure to deliver, the plaintiffs were compelled to buy lumber, in the open market, at higher prices than those named in the contract for the purpose of filling their contracts with their customers, and by reason thereof they were damaged to the amount of \$5,527, for which amount they demand judgment.

Defendants denied that they were engaged in operating sawmills, but admitted that they were engaged in selling lumber, and that plaintiffs were engaged in buying it to be sold at wholesale to the trade, as alleged; they deny the contract and the other material allegations of the complaint.

The jury rendered a verdict for the plaintiffs, and assessed their damages at \$2,125. Judgment was entered thereon, and defendants appealed.

Raper & Raper, of Lexington, for appellants.

J. Gilmer Korner, Jr., Louis M. Swink, and Fred S. Hutchins, all of Winston-Salem, and Walser & Walser, of Lexington, for appellee.

WALKER, J. (after stating the facts as above). The defendants have reserved several exceptions as to evidence, and other matters affecting the merits of the case and the damages. The objections to evidence will be postponed for consideration until we have passed upon the other alleged errors, which we will discuss in the order of their assignment.

[1, 2] The court properly submitted to the jury the controverted question whether the contract, which was made by Stemple, for the plaintiffs, with Stokes, for the Valley Lumber Company, had been accepted and confirmed by the plaintiffs. What is the contract, is a question of fact for the jury (*Devries v. Haywood*, 64 N. C. 83); but when the contract is admitted, or proven, its construction is a question of law for the court. There was some evidence here that the contract made by Stemple had been confirmed, and, moreover, that defendants so understood it. It was for the jury to say, by their verdict, what was the truth of the matter. The instruction of the court in this respect was simple, direct, and clear, and left it to the jury to find whether there had been an approval by the plaintiffs of the terms of the Stemple contract, which was made subject to their ratification. We do not think that this was to be determined solely by the letters or other writings, upon a legal construction of them, but upon the evidence, oral and written, because it was a question of intention; that is, what the parties said, and did, and what they mutually meant by their acts and conduct. The defendants in several letters, particularly the one of May 14, 1917, complain, not that the parties had disagreed about the specific terms of the contract, but that they had been disappointed in getting the necessary stock, which they thought had been secured, and promised, if they could get the cars accepted for immediate shipment, that they would send forward at least one car, regretting their inability to serve the plaintiffs better. They still did not ship, and plaintiffs' letters then urge them to do so and notify them that they have made contracts of resale. Storey went to Newsom, N. C., talked with the defendants, and he says they promised "to get off two cars promptly." When defendants gave one excuse after another for not shipping—failure of parties, with whom they had contracted for stock, to deliver the same, embargo of the railroad companies on shipments, and lack of permits—plaintiffs promised to help them out in regard to these matters, and did secure a special permit. The

correspondence tends to show that defendants were not attempting to perform their contract, and plaintiffs complained of it, and charged that their Mr. Stemple had informed them of defendants' selling to other parties the lumber which they had contracted to ship to them. The excuse for not shipping the lumber, as stated in letters of May 21 and July 4 of 1917, and in others, seemed to be that they could not get the stock. They do refer in one of the letters to some disagreement as to the way the lumber should be worked and the terms of settlement; but, when we examine the lengthy correspondence, we can easily discover some evidence for the jury to the effect that the contract was sufficiently understood, and especially so when it is read in the light of the oral testimony. The judge stated to the jury that, according to Storey's testimony, the plaintiffs confirmed the contract, as soon as they heard from Stemple what it was, and the conduct of the defendants subsequently, as disclosed by the correspondence and the other testimony, supports the statement.

[3] II. Several of the exceptions were taken to the judge's recital of the different contentions in the case, as to the evidence. If they were not correctly stated, the judge should have been requested, in due time, to make the proper amendments. This was not done. *Matthews v. Myatt*, 172 N. C. 230, 90 S. E. 150; *State v. Merrick*, 172 N. C. 870, 90 S. E. 257.

[4] III. As to the embargo on shipments, this is no protection to the defendants, for they did not tender the lumber for shipment, and, besides, the plaintiffs proposed to get for them the necessary permits.

The other parts of the charge were clearly right, and perfectly fair to both parties. There was ample evidence to support it, and defendants have no just ground for complaint.

Plaintiffs assert that defendants refused to ship the lumber, not for the reasons they gave, that they could not get the stock from which to make it, or that its shipment had been embargoed, but because the market price of lumber was rapidly rising, and they had found another customer with a better price, and that the defendants' excuses were not frank and well-founded. While this may or may not be so, and it was denied by the defendants, we are unable to declare that there was absolutely no evidence to sustain such a theory, and therefore we cannot say that the argument was so wholly unfounded that it should not have any weight with the jury, but should have been excluded from the consideration of the case.

[5-7] IV. As to damages: The sale of the lumber was made to the plaintiffs with full knowledge on the part of the defendants as to the nature of their business, in other words, that plaintiffs were buying the lumber for resale, and defendants were specially

informed of it, and the correspondence, and other evidence, show that plaintiffs had outstanding contracts with other parties for the purchase of the lumber at a higher price which would bring a considerable profit to the plaintiffs. It was held in *Johnson v. Railroad Co.*, 140 N. C. 574, 577, 53 S. E. 362, that, when the action is for a breach of contract, the damages recoverable are such as naturally flow from the breach, and such special or consequential damages as are reasonably presumed to have been within the contemplation of the parties at the time they made the contract, as the probable result of a breach of it. In ascertaining what damages come within the rule, it is proper to examine, not only the terms of the contract, the subject-matter, etc., but also to inquire whether such circumstances or conditions as produced special damages were communicated to the defendant. We apprehend that the same rule prevails when an action in the nature of tort is brought for the breach of a duty arising out of contract, citing *Williams v. Telegraph Co.*, 136 N. C. 82, 48 S. E. 559, 1 Ann. Cas. 359; *Dayvis v. Telegraph Co.*, 139 N. C. 79, 51 S. E. 898; and *Lee v. Railroad Co.*, 136 N. C. 533, 48 S. E. 809, where it was said: It is immaterial whether we treat the cause of action as for a breach of contract or for a negligent omission to perform a public duty arising out of a contract. The damages in either case are confined to such as were reasonably within the contemplation of the parties when the contract was made by which the duty to the plaintiffs was assumed. That for failure to deliver freight, when the carrier is not informed of the special circumstances causing the loss of the plaintiff's contract with other persons, the measure of damages is the difference between the market value of the article at the time it ought to have been delivered and the time it was in fact delivered. *Joyce on Damages*, § 1956, thus states the rule:

"Where the delivery of freight is negligently delayed by a carrier, there may be in an action for the breach of the contract recovery of such damages as are the natural and proximate result of its act, and for such as reasonably might have been expected to be within the contemplation of the parties at the time of entering into the contract, as the probable result of a breach. When the carrier has notice of the fact that a delay in the delivery of the goods will result in an unusual loss or some special damage to the shipper, there may be a recovery for the actual damages sustained, when the notice is of such a character that it will be presumed that the carrier contracted with reference thereto." *Lindley v. Railroad Co.*, 88 N. C. 547; *Swift River Co. v. Railroad Co.*, 169 Mass. 326, 47 N. E. 1015, 61 Am. St. Rep. 288.

Justice Rodman said, in *Lewis v. Rountree*, 79 N. C. 122, 124 (28 Am. Rep. 309):

"The contract of the defendant may be regarded as a contract to deliver the rosin at any

usual market to be named by the purchaser, the purchaser taking on himself the risk, trouble, and expense of the transportation. As damages recoverable on a breach of a contract are the natural and probable consequences which the parties may be supposed to have had in contemplation, it would seem reasonably to follow that a knowledge by a vendor of the purpose which the vendee had in view in making the purchase was an essential element in estimating the damages likely to be sustained by a breach. Many cases support this proposition."

And again:

"There can be no doubt that a vendee who takes a warranty and gives notice that he buys to sell again in another market may include in his damages both the losses he actually sustained by reason of the breach, and also the profits he would have made upon resale, had the article been what it was warranted to be."

In *Mace v. Ramsey*, 74 N. C. 11, the charterer of a boat was held entitled to recover the profit he would have made, under the circumstances, which were in the contemplation of both parties. The rule of damages was held, in *Spiers v. Halsted*, 74 N. C. 620, to be the profit which plaintiff would have made on a resale of the goods, which really in that case, as it is here, was the difference between the contract price and what he could get for the goods at the place of delivery. *Clements v. State*, 77 N. C. 142. We thus stated the general rule in *Machine Co. v. Tobacco Co.*, 141 N. C. 284, 289, 53 S. E. 885:

"The amount that would have been received if the contract had been kept and which will completely indemnify the injured party is the true measure of damages for its breach. *Benjamin v. Hilliard*, 23 How. 149 [16 L. Ed. 518]; *Mace v. Ramsey*, 74 N. C. 14. Where one violates his contract, he is liable for such damages, including gains prevented as well as losses sustained, which may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, such as might naturally be expected to follow its violation, and they must be certain, both in their nature and in respect to the cause from which they proceed. *Ashe v. De Rosset*, 50 N. C. 299 [72 Am. Dec. 552]; *Griffin v. Colver*, 16 N. Y. 489 [69 Am. Dec. 718]. It is the rule last stated which principally raises the doubt as to whether profits of the future should be included in any estimate of damages. They may be necessary to completely indemnify the injured party and they may also answer the other requirement, in that the loss of them may naturally be expected to proximately result from a breach of the contract; but there still remains another important element to be considered, and that is whether there is any reliable standard by which they can be ascertained, for we have seen that the damages must be certain, and this certainty which is required does not refer solely to their amount, but also to the question whether they will result at all from the breach. It is clear that, whatever profits are rejected as an item in the calculation of damages, it is because they are subject to too many contingencies and are too dependent upon

the fluctuations of markets and the chances of business to constitute a safe criterion for an estimate of damages."

See, also, *Critcher v. Porter Co.*, 135 N. C. 542, 551, 47 S. E. 604, 607, where we said:

"In *Lewis v. Rountree*, 79 N. C. 123, 28 Am. Rep. 309, the plaintiff was permitted to recover upon the basis of the price of the rosin in New York, to which point it was shipped, for the reason that it was purchased for resale there, and the defendant had notice of it. In *Mace v. Ramsey*, supra, the boat was hired for a particular occasion, and the plaintiff had engaged a certain number of passengers at an agreed price. The court held that such loss as ensued was within the contemplation of the parties."

There are many authorities to this effect, and it may be well that we should refer to a few of them. The rule was laid down (in *Hadley v. Baxendale*) that the damages recoverable for breach of contract are such as may fairly and reasonably be considered as arising naturally—that is, according to the usual course of things—from the breach itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. 8 R. C. L. 455 (section 25). Where a contract is entered into with a view to future profits, such profits are to be deemed to be within the contemplation of the parties, and are recoverable, if they are certain and can reasonably be estimated, in an action for a breach of the contract. *Wakeman v. Wheeler*, 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676; *Davidson v. Buggy Co.*, 167 N. C. 423, at page 425, 83 S. E. 557. Where the plaintiff proves a contract, its breach, and the loss of a certain sum resulting from the breach, upon all the authorities the burden lies on the defendant to prove anything in diminution of the damages. *Rodman, J.*, in *Oldham v. Kerchner*, 79 N. C. at page 114, 28 Am. Rep. 302. The allowance of profits for the breach of a contract, when not excluded as unnatural or remote, is wholly a question of the certainty of proof, and whenever a certain gain prevented is provable, and was contemplated by the parties, it may be recovered. *Joske Bros. v. Pleasants*, 15 Tex. Civ. App. 433, 39 S. W. 586; 53 L. R. A. 40 (note e). Lost profits may be recovered for breach of a seller's contract, where evidence relevant to the inquiry affords data from which the amount may be ascertained with a reasonable degree of certainty. *Davidson v. Buggy Co.*, 167 N. C. 423, 83 S. E. 557.

There are no such uncertainties in this

case that the failure of any one of them would subvert the whole computation as to damages. And, in this connection, we may say that the defendants' contention that the deliveries were to be made at Newsom, N. C., is clearly unsound, as they were to be made in New York, according to shipping instructions, and it reasonably appears that the sales by the plaintiffs at that place were made according to market prices prevailing there. So that the case could be brought within the rule which the defendants rely on. *Berbarry v. Tombacher*, 162 N. C. 497, 77 S. E. 412; *Lumber Co. v. Manufacturing Co.*, 162 N. C. 395, 78 S. E. 284; *Lumber Co. v. Furniture Co.*, 167 N. C. 565, 83 S. E. 801.

We are of the opinion that there was ample evidence, from which it could be inferred that profit, which could be ascertained with sufficient certainty, would have been realized from a resale of the lumber, if the contract had been performed by the defendants, and that those cases cited by them, where the profits were uncertain or speculative, do not apply to the evidence in this record, or to the facts deducible therefrom.

[8-10] V. As to the questions of evidence: The letter Exhibit E was competent, as it was a part of the correspondence between the parties. It came from the defendants, and contained their own declarations about the transaction. The book of sales, the entries in which were made under his supervision, was competent to refresh the memory of the witness, and to corroborate him, and, besides, he testified (*Bowman v. Blankenship*, 165 N. C. 521-522, 81 S. E. 746) that he had an independent knowledge of the facts and items recorded in it. The testimony, as to plaintiffs' inability to perform their own contracts of resale, which were made in reliance upon the defendants' shipment of the lumber, according to the terms of their contract, was competent, as it tended to show what the damages were—how much they had lost by the defendants' delinquency. The latter knew that the lumber was purchased from them for resale in New York. They practically admit this to be so, by their answer to the first two sections of the complaint. They must have known that plaintiffs would have to supply the place of lumber they should have received from them, in order to save themselves from answering in damages to their own customers.

The other exceptions, not covered fully by what we have already said, are in themselves without any merit.

We find no error in the record, after a most careful examination of it, and a full consideration of the material exceptions.

No error.

(178 N. C. 399)

**BETHLEHEM MOTORS CORPORATION**  
et al. v. FLYNT, Sheriff. (No. 355.)(Supreme Court of North Carolina. Nov. 5,  
1919.)**1. COMMERCE** ⇨40(3) — **WHEN INTERSTATE  
COMMERCE CEASES.**

Where automobiles were consigned to corporations within the state and were sold direct by the consignees from their storage warehouses in the state, they were not in interstate commerce after reaching the storage warehouses.

**2. LICENSES** ⇨16(½) — **"AUTOMOBILES" IN-  
CLUDE MOTORTRUCKS.**

The word "automobiles," in laws 1917, c. 231, § 72, requiring a license tax for selling automobiles, includes motortrucks; an "automobile" being a motor vehicle usually propelled by steam, electricity, or gasoline, and carrying its motive power within itself.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Automobile.]

**3. COMMERCE** ⇨64 — **LICENSE TAX FOR SELL-  
ING AUTOMOBILES NOT VIOLATION OF INTER-  
STATE COMMERCE CLAUSE.**

Laws 1917, c. 231, § 72, requiring payment of license tax to sell automobiles in state, is not in conflict with the interstate commerce clause of the federal Constitution. Const. art. 1, § 8, cl. 3.

**4. CONSTITUTIONAL LAW** ⇨207(7) — **LICENSES  
⇨7(1) — LICENSE TAX FOR SELLING AU-  
TOMOBILES NOT INTERFERENCE WITH PRIVI-  
LEGES OF "CITIZENS."**

Laws 1917, c. 231, § 72, requiring payment of license tax to sell automobiles in state, but providing that four-fifths of such licenses need not be paid if company has three-fourths of its assets invested in the state and returned for taxation therein, does not interfere with the privileges and immunities; the term "citizen" in Const. U. S. art. 4, § 2, referring only to natural persons, members of the body politic, owing allegiance to the state, and not to artificial persons created by the Legislature, and possessing only such attributes as the Legislature has prescribed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Citizen.]

**5. CONSTITUTIONAL LAW** ⇨230(3) — **LICENSE  
TAX ON SALE OF AUTOMOBILES.**

Laws 1917, c. 231, § 72, requiring payment of a license tax to sell automobiles in the state, but reducing the amount of such tax where the owner has assets invested in the state, does not deny the equal protection of the laws to a foreign corporation in violation of Const. U. S. Amend. 14.

**6. CONSTITUTIONAL LAW** ⇨206(7) — **CORPO-  
RATIONS NOT CITIZENS WITHIN PRIVILEGE  
AND IMMUNITIES CLAUSE.**

While corporations are held to be "persons" within the equal protection and due process clause of Const. U. S. Amend. 14, they are not

"citizens" within the privilege and immunities clause of that section.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Person.]

**7. CONSTITUTIONAL LAW** ⇨206(7) — **FOR-  
EIGN CORPORATIONS AS PERSONS AND CITI-  
ZENS.**

A corporation not created by the state, nor doing business in the state under conditions that subject it to process issuing from the courts of the state, is not within the provisions of Const. U. S. Amend. 14.

Appeal from Superior Court, Forsyth County; Bryson, Judge.

Suit by the Bethlehem Motors Corporation and others against George W. Flynt, Sheriff of Forsyth County. Decree for defendant, and plaintiffs appeal. Affirmed.

It appears from the facts found by consent and from the admissions, affidavits, and pleadings in the cause, that the plaintiff, the Bethlehem Motors Corporation, is engaged in the manufacture of Bethlehem trucks in Pennsylvania, and that of the other plaintiffs the National Motor & Vehicle Company is engaged in the manufacture of the National automobile in Indiana; the W. Irving Young & Co. is a corporation of Maryland; that the Liberty Motors Corporation is incorporated in this state with its office in Winston; and that the National Motor Company is also incorporated in this state with its principal office in Greensboro. The two companies last named represent W. Irving Young & Co. as their agents at Winston and Greensboro.

Under authority of Laws 1917, c. 231, § 72, the sheriff of Forsyth levied on a National motorcar, and the sheriff of Guilford upon a Bethlehem truck, for nonpayment of the license tax for selling under above section. The plaintiffs sued out a restraining order against the sheriff of Forsyth from selling the motorcar and against the sheriff of Guilford from selling the Bethlehem truck. From the dissolution of said restraining order the plaintiffs appealed.

J. E. Alexander, of Winston-Salem, for appellants.

Jones & Clement, of Winston-Salem, for appellee.

The Attorney General and Frank Nash, Asst. Atty. Gen., for the State.

CLARK, C. J. The facts being practically admitted, the real question before the court is whether section 72, c. 231, Laws 1917, is constitutional.

As found by the court, the trucks and automobiles consigned to the Liberty Motor Corporation and the National Motor Company by the other plaintiffs are sold direct by such consignees from their storage warehouses in this state. They are consigned to them for



that purpose and not to be used exclusively as samples or for demonstration purposes, and the court finds from the testimony that purchasers were obtained here by the said consignee companies, the cars and trucks on hand being used for demonstration, and the sales were made direct from their warehouses in this state.

[1] Under such circumstances, the goods after reaching the storage warehouse in this state were not in interstate commerce. *Sewing Machine Co. v. Brickell*, 233 U. S. 304, 34 Sup. Ct. 493, 58 L. Ed. 974. Again, where coal was mined in Pennsylvania and sent by water to New Orleans and sold on the open market on account of the mine owners in Pennsylvania, or even if the coal was not landed in New Orleans, but was sold and transferred there to another vessel bound to a foreign port, the coal was intermingled with property in Louisiana, and the sale was not an interstate transaction. *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257. There was no error in the exception that the judge did not find that this was interstate commerce.

[2] It is assigned for error that the words in the statute "manufacturers of automobiles" do not include "motortrucks." The definition of automobile is given in 28 Cyc. 24, as follows (which we think is correct):

"An automobile in the sense in which the term has come to be commonly understood, is a motor vehicle, usually propelled by steam, electricity or gasoline, and carrying its motive power within itself. It falls within the appellation of 'carriage' and 'vehicle.'"

[3] Said section 72, c. 231, Laws 1917, imposed license taxes on every manufacturer or other person engaged in the business of selling automobiles in this state. The question intended to be raised by this appeal is the constitutionality of the second proviso in that section:

"Provided further, that if the officer, agent or representative of such manufacturer shall file with the state treasurer a sworn statement showing that at least three-fourths of the entire assets of the said manufacturer of automobiles are invested in any of the following securities or property, viz., bonds of the state of North Carolina or of any county, city or town of said state, or any property situated therein, and returned for taxation therein, the taxes named in this section shall be one-fifth of those named."

The plaintiffs allege that by reason of this proviso the act was in violation of the federal Constitution because:

I. It is in conflict with the interstate commerce clause (article 1, § 8[3]).

II. It is in conflict with article 4, § 2, in that it deprives them of the privileges and immunities of other citizens.

III. It is in conflict with section 1 of amendment 14, in that it denies the plaintiffs the equal protection of the laws.

First. Section 72 is not obnoxious to the interstate commerce clause. In *New York v. Roberts*, 171 U. S. 658, 19 Sup. Ct. 58, 43 L. Ed. 323, the court says:

"It must be regarded as finally settled by frequent decisions of this court that, subject to certain limitations as respects interstate and foreign commerce, a state may impose such conditions upon permitting a foreign corporation to do business within its limits as it may judge expedient; and that it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital used within the state."

In regard to the contention that the statute discriminated against foreign corporations, the court said:

"If the object of the law in question was to impose a tax upon products of other states, while exempting similar domestic goods from taxation, there might be room to contend that such a distinction was constitutionally objectionable as tending to affect or regulate commerce between the states. But we think that obviously such is not the purpose of this legislation. 'Every corporation, joint-stock company or association whatever, now or hereafter incorporated, organized or formed under, by or pursuant to law in this state or in any other state or country and doing business in this state. \* \* \* shall be liable to and shall pay a tax as a tax upon its franchise or business into the state treasury annually, to be computed as follows.' It will be perceived that the tax is prescribed as well for New York corporations as for those of other states. It is true that manufacturing or mining corporations wholly engaged in carrying on manufacture or mining ores, within the state of New York are exempted from this tax; but such exemption is not restricted to New York corporations, but includes corporations of other states as well, when wholly engaged in manufacturing within the state."

In *Brewing Co. v. Brister*, 179 U. S. 452, 21 Sup. Ct. 201, 45 L. Ed. 269, it was held that the exemption from tax on sales by the manufacturer in Ohio of intoxicating liquor of his own make was not an illegal discrimination against a foreign corporation which was taxed on sales of its liquor manufactured outside of the state and sold in Ohio.

Section 72 does not tax the plaintiffs or any of them by reason of the manufacture of automobiles, but taxes only selling them in this state, after they arrive here and have become a part of the personal property in this state.

[4] Second. Section 72 does not interfere with the privileges and immunities as citizens of the United States, for it has always been held that the term "citizen," in article 4, § 2, U. S. Constitution, which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states," refers to natural persons only, members of the body politic, owing allegiance to the state, and not to artificial persons created by the Legislature

and possessing only such attributes as the Legislature has prescribed.

[5, 6] Third. Section 72 does not deny the equal protection of the laws to the plaintiffs. While corporations are held to be persons within the equal protection and due process clauses of the 14th amendment, they are not citizens within the privilege and immunities clause of that section. *Western Turf Association v. Greenberg*, 204 U. S. 363, 27 Sup. Ct. 384, 51 L. Ed. 520. While probably no manufacturer of automobiles in another state could invest three-fourths of all its assets in bonds of this state, or of any county, city, or town of this state, section 72 does not deny the plaintiffs the equal protection of the law because it confers no benefit on any citizen of this state which is not equally conferred upon a citizen of another state.

[7] That part of the proviso which reduces the selling license tax from \$500 to \$100 upon the manufacturer who has invested at least three-fourths of his entire assets in any property situated in this state, or in the bonds of this state and its counties and towns, is not in violation of the United States Constitution. When the corporation is not created by this state nor doing business here under conditions that subject it to process issuing from our courts, it is not within the provision of the amendment 14. *Blake v. McClung*, 172 U. S. 260, 19 Sup. Ct. 165, 43 L. Ed. 432.

Indeed, the provision is not discriminatory. In *Commonwealth v. Armour & Co.*, 118 Va. 242, 87 S. E. 610, the court of that state sustained a statute imposing a license tax upon all merchants for the privilege of doing business but exempting manufacturers who were already taxed on their capital by that state and offered for sale at the place of manufacture, goods, wares, and merchandise manufactured by them. This was affirmed on writ of error. *Armour v. Virginia*, 246 U. S. 1, 38 Sup. Ct. 267, 62 L. Ed. 547, already cited. To same purport, *New York v. Roberts and Brewing Co. v. Bristol*, both cited supra. To same purport, *Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 21 Sup. Ct. 43, 45 L. Ed. 102.

The contention of the plaintiffs may be summed up in the proposition that the state, having laid a tax of \$500 upon the business of selling automobiles in this state, could not reduce the amount to \$100 as to those persons or companies who have listed and paid taxes on three-fourths of their property in this state. We think this provision does not violate any clause either of the state or federal Constitution. Indeed, in our state Constitution we have a very similar provision in article 5, § 3:

"The General Assembly may also tax trades, professions, franchises, and incomes, provided that no income shall be taxed when the property from which the income is derived is taxed."

The object is to reduce the license tax for selling automobiles in this state in cases where such seller is already paying a tax to the state of three-fourths of his assets.

Affirmed.

(178 N. C. 394)

**BOARD OF COM'RS OF WILKES COUNTY v. PRUDEN et al.** (No. 505.)

(Supreme Court of North Carolina. Oct. 29, 1919.)

**1. STATUTES  $\S$ 97(2)—PUBLIC LOCAL LAWS AS TO HIGHWAY BONDS NOT UNCONSTITUTIONAL.**

Pub. Loc. Laws 1919, c. 451, authorizing an additional bond issue to complete the improvement of roads in Wilkes county authorized by Pub. Loc. Laws 1915, c. 345, and apportioning the proceeds between the different townships, did not violate Const. art. 2, § 29 (see Pub. Laws 1915, c. 99), as amended in 1916-17 as to local acts authorizing the laying out of highways.

**2. STATUTES  $\S$ 97(2)—PUBLIC LOCAL LAWS AS TO BONDS FOR HIGHWAYS CONSTITUTIONAL.**

Pub. Loc. Laws 1919, c. 443, authorizing a bond issue to complete the Boone Trail Highway to a certain county line, does not violate Const. art. 2, § 29 (see Pub. Laws 1915, c. 99), as to local acts authorizing the laying out of highways.

**3. COUNTIES  $\S$ 174 — BONDS FOR CONSTRUCTION AND IMPROVEMENT OF ROADS.**

Pub. Loc. Laws 1915, c. 345, authorizing a bond issue for constructing and improving roads in Wilkes county, is still in force except as amended by Pub. Loc. Laws 1917, c. 63, reducing the bond issue, and Pub. Loc. Laws 1919, c. 451, increasing it and distributing the proceeds between the different townships.

Appeal from Superior Court, Wilkes County; Webb, Judge.

Action by the Board of Commissioners of Wilkes County against Pruden and another, doing business as Pruden & Co. Judgment for plaintiff, and defendants appeal. Affirmed.

The action was brought to test the validity of certain bonds to the amount of \$275,000, which have been issued, and contracted to be sold to defendants, by the county of Wilkes, for the purpose of constructing public roads in the said county. Public Local Laws of 1915, c. 345, authorized that county to issue bonds to an amount not exceeding \$500,000 for the purpose of "grading, building and constructing public roads there, \* \* \* and otherwise improving and maintaining the same." The act declares in sections 19 and 20 its object to be, "to provide for a uniform, comprehensive, and practicable system of good roads in [the county], calculated in a

general way to serve the needs of every section thereof," and then further provides for a wise, judicious, and equitable distribution of the funds derived from a sale of the bonds, so that each township and section of the county will be benefited, and in such a way as will be advantageous to the county as a whole. The bonds were issued and sold to the amount of \$250,000, but this fund proved to be insufficient to carry out the scheme as to roads contemplated by the act, resulting from the sudden and large increase in the cost of labor and material necessary for the purpose, which undertaking was to be executed by the Good Roads Commission appointed by the act. That body has since had complete control of the county's road system.

By chapter 63 of the Public Local Laws of 1917, the act of 1915 was amended by reducing the amount of bonds authorized thereby from \$500,000, to \$250,000 and validating the previous issue of \$250,000 in all respects. Section 3 of the act of 1917 provides:

"That except as herein amended the said chapter three hundred and forty-five of the public local laws of nineteen hundred and fifteen shall remain in full force and effect."

Public Local Laws of 1919, c. 451, increased the bond issue of 1915 as reduced in 1917, and authorized an issue of \$250,000 in bonds to complete the public roads of Wilkes county, as the proceeds from the former issue of \$250,000 had proved insufficient for that purpose. That act provides that the proceeds of the bonds last authorized shall be distributed among the townships of the county, so as to carry out the spirit and intent of the act of 1915; that each section shall receive its proportionate share; and, in order to accomplish this purpose, it is further provided that a certain amount (naming it) shall be applied to paying the expense of laying out and constructing a road in each township, the route or course of the road to be determined by the commission so as "to serve the best interests of the townships."

Public Local Laws of 1919, c. 443, provides for the issue of \$25,000 in bonds for the completion of the Boone Trail Highway to the line of Watauga county. There were other provisions, in the acts just mentioned, which need not be set out, as they are not material to the case and the question presented by it.

The commissioners have contracted with the defendants to sell the bonds for \$275,000 authorized by both acts of 1919, to them, at a sum agreed upon, and have brought this action to recover the stipulated price. Defendants refused to pay because they allege that the bonds are invalid.

Judge Webb was of the opinion, and so held, that the bonds are valid, and gave judgment for the plaintiff. Defendants appealed.

C. N. Malone, of Asheville, and J. W. Hinsdale, of Raleigh, for appellants.

Joseph M. Prevette, of Wilkesboro, and Hayes & Jones, of North Wilkesboro, for appellee.

WALKER, J. (after stating the facts as above). [1] The particular contention of the defendant is that the acts of 1919 are in violation of the Constitution, art. 2, § 29, which prohibits the enactment of "any local, private or special act . . . authorizing the laying out, opening, altering . . . or discontinuing of highways"; but we are of the opinion that this is a misconception of the object and purpose of those laws. It was not intended to require the local authorities to lay out, open, alter, or discontinue any road or highway; but they were passed by the Legislature for the purpose of enabling the local authorities designated in them to issue bonds, and out of the proceeds to pay the expense of constructing roads in the various townships of the county, in order, by special directions, to complete the scheme of road building which was authorized by the Public Local Laws of 1915, c. 345, and this will be apparent to any one who will read the four acts together. The exact location of the roads was left to the good judgment and discretion of the local authorities named in the acts; but, in order to equalize the benefits to accrue to each and every part of the county, the Legislature considered it wise and expedient that the money raised by a sale of the bonds should be distributed upon some fixed basis, or according to a fixed rule, so that this equal apportionment might be the better enforced. It was not passing laws to lay out or construct roads, but to pay for these things by issuing and selling bonds, just as was done in *Brown v. Commissioners*, 173 N. C. 598, 92 S. E. 502. There is no prohibition in our Constitution, not even since the amendments of 1916-17 were ratified, which prevents the Legislature from passing an act to pay for the construction of roads in the manner prescribed in these statutes. The court, in *People v. Banks*, 67 N. Y. 568, interpreting a provision of the Constitution of that state, which is similar to article 2, § 29, of our Constitution, with reference to a statute containing language not substantially unlike that in the statutes under consideration, said:

"The act under review does not, in any of its provisions, provide for the altering, opening, or working of a highway in the sense in which those terms were used in the statutes of the state, regulating highways and public roads, or the constitutional provisions now invoked."

Grading, paving, sewerage, and ornamenting were even provided for in this act, since it could not be done by general law. It was held to be within the discretion of the Legis-

lature. See, also, *Mills v. Commissioners*, 175 N. C. 215, 95 S. E. 481; *State v. Lytton*, 8 Colo. 563, 9 Pac. 855.

The general road system of Wilkes county was established by the act of 1915, passed before the constitutional amendments of 1916-17 were ratified and took effect, and the statutes in question only provided the means whereby the roads could be constructed and maintained in the most rational and equitable way for the general benefit of the county, and to this end the Legislature authorized the issue of bonds to raise a fund of \$275,000 and required that it should be so apportioned to the different sections of the county as to give each one its fair share of the benefit to accrue. The framers of the Constitution certainly did not intend to withhold their sanction from so beneficial a scheme for road improvement. As said in *Brown v. Commissioners*, supra:

"Such provisions are construed, not to destroy or weaken the power of the General Assembly in its necessary control over the subordinate divisions of the state government, but to prevent cumbering the statute books with a mass of purely private and local legislation."

The *Brown Case* has been approved in *Mills v. Commissioners*, supra; *Parvin v. Commissioners*, 177 N. C. 508, 99 S. E. 432, and at the present term; in *Martin County v. Wachovia Bank & Trust Co.*, 100 S. E. 134; and *Surry County v. Same Defendant*, 100 S. E. 421. What is held in the *Mills Case* is peculiarly applicable to the facts now before us, and upon which we are asked to decide as to the validity of these bonds. It was said there:

"It is well understood that our General Assembly, at session after session, was called on by direct legislation to authorize a particular highway or street or to establish a bridge or ferry at some specified place. \* \* \* The Legislature in these cases was in fact called upon to usurp, or rather to exercise, functions which were more usually and properly performed by the local authorities, and it was in reference to local and special and private measures of this character that these amendments were adopted; and, as stated in *Brown's Case*, supra, it was never intended to prohibit legislation authorizing the raising of proper funds by the sale of bonds or by taxation for measures required for the public good, though such funds should be for improvements in some fixed place or in restricted territory determined upon by local authorities in pursuance of general laws on the subject."

And the language of the court in *Brown's Case*, supra, is equally and directly pertinent. Speaking of a statute somewhat similar to those upon which we are passing, and of the plain object of the law, the court said:

"An analysis of the act shows that its primary purpose is to authorize the sale of bonds for road purposes in North Cove township, and

to require the levying of a tax to pay the interest and principal of the bonds. \* \* \* It only provides the means for constructing and repairing them. \* \* \* Speaking of such legislation as affected by a constitutional provision, \* \* \* the Pennsylvania court, in *Re Sugar Notch Borough*, 192 Pa. 349, 43 Atl. 985, says: 'The restrictions of the Constitution upon legislation apply to direct legislation, not to the incidental operation of statutes, constitutional in themselves, upon other subjects than with those with which they directly deal.' So in this case, the bond issue being the direct legislation, the fact that it provides that the proceeds of the bonds are to be used for road purposes will not bring it within the prohibition of the constitutional amendment."

Numerous cases are cited in *Martin County v. Wachovia Bank & Trust Co.* to the same effect.

[2] If the Legislature may provide a fund necessary to lay out and construct roads, we are unable to perceive why it may not also prescribe the rule by which that fund shall be disbursed and distributed in order to effect the best results, when it confines itself, as it has done in this instance, to the control and management of the fund, and does not essay to have done any of the acts prohibited by article 2, § 29, of the Constitution, but leaves these things to be performed by the local authorities in the due exercise of their proper functions. What we have said applies as well to the bonds for \$25,000 issued to construct or complete the Boone Trail Highway.

There was one other question presented originally in the case, as to whether the 10 per cent. clause of the "Revaluation Act of 1919" would apply to the bonds for \$275,000 issued under the acts of 1919, and upon the validity of which we are passing. We understand from the appellant's brief that this question has been withdrawn from our consideration, and we therefore do not further refer to it.

[3] We have stated fully the provisions of the statute of 1915, not only because it was enacted before the adoption of the amendments of 1916-17, which took effect on January 10, 1917 (*Reade v. City of Durham*, 173 N. C. 668, 92 S. E. 712), but also because it has been recognized by the act of 1917, amending it, and by the act of 1919, as having always been in force since it was passed, save and except as it was amended by the act of 1917, reducing the amount of the bond issue. The acts of 1919 were intended merely to enforce the will of the Legislature as expressed in the prior statute of 1915, by supplying the means and facilities for doing so.

The result is that the bonds in question are valid obligations of Wilkes county, and there was no error in the judgment of the court to this effect upon the case agreed.

Affirmed.

(178 N. C. 305)

**BOARD OF EDUCATION OF ALAMANCE  
COUNTY v. BOARD OF COM'RS OF  
ALAMANCE COUNTY. (No. 326.)**

(Supreme Court of North Carolina. Oct. 22, 1919.)

**1. SCHOOLS AND SCHOOL DISTRICTS —19(1)—  
APPORTIONMENT FROM STATE PUBLIC SCHOOL  
FUND.**

Where special county school tax levy of 35 cents on \$100 of valuation is insufficient for payment of salaries of the teachers of the public schools of the county for the six months' period of school required by Const. art. 9, § 3, county is entitled, under Pub. Laws 1919, c. 102, § 6, to receive from the state public school fund an apportionment sufficient to supply the deficiency.

**2. MANDAMUS —117—COMPELLING INCREASE  
OF TAX LEVY.**

Where special county school tax levy of 35 cents on \$100 of valuation is insufficient to provide necessary incidental expense and building fund, county may by mandamus under Pub. Laws 1919, c. 102, § 8, require board of county commissioners to exceed 35-cent limit under section 7 without applying for and receiving apportionment from state public school fund under section 6; the making of additional levy not being discretionary with board of county commissioners, and the apportionment from the state fund being applicable only where tax is insufficient to pay the teachers' salaries.

**3. SCHOOLS AND SCHOOL DISTRICTS —10—  
DUTY TO ESTABLISH AND MAINTAIN.**

Const. art. 9, §§ 2, 3, requiring county to establish and maintain public schools for six months' period, is mandatory.

**4. MANDAMUS —72—DISCRETION OF PUBLIC  
OFFICERS.**

A court will not by its compulsory process command an act to be done which involves the exercise of a public officer's discretion, and though it will compel him to perform his plain duty by acting, it will not require him to act in any particular way; for to so do would be taking away his discretion.

Appeal from Superior Court, Alamance County; Devin, Judge.

Mandamus by the Board of Education of Alamance County against the Board of Commissioners of Alamance County. Judgment for plaintiff, and defendant appeals. Affirmed.

Civil action heard by Devin, J., in Alamance superior court, the hearing, by consent, being adjourned to his chambers in the city of Durham, where he made the following findings of fact and rendered the following judgment:

"This was a mandamus proceeding instituted by the board of education of Alamance county against the board of commissioners of said county, and was heard before the undersigned judge at chambers at Oxford on the 24th day of July, 1919, and at chambers at Durham on

the 15th day of August, 1919. No exception was taken by either side as to any matter of procedure; both plaintiff and defendant appearing with counsel. The cause was heard upon the pleadings and exhibits thereto, affidavits and oral testimony, and the court finds the following facts:

"The court finds that the plaintiff board of education, in accordance with the provisions of chapter 102, Public Laws of 1919, filed with the defendant board of county commissioners, in due form properly verified, the school budget of Alamance county for the school year beginning July, 1919, and ending June 30, 1920. The summary of the items of the budget showed the rate of tax on each \$100 assessed value of property necessary for salary fund to be 40 cents, and for the building and incidental fund 10 cents, making a total levy asked of 50 cents. At the May meeting of the board of county commissioners an order was made to levy this rate as asked, but at the meeting on the first Monday in June, 1919, this order was rescinded, and there was included in the levy of the regular county taxes made on this date a levy of 35 cents on the \$100 worth of property for special tax for school. In making said levy the Board of County Commissioners made no distinction between salary fund and that for repairs and incidental expenses.

"The court finds from the carefully prepared affidavit of M. C. Terrell, and the other evidence adduced that the teachers' salary fund necessary to be raised to pay teachers' salaries for the year will be substantially the sum stated in the budget, to wit, \$54,812. The court finds that the total assessed value of property taxable in Alamance county for the year 1919 will be \$14,598,420. Therefore the tax levy of 35 cents would produce, without allowing any deduction for insolvents and expenses of collection, \$51,094. This amount will not be sufficient to pay the teachers' salaries.

"The court finds that the budget correctly sets forth the amount that will necessarily be required to provide repairs and additions to school buildings and incidental expenses, all of which the court finds are necessary to carry on and maintain the schools of said county for six months. The correctness of the items of the budget were not controverted by the defendant.

"The court finds that the building fund requirement of \$10,600 does not include anything for new school buildings, but is for repairs and additions only to existing school buildings which are rendered necessary to properly house and protect the school children during the ensuing school year.

"The court finds, that the amount for 'administration expenses,' \$2,182, and the amount for 'Expenses of operation and maintenance,' \$3,049, are reasonable, proper, and necessary.

"The amounts asked for the purpose of refunding borrowed money and for salary of superintendent of public welfare and home demonstrator are not considered necessary to maintain six months' school term, and are omitted from the findings in this case, though they should in some way be provided for.

"The court finds that the amount for 'city schools, building and expense fund,' \$4,283, is for repairs and additions to school property and maintenance expenses, which are reasonable and proper expenditures for the housing

and protection of school children and necessary to the carrying on and maintaining of a six months' school term in said county for the ensuing year.

"There are other items of incidental expense necessary to correctly meet statutory requirements, but which are not included in the budget, and are therefore not considered in these findings. These necessary requirements total \$20,114.

"The court finds that the only 'available funds' to meet these expenditures required for 'building and incidental expense fund' will amount to \$11,194 for the year 1919 in Alamance county, this being the total amount that will be derived from poll tax, dog tax, fines, and all other sources.

"It therefore appears to the court that the available funds are insufficient to provide for the incidental expenses and for necessary repairs and additions to school buildings, and that there will be a deficiency of \$8,520. Considering that a reduction of \$1,250 of this amount may be effected by strict economy and a reduction of estimates, it follows that a certain deficiency of \$7,270 will arise, and that there is no other source from which it can be met but by an additional tax levy of 5 cents on the \$100 worth of taxable property, and the court finds that an additional levy of special tax of this amount is necessary in order to maintain a six months' school term in said county.

"The court finds that the rate of special tax for school levied in said county, to wit, 35 cents, will be insufficient to maintain schools for six months in every school district in said county as required by the Constitution, and that an additional levy of 5 cents, making the total rate 40 cents on the \$100 assessed value of all taxable property in said county, will be necessary for the performance of the duty imposed by article 9, § 3, of the Constitution of North Carolina.

"Therefore, in accordance with provisions of chapter 102, Public Laws of 1919, § 8, upon motion of J. Elmer Long, attorney for plaintiff, it is adjudged that defendant board be required to levy an additional special tax for schools in said county of 5 cents on the \$100 worth assessed value of all taxable property in said county."

As the decision of the case depends upon a construction of the following sections of the School Law of the year 1919 (Public Laws of 1919, c. 102), we set them out here for convenience, instead of in the opinion of the court:

"Sec. 6. On or before the first Monday in May of each year the county board of education shall submit an itemized county school budget to the county commissioners, setting forth the amount of money needed to maintain the public schools of the county six months for the succeeding school year. \* \* \* It shall then be the duty of the board of county commissioners, after deducting the amount to be received from the state public school fund, to levy annually a special tax on all property, real and personal, and on all taxable polls, subject to the constitutional limitation of the poll tax, in said county, sufficient to supply the deficiency shown by said budget to be needed for the support and maintenance of the public schools of said county for six months in each school district. The said

tax shall be annually levied and collected at the same time and in the same manner as other county taxes are levied and collected, and the funds derived therefrom, together with other school funds in their hands, shall be apportioned and expended by the county board of education for maintaining one or more public schools in each school district for a term of six months in each year: Provided, that no county shall be compelled to levy a special county tax of more than thirty-five cents on every one hundred dollars valuation of property, real and personal, and a corresponding tax on every taxable poll for said purpose, except as provided in section seven of the act; and after every county shall have levied and collected the special county tax to the limit stated above, if the funds derived therefrom may be insufficient therefor, said county shall receive from the state public school fund an apportionment sufficient to bring the school term in every school district to six months.

"Sec. 7. All poll tax, fines, forfeitures, penalties, and all public school revenues, other than that derived from the state public school fund and the special county tax, shall be placed to the credit of the incidental expense fund and the building fund, as provided in the budget, and if this amount is insufficient for these funds, the county board of education may provide in the county school budget for an additional amount not to exceed twenty-five per cent. of the teachers' salary fund, and the county tax may be increased sufficiently beyond the maximum levy of thirty-five cents to provide this amount if it shall appear necessary to the county board of education and the county commissioners.

"Sec. 8. In the event of a disagreement between the county board of education and the board of county commissioners as to the amount to be provided by the county for the maintenance of a six months' school term, and as to the rate of tax to be levied therefor, or in the event of the refusal of any board of county commissioners to levy said tax, the county board of education shall bring action in the nature of a mandamus against the board of county commissioners to compel the levying of such special tax in the manner and form as provided in sections eight hundred twenty-two and eight hundred twenty-four of the Revisal of one thousand nine hundred and five of North Carolina. And it shall be the duty of the judge hearing the same to find the facts as to the amount needed and the amount available from the sources herein specified, which findings shall be conclusive, and to give judgment requiring the county commissioners to levy the sum which he shall find necessary to maintain the schools for six months in every school district in said county. Any board of county commissioners failing to obey said order and to levy said tax shall be guilty of a misdemeanor and shall be prosecuted therefor in the Superior Court by the solicitor of that district."

The defendant, after excepting thereto, appealed from the judgment.

Parker & Long, of Graham, for appellant.  
Long & Long, of Graham, for appellee.

WALKER, J. (after stating the facts as above). [1] It must be admitted that there is

some confusion in the terms of the statute as to the limit of 35 per cent. Our view is that the dominant idea, and the clear and explicitly expressed purpose, was to provide sufficient funds for the support and maintenance of the public schools in the state for the new constitutional term of six months, instead of for four months, which was formerly the length of the term, as fixed by the Constitution. We must so construe the law as to execute this intention. It seems to be conceded that the levy of 35 cents on the \$100 will not be sufficient to take care of teachers' salaries for a six months' term in this county. If that fund is deficient for such purpose, or for "the support and maintenance of the schools," as it is denominated in the act, the county shall receive from the "state public school fund" an apportionment sufficient to supply the deficiency, and provide a fund adequate "to bring the school term to six months." This would appear to be a satisfactory and complete provision for keeping that fund to the required amount. Section 6 of the Acts of 1919, c. 102, provides that no county shall be compelled to exceed the limit of 35 cents on the \$100 of property, "except as provided in section 7." We think that the exception therein refers plainly to the further provision in section 7 that the "thirty-five cents" levy may be exceeded to furnish the amount requisite to make up the deficiency in the incidental expense and the building fund mentioned in the latter section, if that fund is inadequate after exhausting all sources from which it comes. It was supposed that the support and maintenance fund had already been fully established.

[2] But the appellee's counsel contends that the limit of 35 cents cannot be exceeded, even to supply any insufficiency in the incidental expense and the building funds, until the county school authorities have applied for and received the apportionment from the state public school fund, which is allowed to the county by the concluding words of section 6. That provision does not take effect unless the fund raised by the tax of 35 cents is insufficient for the purpose designated by section 6. In other words, it is intended to supplement the amount so raised by the levy of 35 cents of the \$100 if it falls short of what is necessary to maintain the schools for the six months' period.

This brings us to consider section 8 of the Public Laws of 1919, c. 102, which refers to any differences or disagreements which may arise between the two boards—that is, the county board of education and the board of county commissioners—with reference to the amount needed for the maintenance of a six months' school term, and also as to the rate of taxation therefor, and also what must be done in the event of the refusal of the commissioners to levy the necessary tax. In such cases the board of education is required to bring an action for a mandamus to com-

pel them to comply with the law and perform their duty.

The defendant contends that section 6 and section 8 refer to the salaries of teachers, and the fund to be raised by the 35-cent levy, and it is only where the latter produces an insufficient fund, and there is disagreement between the two boards, that the mandamus will lie, and further that application should first be made for the county's apportionment from the state public school fund before any action can be brought. But this position is manifestly untenable, for one reason, if there are not others, that section 6 requires that the deficiency in the amount derived from the 35-cent tax shall be supplied from the state apportionment fund until a fund shall be realized which will "be sufficient to bring the school term, in every district, to six months." If the amount produced by the levy of 35 cents is to be so supplemented from the state apportionment fund as to make it adequate for a six months' term in each school district, where would there be any necessity for a mandamus? If the 35-cent fund is to be replenished from the apportionment fund, the object of the sixth section would be fully accomplished, and no compulsory process would be needed. If the boards disagree "as to the amount to be raised under section 6, or as to the rate of the tax, or the commissioners refuse to levy the proper tax," it may be that the board of education may proceed, by an action for a mandamus, to force obedience to the requirements of that section, but it is clear, at least to us, that any delinquency on the part of the commissioners, whether it be a failure to act in any material way, under section 6 or under section 7, or a disagreement with the other board, requires the board of education to apply for a mandamus under section 8. Why not? The very same question is raised by a disagreement concerning the proper tax, or rate, under section 7 as under section 6, and it would be strange if the Legislature provided for the one case and did not do so for the other, and the taxes required to be levied under both sections—one as well as the other—were necessary in order to provide for a six months' term. The expense fund and the building fund were essentials in the same sense, and in the same degree. Schools cannot be well conducted without schoolhouses and accessories such as are mentioned in section 7. Article 9, § 3, is just as mandatory in respect to "maintaining in each district one or more public schools for at least six months in every year" as any other provision of that article, and, too, it declares to be criminal a failure of the commissioners to comply with it, and subjects them to indictment. Could it possibly be made more preemptory? *Collie v. Commissioners*, 145 N. C. 177, 59 S. E. 44. Speaking of the imperative nature of the requirement of article 9, §§ 1, 2, and 3, as to maintaining

schools, it was said, at page 184 and 185, of 145 N. C., at page 49 of 59 S. E.:

"It is true the people have agreed to support their government in all its branches by the method of taxation, consisting in reasonable impositions laid upon persons and property, by a standard which they deemed fair and just to all; but one of their leading desires was that their children should receive the advantages of education, so that not only should the government proceed in the exercise of its ordinary functions for their benefit and advantage, but that the people of the state should be elevated in the scale of intelligence and prepared to enjoy the true blessings of liberty and prosperity for which the compact of government was formed, and, moreover, to further advance their welfare and happiness. This was of the first consideration. \* \* \* If there is a deliberately conceived and carefully stated principle in their Constitution, and one which it is perfectly evident [the people] desired to be clearly understood and rigidly enforced, it is that embraced in sections 1, 2, and 3 of article 9 in regard to the schooling of the children of the state. They intended that the state should no longer be debased or retarded in its progress by the ignorance of its people. It is plain that those who wrote these sections knew, as any intelligent citizen knows, that the surest way to obtain good government, and to enjoy it, is to know how to appreciate its blessings and to be able to perpetuate it by a proper and intelligent use of it. When it was, therefore, declared that the people must be educated, it was just as binding an injunction that the means to that end must be supplied by taxation as it was that the counties, or even the state government, should be supported. \* \* \* Why is one essential mandate of the Constitution any more binding, or obedience to it any more obligatory, than another? What the framers of the Constitution meant was this: That the state and county governments should be maintained by taxation (with certain qualifications), which should be laid upon a principle of equation or due proportion between property and taxes, and within a certain limit, but that, in addition to this sovereign power and corresponding duty, so necessary to the vigorous life of the government, there should be another, which is equally vital to its continuance under just and wise laws, and that is the separate and independent right to educate the people, by taxation also, to the extent that it might be necessary to keep open to all the children between certain ages the public schools of the state for 'at least four months in every year.'"

Section 1 of article 9, declares that—

"Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall be forever encouraged."

[8] The language of sections 2 and 3 regarding the establishment and maintenance of schools is mandatory in form and substance. Board of Education v. Commissioners, 150 N. C. 116, 63 S. E. 724, where the question is fully considered.

But the appellant further contends that the levying of the tax and fixing the rate is

discretionary, and the board of county commissioners cannot be forced to do either by mandamus, but should be left to the free and untrammelled exercise of that discretion. The position is thus stated in the appellant's brief:

"The only real question in this case is whether the levying of additional taxes to take care of the incidental expense fund and the building fund shown in the budget prepared by the county board of education is vested in the discretion of the county commissioners. The statute distinctly says that additional taxes may be levied for this fund 'if it shall appear necessary to the county board of education and the county commissioners.' These words must of necessity vest the county commissioners with the power to say whether they deem this additional levy necessary. The county board of education must have thought it necessary when they made up the budget, but this language of the statute vests this discretion in both boards, and each board equally."

[4] It cannot be denied that a court will not by its compulsory process command an act to be done which involves the exercise of a public officer's discretion, but what that means is that it will not control the exercise of his discretion, but merely compel him to perform his plain duty by acting, but not in any particular way; for to go beyond this limit would result in taking away his discretion. High on Extr. Legal Remedies (2d Ed.) § 24, puts it this way:

"Whenever such officers or bodies are vested with discretionary powers as to the performance of any duty required at their hands, or when in reaching a given result of official action they are necessarily obliged to use some degree of judgment and discretion, while mandamus will lie to set them in motion and to compel action upon the matters in controversy, it will in no manner interfere with the exercise of such discretion or control or dictate the judgment or decision which shall be reached. \* \* \* An important distinction to be observed in the outset, and which will more fully appear hereafter, is that between duties which are peremptory and absolute, and hence merely ministerial in their nature, and those which involve the exercise of some degree of official discretion and judgment upon the part of the officers charged with their performance. As regards the latter class of duties, concerning which the officer is vested with discretionary powers, while the writ may properly command him to act or may set him in motion, it will not further control or interfere with his action, nor will it direct him to act in any specific manner."

Our decisions are in perfect harmony with the doctrine as just stated. Attorney General v. Justices of Guilford, 27 N. C. 315; Brodnax v. Groom, 64 N. C. 244; Barnes v. Commissioners, 135 N. C. 27, 47 S. E. 737; Tate v. Commissioners, 122 N. C. 812, 30 S. E. 352; Ewbank v. Turner, 134 N. C. 77, 46 S. E. 508; Glenn v. Commissioners, 139 N. C. 412, 52 S. E. 58; Laughran v. Hickory, 129 N. C. 281, 40 S. E. 46; Burton v. Furman, 115 N. C. 166,



20 S. E. 443; Board of Education v. Commissioners, 150 N. C. 116, 63 S. E. 724; and Edgerton v. Kirby, 156 N. C. 347, at page 350, 72 S. E. 365, at page 366, where we said:

"If a public officer fails to perform his legal duty to the public, mandamus will lie to compel him to do so, if it is a mandatory one, but not to control the exercise of a discretion given to him, for it is the nature of a discretion in certain persons that they are to judge for themselves, and therefore no court can require them to decide in a particular way or review their judgment by way of appeal, or by any proceeding in the nature of an appeal, since the judgment of the persons to whom the discretion is confided by law would not then be their own, but that of the court under whose mandate or compulsion they gave it."

Justice Bynum stated the rule with clearness in *Brown v. Turner*, 70 N. C. 93:

"Mandamus will lie when the act required to be done is imposed by law, is merely ministerial, the relator has a clear right and is without any other adequate remedy. *Moses on Mandamus*, 68. But it does not lie where judgment and discretion are to be exercised, nor to control the officer in the manner of conducting the general duties of the office."

If the two boards, or the commissioners, have a discretion in the matter, the rule applies, and the writ of mandamus should not have issued. But we do not see that any discretion exists, or that a case for the application of the rule can possibly arise. The appellant's counsel based his contention on the requirement in the Statute (section 7), the words being those quoted below, that they may increase the levy sufficiently beyond the maximum of 35 cents "if it shall appear necessary" to the two boards that this should be done. If the Legislature had stopped there, the argument of appellant might have some force, but it does not, and expressly provides, as we think, that if they disagree as to the amount of tax that should be levied, which, of course, includes the necessity for it, or as to the rate, a writ of mandamus shall be applied for by the board of education (section 8). An important function of the two boards would be neglected, and the intention of the Legislature would be utterly defeated, under any other interpretation of the statute. We consider that the meaning of the statute is so palpable, as to be entirely free from doubt.

The scheme provided for supporting the public schools in each district for a six months' term, under the mandatory provisions of the Constitution and the requirements of the statute, would prove futile if we should decide otherwise. The language being clear and unmistakable, this canon of interpretation applies:

"Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the Legislature should be intended to mean what they have plainly expressed, and con-

sequently no room is left for construction." *United States v. Fisher*, 2 Cranch, 399, 2 L. Ed. 304; *Abernathy v. Commissioners*, 169 N. C. 631, 86 S. E. 577; *Sedgwick Stat. Constr.* p. 231.

If we so interpret the law, the proceedings below were undoubtedly correct. *School Commissioners v. Board of Aldermen of the City of Charlotte*, 158 N. C. 191, 73 S. E. 905, fully sustains our view, and somewhat resembles this case in respect to its facts.

The paramount intention was to support and maintain schools for the term of six months, as provided by the Constitution, which was recently amended, and that taxes should be levied to accomplish that purpose.

Affirmed.

(178 N. C. 370)

SMITH et al. v. MOORE et al. (No. 282.)

(Supreme Court of North Carolina. Oct. 22, 1919.)

1. WILLS ⇐439—INTENT OF TESTATOR GOVERNS CONSTRUCTION.

In construing a will, the court must search for the intention of the testator, and execute it, if it is not contrary to law.

2. ESTOPPEL ⇐28—BY DEED OF THIRD PERSON.

Where property was left to one for life, with remainder to certain persons if he dies without child or children, or without having left a will, the fact of such person leaving a will is not material on the question as to whether or not he has power to dispose of the property by deed, since a person claiming under the will would be bound or estopped by the deed.

3. INFANTS ⇐23—CONVEYANCE OF LAND.

A minor cannot convey an indefeasible title, and cannot bind himself irrevocably by a contract to convey.

4. WILLS ⇐614(5)—CREATING LIFE ESTATE WITH REMAINDER TO LIFE TENANT'S CHILDREN.

A will providing: "I give and bequeath my estate to be equally divided between my daughters, C. and J., but if J. should die without making a will or without a child or children, then her portion of my estate shall go to C., or the surviving sister, or her children if C. is dead. \* \* \* I wish at the death of C. her portion of my estate to go to her children"—held to give to C. only a life estate, with remainder to her children.

5. WILLS ⇐608(1)—RULE IN SHELLEY'S CASE WHERE CONTRARY INTENT CLEAR.

Where the clear purpose of a will was that there should be two distinct and disunited estates, one for the life of one, and the other in remainder to her children, and not that the life estate should unite with the remainder, so that the children would take in the quality, or character, of heirs, or heirs of her body, as a class of persons to take collectively in succession, from generation to generation, as

they would take by the canons of descent, the rule in Shelley's Case did not come into play.

**6. WILLS §470—CONSTRUCTION AS ENTIRETY.**

In construing a will, it must be read as an entirety.

**7. WILLS §451—PRESUMPTION OF POSSIBILITY OF ISSUE.**

In construing a will, the law presumes that the possibility of issue is not extinct.

**8. GUARDIAN AND WARD §42—POWER OF GUARDIAN TO CONVEY LAND.**

A guardian cannot sell or part with his ward's interest in land, except by regular judicial proceedings under the statute, so that the court may pass upon the necessity, propriety, or expediency of his doing so.

Appeal from Superior Court, New Hanover County; Calvert, Judge.

Action by Carrie W. Smith and others against Roger Moore and others. Judgment for plaintiffs, and the named defendant appeals. Reversed.

It appears that the plaintiff Carrie W. Smith (wife of Herbert Smith) and Janie H. Strange, who are the children of the late Mrs. Bettie Andrews Atkinson, have contracted to sell and convey to the defendant Roger Moore a certain lot of land on Market street, in the city of Wilmington, and to convey to him a good and indefeasible title thereto in fee by deed sufficient for the purpose, and the said Moore promised to pay therefor the sum of \$500. Plaintiffs tendered a deed for the lot to Mr. Moore, and he refused to accept it, upon the ground that the plaintiffs could not convey to him thereby a good title in fee, because they did not acquire such a title by the will of their mother, the material portion of which reads as follows:

"I give and bequeath my estate to be equally divided between my two daughters, Carrie W. Smith and Janie H. Strange, but if Janie should die without making a will or without a child or children, then her portion of my estate shall go to Carrie, or the surviving sister, or to her children if Carrie is dead. She, Janie, is privileged to make a will and leave the estate to whom she will. I wish at the death of Carrie W. Smith her portion of my estate to go to her children. If my dear husband should be living when I die I wish him to have my home (corner Fifth and Dock streets, Wilmington, N. C.) as long as he lives, and at his death to be divided between my two daughters, Carrie W. Smith and Janie H. Strange. My daughter, Janie H. Strange, I give my interest in the Front street house we bought together some time ago. That is to be taken out before the estate is divided. My stock and real estate I wish divided between my two daughters."

The will was duly admitted to probate after the death of Mrs. Atkinson (formerly Mrs. Strange). The Judge was of the opin-

ion, and so held, that the plaintiffs could convey a good title by their deed, and rendered judgment accordingly, and the defendant Roger Moore appealed.

A. G. Ricaud, of Wilmington, for appellees.

WALKER, J. [1] We always regret to disagree with the lower court, and especially when our inclination is to concur with it and unfetter titles, so that land may be kept in the channels of commerce. But we must, of course, follow the law and be governed by its principles. In construing this will, we must search for the intention of the testator, and execute her wish as we may discover it to be, if it is not contrary to law, but is a valid one, which is the case here. So the only question is the true meaning and legal effect of the will.

[2, 3] The devise was made contingent by the first clause. It is true that the real property is given to the daughters, to be equally divided between them; but it is further provided that if Janie should die without leaving a will, and without a child or children, then her portion of the estate shall go to Mrs. Smith, her surviving sister, or to her children, if she is dead. Miss Janie took, under this clause, a defeasible fee, the contingency being that she dies without child or children, and without having left a will; but there is a further contingency, that in that event it shall go to Mrs. Smith, if living at Miss Janie's death, and, if not, then to her children. Of course, the fact of her leaving a will would not be material, because, if she did so, the party claiming under her would be bound or estopped by this deed in which she joins. The further contingency, just mentioned, arises: If she does not leave a will, then at her death the estate will go to her sister, or if she be dead at the time, then to her children. If Miss Janie does not marry, or dies without children if she does marry, and leaves no will, it cannot be determined at this time who will be the children of Carrie, if the latter has died before her sister. All of her present children may be dead at that time, and other children, not now living, may be in esse, and they have not, and of course could not, have signed the contract. Besides, one of her living children is a minor, and cannot convey an indefeasible title, and is not a party to the contract, if he could be so as to bind himself irrevocably. His guardian does not profess, in his answer, to surrender any of his rights, but submits the matter to the court, to determine what they are and to adjudge accordingly.

[4] But there is another question. The plaintiffs' counsel seems to concede that, if Mrs. Carrie Smith acquired only a life estate in her mother's land by the will, the plaintiffs cannot comply with their contract

and pass a good title by their deed. It is argued with much ability and plausibility that, by a survey of the entire will, it appears that Mrs. Atkinson's purpose was to give to her two daughters a fee simple absolute in her real estate, to be held and enjoyed by them as tenants in common, share and share alike, and this deduction is drawn from the first words and the last words in the will, where it is said she devises it to them without qualification, and that the clause, "I wish, at the death of Carrie W. Smith, her portion of my estate to go to her children," should not be allowed the effect to change the manifest intention which is to be drawn from the other language just referred to. But the trouble with this argument is that she qualified the gift, as expressed in the first part of the will, by the contingent clause which follows it, and by which she limits Miss Janie's share over to her sister, or to her sister's children, if she be dead. The clause just quoted above intervenes the first and last clauses of limitation, and, as we are bound to hold, clearly and unequivocally gives Mrs. Smith a life estate, with remainder to her children at her death. But neither the last nor the first clause is necessarily inconsistent with the creation of this life estate. The property is still divided "between the daughters," though one may take a life estate, with remainder to her children, and the other a defeasible fee. At least, they are not in such irreconcilable conflict as to bring the case within the rule of construction relied on by plaintiffs' counsel, that the last clause takes precedence over those before it in the instrument.

[5, 6] Plaintiffs' counsel cites *Taylor v. Brown*, 165 N. C. 157, 81 S. E. 137, as an authority to support the rule just mentioned, and to show its application to our case. But a careful reading and consideration of that decision will show that it does not sustain the contention of plaintiffs, but rather tends the other way. The court there said:

"If Elizabeth Taylor did not take a fee simple, the limitation over vested the title at her death in the children of the testator under the fourth paragraph of her will. It is elementary that a will must be so construed as to effectuate the evident intent of the testator. *Lynch v. Melton*, 150 N. C. 595 [64 S. E. 497, 27 L. R. A. (N. S.) 684]; *Fellowes v. Durfey*, 163 N. C. 305 [79 S. E. 621]. The primary purpose is to ascertain the intention of the testator from the language used by him, taking the will as a whole, and not separate parts of it. It is manifest from the context of this will that the testator did not intend to give his wife an absolute estate in his lands under the first clause of his will; otherwise, the words used in the fourth clause would be meaningless and unnecessary. It is the duty of the courts in construing a will to give effect to every part of it, if possible. The testator's children were evidently in his mind when he made his will, and were as much the objects of his bounty as his wife. He evidently intended to provide for the care of his wife as long as she lived and

then that his children should share his estate between them."

That case stands very close to ours in its facts and the principles relied on to sustain it, and it is sufficiently like it to control our decision. It would be difficult, if not impossible, to distinguish the two cases. The question there was, What did the testator mean? And the inquiry here is, What did the testatrix mean? If it was held there that Elizabeth Taylor did not get a fee simple, how can it be said here that Mrs. Smith does get one, and not a life estate? The only distinction is that there the remainder was limited to Isham U. Taylor's heirs, while here it is given to Mrs. Smith's heirs. If anything, it is more manifest in our case that Mrs. Atkinson intended the children to be among the principal objects of her bounty, and this is clearer and more evident than it was in *Taylor v. Brown*, *supra*, that Isham Taylor's heirs were as much the objects of his bounty as was his wife. In this will she twice mentions the children of Mrs. Smith as those who were favored by her and should share in her bounty, and she gives them the fee; whereas she gives Mrs. Smith, their mother, only the life estate. In the one case she wills the property to them directly, if their mother should not be living at the death of Miss Janie Strange, and the latter has not herself disposed of it, and dies without a child or children, and in the other she limits the estate to them in remainder after their mother's death. There is manifestly no room here for the operation of the rule in *Shelley's Case*, as it plainly appears that Mrs. Atkinson intended, beyond question, that the children mentioned by her should take under the will as purchasers, and not that the mother should take a fee simple absolute, so that the children should take by descent from her, at her death, if she had retained the property and owned it at that time, as was the case in *Whitfield v. Garriss*, 134 N. C. 24, 45 S. E. 904. The clear purpose was that there should be two distinct and disunited estates, one for the life of Mrs. Smith, and the other in remainder to her children, and not that the life estate should unite with the remainder, so that the children would take in the quality or character of heirs, or heirs of her body, as a class of persons to take collectively in succession, from generation to generation, as they would take by our canons of descent. This is essential to bring the rule in *Shelley's Case* into play, as they must take by limitation, and not by purchase; the rule itself declaring that, where the estate is limited over to the "heirs" in fee or in tail, that word shall be one of limitation and not of purchase. 1 *Preston on Estates*; *Wool v. Fleetwood*, 136 N. C. 460-470, 48 S. E. 785, 67 L. R. A. 444; *Ward v. Jones*, 40 N. C. 404; *Mills v. Thorne*, 95 N. C. 362; *Whitesides v. Cooper*, 115 N. C. 570, 20 S. E. 295; *Nichols v.*

Gladden, 117 N. C. 497, 23 S. E. 459; May v. Lewis, 132 N. C. 115, 43 S. E. 550; Smith v. Proctor, 139 N. C. 314, 51 S. E. 889, 2 L. R. A. (N. S.) 172; Cotten v. Moseley, 159 N. C. 1, 74 S. E. 454, 40 L. R. A. (N. S.) 768; Jones v. Whichard, 163 N. C. 241, 79 S. E. 503. In Cotten v. Moseley, supra, we said, citing Crockett v. Robinson, 46 N. H. 461, it is the form of the second limitation which determines the application of the rule, and it is so held in Crockett v. Robinson, supra. Under the rule in Shelley's Case, the court said that—

"It is not material to inquire what the intention of the testator was as to the quantity of estate that should vest in the first taker. If the limitation were to A. for life, remainder to his heirs in fee simple, without other qualifying words, the actual intention would undoubtedly be that A. should take an estate for life only, and have no power to dispose of the remainder in fee, and negative words saying that A. should take for life only would add nothing to the clearness of the first words. The material inquiry is, What is taken under the second devise? If those who take under the second devise take the same estate that they would take as his heirs, or as heirs of his body, the rule applies. However clear the intention may be to create an estate in A. for life, remainder to his heirs, so that the estate shall go to these persons who are the heirs of A., and descend to his heritable blood in line of descent, the policy of the law, which established the rule in Shelley's Case, did not allow such a limitation. By that rule no person was permitted to raise in another an estate of inheritance, and at the same time make the heirs of that person purchasers." 6 Cruise, 325, 328, 328; Fearn on Con. Rem. 196; Hargrave's Tracts, 551; 4 Kent, 208, 214; Denn v. Puckey, 5 T. R. 299, 303; Richardson v. Wheatland, 7 Metc. (Mass.) 172.

That view of the rule was taken in Nichols v. Gladden, supra, by this court, and it was added that "the material inquiry is, What is taken under the second devise?" But what is said in Jones v. Whichard, supra, a leading authority on this subject, is very appropriate to the special facts of our case and to the form of the devise we are construing. After saying that, in order for the rule to apply where the words are "heirs" or "heirs of the body" (which are stronger words than those here to show descent), they must be used in their technical sense, and carry the estate to them, as an entire class, to take in succession from one generation to another, and must have the effect to pass the same estate to the same person, whether they take by descent or by purchase, the court proceeds to state that:

"Whenever it appears from the context, or from a perusal of the entire instrument, that the words were not intended in their ordinary acceptance of words of inheritance, but simply as a descriptio personarum, designating certain individuals of the class, or that the estate is thereby conveyed to any other person

in any other manner or in any quality than the canons of descent provide," the rule in question does not apply, and the interest of the first taker will be, as it is expressly described, an estate for life"

—citing numerous cases, some of them already cited in this opinion, supra. And referring to Whitfield v. Garria, 134 N. C. 24, 45 S. E. 904, and Morrisett v. Stevens, 136 N. C. 160, 48 S. E. 661, after commenting upon Puckett v. Morgan, 158 N. C. 344, 74 S. E. 15, the court continued to say that they were cases where one stock of inheritance was substituted, in certain events, for another, so that the former or ulterior devisees, would take as purchasers, and directly, under the will, from the deviser. The provisions in this will are much plainer to show an intent that the "children" should take in remainder, as purchasers and as immediate objects of the testator's bounty, than were those considered in the cases cited to manifest a purpose that the devisees there should take in that character. No such intention could have been expressed more clearly than by the language of this testatrix in her will, especially if it is read as an entirety, as it should be (Jones v. Whichard, supra, 163 N. C. at page 246, 79 S. E. 503), and when so read we do not have to search long to find the true intent and meaning of the testatrix. We are not combating the position taken by counsel that the word "children" may not sometimes be synonymous with "heirs" or "descendants." Redfield on Wills (3d Ed.) p. 16.

[7, 8] The law presumes that the possibility of issue is not extinct, and that there may be other children of the marriage to share in this property, who, of course, have not signed the contract. Whether we construe the remainder to be vested, or as one, while vested, which will open and let in after-born children, who fulfill the description at the life tenant's death, or to be contingent, as being confined to those children living at the death of the first taker (Irvin v. Clark, 98 N. C. 437, 4 S. E. 30), it is apparent that there will be a defect in the purchaser's title, without considering the other question, previously stated, as to the present minority of one of the children. We held, at this term, in Morton v. Pine Lumber Co., 178 N. C. —, 100 S. E. 322, that a guardian cannot sell, or part with, his ward's interest in land, but must do so, if at all, by regular judicial proceedings, under the statute, so that the court may pass upon the necessity, propriety, or expediency of his doing so.

The court was in error when it construed this will otherwise than we have herein indicated its meaning to be, and for this reason the judgment must be reversed. Whether the property can be sold under the statute relating to contingent estates and interests we have not been asked to declare.

Reversed.

(113 S. C. 1)

**GLENN v. WALKER. (No. 10283.)**

(Supreme Court of South Carolina. Oct. 20, 1919.)

**1. ADVERSE POSSESSION §104—EVIDENCE IN EJECTMENT BY PURCHASER FROM PROBATE COURT.**

In an action to recover possession of land, where plaintiff introduced probate court records relative to settlement of the estate of one who was common source of title of the parties, among which was an order for sale of the land in dispute and a report of sale to plaintiff's remote grantor, and it appeared that the deed from the probate judge to such grantor had been lost, the offer in evidence of a record of a mortgage given by such grantor to the probate judge more than 20 years prior to the action was relevant and competent; for after a lapse of 20 years a grant to such mortgagor would be presumed.

**2. ADVERSE POSSESSION §104—EXECUTORS AND ADMINISTRATORS §139—PRESUMPTION AFTER 20 YEARS AS TO DEED OF EXECUTORS BY ONE AS ATTORNEY IN FACT.**

Where two executors were authorized by the will to sell and convey land, and no particular mode of execution was required, they had the right to constitute one of themselves attorney in fact to execute a deed, and the lapse of 20 years raises the presumption that both consented to the execution of such deed.

**3. EXECUTORS AND ADMINISTRATORS §145—PRINCIPAL AND AGENT §126(6)—RECITAL OF POWER OF ATTORNEY IN DEED EXECUTED THEREWITH UNNECESSARY.**

A deed which appears upon its face to be the joint deed of two executors, executed in the name of both, is valid, though the name of one is signed by his coexecutor as attorney in fact, and though the deed makes no reference to the power under which it was executed, as it is not essential that the deed should recite the power of attorney under which it was executed.

**4. EXECUTORS AND ADMINISTRATORS §145—DEED EXECUTED IN REPRESENTATIVE CAPACITY.**

The objection that a deed by two executors, to be valid, should be signed by both "as executors," instead of merely using the word "executor," cannot be sustained where it clearly appears upon the face of the deed that they executed it in their representative capacity as executors.

**5. TRIAL §194(1)—INSTRUCTIONS ON WEIGHT OF EVIDENCE PROPERLY REFUSED.**

A request to charge on weight of evidence in violation of Const. art. 5, § 26, is properly refused.

**6. ADVERSE POSSESSION §44—NECESSITY OF CONTINUOUS POSSESSION.**

Adverse possession must be continuous.

**7. TRIAL §331—VERDICT SUFFICIENTLY CERTAIN AS TO LAND IN ISSUE.**

Where complaint in action to recover possession of land was indefinite as to description

of land, but plat was admitted in evidence conceded to represent the land in dispute, a verdict, "We find for the plaintiff the land in dispute," is sufficiently certain.

**8. APPEAL AND ERROR §1050(1)—EVIDENCE OF PLAT SHOWING TITLE IN THE COMMON SOURCE HARMLESS.**

In an action to recover possession of land, an exception assigning error to the introduction of a plat showing title in H. cannot be sustained as prejudicial error where plaintiff and defendant both claimed title from H. as the common source.

Appeal from Common Pleas Circuit Court, Spartanburg County; T. S. Sease, Judge.

Action by John P. Glenn against L. P. Walker. Judgment for plaintiff, and defendant appeals. Affirmed.

Bomar & Osborne, of Spartanburg, for appellant.

Sanders & DePass, of Spartanburg, for respondent.

GARY, C. J. This action was commenced in 1916 to recover possession of the land described in the complaint.

The defendant denied the allegations of the complaint, except so much thereof as alleges that the plaintiff and the defendant claim from a common source of title, to wit, from W. W. Harris, who died prior to the year 1875, and sets up the defenses of adverse possession and the statute of limitations. The jury rendered a verdict in favor of the plaintiff for the land in dispute, and the defendant appealed.

[1] The plaintiff, as one of the links in his chain of title, introduced in evidence the records in the probate court relative to the settlement of the estate of W. W. Harris, among which was an order for the sale of his real estate, including the land in dispute, dated the 7th of August, 1875; also report of sale showing that J. R. Little was the purchaser at public outcry. It was admitted that Mrs. Sarah Little, widow of J. R. Little, had searched for a deed from the probate judge to J. R. Little, but that she could not find it, and that she knew nothing about it. Thereupon the plaintiff offered in evidence the record of the mortgage given by J. R. Little to the probate judge, dated the 6th of September, 1875, reciting an indebtedness to the probate judge in the sum of \$152 for the purchase money of part of the real estate of W. W. Harris, deceased. The defendant objected to the introduction in evidence of said mortgage on the ground of irrelevancy, and on the ground that it was not competent evidence to prove a legal title.

The following principle was announced in *Spears v. Oakes*, 4 Rich. 347:

"A mortgage of the premises in dispute was executed by Spears, the plaintiffs' ancestor, to the South Carolina Society, to secure the pur-

chase money; then that that was paid, and satisfaction entered on the record. \* \* \* It was proved that Spears died in possession of the lot. These facts; it is not denied, made out prima facie title in the plaintiffs; but it is said such proof was not conclusive. Concede it, and how does that help the defendant? The jury is bound to respect a prima facie showing, until rebutted, just as much as they would be any other. Indeed, if not rebutted, such a showing establishes the case, and the jury have no right to say, We will not find accordingly. But the plaintiffs' case is not merely prima facie. I think it is conclusively shown that the title of the South Carolina Society was in George T. Spears; the mortgage was by him to the South Carolina Society to pay the purchase money. This was an admission in law that he had the title of the South Carolina Society to the premises, otherwise he had nothing to convey, and thereby mortgage."

Furthermore, after the lapse of 20 years the law presumes that there was a title. *Riddlehoover v. Kinard*, 1 Hill, Eq. 376; *McLeod v. Rogers*, 2 Rich. 19; *Corbett v. Fogle*, 72 S. C. 312, 51 S. E. 884; *Young v. McNeill*, 78 S. C. 143, 59 S. E. 986; *Powers v. Smith*, 80 S. C. 110, 61 S. E. 222; *Lewis v. Pope*, 86 S. C. 85, 68 S. E. 680.

The exception raising this question is overruled.

[2, 3] The will of Benjamin Wofford, from whom the plaintiff traces his title, was offered in evidence. The sixth item thereof, is as follows:

"I hereby fully authorize and empower my executors, hereinafter named, as soon after my death as convenient, to collect all debts due my estate, to sell and convey the real estate at public auction, or private sale, as they may deem best, and make good and sufficient title thereto, and on such terms as they think best, and to divide and distribute the fund, arising under this item of my will as directed in the fifth item of my will."

W. L. Wait and J. N. Holcombe were appointed executors of said will, and both duly qualified. On the 28th of September, 1894, J. N. Holcombe executed an instrument of writing, whereby he undertook to delegate to W. L. Wait, the other executor, all the powers conferred upon him by the will. The defendant's attorneys objected to the introduction in evidence of said instrument on the ground:

"That under the terms of that will and under the law it was incompetent and impossible for J. N. Holcombe to give to W. L. Wait the power to exercise the duties of both executors under the will; that is, for one executor to give to the other the power of sale that was by the terms of the will vested in such coexecutors."

The case of *Black v. Erwin*, Harp. 411, decides that a power coupled with a trust cannot be delegated to another. But, for reasons hereinafter stated, there was no prejudicial error in admitting the instrument.

The record contains this statement:

"Next was offered book \* \* \* containing record of deed purporting to be from W. L. Wait and J. N. Holcombe, executors, to Mrs. Ella Wofford, of date July 26, 1895. Said recorded deed recites that the indenture 'is between W. L. Wait and J. N. Holcombe, executors of the last will and testament of Dr. Benjamin Wofford, deceased,' and refers to the authority of said executors given under and by the last will and testament of Dr. Benjamin Wofford, deceased, and purports to convey to Mrs. Ella B. Wofford in fee a certain tract of land. \* \* \* The deed is signed: 'W. L. Wait, Executor. [Seal.] J. N. Holcombe, Executor [seal], by W. L. Wait, Attorney in Fact.'"

The defendant's attorneys objected to said deed—

"as being a valid link in plaintiff's chain of title, upon the ground that it was not competent for W. L. Wait to act as attorney, and he could not thereby bind the estate and make a valid deed, and it conveys nothing, because it is not signed in the proper way to convey a legal title, in that, to be valid, it should have been signed by both W. L. Wait and J. N. Holcombe 'as executors.'"

This deed is to be construed without reference to the instrument of writing signed by J. N. Holcombe. The fact that the deed was signed, "J. N. Holcombe, Executor, by W. L. Wait, Attorney in Fact," does not indicate, that its execution was without the approval of Holcombe; on the contrary, it appears upon its face to be the joint deed of Wait and Holcombe, executors. A deed made under a power of attorney must be executed in the name of the principal. *Webster v. Brown*, 2 S. C. 428; *De Walt v. Kinard*, 19 S. C. 292; *Johnson v. Johnson*, 27 S. C. 309, 3 S. E. 606, 13 Am. St. Rep. 636.

When the name of Holcombe was signed by Wait as attorney in fact, it appeared upon its face to be a valid deed, as it was not essential to its validity that the deed should recite the power under which he acted. The rule is thus stated in 22 Enc. of Law, 1012:

"In the execution of a power it is not essential that the donee expressly refer to the power and profess to execute it. If his intention to execute the power is apparent from the instrument or the circumstances surrounding its execution, the instrument will be upheld as an execution of the power, though no reference is expressly made thereto."

Numerous cases are cited in the note to sustain this principle, among which is *Lee v. Simpson*, 134 U. S. 572, 10 Sup. Ct. 631, 33 L. Ed. 1038, in which the court reviewed the South Carolina cases, as the appeal was from the federal court in South Carolina. Two of the cases therein cited to which we desire to call special attention are: *Bilderback v. Boyce*, 14 S. C. 528; *Moody v. Tedder*, 16 S. C. 557.

The last-mentioned case also shows that the deed did not indicate upon its face that

its execution by Holcombe was in violation of his trust as executor. The court in that case quoted with approval, the following language from 1 Sugden on Powers, 215:

"It is frequently contended in practice that a devisee of a power cannot execute a deed of appointment by attorney. But the cases by no means authorize this position. They merely establish that the devisee cannot delegate the confidence and discretion imposed in him to another. There the devisee points out the precise appointment which he is desirous should be made; there no confidence, no discretion, is delegated. The appointment is in every respect the exercise of his own judgment, and there cannot be any reason, why he should not be permitted to execute the deed of appointment by attorney. The contrary doctrine would lead to great inconvenience. Where, however, a particular mode of execution is required, it would be difficult to support an execution by attorney."

No particular mode was required in this case. Another reason why the objection to the introduction of the deed in evidence was properly overruled is that more than 20 years had elapsed since the execution of the deed until the commencement of this action, from which the consent of Holcombe will be presumed.

In *Riddlehoover v. Kinard*, 1 Hill Eq. 376, the court says:

"The lapse of 20 years is sufficient to raise the presumption of a grant from the state of the satisfaction of a bond, \* \* \* or the payment of a legacy, or almost anything else, \* \* \* to quiet the title of property."

In *Corbett v. Fogle*, 72 S. C. 312, 51 S. E. 884, this court ruled that the lapse of 20 years afforded evidence of acquiescence on the part of those interested in the terms of a deed, and likewise of any fact necessary to give it full force and effect.

The distinction between presumptions of law and of fact is pointed out in the case of *Lewis v. Pope*, 86 S. C. 285, 68 S. E. 680. The lapse of 20 years raises a presumption of law, and that principle is applicable to this case.

[4] The objection that, in order to be valid, the deed should have been signed by both *Walt* and *Holcombe* "as executors," instead of merely using the word "executors," cannot be sustained, as it otherwise clearly appears upon the face of the deed that they executed it in their representative capacity as executors.

What we have said disposes of all the exceptions, except those numbered 10, 11, 18, and 20.

[5] The exception numbered 10 cannot be

sustained for the reason that, if his honor the presiding judge had charged as requested, it would have been in violation of article 5, § 26, of the Constitution. *Weaver v. Railway*, 76 S. C. 49, 56 S. E. 657, 121 Am. St. Rep. 934.

[6] The eleventh exception assigns error on the part of his honor in charging the jury as follows:

"I will call your attention to what is meant by adverse possession. Adverse possession means continuous possession. A mere occasional entry would not be adverse possession. The possession must be continuous."

The rule is well settled that, in order to establish the defense of adverse possession, it is necessary to prove that it was continuous.

[7] The eighteenth exception assigns error in the refusal of the motion for a new trial on the ground that the verdict is too indefinite and uncertain to form the basis of a legally enforceable judgment. The description of the land in the complaint is as follows:

"One hundred and fifty acres, more or less, near the city of Spartanburg, bounded on the north by F. H. Knox; on the west by the estate of F. M. Trimmier, Southern Railway, and John B. Cleveland; on the south by John B. Cleveland, Berry Ferguson, and L. P. Walker; and on the east by L. P. Walker and the Waterworks Company—and being a part of the land formerly belonging to the land of W. W. Harris, deceased."

And it is alleged that defendant trespassed on a part thereof next to his own land.

The verdict of the jury was:

"We find for the plaintiff the land in dispute."

There was in evidence the plat, which showed the land in dispute to be a small triangle, containing about twenty-seven one-hundredths of an acre. It appears from the record that both sides conceded at the trial that the plat correctly represented the land in dispute. Clearly the jury intended by their verdict to refer to the plat, and by reference thereto the verdict is made certain.

[8] The last exception assigns error in the introduction of a plat for the purpose of showing title in W. W. Harris. It cannot be successfully contended that there was prejudicial error, as the plaintiff and the defendant claim title from W. W. Harris as a common source.

Affirmed.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

(113 S. C. 19)

HINNANT v. SOUTHERN RY. CO. et al.  
(No. 10282.)

(Supreme Court of South Carolina. Oct. 14, 1919.)

1. CARRIERS ⇐282—RAILROADS ⇐276(4)—  
RIDING FREE, WITH CONSENT, UNLAWFUL,  
PRECLUDING RECOVERY FOR INJURY.

One riding on the engine of an interstate freight train by permission of the conductor and engineer, without payment of fare, violates the state and federal statutes, and cannot recover for personal injury on theory that he was a licensee.

2. CONTRACTS ⇐138(1)—ILLEGALITY OF CONTRACT.

No action can be based on an illegal contract.

Appeal from Common Pleas Circuit Court of Bamberg County; Thomas S. Sease, Judge.

Action by H. Y. Hinnant against the Southern Railway Company and others. Judgment for plaintiff, and defendants appeal. Reversed.

Harley & Blatt, of Barnwell, and B. W. Miley, of Bamberg, for appellants.

Mayfield & Free and Carter & Carter, all of Bamberg, for respondent.

FRASER, J. The essential facts in this case may be briefly stated. The plaintiff entered the cab of the engine of one of defendant's freight trains, to go from Ridgeway to Columbia. The train was an interstate train. The plaintiff's father had been in the employ of the defendant, and the plaintiff testified that he had many times traveled in the way he was traveling on the day in question, without paying fare. The plaintiff said he was on the engine with the consent of the conductor and engineer. On the way there was a collision between the freight train and a work train, in which the plaintiff was seriously injured.

At the close of the testimony for the plaintiff, the defendant moved for a nonsuit and this was refused. At the close of all the testimony, the defendant moved for a direction of a verdict in its behalf, which was also refused. The motions were made on the ground that the plaintiff was not only a trespasser, but was on the train in violation of the statutes, both state and federal.

The trial judge properly held that the plaintiff was on the train in violation of the state and federal Statutes, but refused to direct a verdict.

[1] There is properly but one question in this case, to wit, Can one who is on a train, not merely without warrant of law, but in contravention of law, recover damages for an injury received while so riding? The

answer is that he cannot. Ruling Case Law, vol. 6, § 215, p. 817.

[2] We find:

"The general rule that no action can be based on an illegal contract is therefore not open to question."

The plaintiff claims to be a licensee, and therefore under contract.

The Supreme Court of the United States refused to allow a recovery in a similar case. Illinois Central R. R. Co. v. Messina, 240 U. S. 395, 36 Sup. Ct. 368, 60 L. Ed. 709.

Neither the conductor, the engineer, nor the defendant itself can make a contract in violation of law, or waive the requirements of the law. The courts are jealous to see that no discrimination is made directly or indirectly.

The judgment is reversed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(149 Ga. 489)

SOUTHERN EXPRESS CO. v. STATE.  
(No. 1321.)

(Supreme Court of Georgia. Oct. 16, 1919.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS ⇐138 — TRANSPORTATION FOR MEDICINAL PURPOSES—CONSTRUCTION OF STATUTE.

The act of 1917 (Acts Ex. Sess. 1917, p. 7), amending and supplementing the prohibition laws of this state, authorizes a common carrier to transport and deliver to a practicing physician, who is the sole proprietor of a drug store, pure alcohol for medicinal purposes, under certain conditions specified in the act, from one point within the state to another point within the state of Georgia.

2. INTOXICATING LIQUORS ⇐138, 139 — TRANSPORTATION FOR MEDICINAL PURPOSES AND POSSESSION BY COMMON CARRIER.

Under the facts of this case, it was error to hold that the common carrier was guilty of a misdemeanor for transporting pure alcohol shipped by a wholesale druggist living at a point within this state to a practicing physician living at another point within this state, where it appeared that such physician had an office and kept drugs therein for the purpose of compounding his own medicine, and where such alcohol was to be used for medicinal purposes only, and all the conditions of the act relative to receiving and delivering the alcohol had been complied with by the physician and the common carrier. Nor was it illegal under the act of 1917 for such common carrier, under such circumstances, to have pure alcohol in its possession.

Certiorari to Court of Appeals.

The Southern Express Company was convicted of unlawfully transporting and of hav-



ing control and possession of intoxicating liquors, and from a judgment of affirmance by the Court of Appeals (98 S. E. 272), it brings certiorari. Reversed.

Opinion conformed to 100 S. E. 791.

The Southern Express Company was tried for a misdemeanor under an indictment which contained two counts, the first charging that—

The defendant "did then and there transport, ship, and carry from Valdosta, Ga., to Camilla, Ga., both being points within this state, spirituous, vinous, malt, fermented, alcoholic, and intoxicating liquors and beverages, the last-named point, to wit, Camilla, Ga., being in the county of Mitchell, and said defendant did so transport, ship, and carry said liquors and beverages in the said county of Mitchell."

The second count charged that the Southern Express Company did "unlawfully and with force of arms, in the county aforesaid, have, control, and possess, spirituous, alcoholic, and intoxicating liquors." The case was tried by the presiding judge, to whom it was submitted without a jury, on the following agreed statement of facts:

"The Southern Express Company was a corporation and common carrier at all times herein mentioned. In April, 1917, said express company received for transportation, from the Mashburn Drug Company, which was at all times herein mentioned a wholesale druggist of Valdosta, Ga., at said Valdosta, Ga., one gallon of pure alcohol, to be transported by said Southern Express Company to Dr. H. G. Fussell at Camilla, Ga., in Mitchell county. Said alcohol was not delivered by said express company to Dr. Fussell, but was seized in the office of said express company by the sheriff at Camilla, Ga. Dr. Fussell was at all times mentioned herein a practicing physician of Camilla, Ga., but was not a pharmacist or apothecary holding license as such from the state board of pharmacy, but kept a stock of drugs and medicines, costing at wholesale from \$100 to \$200, in his office at Camilla, Ga., for use in putting up his own prescriptions and dispensing medicines from his own office, and in his practice of his profession as a doctor of medicine; and said alcohol was wanted by him for medicinal purposes in connection with said stock of drugs and medicines. He had ordered the same from the Mashburn Drug Company of Valdosta, Ga., and the Southern Express Company did transport the same for said Dr. Fussell from said Mashburn Drug Company, which was undertaking to fill said order therefor. Camilla and Valdosta are both points within the state of Georgia, and said alcohol was conveyed from Valdosta, Ga., to Camilla, Ga., and into the county of Mitchell, and was in said Southern Express Company's custody at its office in Camilla, in Mitchell county, for the purpose aforesaid, when seized by the sheriff. Subsequently said Fussell applied in due form to the ordinary of Mitchell county, for a permit to receive said alcohol for medicinal purposes, stating in said application that the business or occupation of applicant was that of a physician, said application being supported in due form by the affidavits of said Fussell and a certificate of two citizens of Mitchell

county, as required by law; and said application was approved and granted by said ordinary, and said sheriff then delivered said alcohol to said Fussell. All of the above-stated transactions occurred in the month of April, 1917, and prior to April 11, 1917, the date when said special presentment was returned and filed. Neither said defendant nor any agent or officer thereof intended to violate any law in said transaction, or knew that it was a violation of the law to do any of said things, if it was such in fact."

The trial judge rendered judgment against the defendant, which excepted, and the case was taken to the Court of Appeals. That court affirmed the judgment, one judge dissenting; and the case was brought to this court on a writ of certiorari.

Robt. C. & Phillip H. Alston and H. E. Riddell, all of Atlanta, for plaintiff in error.

R. C. Bell, Sol. Gen., of Cairo, and F. A. Hooper, of Atlanta, for the State.

HILL, J. (after stating the facts as above). The defendant was indicted and tried in the court below under an act of the General Assembly passed at the extraordinary session of March, 1917 (Acts 1917 [Extra Sess.] p. 7). The caption of this act is as follows:

"An act to amend and supplement the prohibition laws of this state; to make it unlawful to transport, ship, or deliver in this state \* \* \* any spirituous, vinous, malt, or fermented liquors, or other intoxicating liquors or beverages, except alcohol and wine under certain restrictions and limitations; to make it unlawful to have, receive, possess or control any such liquors, except alcohol for medicinal, mechanical and scientific purposes, and wine for sacramental purposes under conditions prescribed; to make it unlawful to distill, manufacture, or make any alcoholic, spirituous, vinous, or malted liquors or intoxicating beverages in this state; to provide for the punishment of violators of the provisions of this act; to provide for the seizure, condemnation, and sale of property used in violation of this act, and for the disposition of the funds arising from such sale; to provide additional fees and costs in cases of conviction for violation of certain provisions of the prohibition laws of this state; to repeal the acts approved November 18, 1915, and of August 19, 1916, and certain portions of the act approved November 17, 1915; and for other purposes."

Section 1 of the act provides, so far as applicable to this case that—

"It shall be unlawful for any common carrier, corporation, firm or individual to transport, ship or carry, by any means whatsoever, with or without hire, or cause the same to be done, from any point without this state to any point within this state, or from place to place within this state, whether intended for personal use or otherwise, any spirituous, vinous, malted, fermented or intoxicating liquors, or any of the prohibited liquors or beverages, as are defined in the act approved November 17, 1915, being 'an act to make clearer and more certain' the prohibition laws of this state, etc., or any alcoholic compound or malt or liquors, whether intended

for beverage purposes or not, but which can be diluted, and when so diluted may be used as a beverage and will produce intoxication. It shall be unlawful for any corporation, firm, person or individual to receive from any common carrier, corporation, firm, person or individual, or to have, control or possess, in this state, any of said enumerated liquors, \* \* \* save as is hereinafter excepted."

Under section 16 of the act, it is provided that any one violating its provisions shall be punished as for a misdemeanor as provided in section 1065 of the Penal Code of 1910. Section 2 of the act of 1917 provides:

"That nothing herein contained shall prohibit the use of pure alcohol for medicinal purposes, as is prescribed in sections 426, 427, 428, 429, and 430 of the Criminal Code of 1910, said alcohol, however, to be shipped, received and possessed only as is provided in section 3 of this act."

Section 3 of said act is as follows:

"That any common carrier may transport, ship or carry from any point without this state to any point within this state, pure alcohol to be received only by any practicing physician who is the sole proprietor of a drug store, licensed druggists, pharmacists, manufacturers, chartered colleges, chartered hospitals, or state institutions, and to be used only for medicinal, mechanical and scientific purposes not contravening in any way the prohibition laws of this state, under the following conditions: Any practicing physician who is the sole proprietor of a drug store, licensed druggist, pharmacist, manufacturer, chartered college, chartered hospital, or state institution, desiring to have shipped and to receive pure alcohol for said purpose within this state, shall make sworn application to the ordinary of the county of his residence for a permit to receive said alcohol, upon the certificate of two responsible citizens of said county as to his good moral character, in the following form:" (Form omitted.)

[1. 2] The question for decision is whether, under the indictment, the agreed state of facts, and the act above mentioned, construed in connection with sections 426 to 430, inclusive, of the Penal Code of 1910, the defendant, Southern Express Company, is guilty of a misdemeanor, and should, on conviction, be punished accordingly. Under the view that we take of this case, the defendant has been illegally convicted; and, accordingly, we think that the Court of Appeals erred in affirming that conviction. It will be seen from a consideration of the act in question that the Legislature had one main purpose in view with reference to common carriers, and that was to make it unlawful to transport or deliver, in this state, "any spirituous, vinous, malt, or fermented liquors or other intoxicating liquors or beverages, except alcohol and wine under certain restrictions and limitations." It will be perceived that pure alcohol was excepted from the operation of the act. It is true that section 3 provides that—

"Any common carrier may transport, ship, or carry from any point without this state to any point within this state pure alcohol to be received only by a practicing physician who is the sole proprietor of a drug store."

And it is insisted that under the facts of this case the physician to whom the alcohol was delivered, while a practicing physician, was not the sole proprietor of a drug store, as contemplated by section 3 of the act; that he merely kept a few drugs on hand in his office for the purpose of filling his own prescriptions, and therefore that he did not fall within the definition of those to whom alcohol could be shipped and delivered; and that the common carrier, the express company, violated the provisions of that section of the act when it delivered the alcohol to him. Whether the physician in this case is technically the "sole proprietor of a drug store" is immaterial under the facts of this case, inasmuch as the carrier was authorized to deliver the alcohol when it was presented with the application, which had been approved and granted by the ordinary as required by the statute. This had been done. If the common carrier delivers pure alcohol to an individual upon a false or forged application, "knowing the same to be such" or without such application for delivery having been made, etc., such carrier could be punished as prescribed in section 16 of the act of 1917. See section 11 of the act of 1917. On the other hand, if the carrier should deliver the alcohol without the application being presented to it, or without the application being allowed and approved by the ordinary, or delivered it upon a false or forged application, "knowing it to be such," the case would be different. See section 11 of the act, supra. Here the application was regularly issued and approved by the ordinary; and, this being so, the common carrier would be authorized *prima facie* to deliver the alcohol without committing any offense under the statute. Section 31 of the Penal Code provides that—

"A crime or misdemeanor shall consist in a violation of a public law, in the commission of which there shall be a union or joint operation of act and intention, or criminal negligence."

The agreed statement of facts discloses that the physician to whom the alcohol was shipped made a sworn application to the ordinary of the county of his residence, for permission to receive the alcohol, and that section 3 of the act in this regard was otherwise complied with. When therefore this permit of the ordinary was presented to the common carrier "in due form," approved and granted by the ordinary, nothing else appearing, we do not think that anything in the record would authorize the conclusion that there was an intention on the part of the carrier to violate the act of 1917, or that there was any criminal negligence on its

part. The act provides that the application shall be presented to the ordinary in duplicate; and, when approved by the ordinary and presented to the common carrier, that will authorize the common carrier to deliver to the applicant the quantity of pure alcohol therein specified. The common carrier is required to indorse on the certificate the date of the delivery and the quantity of alcohol received on the certificate, and the certificate shall then cease to be authority for the delivery of any further alcohol. No contention is made that these provisions of the act were not complied with in good faith; and, that being true, we think defendant was authorized to deliver the alcohol to the applicant. Under the decision of the Court of Appeals, it was unlawful for the carrier to have the alcohol in its possession; but we cannot agree to this conclusion.

It is argued that the act authorizes pure alcohol to be shipped from a point in another state to a wholesale druggist in this state, but that no shipment of pure alcohol can be made from such wholesale druggist within this state to a retail druggist within the state. The evident purpose of the Legislature was to prohibit the use of alcoholic liquors, etc., for beverage purposes; but it is just as evident that the Legislature intended to allow the use of pure alcohol for medicinal purposes. It would be strange indeed, and inconsistent, to impute to the Legislature the purpose of permitting pure alcohol to be shipped to wholesale druggists within this state, and yet deny to retail druggists the right to have shipped to them pure alcohol from such wholesale druggist. It cannot be said that the Legislature permitted the transportation and shipment of alcohol from other states into this state because of the fact that that was an interstate shipment and therefore it had no power or authority to prevent such shipment. It will be called to mind that the act of 1917 was passed subsequently to what is known as the Webb-Kenyon Act of Congress (Act Cong. March 1, 1913, c. 90, 37 Stat. 699 [U. S. Comp. St. § 8739]), under which the Legislatures of the different states could prohibit the shipment from points without the state to points within the state, notwithstanding its interstate character. Therefore the Legislature, knowing this fact, certainly did not mean to authorize interstate shipments solely for the reason that they had no authority to prohibit it; but, on the contrary, a reading of the entire act of 1917 will clearly show the purpose and intention of the Legislature to except from the operation of the act pure alcohol, whether shipped from points without to points within, or from points within the state to other points within the state. If it be said that the common carrier could ship and deliver only to a physician who is the sole proprietor of a drug store, and that the delivery in this case was

not to the sole proprietor of a drug store, and therefore, whether done intentionally or not, that the carrier was guilty of a misdemeanor under the act of 1917, the reply is that the delivery was made upon a permit from the ordinary of the county, which, as already stated, was regular upon its face and purported to be in accordance with the requirements of section 3 of the act of 1917. In addition to what has been said, we think the act of 1917 must be construed in connection with sections 426, 427, 428, 429, and 430 of the Penal Code of 1910. Section 2 of the act expressly provides that nothing therein contained "shall prohibit the use of pure alcohol for medicinal purposes as is prescribed" in the sections just referred to. Section 430 is as follows:

"Nothing in the preceding sections of this article shall be so construed as to prevent wholesale druggists from selling or furnishing alcohol in wholesale quantities to regular licensed retail druggists, or to public or charity hospitals, or to medical or pharmaceutical colleges. All wholesale druggists shall be required to keep a complete record of all their sales of alcohol, which record shall at all times be open for inspection to the regular authorities of such counties or cities in which such wholesale stores are located."

It will be seen from reading this section, which the Legislature in 1917 sought to preserve, that nothing should be so construed as to prevent druggists from selling or furnishing alcohol in wholesale quantities to regular licensed retail druggists, etc.; and that section also provided that wholesale druggists should be required to keep a complete record of all their sales of alcohol which should be open for inspection to the authorities of such counties or cities in which such wholesale stores were located. This was evidently done to protect the public, and in order that such sales under the authority of the law should not be a license to wholesale and retail druggists to sell pure alcohol for any other purposes than those stated. The whole scheme of the prohibition law is obviously to prevent the possession, transportation, and sale of all alcoholic spirituous, vinous, or malt liquors, etc., for beverage purposes; and not for the purpose of preventing pure alcohol from being transported and used for medicinal purposes. It would be an unreasonable construction to say that a wholesale druggist within the state of Georgia could have shipped to him pure alcohol from without the state, and yet he would be deprived of the right to supply such alcohol to a retail druggist within the state, who was to use it solely for medicinal purposes; and that he could not ship it, and no common carrier could transport it, from his place of business within this state to a retail druggist at some other point within this state. Carried to its logical result, this line of reasoning would prevent a wholesale druggist in this state

from supplying, or a common carrier from transporting and delivering, pure alcohol to a retail druggist across the street in the same town or city. Under this view, the transporting or possession of such alcohol for the purpose specified in the act of 1917 would be illegal and subject the offender to the penalties provided. Surely the Legislature never intended such construction, and it is the intention of the Legislature that we are to ascertain.

Judgment reversed.

All the Justices concur.

(24 Ga. App. 238)

**GEORGIA RY. & POWER CO. v. RYAN et al.**  
**SOUTHERN WOOD PRESERVING CO.**  
**v. SAME.**

(Nos. 10842, 10844.)

(Court of Appeals of Georgia, Division No. 2.  
 Oct. 20, 1919.)

(Syllabus by the Court.)

**1. CARRIERS**  $\Leftrightarrow$  820(30)—**NEGLIGENCE**  $\Leftrightarrow$  61  
 (1), 138(2)—**ON CONCURRENT NEGLIGENCE,**  
**RECOVERY CAN BE HAD AGAINST EITHER**  
**TORT-FEASOR.**

This was an action by a passenger on a street railway against two alleged joint tortfeasors. Petitioner shows that one of the defendants, the street railway company, had, in order to permit her to alight, brought its car to a stop, not at the near side of the street intersection, as required by the city ordinance, but had negligently carried its car a considerable stated distance over and beyond such designated place for stopping, and in thus continuing the progress of the car beyond the point legally designated for stopping it had negligently approached within a dangerously close distance to the rear end of a wagon, to which was hitched a nervous and balking horse. It is alleged that the other defendant, the owner of the wagon, gave to the horse a violent jerk at the time the car was coming to a stop, thus causing the horse to back and the load of the wagon to be projected into the door on the front end of the street car, all of which joint acts of negligence it is alleged resulted in the serious bodily injury to the plaintiff, who at the time of the accident was preparing to alight from the car. The defendant street railway company excepts to the overruling of its demurrer, which sought to strike the petition on the ground that the alleged acts of negligence on its part were not the proximate cause of the injury. A verdict having been rendered against the defendants jointly, each made a motion for a new trial on the general grounds, and exceptions are taken to the overruling of the same. *Held*, no general, yet precise and inflexible, rule can be laid down with reference to the highly involved and much-discussed subject as to what constitutes the proximate cause of an injury. Consequently each case must depend for solution

upon its own particular facts; but it is a well-settled principle of law that, where two concurrent causes operate directly in bringing about an injury, there can be a recovery against either one or both of the responsible parties. The mere fact that the injury would not have been sustained, had only one of the acts of negligence occurred, will not of itself operate to define and limit the other act as constituting the proximate cause, for if both acts of negligence contributed directly and concurrently in bringing about the injury, they together will constitute the proximate cause. *Barrett v. Savannah*, 9 Ga. App. 642, 72 S. E. 49; *Bonner v. Standard Oil Co.*, 22 Ga. App. 532, 96 S. E. 573, and cases cited. The determination of questions as to negligence lies peculiarly within the province of the jury, and in the exercise of this function the question as to what constitutes the proximate cause of an injury complained of may be directly involved as one of the essential elements and disputed issues in the ascertainment of what negligence, as well as whose negligence, the injury is properly attributable to. *White v. Seaboard Air Line Ry.*, 14 Ga. App. 139, 80 S. E. 667. It was not error, therefore, for the judge to overrule the railway company's demurrer to the petition, since it was properly a question of fact, for the jury to determine from the evidence, whether the defendants were guilty of negligence in any of the particulars charged, and, if so, whether the concurrent acts of negligence of both wrongdoers, or the separate acts of either of them, constituted the proximate cause of the injury.

**2. NEW TRIAL**  $\Leftrightarrow$  70—**MOTION ON GENERAL**  
**GROUND PROPERLY DENIED.**

There was evidence tending to substantiate the contentions of plaintiff as to each of the grounds of negligence referred to, and the trial court did not err in overruling either of the motions for a new trial, based solely upon the general grounds.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Blanche M. Ryan, by next friend, and others, against the Georgia Railway & Power Company and the Southern Wood Preserving Company, as joint tortfeasors. Verdict against defendants jointly, motion of each defendant for a new trial overruled, and they separately bring error. Judgment in each case affirmed.

Colquitt & Conyers, of Atlanta, for plaintiff in error Georgia Ry. & Power Co.

E. V. Carter and E. V. Carter, Jr., both of Atlanta, for plaintiff in error Southern Wood Preserving Co.

Alex MacDougald and Hewlett & Dennis, all of Atlanta, for defendant in error Ryan.

JENKINS, P. J. Judgment in each case affirmed.

STEPHENS and SMITH, JJ., concur.

(24 Ga. App. 290)

**GEORGIA RY. & POWER CO. v. RYAN et al.**  
**SOUTHERN WOOD PRESERVING CO.**  
**v. SAME.**

(Nos. 10343, 10345.)

(Court of Appeals of Georgia, Division No. 2.  
Oct. 20, 1919.)*(Syllabus by the Court.)***1. INJURY TO CHILD.**

The law of these cases is settled by the rulings made in the case of Georgia Ry. & Power Co. v. Ryan, by Next Friend et al. (No. 10342) 100 S. E. 713, this day decided.

**2. NEW TRIAL — 70—DENIAL OF MOTION PROPER UNDER EVIDENCE.**

There was sufficient evidence to authorize the court to submit to the jury the questions as to the plaintiff's right to recover for necessary expenses, consisting of reasonable physician's bills incurred by him in consequence of the injuries sustained by his minor daughter, and the evidence was sufficient to sustain the verdict rendered covering this element of damages, as well as the loss by the plaintiff of the services of his minor daughter during her minority. The court did not err, therefore, in overruling either of the motions for a new trial.

Error from City Court of Atlanta; H. M. Reid, Judge.

Separate actions by J. F. Ryan and others against the Georgia Railway & Power Company and against the Southern Wood Preserving Company. Judgment in each case for plaintiffs, motions for new trial overruled, and defendants in each case bring error. Judgment affirmed in each case.

Colquitt & Conyers, of Atlanta, for plaintiff in error Georgia Ry. & Power Co.

E. V. Carter and E. V. Carter, Jr., both of Atlanta, for plaintiff in error Southern Wood Preserving Co.

Alex MacDougald and Hewlett & Dennis, all of Atlanta, for defendant in error Ryan.

JENKINS, P. J. Judgment affirmed in each case.

STEPHENS and SMITH, JJ., concur.

(24 Ga. App. 210)

**SNEAD et al. v. WOOD.** (No. 10355.)(Court of Appeals of Georgia, Division No. 1.  
Oct. 9, 1919.)*(Syllabus by the Court.)***1. VENDOR AND PURCHASER — 18(3)—EXERCISE OF OPTION TO PURCHASE PROPERTY.**

An option to purchase property can be "exercised," unless otherwise provided in the option contract, by the mere giving, within the life of the option, of an unconditional notice,

by the holder of the option, to the other party or his agent, that the former has elected to purchase the property at the price and upon the terms stated in the option contract.

(a) An option to purchase can be exercised without the payment of the purchase price, or the tender thereof, unless the option contract provides for such payment as a condition precedent to the exercise of the option.

**2. BROKERS — 54 — RIGHT TO COMMISSION — EXERCISE OF OPTION.**

A broker is entitled to his commissions where, as agent of the owner, he procures a purchaser ready, able, and willing to purchase, and who actually offers to purchase on the terms stipulated by the owner. Civ. Code 1910, § 3587. This provision of the Code applies where the purchaser procured by the broker first buys an option to purchase, and subsequently, within the life of the option, exercises his option by electing to purchase and gives timely and unconditional notice thereof to the other party. In such a case the broker's right to his commissions does not ripen into a cause of action until the option has been actually exercised. As soon, however, as the option has been exercised, his cause of action is complete.

*(Additional Syllabus by Editorial Staff.)***3. VENDOR AND PURCHASER — 18(3) — UNCONDITIONAL NOTICE OF EXERCISE OF OPTION TO PURCHASE.**

A notice to owner by transferee of an option to purchase was an unconditional notice, sufficient as an exercise of the option, where it formally demanded that owner place himself into a position to comply with his contract obligation to make a good title to land covered by contract upon payment of a certain amount, as no particular form of notice is required.

**4. VENDOR AND PURCHASER — 18(3) — ELEMENTS OF ACT OF "EXERCISING THE OPTION."**

The elements of the act commonly called "exercising the option" are: First, the decision of the optionee to purchase the property under the terms of the option; and, second, the communication of this decision to the optionor within the life of the option.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Suit by J. P. Wood against C. C. Snead and others. Verdict for plaintiff, motion for new trial overruled, and defendants bring error. Affirmed.

Callaway & Howard, of Augusta, for plaintiffs in error.

Wright & Wright & Jackson, of Augusta, for defendant in error.

BROYLES, C. J. This was a suit against the owners of a tract of land to recover a broker's commissions for the lease and sale of the land. Before the sale was consummated, however, by agreement of all parties, the land, instead of being sold, was leased, in the fall of 1911, to the proposed purchaser for a term of five years, beginning January

1, 1912, and ending December 31, 1916. In the lease contract, which was attached to the petition and made a part thereof, it was recited that—

The lessors "hereby grant and sell unto the party of the second part, his heirs and assigns, an option to purchase the property described in paragraph one, at the expiration of this lease, for the price of \$35,000. It is understood, however, that while the party of the second part shall during the life of the lease notify the parties of the first part of his intention to buy, that shall not terminate the lease, but that the said party of the second part, his heirs and assigns, shall continue in possession of said property as a tenant and paying the annual rental as above provided."

The original petition set out that the plaintiff negotiated the sale and succeeded in substituting the lease contract, and that Hankinson, the lessee, by Hagler, his assignee, had given timely and proper notice to the defendants that he had exercised the option to purchase the land for \$35,000, the price named in the option.

The suit was filed on the 1st day of November, 1916. The defendants demurred to the petition, on the general ground that it set forth no cause of action, and on the special ground that it appeared on the face of the petition that the plaintiff's cause of action was barred by the statute of limitations, for the reason that the alleged services were rendered in the fall of 1911, and his suit was not filed until more than four years after the services were rendered. The court overruled the demurrer, and the defendants excepted *pendente lite*. By their plea also this question as to bar by the statute of limitations was raised. Subsequently the petitioner offered the following amendment to his petition, which was allowed without objection:

"(e) Petitioner says that it was agreed between himself and the defendants that no part of his commissions for the rental or sale of said property was to become due and payable unless and until the option to buy said land contained in said lease was exercised by the purchaser or his assignee; and that the said purchaser, by J. C. Hagler, the assignee of the rights of J. L. Hankinson under said lease, did on the \_\_\_\_\_ day of November, 1916, exercise the option to purchase said land, and made a formal demand of said defendants that they make to the said J. L. Hankinson, or his assignee, the said J. C. Hagler, a good and sufficient title thereto upon the payment by the purchaser of the sum of thirty-five thousand dollars (\$35,000.00), which sum the said purchaser, J. L. Hankinson by J. C. Hagler, his assignee, was then ready, willing, and able to pay, and did then and there offer to pay, in cash, the said purchase money of \$35,000.00 to the said defendant, upon the execution of the said purchaser of a good title to said land; whereupon petitioner's said commissions for the rental and sale of said property then and there first became due and payable by the said defendants to petitioner."

Upon the trial of the case the plaintiff amended the amendment to the petition by adding, after the word "assignee" in the fifth line thereof, the following words:

"That is to say, unless and until the said purchaser, or his assignee, shall, within the time prescribed in said lease, be ready, able and willing to buy, and actually offered to buy said land for the sum of \$35,000, stipulated in said lease."

This amendment was objected to by the defendants, upon the grounds that it was inconsistent with the original amendment and was an effort to change the law of an option contract and the legal method of exercising the same by substituting the law of an actual contract of bargain and sale. The court overruled the objections and allowed the amendment, and the defendants excepted *pendente lite*. The case proceeded to trial and a verdict was returned for the plaintiff for \$1,625. The defendants' motion for a new trial was overruled, and to this judgment exceptions were taken.

[1,4] 1. The controlling question in this case is whether the option could be exercised by the optionee or his assignee by the mere giving of a timely notice to the optionor or his agent that he had elected to purchase the property on the terms of the option. It is strongly insisted by learned counsel for the plaintiffs in error that an option cannot be exercised except by the payment of the purchase price, or the tender thereof. We cannot agree with this contention. An option contract to purchase is at first unilateral, and continues so until the optionee exercises his right of election to purchase and gives an unconditional notice thereof to the optionor, whereupon it ripens into a binding promise on the part of the optionor to sell. The "exercise" of an option to purchase is merely the election of the optionee to purchase. The elements of the act commonly called "exercising the option" are: First, the decision of the optionee to purchase the property under the terms of the option; and, second, the communication of this decision to the optionor within the life of the option. An election, other than by the performance of some act, involves merely the giving of notice thereof to the optionor. In the absence of express provisions in the option contract, the election must be made in accordance with the terms implied by law. However, the particular act or acts which constitute an election may be fixed by the terms of the option itself. The kind of notice and the mode of communicating it may also be fixed by the terms of the option contract. The option contract can, of course, provide that, in addition to the communication of the bare fact that the optionee has elected to purchase, a part or the whole of the purchase money must be paid as a condition precedent to the exercise of the option privilege. In such a case the mere notice of an election would be clearly insufficient. On

the other hand, if the option contains no stipulation that the whole or any part of the purchase price must be so paid, and provides for notice merely, and contemplates that the price shall be paid after the act of election, when the deed is tendered, the option can be legally exercised without the payment or tender of any part of the purchase price. James on Option Contracts, §§ 102, 105, 719, 801, 809, 813, 839, 844, 901, 914, 915, and authorities cited; 39 Cyc. 1232.

A provision in a lease giving the lessee, "his heirs and assigns," an option to purchase the leased premises, is a covenant running with the land and passes to the assignee of the leasehold term. An assignee of an option contract is the proper person to exercise the option privilege and give the required notice. James on Option Contracts, §§ 607, 802, 804; 39 Cyc. 1247, 1248. Where an option contained in a lease contract gives the lessee the privilege of purchasing the property "at the expiration" of the lease, the lessee can exercise his right of option; that is, by giving unconditional notice that he has elected to purchase the property, at or before the expiration of the lease. James on Option Contracts, § 852. Especially is this true in the instant case, where the option contract contains the following provision:

"It is understood, however, that while the party of the second part shall, during the life of the lease, notify the parties of the first part of his intention to buy, that shall not terminate the lease, but that said party of the second part, his heirs and assigns, shall continue in possession of said property as a tenant and pay the annual rental as above provided."

We think it clear in this case the option could be exercised by the mere giving of a timely unconditional notice that the assignee of the optionee had elected to purchase the land at the price and on the terms stated in the option contract. This ruling is not in conflict with the decisions in *Emery v. Atlanta Real Estate Exchange*, 88 Ga. 321, 14 S. E. 556; *Larned v. Wentworth*, 114 Ga. 208, 39 S. E. 855; *Phinizy v. Bush*, 129 Ga. 479, 59 S. E. 259; or in any of the other cases cited by counsel for the plaintiff in error. While some of those cases contain rather broad statements apparently tending to a contrary holding, those statements should be construed in the light of the particular facts of the case then under consideration, and, when so construed, each of those decisions can be reconciled with the present holding.

[3] The next question, then, is whether the notice given was an unconditional one. That notice was as follows:

"As per our conversation in which you were notified that the contract between J. L. Hankinson and Mrs. Cora C. Snead, Mrs. Elizabeth S. Kersh (now Palmer) and Marion C. Snead, has been transferred to me, since our 'gentlemen's agreement' with you in August last, which, as explained, took the place of an injunction you would obtain for your clients if I did not cease

cutting timber on the land leased from your clients, I have cut no timber, notwithstanding there had already been expended more than five thousand dollars above the value of the timber that has been cut in making improvements on the property. These expenditures were made in the confident belief, which I still entertain, that I had a perfect right under said contract to use any timber from said place, or its value, in making such improvements, and the fact that the improvements were made first in no way altered by rights. I consider that the action on the part of your clients constitutes a breach of such contract, and I propose to hold them responsible for all damages caused me thereby, and you will please accept this as formal notice to that effect.

"In preparation for the exercise of the option of purchase, provided for in such contract, I had the title to the land examined, and the report is made to me that your clients are not in a position to comply with their contract and convey a perfect title to such property for the following, among other reasons: If Mrs. Palmer or Mr. Snead should predecease their mother, leaving a child or children, the title of such child or children would not be affected by the deed from the parent, and further, that there is now pending in Columbia superior court a suit for some seven hundred acres of said land. *I now make formal demand upon your clients that they place themselves in a position to comply with their obligation in said contract with me to make me a good title to the nineteen hundred acres of land covered by such contract, upon the payment of \$35,000.* I estimate that the land is worth materially more than that amount, exclusive of the aforesaid improvements I have made and not been reimbursed for, *and I will of course hold your clients for all damages that may be suffered by me by the breach of their contract.* Please let me have a prompt reply to this, advising first whether your clients still insist upon their demand, with a threat of injunction to enforce it, that I cut no more timber; and, second, whether or not they will be prepared to make me a perfect title upon my payment of \$35,000." (Italics ours.)

While the election to purchase must be unconditional, the communication of the fact that the optionee has exercised his option right is not required to be in any particular form—unless so provided in the option contract. Where the communication advises the optionor that the optionee desires to exercise the option and is ready to pay the purchase price, the notice is sufficiently unconditional. James on Option Contracts, §§ 823, 824. A notice of an election to purchase is not made conditional by the optionee criticising the title to the property and demanding that the optionors "place themselves in a position to comply with their obligation in said contract with me to make me a good title to the nineteen hundred acres of land covered by such contract, upon the payment of \$35,000." Where it is clearly apparent from the communication that the optionee has elected to purchase the property at the price and on the terms of the option, the notice is sufficient. James on Option Contracts, § 847.

While the notice in the instant case is not as clear and definite as it might be, and while it contains much irrelevant matter, we think the italicized words clearly put the optionors on notice that the assignee of the option had elected to purchase the property at the price and on the terms stated in the option, and that the trial court did not err in so holding.

[2] 2. The provisions of section 3587 of the Civil Code (1910), that a broker's commissions are earned when he procures a purchaser ready, able, and willing to purchase, and who actually offers to purchase on the terms stipulated by the owner, are applicable to a case where the procured purchaser first obtains an option to purchase, and subsequently, within the specified time, exercises the option by electing to purchase and gives an unconditional notice thereof to the optionor. In such a case the broker's right to commissions does not accrue until the option has been exercised. When, however, the option has been exercised, his right of action is complete. 9 Corpus Juris, 604, 605, note 75. See, also, in this connection, *Mercer v. Planters' Rice Mill Co.*, 16 Ga. App. 38, 84 S. E. 492.

Under this ruling the plaintiff's action was neither barred by the statute of limitations nor prematurely brought.

From what has been said above it follows that the original petition was not subject to the demurrer interposed, and that the amendments to the petition were really unnecessary and immaterial. Only one of the amendments was objected to by the defendants, and none of the objections was upon the ground of immateriality. The grounds of the objections made were without merit, and the court did not err in allowing the amendment.

The controlling facts of the case show that the judge tried it under the proper theory of law, and that he committed no material error in his rulings upon the admissibility of evidence, or in his charge to the jury, or in his refusal to give the charges requested by the defendants.

The evidence was sufficient to show a legal assignment of the option to the alleged assignee, and authorized the verdict returned; and none of the special grounds of the motion for a new trial shows cause for a reversal of the judgment.

Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(34 Ga. App. 233)

HEED v. J. O. DORRIS & CO. et al.  
(No. 10369.)

(Court of Appeals of Georgia, Division No. 1.  
Oct. 20, 1919.)

(Syllabus by the Court.)

CARRIERS  $\Rightarrow$  196—SALE BY CARRIER ON RE-  
CONSIGNMENT OF INTERSTATE SHIPMENT ON  
BILL OF LADING.

Even though it be conceded that where the consignee of an interstate shipment of freight proceeds, without notice to the shipper, to re-consign the goods upon the original bill of lading to a third person, and such third person refuses to accept them, that the carrier who transports the goods under the reconsignment can ordinarily recover from the original consignor the freight and demurrage charges which had accrued thereon, provided that it has notified the original consignor with reasonable promptness of such failure to accept (see *Jelks v. Philadelphia & Reading Ry. Co.*, 14 Ga. App. 96, 80 S. E. 216; *B. & O. Railroad Co. v. Montgomery*, 19 Ga. App. 29, 90 S. E. 740), still, in this case, since it appears from the petition itself that the carrier failed to give notice of such refusal to the original consignor, but proceeded to dispose of the goods and to convert the proceeds to its own use, without showing any reason why the giving of such notice was, under the circumstances, impracticable, the trial court did not err in sustaining the demurrer to its petition in a suit against the original consignor (*Bird v. Georgia Railroad*, 72 Ga. 655; *Merchants' & Miners' Transportation Co. v. Moore*, 124 Ga. 482, 52 S. E. 802; *Alabama Great Sou. R. Co. v. McKenzie*, 139 Ga. 410, 77 S. E. 647, 45 L. R. A. (N. S.) 18; *Atlantic Coast Line R. Co. v. Goodwin*, 1 Ga. App. 351, 57 S. E. 1070; *Atlantic Coast Line R. Co. v. Henderson Elevator Co.*, 18 Ga. App. 279, 88 S. E. 101 [1]; *C., N. O. & T. P. Ry. Co. v. Malsby Co.*, 22 Ga. App. 595, 96 S. E. 710 [3].

Error from City Court of Valdosta; J. G. Cranford, Judge.

Action by T. D. Heed, receiver, against J. O. Dorris & Co. and others. Demurrer to petition sustained, and plaintiff brings error. Affirmed.

Patterson & Copeland, of Valdosta, for plaintiff in error.

Franklin & Langdale, of Valdosta, for defendants in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and SMITH, JJ., concur.

$\Rightarrow$  For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes



(24 Ga. App. 286)

**FLETCHER v. STATE et al.** (No. 10634.)(Court of Appeals of Georgia, Division No. 1.  
Oct. 10, 1919.)*(Syllabus by the Court.)***1. INTOXICATING LIQUORS**  $\S$ 250 — IN PROCEEDINGS AGAINST STRIKING ANSWER AS FILED TOO LATE ERROR.

Where a proceeding to condemn an automobile is instituted under the provisions of section 20 of the Prohibition Act approved March 28, 1917 (Laws Ga. Ex. Sess. March, 1917, p. 16), and the defendant fails to file any defense within 30 days from the filing of the petition; but where no judgment by default is entered by the court until after the defendant has filed his answer, it is error to dismiss the defendant's answer, filed upon the calling of the case, upon the ground that it was filed too late. See, in this connection, Civ. Code 1910, § 5653; *Gordon v. Hudson*, 120 Ga. 698, 48 S. E. 131; *Pennsylvania Casualty Co. v. Thompson*, 123 Ga. 240 (2), 241, 51 S. E. 314; *Albany Pine Products Co. v. Hercules Manufacturing Co.*, 123 Ga. 270, 51 S. E. 297.

**2. OTHER PROCEEDINGS.**

The error in striking the defendant's answer rendered the further proceedings in the case nugatory.

Error from City Court of Albany; Clayton Jones, Judge.

Proceeding by the State of Georgia against S. T. Fletcher to condemn an automobile under the Prohibition Act. From the striking of his answer, defendant brings error. Reversed.

Pottle & Hofmayer, of Albany, for plaintiff in error.

S. B. Lippitt, Sol., of Albany, for defendants in error.

**BROYLES, C. J.** Judgment reversed.

**LUKE and BLOODWORTH, JJ.,** concur.

(24 Ga. App. 278)

**MANN v. STATE.** (No. 10679.)(Court of Appeals of Georgia, Division No. 1.  
Oct. 14, 1919.)*(Syllabus by the Court.)***1. READING PROVISION OF PENAL CODE TO JURY—PROVOCATION.**

When considered in the light of the facts of this case and the entire charge, the court did not err in reading to the jury section 95 of the Penal Code of 1910, including the words "provocation by words, threats, menaces, or contemptuous gestures shall in no case be sufficient to free the person killing from the guilt and crime of murder." *Price v. State*, 137 Ga. 71, 72 S. E. 908 (7).

**2. CRIMINAL LAW**  $\S$ 1160—APPROVED VERDICT BY TRIAL COURT WILL NOT BE DISTURBED.

The presiding judge was satisfied with the finding of the jury, and this court is not authorized to interfere where there are any facts to support the verdict and no error of law appears.

Error from Superior Court, Appling County; J. P. Highsmith, Judge.

Edgar Mann was convicted of an offense, and from the judgment he brings error. Affirmed.

W. W. Bennett, of Baxley, for plaintiff in error.

Alvin V. Sellers, Sol. Gen., and C. H. Parker, both of Baxley, for the State.

**BLOODWORTH, J.** Judgment affirmed.

**BROYLES, C. J., and LUKE, J.,** concur.

(24 Ga. App. 306)

**SMITH v. RODDENBERY HARDWARE CO.**  
(No. 10686.)(Court of Appeals of Georgia, Division No. 2.  
Oct. 20, 1919.)*(Syllabus by the Court.)***PRINCIPAL AND AGENT**  $\S$ 77½, New, vol. 3A Key-No. Series — SUFFICIENCY OF PETITION BY AGENT TO RECOVER DEPOSIT.

The plaintiff's petition shows that he entered into a written contract with the defendant, pursuant to the terms of which he deposited \$150 for the "right of exclusive sale of Grant motor cars in Thomas county," said deposit to be refunded on his sale of four cars. The sale of the four cars was a condition precedent to the recovery of the deposit, and, there being no allegation that the plaintiff had executed this condition, or any good and valid reason why the same had not been performed, or that the defendant had in any way breached the contract, no cause of action was set forth, and the trial court properly dismissed the petition on demurrer. See *Griswold v. Scott*, 13 Ga. 210 (2); *Kimbrough v. Worrill*, 33 Ga. 119; *Baker v. Tillman*, 84 Ga. 401, 11 S. E. 355; *Life Insurance Co. of Virginia v. Procter*, 18 Ga. App. 517, 89 S. E. 1088 (2).

Error from City Court of Cairo; L. W. Rigsby, Judge.

Action by E. M. Smith, Jr., against the Roddenbery Hardware Company. Petition dismissed on demurrer, and plaintiff brings error. Affirmed.

Titus, Dekle & Hopkins, of Thomasville, for plaintiff in error.

Ledford & Christopher, of Cairo, for defendant in error.

**SMITH, J.** Judgment affirmed.

**JENKINS, P. J., and STEPHENS, J.,** concur.

(24 Ga. App. 304)

**MULHERIN v. SABEL & ROTHSCHILDS.**  
(No. 10573.)(Court of Appeals of Georgia, Division No. 2.  
Oct. 20, 1919.)*(Syllabus by the Court.)***SALES** ¶53(2)—WHETHER ACCEPTANCE WAS  
WITHIN REASONABLE TIME FOR JURY.

The petition in this case set out substantially that, by telegrams and letters exchanged between the parties (copies of which were attached to the petition), the defendant entered into a contract to sell a certain described engine to the plaintiffs, for the price of \$350, and the only question raised by the general demurrer of the defendant was whether the plaintiffs waited too long—an unreasonable time—in accepting his offer of sale; his letter being dated April 22, 1918, and mailed at Augusta, Ga., to the plaintiffs at Jacksonville, Fla., and the answer by wire being dated April 24, 1918, at Jacksonville, Fla. *Held*, under the allegations of the petition it was a question of fact, for the jury to determine, whether or not the answer by wire was made within a reasonable time. The court, therefore, did not err in overruling the general demurrer.

Error from City Court of Richmond County; J. O. O. Black, Jr., Judge.

Action by Sabel & Rothschilds against J. P. Mulherin. General demurrer to petition overruled, and defendant brings error. Affirmed.

Isaac S. Peebles, Jr., of Augusta, for plaintiff in error.

Sam'l H. Myers, of Augusta, for defendants in error.

SMITH, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(24 Ga. App. 307)

**HURST v. JORDAN.** (No. 10691.)(Court of Appeals of Georgia, Division No. 2.  
Oct. 20, 1919.)*(Syllabus by the Court.)***1. NEW TRIAL** ¶99 — REFUSAL FOR NEWLY  
DISCOVERED CUMULATIVE AND IMPEACHING  
EVIDENCE.

Applications for new trial on the ground of newly discovered evidence are not favored; and where, from the affidavits of the witnesses by whom the new facts are to be proved, it appears that the alleged newly discovered evidence is merely cumulative and impeaching in its nature, and would not likely produce a different result on another trial, the trial judge did not abuse his discretion in refusing a new trial on this ground.

**2. DENIAL OF NEW TRIAL.**

There was ample evidence to authorize the verdict, and the trial judge did not err in overruling the motion for a new trial.

Error from City Court of Dublin; R. D. Flynt, Judge.

Action between Henry Hurst and Henry Jordan. Judgment for the latter, motion for new trial overruled, and the former brings error. Affirmed.

W. A. Dampier, of Dublin, for plaintiff in error.

T. E. Hightower, of Dublin, for defendant in error.

SMITH, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(24 Ga. App. 277)

**SMITH v. CHEROKEE FERTILIZER CO.**  
(No. 10677.)(Court of Appeals of Georgia, Division No. 1.  
Oct. 14, 1919. Rehearing Denied  
Nov. 4, 1919.)*(Syllabus by the Court.)***1. ACCORD AND SATISFACTION** ¶12(1)—RE-  
CEIPT IN FULL WITHOUT CONSIDERATION  
WORKS NO ESTOPPEL.

If one who has several different demands against another accepts payment of one or more and gives a receipt therefor, there being at the time no mention of the other demands, a mere recital in the receipt that it is in full payment of all claims to date is without consideration so far as relates to an unsettled note signed by the party making the payment and another which was not mentioned nor in the minds of the parties at the time of such settlement, and the signing of the receipt does not estop the holder of the unsettled demand from asserting that demand; nor does the signing of the receipt render it incumbent upon the holder of that demand to refund the money received upon the settlement as to the disputed claims. See *Armour v. Ross & Barfield*, 110 Ga. 403, 35 S. E. 787 (7).

**2. COMPROMISE AND SETTLEMENT** ¶12—RE-  
CEIPT IN FULL NOT AFFECTING CLAIM NOT  
MENTIONED.

The undisputed evidence in this case is that Cherokee Fertilizer Company had a suit pending against Smith for several thousand dollars, and a settlement of that case was had between the parties and the case marked settled upon Smith's paying certain money and delivering certain stock to Cherokee Fertilizer Company. The payment was made and received in full settlement of that claim. Subsequently the present suit was instituted upon a note signed by Smith and another, which was not mentioned by either of the parties at the

time of the settlement. In fact, the attorneys representing both parties testify that neither of them knew about this note. The defendant Smith pleaded that there was a full settlement because of the receipt heretofore referred to. Upon the facts the court did not err in directing a verdict for the plaintiff for the amount of the note sued upon.

Error from City Court of Houston County; A. C. Riley, Judge.

Action by the Cherokee Fertilizer Company against J. A. Smith. Directed verdict for plaintiff, and defendant brings error. Affirmed.

Feagin & Hancock, of Macon, for plaintiff in error.

Walter De Fore and Jas. C. Estes, both of Macon, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 286)

HIGGINBOTHAM v. CITY OF ROME.  
(No. 10314.)

(Court of Appeals of Georgia, Division No. 2.  
Oct. 20, 1919.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS — 761(3) — CITY'S  
LIABILITY FOR INJURIES FROM UNINSULATED  
WIRE SAGGING OVER PATHWAY.

The petition in this case (a suit for damages for the negligent homicide of the plaintiff's husband) sufficiently set forth a cause of action against the city of Rome. The court erred in sustaining the demurrer and in dismissing the suit. The case of Zettler v. City of Atlanta, 68 Ga. 195, relied on by counsel for the city, is clearly distinguishable from this case.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by Winnie Higginbotham against City of Rome. Demurrer to petition sustained, and suit dismissed, and plaintiff brings error. Reversed.

See, also, 99 S. E. 638.

The city of Rome was sued for damages on account of the death of the plaintiff's husband, alleged to have been caused by electricity when he came in contact with an uninsulated wire sagging over a pathway in the city. The plaintiff's petition was dismissed on general demurrer. The petition alleges that this wire was a part of the line of the Rome Railway & Light Company, and had been strung on a glass knob attached to the cross-arm of a pole "erected on the west side of the Summerville road, about 30 or 40 feet on the south side of the Rome & Decatur

Railroad trestle." Immediately beneath the wire, and about halfway between the pole and the trestle, was the pathway mentioned above. The pathway had been used by the public for a great number of years, and showed signs of considerable use, "all of which was known to the city of Rome, or by the exercise of ordinary [care] could have been ascertained, for the usage of said pathway was open, notorious, peaceable, and without restriction, and one Poole, who was then in the employment of the city of Rome, guarding its convicts, knew of the existence and usage of said pathway." The insulation of the wire had worn off, and its unprotected condition had existed for several years. On September 2, 1916, the glass knob to which the wire was attached was struck and broken by a rock hurled against it by blasting conducted by the city, and this caused the wire to sag to within four or five feet of the ground just over the pathway mentioned. The breaking of the knob, and the sagging of the wire, and its uninsulated condition were at once brought to the attention of Poole, the city's guard or agent in charge of the blasting, and he requested a person not in the employment of the city to notify the Rome Railway & Light Company of the condition of the wire and to repair it. It remained in this condition until the plaintiff's husband was killed, and the defendant knew that it was in this condition. The plaintiff's husband started to his home some time after 11 o'clock at night on the same date from a store situated about 100 yards from where he was killed, and, as had been his custom for years, "he started to go along the pathway aforesaid, and came in contact with said heavily charged noninsulated wire and was instantly killed." It is alleged that the city of Rome was in charge, possession, and control of the tract of land where he was killed. "The defendant was engaged in widening and straightening the street, which was a public street of said city, at the place contiguous to where said Higginbotham was killed, and in order to widen said street it was necessary to remove the rock at the place where said Higginbotham was killed. When said Higginbotham was killed he was only a few feet from the public street as then in use. The defendant, in doing this work, was carrying out its avowed project of straightening said street."

The petition contains specific allegations of negligence of the city in allowing the wire to hang as close to the pathway as it did, and in the condition in which it was, and in not placing a guard at that point to prevent injury after having discovered that the breaking of the knob had caused the wire to sag. There are also allegations as to the age and earning capacity of the plaintiff's husband, and as to notice of the claim, etc. In the brief of counsel for the defendant in error,

It was contended that the city was under no duty as to the condition of the place at which the plaintiff's husband was killed, and that he was himself at fault in leaving the public street and going at night on a path on private property which proved to be dangerous.

Harris & Harris, of Rome, for plaintiff in error.

Max Meyerhardt, of Rome, for defendant in error.

STEPHENS, J. Judgment reversed.

JENKINS, P. J., and SMITH, J., concur.

(24 Ga. App. 271)

BIRD et al. v. TALIAFERRO COUNTY et al.

TALIAFERRO COUNTY et al. v. BIRD.

(Nos. 10428, 10491.)

(Court of Appeals of Georgia, Division No. 1.  
Oct. 14, 1919.)

(Syllabus by the Court.)

APPEAL AND ERROR ¶843(2) — COUNTIES  
¶75(4)—CONSIDERATION OF RECOMMENDATION  
OF TRIAL JUDGE—EXECUTION AGAINST  
FORMER COUNTY TREASURER.

Without the intervention of a jury and on an agreed statement of facts, this case was submitted to Judge Walker, who rendered the following judgment:

"I find, as a matter of law, that the term of office of Mr. Bird as county treasurer expired with the last minute of the last hour of December 31, 1916, the act of 1915 (Laws 1915, p. 363), having abolished the treasurer's office of said county, to take effect at said time; and therefore that he was not treasurer on January 1, 1917. Not being treasurer on January 1, 1917, I find that Mr. Bird was not entitled to receive from the tax collector of said county the county taxes collected by said collector during December, 1916, which said tax collector was bound to deliver on the first Monday in January, 1917, which was January 1, 1917, to the proper officials or treasury of said county. I find that in view of the foregoing facts the county commissioners, in their settlement with Mr. Bird on January 2, 1917, were not authorized to allow him commissions on said taxes which were in the hands of the tax collector on January 1, 1917. Said commissioners being without authority in law to pay said Bird said commissions on said taxes in their said settlement with him, had on January 2, 1917, they may proceed to collect back from him the commissions on said taxes which were illegally allowed him in said settlement, and their said settlement does not estop them from so doing. I find, as a matter of law, that Mr. Bird is not entitled to commissions on the

sum of money he advanced from his own funds to pay county warrants, but because I know same to be a practice followed in a large number of counties in Georgia—for the treasurer to finance the county from his own funds when county funds become exhausted—and because it works no hardship on the county to pay commissions on said funds to the officer making such advances, as they would have to pay commissions later to the officer handling such county warrants with county money, I recommend that the commissions on said sum of \$2,194.88, in the amount of \$54.87, be credited by the county on the *fi fa.* which I herein later authorize to proceed. I find that since Mr. Bird had a settlement with the county commissioners on January 2, 1917, and on that date paid them all they demanded of him at that time, he is not a defaulter within the meaning of the law placing a penalty of 20 per cent. interest on defaulting treasurers, and that the county is not entitled to 20 per cent. interest, but is entitled to 7 per cent. interest on said sum of \$186.73. In view of these findings of law, it is the judgment of the court that the *fi fa.* proceed for the collection of the sum of \$186.73, with 7 per cent. interest thereon from ——. It is the recommendation of the court, for the reason above set out, that said *fi fa.* for said amount of \$186.73 be credited with the sum of \$54.87, being the amount of commissions which might have been earned in handling said sum of \$2,194.88, which Mr. Bird used out of his own funds to help finance the county."

We construe this judgment to mean that the execution proceed for \$186.73, with 7 per cent. interest thereon, and that what is said in reference to the \$54.87 is only a recommendation. This being true, we are not called upon to consider the "recommendation." We agree with the judge in his findings of law that the execution should proceed for \$186.73, with interest thereon at 7 per cent.

Error from Superior Court, Taliaferro County; B. F. Walker, Judge.

Proceeding by Taliaferro County and others against W. W. Bird and others. Judgment for plaintiffs that execution proceed for a certain sum with interest, and plaintiffs bring error, and the defendants take a cross-bill of exceptions. Judgment on both bills of exception affirmed.

Alvin G. Golucke, of Crawfordville, and Davison & Lewis, of Greensboro, for plaintiffs in error.

S. H. Sibley, of Union Point, and J. A. Beazley, of Crawfordville, for defendants in error.

BLOODWORTH, J. Judgment on both bills of exceptions affirmed.

BROYLES, C. J., and LUKED, J., concur.

(24 Ga. App. 281)

**EICHHOLZ v. LA ROCHE.** (No. 10697.)(Court of Appeals of Georgia, Division No. 1.  
Oct. 14, 1919.)*(Syllabus by the Court.)***CERTIORARI** ⇨70(7) — **SUSTAINED TO GRANT OF FIRST NEW TRIAL.**

The judgment, although authorized, was not demanded by the evidence. Therefore the sustaining of the certiorari, upon the assignment of error that the judgment was without evidence to support it, will not be disturbed, for the reason that the judgment sustaining the certiorari for the first time was in the nature of a first grant of a new trial. See *Parker v. Bridges*, 22 Ga. App. 58, 95 S. E. 321, and cases there cited.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Action between Selig Eichholz and E. M. La Roche. Judgment for the former, certiorari sustained, and he brings error. Affirmed.

Osborne, Lawrence & Abrahams, of Savannah, for plaintiff in error.

Geo. S. Cargill and W. R. Hewlett, both of Savannah, for defendant in error.

**LUKE, J.** Judgment affirmed.

**BROYLES, C. J., and BLOODWORTH, J.,** concur.

(24 Ga. App. 306)

**THIBADEAU v. POWELL TRUST CO.** (No. 10675.)(Court of Appeals of Georgia, Division No. 2.  
Oct. 20, 1919.)*(Syllabus by the Court.)***HOLDING OVER BY TENANT — FINDING OF TRIAL JUDGE.**

"In all cases where a tenant shall hold possession of lands or tenements over and beyond the term for which the same were rented or leased to him, or shall fail to pay the rent when the same shall become due, and in all cases where lands or tenements shall be held and occupied by any tenant at will or sufferance, whether under contract of rent or not, and the owner of the lands or tenements shall desire possession of the same, such owner may, by himself, his agents, or attorney in fact, or attorney at law, demand the possession of the property so rented, leased, held, or occupied; and, if the tenant refuses or omits to deliver possession when so demanded, the owner, his agent, or attorney at law, or attorney in fact may go before the judge of the superior court, or any justice of the peace, and

make oath of the facts." Civil Code 1910, § 5385.

The judge of the municipal court, who tried the case without a jury, had all the parties and witnesses before him, and from an examination of the testimony we cannot say as a matter of law that there was not some evidence to support each of the elements essential to the maintenance of such a proceeding.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action between R. T. Thibadeau and the Powell Trust Company. Judgment for the latter, and the former brings error. Affirmed.

C. Don Miller, of Atlanta, for plaintiff in error.

R. J. Jordan, of Atlanta, for defendant in error.

**SMITH, J.** Judgment affirmed.

**JENKINS, P. J., and STEPHENS, J.,** concur.

(24 Ga. App. 276)

**OGLESBEE v. STATE.** (No. 10660.)(Court of Appeals of Georgia, Division No. 1.  
Oct. 14, 1919.)*(Syllabus by the Court.)*

**1. CRIMINAL LAW** ⇨938(1) — **NEWLY DISCOVERED CUMULATIVE AND IMPEACHING EVIDENCE.**

The alleged newly discovered evidence upon which the special ground of the motion for a new trial was based is both cumulative and impeaching in its character, and is not such evidence as would probably produce a different result if a new trial were granted.

**2. SUFFICIENCY OF EVIDENCE—RULING ON MOTION FOR NEW TRIAL.**

There was ample evidence to authorize the verdict, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Proceeding between the State and Robert Oglesbee. From the judgment and a denial of his motion for a new trial, Oglesbee brings error. Affirmed.

H. H. Elders, of Reidsville, and Oliver & Oliver, of Savannah, for plaintiff in error.

J. Saxton Daniel, Sol. Gen., of Claxton, for the State.

**BROYLES, C. J.** Judgment affirmed.

**LUKE and BLOODWORTH, JJ.,** concur.

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(24 Ga. App. 375)

**BOOTH v. STATE.** (No. 10626.)(Court of Appeals of Georgia, Division No. 1.  
Oct. 14, 1919.)*(Syllabus by the Court.)***1. EXCLUSION OF HEARSAY TESTIMONY.**

The court did not err in excluding as hearsay the testimony set out in the first ground of the amendment to the motion for a new trial.

**2. WITNESSES  $\S$  321, 400(1) — WHEN IMPEACHMENT OF OWN WITNESS PERMITTED.**

The defendant in a criminal case cannot impeach a witness voluntarily called by him, except where he can show to the court that he has been entrapped by the witness by previous contradictory statements. Penal Code 1910, § 1050. This rule applies where the defendant voluntarily calls as a witness one who has been subpoenaed by the state as a witness, but who has not been put upon the stand; and in such a case it is not error for the judge, after the defendant has examined the witness, to refuse to allow the defendant to contradict the witness' testimony, where there is no contention that he (the defendant) was entrapped by the witness by previous contradictory statements. This is true, even though the judge may have inadvertently suggested this procedure to the defendant's counsel.

**3. AMENDMENT—MOTION FOR A NEW TRIAL.**

There is no substantial merit in any of the other grounds of the amendment to the motion for a new trial.

**4. OVERRULING OF MOTION FOR NEW TRIAL.**

The evidence amply authorized the conviction, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Aaron Booth was convicted of an offense, his motion for a new trial was overruled, and he brings error. Affirmed.

Hixon & Pace, of Americus, for plaintiff in error.

Jule Felton, Sol. Gen., of Montezuma, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 304)

**DYER v. CANNON.** (No. 10664.)(Court of Appeals of Georgia, Division No. 2.  
Oct. 20, 1919.)*(Syllabus by the Court.)***1. EVIDENCE  $\S$  317(1)—TESTIMONY INADMISSIBLE AS HEARSAY.**

In the trial of a case based upon a distress warrant for rent and a counter affidavit there-

to, it was error to admit, over objection, the evidence of the plaintiff in the distress warrant, who testified in his own behalf as follows: "I had a conversation with W. O. King on Sunday morning, the 28th of August, at my lot gate, and King then told me that Dyer [the defendant] had out two bales of cotton, and that he, Dyer, was going to move the two bales of cotton to Macon the next day." This testimony was inadmissible as being hearsay.

**2. LANDLORD AND TENANT  $\S$  270(12) — EVIDENCE INSUFFICIENT TO SUPPORT VERDICT FOR PLAINTIFF IN DISTRESS.**

Without this evidence, which was erroneously admitted, there was no evidence to support the verdict.

*(Additional Syllabus by Editorial Staff.)***3. LANDLORD AND TENANT  $\S$  270(12) — REMOVAL OF CROPS BY TENANT.**

In distress for rent due October 15, 1917, evidence that tenant had gathered some wheat off the farm in the latter part of May, and had it ground and used, or exchanged it for family use, would not support plaintiff's contention, in amendment to his affidavit to procure warrant, that tenant was seeking to remove his crops without plaintiff's consent, and was not substantial enough to authorize a distress warrant, in view of Civ. Code 1910, § 3700.

Error from Superior Court, Twiggs County; J. L. Kent, Judge.

Action by G. F. Cannon against W. G. Dyer, with counter affidavit by defendant. Judgment for plaintiff, motion for a new trial denied, and defendant brings error. Reversed.

L. D. Moore, of Macon, for plaintiff in error.

H. F. Griffin, Jr., and R. A. Harrison, both of Jeffersonville, and Walter DeFore and Jas. C. Estes, both of Macon, for defendant in error.

SMITH, J. G. F. Cannon sued W. G. Dyer for rent due for the year 1917; the amount sued for being \$322.50. The affidavit was in the usual form, and the counter affidavit simply denied that the rent was due. An amendment was offered by the plaintiff, in which it was alleged that at the time of the bringing of the distress warrant in this case, the tenant, W. G. Dyer, was seeking to remove his crops from the premises without the consent of the plaintiff. The jury found in favor of the plaintiff, \$390 principal and \$36.40 interest. The defendant made a motion for a new trial, upon the general grounds, and also upon three special grounds.

[1, 2] In one of the grounds it was complained that the verdict and judgment were for \$68 principal and \$5.69 interest more than the amount claimed in the distress warrant. In view of the ruling stated in the headnotes,

It is unnecessary to say more with reference to this ground than that the error complained of, if error at all, will not likely recur on another trial, as the plaintiff will have an opportunity to amend his affidavit with reference to the amount claimed as rent. The second ground of the amendment to the motion for a new trial refers to the evidence of G. F. Cannon, relating to a conversation had with one W. C. King on the day preceding the issuance of the warrant, and not in the presence of Dyer, the defendant. This evidence was improperly admitted, it being purely hearsay.

[3] In the third ground of the amendment to the motion for a new trial it is insisted that the verdict is contrary to the evidence and without evidence to support it, in that there was no evidence to show that Dyer, the defendant, had removed or was seeking to remove any of his crop from the premises. The evidence of the conversation between G. F. Cannon and W. C. King having been erroneously admitted, there was no evidence left in the case to sustain the contention of the plaintiff that Dyer had removed or was removing or seeking to remove any of his crop from the premises, and it was admitted by the plaintiff that the rent was not due until October 15, 1917. It is true that there was some evidence to the effect that Dyer, the tenant, had gathered some wheat off of the farm in the latter part of May, and had it ground, using part of it for himself and his family, and exchanging 24 pounds of the flour for 24 pounds of commercial flour, which was used by himself and family; but this evidence was insufficient to support the contention of the plaintiff, which was set out in the amendment to his affidavit to procure the distress warrant. This transaction occurred in May, prior to the suing out of the distress warrant on August 27th, and was not substantial enough to place the defendant in the position where a distress warrant could legally issue against him under section 3700 of the Civil Code of 1910.

Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(24 Ga. App. 288)

HARRELL v. TAYLOR. (No. 10330.)

(Court of Appeals of Georgia, Division No. 2.  
Oct. 20, 1919.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ¶248 — REVIEW OF DEFECT IN AFFIDAVIT FOR ATTACHMENT NOT EXCEPTED TO.

The alleged defect in the affidavit for attachment being one that may be cured by amendment, and no exception thereto having been

taken in the court below, it cannot be considered here.

2. APPEAL AND ERROR ¶1005(2)—OVERRULING OF MOTION FOR NEW TRIAL.

There was some evidence to support the verdict, and no error of law, other than the general grounds, being complained of, the court did not err in overruling the motion for a new trial.

Error from City Court of Bainbridge; H. B. Spooner, Judge.

Action between W. H. Harrell and O. L. Taylor. Judgment for the latter, motion for new trial denied, and the former brings error. Affirmed.

Hartsfield & Conger, of Bainbridge, for plaintiff in error.

W. V. Custer, of Bainbridge, and E. E. Cox, of Camilla, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and SMITH, J., concur.

(24 Ga. App. 243)

PARKS v. STATE. (No. 10621.)

(Court of Appeals of Georgia, Division No. 1.  
Oct. 9, 1919. Rehearing Denied  
Nov. 5, 1919.)

(Syllabus by the Court.)

1. CRIMINAL LAW ¶424(1), 770(2), 825(2)—COURT MUST STATE CONTENTIONS FOR THE STATE AND DEFENDANT.

"While it is the duty of a judge in the trial of a criminal case to state the contentions of both the state and the defendant, still, in the absence of a request for more definite instructions, a statement by the court that the grand jury has returned an indictment against the defendant, charging him with the offense of murder, and that to this the defendant has filed a plea of not guilty, which makes the issue for them to try, sufficiently presents the issue." Faison v. State, 13 Ga. App. 180, 79 S. E. 39. And see Wilensky v. State, 15 Ga. App. 360, 83 S. E. 276. There was no request in this case. Besides, the "contention" of the defendant, which he alleges that the judge failed to charge, was based upon declarations that another was the guilty party. The Supreme Court has held that, "on the trial of one of two persons jointly indicted, the declarations of the other that he alone committed the offense with which they are charged are not admissible in evidence in favor of the accused on trial." Robison v. State, 114 Ga. 445, 40 S. E. 253 (2). And see cases cited in opinion (114 Ga. p. 447, 40 S. E. 253). See, also, Daniel v. State, 65 Ga. 199.

2. CRIMINAL LAW ¶911 — DENIAL OF NEW TRIAL IN DISCRETION OF COURT.

There is some evidence to support the verdict. The trial judge, who has a broad discretion, has refused a new trial, and so do we.

Error from Superior Court, Forsyth County; N. A. Morris, Judge.

Lester Parks was convicted of an offense, his motion for a new trial was denied, and he brings error. Affirmed.

See, also, 98 S. E. 90.

V. & B. Moss, of Marietta, for plaintiff in error.

Jno. T. Dorsey, Sol. Gen., of Marietta, and Wm. Butt, of Blue Ridge, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 256)

BURKHALTER v. CONLEY et al.  
(No. 10423.)

(Court of Appeals of Georgia, Division No. 1.  
Oct. 10, 1919. Rehearing Denied  
Nov. 5, 1919.)

(Syllabus by the Court.)

OVERRULING OF CERTIORARI.

The judge of the superior court did not err in overruling the certiorari.

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Action between W. T. Burkhalter and L. P. Conley and others. Judgment for the latter, petition for certiorari overruled, and the former brings error. Affirmed.

H. H. Elders and W. T. Burkhalter, both of Reidsville, for plaintiff in error.

H. C. Beasley and S. B. McCall, both of Reidsville, for defendants in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 288)

BYRD v. FIRST NAT. BANK OF REYNOLDS. (No. 10318.)

(Court of Appeals of Georgia, Division No. 2.  
Oct. 20, 1919.)

(Syllabus by the Court.)

EVIDENCE TO SUSTAIN JUDGMENT.

There was evidence to authorize the finding of the jury that the note sued on represented

the debt of the defendant, and not that of her husband, and against the defendant's plea of suretyship for her husband's debt.

Error from Superior Court, Taylor County; G. H. Howard, Judge.

Action by the First National Bank of Reynolds against Emma Byrd. Judgment for plaintiff, and defendant brings error. Affirmed.

C. W. Foy, of Butler, for plaintiff in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and SMITH, J., concur.

(24 Ga. App. 303)

YATES & GLADNEY v. FIREMAN'S FUND INS. CO. (No. 10611.)

(Court of Appeals of Georgia, Division No. 2.  
Oct. 20, 1919.)

(Syllabus by the Court.)

1. APPEAL AND ERROR  $\Leftrightarrow$  843(3)—MOTION FOR NEW TRIAL ON REFUSAL TO ORDER NONSUIT NOT REVIEWABLE.

The only ground of the motion for a new trial, other than those which complain of the verdict, assigns error upon the refusal of the court to order a nonsuit. This exception will not be considered, since the motion for a new trial, which was overruled, assigns error on the ground that the verdict is contrary to the evidence and without evidence to support it. See *Collins v. Strickland Brothers*, 21 Ga. App. 542, 94 S. E. 1035 (3), and cases there cited.

2. REFUSAL OF NEW TRIAL.

The evidence authorized the verdict, and there was no error in refusing a new trial.

Error from City Court of Carrollton; Jas. Beall, Judge.

Action between Yates & Gladney and the Fireman's Fund Insurance Company. Judgment for the latter, motion for new trial overruled, and the former brings error. Affirmed.

Leon Hood, of Carrollton, for plaintiffs in error.

Boykin & Boykin, of Carrollton, for defendant in error.

SMITH, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.



(24 Ga. App. 302)

**GREEN v. PROCTOR.** (No. 10486.)(Court of Appeals of Georgia, Division No. 2.  
Oct. 20, 1919.)*(Syllabus by the Court.)***REFUSAL OF CERTIORARI—EVIDENCE.**

The judgment of the ordinary requiring the removal of obstructions from an alleged private way was sufficiently authorized under the evidence, and the judge of the superior court did not err in refusing to sanction the writ of certiorari.

Error from Superior Court, Upson County;  
W. E. H. Searcy, Jr., Judge.

Action between Raleigh Green and Sarah Proctor. Judgment for the latter, certiorari refused, and the former brings error. Affirmed.

Jas. R. Davis, of Thomaston, for plaintiff in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and SMITH, JJ., concur.

(24 Ga. App. 376)

**COOPER v. STATE.** (No. 10717.)(Court of Appeals of Georgia, Division No. 1.  
Nov. 6, 1919.)*(Syllabus by the Court.)*

**1. CRIMINAL LAW. §1064½—GROUNDS OF MOTION FOR NEW TRIAL NOT APPROVED BY COURT NOT REVIEWABLE.**

Grounds of a motion for a new trial which are not approved by the trial court cannot be considered by this court.

(a) There is no substantial merit in any of the special grounds of motion for a new trial which have the approval of the trial judge.

**2. MOTION FOR NEW TRIAL.**

The evidence authorized the verdict, which has the approval of the trial judge, and it was not error to overrule the motion for a new trial.

Error from Superior Court, Bibb County;  
H. A. Mathews, Judge.

Proceeding between the State and Henry Cooper, and, from the judgment and the denial of his motion for a new trial, Cooper brings error. Affirmed.

Sidney W. Hatcher, of Macon, for plaintiff in error.

John P. Ross, Sol. Gen., of Macon, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 332)

**HALL et al. v. McLENDON et al.**  
(No. 10365.)(Court of Appeals of Georgia, Division No. 2.  
Oct. 20, 1919.)*(Syllabus by the Court.)*

**1. HUSBAND AND WIFE §129(3)—BURDEN OF PROOF ON CLAIM BY WIFE OF PROPERTY LEVIED ON AS HER HUSBAND'S.**

J. W. and C. I. Hall obtained an execution in the superior court of Emanuel county against S. J. McLendon, which was levied upon a stock of goods in the city of Nashville, Ga.; the entry of levy as made by the sheriff stating that "I have this day levied the within *fi. fa.* upon the following property [describing it], levied on as the property of S. J. McLendon, and in his possession." Nancy S. McLendon, wife of the defendant in *fi. fa.*, interposed her claim to the goods levied upon, and on the trial of the issue thus formed the plaintiffs proceeded, by introducing their execution, with entry of levy thereon, and after the introduction of evidence by both the plaintiffs and the claimant the jury returned a verdict in favor of the claimant. *Held*, the court did not err in charging the jury that "however, if you find it was her [claimant's] property, even though the property had been handled by him [the defendant in *fi. fa.*], if he has been controlling the property, but as a matter of fact it was her property, acquired by her or inherited by her, then I charge you that if she at some particular time may have permitted him to control or handle the property, that would not destroy her right to the property." See *Keller v. Mayer, Straus & Baum*, 55 Ga. 406; *Wells v. Smith & Co.*, 54 Ga. 262.

**2. APPEAL AND ERROR §1046(3) — EXECUTION §194(1)—TRIAL §25(4, 16)—CLAIM—RIGHT TO OPEN AND CLOSE.**

While it is true that in a claim case, if it appears that the defendant in *fi. fa.* was in possession of the property levied upon at the time of the levy, the burden of proof is upon the claimant, and he has the right to open and conclude the case (*Bartlett v. Russell*, 41 Ga. 196; *Powell v. Westmoreland*, 60 Ga. 572; *Bank v. Harper*, 114 Ga. 603, 40 S. E. 717), still, even though the entry of levy shows the defendant in *fi. fa.* to have been in possession, if the claimant upon the call of the case fails to assume the burden of proof and proceed, and the plaintiff assumes the affirmative, the latter is entitled to open and conclude (*James v. Kiser & Co.*, 65 Ga. 515; *Doyle v. Donovan*, 76 Ga. 44); for, as was said in *Taylor v. Brown*, 139 Ga. 797, 77 S. E. 1062(3): "Where, in a claim case, the claimant, before the introduction of evidence commenced, did not admit possession in the defendant in execution, or in any manner claim the right to assume the burden of proof and to open and conclude the argument, but permitted the plaintiffs in execution to assume the burden of proof and to open and conclude the introduction of evidence (each side introducing evidence), it was too late, after the evidence had closed and before the argument began, to assert for the first time the right to the opening and conclusion, on the

ground that the entry of levy (which the plaintiff in execution had introduced in evidence) recited that the property was levied on 'as the property of, and in possession of, the defendant.' See, also, *Southern Ry. Co. v. Gresham*, 114 Ga. 183, 39 S. E. 883(1); *Northington v. Granade*, 118 Ga. 584, 45 S. E. 447(2); *Taylor v. Bank of Tifton*, 140 Ga. 45, 78 S. E. 335; *Baird v. Hill*, 141 Ga. 15, 80 S. E. 281; *Morris v. Reed*, 14 Ga. App. 729, 82 S. E. 814(4); *Wisenbaker v. West Yellow Pine Co.*, 16 Ga. App. 699, 86 S. E. 46(5).

(a) Under the facts of this case the court erred in permitting the claimant to open and conclude the argument, and while this right is generally an important and valuable one (*Widincamp v. Widincamp*, 135 Ga. 644, 70 S. E. 566), yet where, as in this case, the verdict as rendered was demanded by the evidence, an erroneous ruling with reference to the right to open and conclude the argument cannot in any event be reversible error. *Moore v. Brown*, 81 Ga. 10, 6 S. E. 833(3a); *Madison Supply & Hardware Co. v. Richardson*, 8 Ga. App. 344, 69 S. E. 45(5); *Bank of Omega v. Youmans*, 21 Ga. App. 284, 94 S. E. 279.

Error from City Court of Nashville; J. D. Lovett, Judge.

Proceedings in *fi. fa.* by J. W. and C. I. Hall against S. J. McLendon, with claim by Nancy S. McLendon, wife of defendant in *fi. fa.*, to the goods levied upon. Verdict for claimant, and plaintiffs bring error. Affirmed.

R. A. Hendricks, of Nashville, for plaintiffs in error.

Jos. A. Alexander, of Nashville, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and SMITH, JJ., concur.

(24 Ga. App. 424)

EASTERLING v. STATE. (No. 10711.)

(Court of Appeals of Georgia, Division No. 1. Nov. 7, 1919.)

(Syllabus by the Court.)

1. CRIMINAL LAW §814(16) — CHARGE ON CONFESSION ERRONEOUS, WHEN NOT SUSTAINED BY EVIDENCE.

"There being no proof of a plenary confession by the accused, but, at most, evidence only of incriminatory admissions, it was such an error to charge the law relating to confessions as to require a grant of a new trial."

Broyles, C. J., dissenting.

(Additional Syllabus by Editorial Staff.)

2. CRIMINAL LAW §516—"CONFESSION" DEFINED.

A "confession" is a voluntary admission of guilt of a criminal offense, broadly distin-

guished from mere admissions of inculpatory facts.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Confession.]

3. CRIMINAL LAW §406(1)—"ADMISSION" DEFINED.

An "admission," as applied to criminal cases, is the avowal or acknowledgment of facts or circumstances from which guilt may be inferred, and tending only to prove the offense charged, but not amounting to a confession of guilt, and hence broadly distinguished from a confession.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Admission.]

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Eva Easterling was convicted of an offense, her motion for new trial was denied, and she brings error. Reversed.

N. J. Norman, of Savannah, for plaintiff in error.

Walter C. Hartridge, Sol. Gen., of Savannah, for the State.

BLOODWORTH, J. Caroline Coleman and Eva Easterling were on trial charged with robbery. The state sought to prove a conspiracy between the two women and two men to rob a man named Christopher; that the women had persuaded the victim to carry them in his automobile to a certain point some distance out on one of the suburban roads, and one of them gave a signal to the men, who came up and committed the robbery. On the trial a witness swore that, after the women were arrested, Mrs. Coleman, in the presence of Eva Easterling, freely and voluntarily said:

"They [Coleman and Easterling] were out there with this Greek Christopher, and the Greek wanted her to do something, but which she didn't want to do, and she screamed so that the boys could come up and assist her."

[1] The learned judge construed this statement to be a confession of guilt, and charged the jury on confessions. In doing this we think he erred. It is possible to place two constructions upon the statement of Mrs. Coleman. The one is that she screamed to bring the boys to protect her against the advances of Christopher; and the other, as the state insists, is that she screamed as a signal to the young men to rush up and rob the Greek. Accepting the latter theory, the statement does not amount to a confession, but is only at best an incriminatory admission.

[2, 3] In *Riley v. State*, 1 Ga. App. 651, 654, 57 S. E. 1031, 1032, this court says:

"A confession is a voluntary admission of guilt of a criminal offense. An admission, as

applied to criminal cases, is the avowal or acknowledgment of a fact or of circumstances from which guilt may be inferred, and only tending to prove the offense charged, but not amounting to a confession of guilt. There is a broad distinction between mere admissions of inculpatory facts and confessions of guilt. 'When a person only admits certain facts from which the jury may or may not infer guilt, there is no confession.'

See, also, *Lee v. State*, 102 Ga. 221, 222, 225, 226, 29 S. E. 264.

"A confession, in criminal law, is a voluntary statement made by a person charged with the commission of a crime or misdemeanor, communicated to another person, wherein he acknowledges himself to be guilty of the offense charged, and discloses the circumstances of the act and the share and participation he had in it." *Black's Law Dict.* This definition of a confession was adopted and approved by the Court of Appeals of Kentucky in *Spicer v. Commonwealth*, 51 S. W. 802. 'A confession is a person's admission or declaration of his agency or participation in a crime, and is restricted to admissions of guilt.' 3 *Am. & Eng. Ency. Law*, 439. These definitions of a confession imply an admission of every essential element necessary to establish the crime where-with the defendant is charged. Unless the statement of the defendant is broad enough to comprehend every essential element necessary to make out the case against him, it cannot be said to be an admission of guilt. There is a difference between an incriminating statement and a confession of guilt. In the former only one or more facts entering into the criminal act is admitted, while in the latter the entire criminal act is confessed. There are a number of cases in our own Reports which clearly draw this distinction. Thus it is said by Chief Justice Bleckley in *Fletcher's Case*: 'There is a very wide distinction between admitting the main fact and admitting some minor or subordinate fact, or series of facts, which could be true whether the main fact existed or not.' *Fletcher v. State*, 90 Ga. 468 [17 S. E. 100]. To the same effect is *Dumas v. State*, 63 Ga. 600, and *Covington v. State*, 79 Ga. 687 [7 S. E. 153]. 'A confession is rather a fact to be proved by evidence than evidence to prove a fact. It is not so much proof that a particular thing took place as it is a waiver by the party charged of his right to have certain facts alleged against him technically proven.' *Wharton on Crim. Ev.* (9th Ed.) § 623. This conclusion of Mr. Wharton is in line with the decisions of our own court. The distinction in all of our cases is clearly drawn between the effect of admissions of fact from which the guilt of the accused may be inferred and the admission of guilt itself. Incriminating statements, to be the equivalent of a confession of guilt, must be so comprehensive as to include every act necessary to be proved by the prosecution in order to establish the defendant's guilt." *Owens v. State*, 120 Ga. 298, 299, 48 S. E. 21, 22.

Applying the above rulings to the statement of Mrs. Coleman, it will clearly appear that she made no confession of her guilt, and under no conditions could this be accepted as

a confession on the part of Eva Easterlin. The court therefore erred in charging the jury upon the subject of confessions. *Owens v. State*, supra; *Porter v. State*, 11 Ga. App. 246, 74 S. E. 1099.

As a new trial is to be had, it will avail nothing to pass upon the other grounds of the motion.

Judgment reversed.

LUKE, J., concur.

BROYLES, C. J. (dissenting). While the trial judge erred in charging upon the law of confessions, he also, in immediate connection therewith, clearly and explicitly instructed the jury as follows:

"See if there has been any confession in this case, and, if there has not been, you will not consider the charge I have given you in regard to confessions."

Furthermore, in my opinion, the evidence fairly demanded the defendant's conviction, and therefore the error in the charge of the court does not require a new trial.

(24 Ga. App. 294)

FLOYD COUNTY v. GRAHAM. (No. 10381.)

(Court of Appeals of Georgia, Division No. 2. Oct. 20, 1919.)

(Syllabus by the Court.)

1. CLERKS OF COURTS ⇐28—RENT OF TELEPHONE GRANTED CLERK OF SUPERIOR COURT.

Section 402 of the Civil Code of 1910 makes it the duty of the county authorities in this state to furnish the different county offices with "office supplies generally," and this would include a telephone in the office of a clerk of the superior court, whenever it appears that its installation is reasonably necessary to carry on the legitimate business of that office.

2. CLERKS OF COURTS ⇐28—CLERK OF SUPERIOR COURT ENTITLED TO RECOVER FOR RENT OF TELEPHONE.

The court, therefore, did not err in overruling the demurrer attacking the plaintiff's petition on the ground that he, as clerk of the superior court of Floyd county, had no authority to have installed in his office at the expense of the county a telephone, which he alleged to have been necessary to carry on properly the legitimate county business.

Error from City Court of Floyd County; W. J. Nunnally, Judge.

Suit by S. L. Graham against Floyd County. Demurrer to petition overruled, and defendant brings error. Affirmed.

Graham Wright, of Rome, for plaintiff in error.

Maddox & Doyal, of Rome, for defendant in error.

SMITH, J. This is a suit by S. L. Graham against Floyd county to recover \$30.95; this sum having been paid by him as rent for a telephone installed in his office in the courthouse of the county. Plaintiff's petition shows that he is the clerk of the superior court of Floyd county, as well as ex officio clerk of the city court of said county, and that the telephone in question was installed in his office for the necessary and proper conduct of said office; that the defendant county has failed and refused to pay for the same, but that the aforementioned sum has been paid by him. The defendant interposed a demurrer, to the overruling of which it excepted.

[1] The sole question for adjudication in this case (and this is admitted by counsel for plaintiff in error in his brief) is whether or not a county is liable for a telephone installed in the office of a clerk of the superior court, which instrument is to be used in the necessary conduct of the legitimate business of said office. Section 402 of the Civil Code of 1910 is as follows:

"It shall be the duty of the ordinaries or board of county commissioners, or other county authorities where such boards exist, and who have the management of the revenues of the counties, to furnish coal, wood, lights, furniture, stationery, records, and office supplies in general, for the different county offices of the various counties in this state, at the expense of each county: Provided, that this section shall only apply to the offices of said officers in the various courthouses in said counties."

It will be observed that this section makes it the duty of the county commissioners, or other county authorities, to furnish county officers having offices in the courthouses of the various counties of this state, with "office supplies in general." Is this phrase broad enough to include a "telephone"? We think so. In other words, we construe this section to mean that a county officer having an office in the courthouse is entitled to have all office supplies and equipment reasonably necessary to maintain his office in a modern up-to-date manner, corresponding with offices of similar character responsible for a like amount of work. What bank of to-day would undertake to do business without an adding machine? Could it be reasonably and intelligently contended for a moment that the county commissioners of Fulton county, responsible for an enormous amount of business, should be denied the benefits of an adding machine? What well-organized law office of to-day is without a typewriter? Could any physician enjoying a general practice be without a telephone? To put these questions is but to answer them in the negative. Should not, therefore, a clerk of the superior court be given the universally recognized convenience incident to telephone service, which in this day of rapid progress

is absolutely necessary to the proper conduct of any business of importance? We think so; and it is our opinion that the Legislature intended that the term "office supplies in general" should include all necessary office equipment—such as telephones, typewriters, etc.

Our view of the question under consideration is, we think, strengthened by the opinion of Judge Powell in the case of Wood v. Vienna Telephone Co., 8 Ga. App. 209, 68 S. E. 872, wherein he says:

*"Telephone service is no longer a luxury; it is a modern business necessity [italics ours]. When it is needed in connection with the matters and things which the county authorities are authorized to maintain and to tax for, they may lawfully contract for it. It then becomes a part of the maintenance and equipment of the public buildings, a part of the expense of courts, of prisoners, of paupers, etc. It becomes a part of the machinery by which the county authorities carry on the legitimate county business, and the authorities may lawfully pay for it out of the county funds."*

[2] From what is said above, it is clear that the petition set out a cause of action, and that the trial judge did not err in overruling the demurrer.

Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(24 Ga. App. 262)

MURPHY v. RUGELY. (No. 10544.)

(Court of Appeals of Georgia, Division No. 1.  
Oct. 10, 1919.)

(Syllabus by the Court.)

1. EVIDENCE  $\S$ 442(6)—PAROL EVIDENCE AS TO CONTRACT FOR SALE OF LAND INADMISSIBLE.

The court erred in overruling the demurrer to the defendant's answer, and the further proceedings in the case were nugatory.

(Additional Syllabus by Editorial Staff.)

2. VENDOR AND PURCHASER  $\S$ 33—DEFAULT IN PROMISE TO FILL IN LOT NOT FRAUD UPON PURCHASER.

A mere promise by a vendor's agent that lot would be filled in, and that purchaser need not pay for it unless it was filled in, and the failure to fill it in after the written contract was executed constituted no fraud upon the purchaser, and afforded him no ground for avoiding payment, where there was no contention that anything was omitted from the writing that was intended to be inserted therein.

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Action by L. S. Murphy, for use, etc., against W. E. Rugely. Demurrer to answer

overruled, and plaintiff brings error. Reversed.

Jas. L. Dowling and Erle B. Askew, both of Moultrie, for plaintiff in error.

Shipp & Kline and D. P. Starr, all of Moultrie, for defendant in error.

BROYLES, C. J. Parol evidence is inadmissible to add to or vary an unambiguous written contract. Civil Code 1910, § 4268 (1). The written contract in the instant case was unambiguous, and apparently contained all of the agreement between the parties, and could not be varied, or new terms added to it, by proof of a promise made, when and before it was signed, by the agent of the vendors of the property sold to the defendant, that he would fill in with dirt the lot (which was low and swampy), and that the defendant would not have to pay for the lot unless it was so filled in. If at the time of purchasing the lot the defendant desired it filled in, he should have had a stipulation to that effect embodied in the writing. If he had done this, and the vendors had failed to comply with the stipulation, such failure would have constituted a good ground of defense to the present suit. But, having signed a contract which contained no such stipulation and which was unambiguous, he could not show by parol evidence the oral agreement to fill in the lot, without pleading that this agreement was omitted from the writing by fraud, accident, or mistake.

[2] A mere promise by the agent of the vendors that the lot would be filled in, and that the defendant would not be required to pay for it unless it was so filled in, and the failure to fill it in after the written contract was executed, would not constitute a fraud upon the purchaser or afford him any ground for avoiding payment, there being no contention that anything was omitted from the writing that was intended to be inserted therein. *Chattanooga R. Co. v. Warthen*, 98 Ga. 599 (3, 4), 617, 618, 25 S. E. 988. Furthermore, in the instant case there was no allegation in the defendant's plea that the oral promise about filling in the lot was wrongfully, fraudulently, or deceitfully made. In this respect the case is distinguished from *Printup v. Rome Land Co.*, 90 Ga. 180, 15 S. E. 764, and *Thrasher v. Cobb Real Estate Co.*, 12 Ga. App. 718, 78 S. E. 254, relied on by the defendant in error. Moreover, in each of those cases the only writings were a bond for titles and purchase-money notes, and it was not manifest that those writings were intended to speak the whole contract (Civil Code, § 4268 [1]), while in the instant case there was a detailed and unambiguous contract of sale, executed by both parties and apparently intended to speak the whole contract between them.

[1] It follows from what has been said that the defendant's answer failed to set up

a good defense to the suit, and that the court erred in not sustaining the demurrer interposed. The error in the judgment on the demurrer rendered the further proceedings in the case nugatory.

Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 384)

# BLACKMON v. STATE. (No. 10830.)

(Court of Appeals of Georgia, Division No. 1.  
Nov. 8, 1919.)

(Syllabus by the Court.)

## 1. LARCENY $\S$ 30(1)—DESCRIPTION OF PROPERTY IN INDICTMENT FOR "COMPOUND LARCENY."

"In indictments for compound larceny, the allegations in reference to the aggravating fact serve to individualize the transaction, and a more general description of the property is permissible in such cases than would be permitted in indictments for simple larceny." *Melvin v. State*, 120 Ga. 491, 48 S. E. 198; *Cannon v. State*, 125 Ga. 785, 54 S. E. 692.

(a) Larceny from the house is a larceny of a compound nature. *Cannon v. State*, *supra*.

[Ed. Note.—For other definitions, see *Words and Phrases*, First and Second Series, *Compound Larceny*.]

## 2. LARCENY $\S$ 30(1) — INDICTMENT SUFFICIENTLY DESCRIBING STOLEN PROPERTY.

In the instant case the indictment charged the defendant "with the offense of larceny from the house, for that said accused, in the county of Fulton and state of Georgia, on the 28th day of March, 1919, with force and arms, did from the office and place of business of Dr. R. C. Mosley, said office and place of business being a house in said state and county, wrongfully, fraudulently, and privately take, steal, and carry away, with intent to steal the same, one typewriter of the value of seventy dollars and the property of the said Dr. R. C. Mosley." The description of the property alleged to have been stolen, when taken in connection with the other allegations of the indictment just quoted, was sufficiently full to withstand a special demurrer. 2 *Bishop's New Criminal Procedure*, § 700; *Sanders v. State*, 86 Ga. 717, 12 S. E. 1053; *Powell v. State*, 88 Ga. 32, 13 S. E. 829(1); *Cannon v. State*, *supra*.

Error from Superior Court, Fulton County; J. D. Humphries, Judge.

W. H. Blackmon was convicted of an offense, and he brings error. Affirmed.

T. C. Battle, of Atlanta, for plaintiff in error.

John A. Boykin, Sol. Gen., and E. A. Stephens, both of Atlanta, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 332)

**HENDERSON v. STATE. (No. 10859.)**

(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)

*(Syllabus by the Court.)*

**EMBEZZLEMENT**  $\Leftrightarrow$  29—INDICTMENT INSUFFICIENT FOR WANT OF ALLEGATION OF VALUE.

An indictment, drawn under section 193 of the Penal Code of 1910, which alleges that the defendant was intrusted with notes for the purpose of collecting the same, is insufficient as against a special demurrer, unless there be an allegation that the notes are of value. See *Davis v. State*, 40 Ga. 229. The court erred in overruling the demurrer which attacked the indictment for legal insufficiency in failing to allege that the notes were of value.

Error from Superior Court, Floyd County; Moses Wright, Judge.

W. I. Henderson, Sr., was indicted for an offense, his demurrer to the indictment was overruled, and he brings error. Reversed.

M. B. Eubanks, of Rome, for plaintiff in error.

C. H. Porter, Sol. Gen., of Rome, for the State.

LUKE, J. Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 303)

**STEVENS v. SEABOARD AIR LINE RY. (No. 10536.)**

(Court of Appeals of Georgia, Division No. 2.  
Oct. 20, 1919.)

*(Syllabus by the Court.)*

**1. APPEAL AND ERROR**  $\Leftrightarrow$  189(2)—OBJECTION TO SUFFICIENCY OF PETITION TOO LATE WHEN FIRST RAISED ON APPEAL.

The question of whether or not the petition as amended was properly dismissed, because it failed to allege that the costs in the previous suit had been paid (Civ. Code 1910, §§ 5625, 5626), was not raised in the trial court by plea in abatement, and the allegations of the petition not negating this fact, its sufficiency in this respect cannot be raised for the first time in the reviewing court. *Poplarville Sawmill Co. v. Driver & Co.*, 17 Ga. App. 674, 675, 88 S. E. 36 (2).

**2. RAILROADS**  $\Leftrightarrow$  344(7)—PETITION IN ACTION FOR PERSONAL INJURY FAILING TO ALLEGE NEGLIGENCE.

The allegations of the petition, construed, as they must be, most strongly against the pleader, fail to show any specific act of negligence by the defendant railway company which is charged as the proximate cause of the injury sued for. It appears from the recitals of fact in the petition that the proximate cause of the plaintiff's injury was the balking of his

horse, and it is nowhere alleged that the defendant, by any specific act of negligence, caused the balking of the horse and the resulting injury. The court, therefore, did not err in sustaining the general demurrer to the petition and in dismissing the suit.

Error from Superior Court, Liberty County; W. W. Sheppard, Judge.

Action by Richard Stevens against the Seaboard Air Line Railway. General demurrer to petition sustained, and suit dismissed, and plaintiff brings error. Affirmed.

W. C. Hodges, of Hinesville, for plaintiff in error.

Bolling Whitfield, of Brunswick, and N. J. Norman, of Savannah, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and SMITH, J., concur.

(24 Ga. App. 302)

**DONALSONVILLE LIVE STOCK CO. v. CORPORATION SERVICE CO. (No. 10483.)**

(Court of Appeals of Georgia, Division No. 2.  
Oct. 20, 1919.)

*(Syllabus by the Court.)*

**1. TITLE OF HOLDER OF NOTE.**

"The title of the holder of a note cannot be inquired into, unless it is necessary for the protection of the defendant, or to let in the defense which he seeks to make." Civ. Code 1910, § 4290.

**2. CORPORATIONS**  $\Leftrightarrow$  487(1) — REMEDY OF PARTY TO ULTRA VIRES CONTRACT OF CORPORATION.

In this case, the answer of the defendant corporation in the suit on a note executed by it does not set up a defense which would be good even as against the original payee. "After a contract entered into by a corporation has been performed by either of the contracting parties, the fact that the making of the contract involved an unauthorized exercise of corporate power on the part of the company will not constitute a defense to an action brought by the party having performed the contract to recover compensation for a breach of the contract by the other party." *Towers Excelsior Co. v. Inman*, 96 Ga. 506, 23 S. E. 418; *Johnson v. Mercantile Trust Co.*, 94 Ga. 324, 21 S. E. 576.

**3. JURY**  $\Leftrightarrow$  150 — TIME FOR OBJECTION TO FAILURE TO SWEAR JUROR.

"After the rendition of a verdict in a civil case it was too late to object that one or more of the jurors who tried the case had not been sworn, even though this fact was not known by the losing party or his counsel before the verdict was rendered." *Towns v. Rome Railway, etc., Co.*, 19 Ga. App. 457, 91 S. E. 790, citing *Slaughter v. State*, 100 Ga. 323, 28 S. E. 159, in which latter case it was said: "In so far as

it may be gathered from any of the above authorities that a failure to swear one, or more, or all, of the jurors trying a civil case would be fatal to the verdict rendered, even where the losing party knew of such failure before the trial ended, and yet made no objection or complaint, we do not wish to be understood as now agreeing to such a conclusion. Our present decision is limited to the question before us as it relates to criminal cases."

Error from City Court of Bainbridge; John R. Wilson, Judge pro hac vice.

Action between the Donalsonville Live Stock Company and the Corporation Service Company. Judgment for the latter, and the former brings error. Affirmed.

W. V. Custer, of Bainbridge, for plaintiff in error.

J. C. Hale, of Bainbridge, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and SMITH, JJ., concur.

(24 Ga. App. 250)

CARMICHAEL v. FIRST FARMERS' BANK et al. (No. 10320.)

(Court of Appeals of Georgia, Division No. 1. Oct. 10, 1919.)

(Syllabus by the Court.)

1. DENIAL OF MOTION TO DISMISS BILL OF EXCEPTIONS.

The provisions of Civil Code 1910, § 6160, par. 3, as to the waiver of service of a copy of the bill of exceptions, were complied with, and the motion to dismiss the bill of exceptions is denied.

2. PARTIES  $\S$  93(2)—MOTION TO STRIKE INTERVENER AS PARTY TOO LATE.

J. B. Carmichael brought an action of bail trover against the First Farmers' Bank to the August term, 1916, of the superior court. The Chippewa Bank filed an intervention, and prayed that it be made a party defendant. On August 21, 1916, the following order was passed: "It is ordered by the court that the Chippewa Bank be made a party defendant to above-stated suit, and that this its answer be filed as a part of the pleadings and record in said case." At the February term, 1917, the plaintiff filed objection to the intervention, and moved to strike the intervener as a party. This motion came too late and was properly overruled. *Pettis v. Campbell*, 47 Ga. 596 (1); *Life Association of America v. Ferrill*, 60 Ga. 414 (2); *Ansley v. Jordon*, 61 Ga. 484(7), 488(7).

3. DIRECTED VERDICT.

Under the pleadings and the evidence, no other verdict than one in favor of the defendant could have been legally returned, and the court did not err in so directing.

Error from Superior Court, Butts County; W. E. H. Searcy, Jr., Judge.

Action of bail trover by J. B. Carmichael against the First Farmers' Bank, with intervention by the Chippewa Bank, which was ordered to be made a party defendant, etc. Directed verdict for defendants, and plaintiff brings error. Affirmed.

W. E. Watkins, of Jackson, for plaintiff in error.

Little, Powell, Smith & Goldstein, of Atlanta, and H. M. Fletcher, of Jackson, for defendants in error.

BLOODWORTH, J. Judgment affirmed.

BRQYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 301)

HAVERTY FURNITURE CO. v. HUNTER. (No. 10470.)

(Court of Appeals of Georgia, Division No. 2. Oct. 20, 1919.)

(Syllabus by the Court.)

NEW TRIAL  $\S$  70—DENIAL OF FIRST MOTION NOT REVIEWABLE, WHERE JUDGMENT NOT DEMANDED.

Even under the ruling made in the case of *Knight v. Savannah Electric Co.*, 20 Ga. App. 314, 93 S. E. 17 (which principle of law is now pending for determination by the Supreme Court in another case certified to that court by this court), it cannot be said as a matter of law that in this case a judgment for the defendant was absolutely demanded. It therefore follows that the defendant cannot complain because the trial court, in the exercise of its discretion, has seen proper to grant the motion of the plaintiff for the first grant of a new trial, thereby setting aside the judgment in the amount of the plaintiff's recovery. If the plaintiff is entitled to recover at all, the evidence does not demand that the verdict be limited to the amount named in the judgment. See *Parks v. Stevens*, 21 Ga. App. 180, 94 S. E. 60, and cases cited.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action between the Haverty Furniture Company and G. C. Hunter. Verdict for the former, motion for first new trial granted, and the former brings error. Affirmed.

Little, Powell, Smith & Goldstein and King & Spalding, all of Atlanta, for plaintiff in error.

M. U. Mooty, of La Grange, and Brewster, Howell & Heyman, of Atlanta, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and SMITH, JJ., concur.

(24 Ga. App. 288)

McGEE v. STATE. (No. 10663.)

(Court of Appeals of Georgia, Division No. 1.  
Oct. 10, 1919.)*(Syllabus by the Court.)*

CRIMINAL LAW §815(4) — INSTRUCTIONS ON CIRCUMSTANTIAL EVIDENCE AS SHOWING UNLAWFUL POSSESSION ERRONEOUS.

Where, upon the trial of one charged with possessing intoxicating liquors in violation of law, the testimony disclosed that in a barn, over which two persons have equal possession, control, and dominion, liquor was found, and there was nothing more shown than joint occupancy, control, and dominion over the barn, it was error harmful to the defendant, who was away from home at the time of the seizure of the liquor, and denied ownership or knowledge of the presence of the liquor in the barn, for the court, in charging upon circumstantial evidence, and possession, power, custody and control over the barn in which the liquor was found, not to allude to the joint occupancy, possession, power, and control of the barn, for one might have power over, custody, and control with another of a house, and yet not know of hidden liquors stored therein. See *Hall v. State*, 65 Ga. 36(3); *Shropshire v. State*, 69 Ga. 273; *Moncrief v. State*, 99 Ga. 295, 25 S. E. 735; *Lunceford v. City of Washington*, 17 Ga. App. 730, 88 S. E. 212. For the reasons given, the court erred in overruling the motion for a new trial.

Error from Superior Court, Harris County; G. H. Howard, Judge.

Ira McGee was convicted of possessing intoxicating liquors in violation of law, his motion for a new trial was overruled, and he brings error. Reversed.

J. B. Burnside, of Thomson, and Thos. H. Shanks, of Columbus, for plaintiff in error.

C. F. McLaughlin, Sol. Gen., of Columbus, for the State.

LUKE, J. Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(84 W. Va. 721)

EDWARD F. GERBER CO. v. THOMPSON.  
(No. 3896.)(Supreme Court of Appeals of West Virginia.  
Oct. 14, 1919.)*(Syllabus by the Court.)*

1. JUDGMENT §45 — POWER OF ATTORNEY TO CONFESS JUDGMENT MUST STATE AMOUNT.

A power of attorney purporting to give authority to confess judgment must state the amount for which such judgment is to be confessed, or at least contain facts from which such amount can be definitely ascertained.

2. JUDGMENT §45—POWER OF ATTORNEY TO CONFESS JUDGMENT FOR AMOUNT DUE INVALID.

A paper purporting to confer authority to confess judgment for such amount as may be found due from one party to another, upon their dealings in the future, is invalid because of the uncertainty and indefiniteness of the amount for which such confession of judgment is attempted to be authorized.

3. JUDGMENT §17(1) — PERSONAL SERVICE NECESSARY TO PERSONAL JUDGMENT IN ATTACHMENT SUIT.

A judgment in an attachment suit, where no personal service is had upon the defendant therein, has no other effect than to reach the property which the nonresident defendant may have in the state, and after such property is exhausted such judgment is of no force or effect.

4. JUDGMENT §678(1)—CONCLUSIVENESS AS TO PARTIES AND PRIVIES.

A judgment rendered by a court of competent jurisdiction after service of process upon the parties to be affected thereby is conclusive, not only upon those who are actually parties thereto, but also upon all who are in privity with them.

5. JUDGMENT §681—NOT RES JUDICATA AS TO INTEREST OF THIRD PARTY BEFORE LITIGATION.

For the purpose of the application of the rule of res judicata to persons because of their privity with the parties to a suit, it must appear that the estate or interest of such a one was acquired from or through such actual party after the litigation. If his interest in the cause of action or the subject-matter of the litigation was acquired prior to the litigation, he will not be bound by the judgment.

6. JUDGMENT §585(1), 662(2)—FOR MONEY NOT CONCLUSIVE IN ACTION BY DEFENDANT FOR DEBT NOT LITIGATED.

A judgment rendered in a suit for the recovery of money is not conclusive of the defendant's right to maintain a subsequent suit to recover a debt claimed to be due to him by the plaintiff in the former suit, when such claim was not pleaded or relied upon therein. The adjudication in such former suit, where the recovery of money is sought, is only conclusive of the matters actually put in issue therein, and such other matters as are defensive to the claim set up, and does not bar a suit upon a different claim which either of the parties may have against the other.

7. TRIAL §2—ISSUES RAISED BY PLEAS IN BAR SHOULD BE TRIED TOGETHER.

Where there is more than one issue upon pleas in bar in an action at law, they should all be tried together.

8. APPEAL AND ERROR §1177(6) — WHERE FINDING FOR DEFENDANT ON ONE ISSUE ERRONEOUS REMAND FOR TRIAL OF REMAINING ISSUES.

Where, however, the court below with the assent of the parties proceeds to the trial, without a jury, of only one of such issues, and erroneously finds for the defendant upon such issue, and renders judgment accordingly, this



court will reverse the same, set aside the findings of the court below, and remand the cause for a trial upon the remaining issue, or issues.

**Error from Circuit Court, Harrison County.**

Suit by the Edward F. Gerber Company against D. Scott Thompson. Judgment for defendant on plea of *res judicata* alone, and plaintiff brings error. Reversed and remanded for a trial upon a certain issue joined upon a plea of *non assumpsit*.

Robert R. Wilson, of Clarksburg, for plaintiff in error.

Clarence B. Sperry and John C. Southern, both of Clarksburg, for defendant in error.

RITZ, J. On the 3d of January, 1913, the defendant D. Scott Thompson entered into a contract with the Pennsylvania Sales Corporation, assignor of the plaintiff in this case, by which he became the agent of that concern for the sale of Michigan automobiles and their accessories in certain designated territory. The provisions of the contract, so far as they are material to the determination of the questions involved here, are that Thompson deposited \$1,000 with the Sales Corporation to be held by it as security for the payment of any amount which he might owe, and to be refunded to him by crediting it on the automobiles sold by him, at the rate of \$100 for each of such machines so sold. The contract further fixed the price at which such machines and their accessories were to be sold, and the compensation to be allowed to Thompson for making the sales. It further provided that in case of the failure of Thompson to remit the invoice price of the automobiles and parts shipped and sold under the agreement at the time provided in the contract he, the said Thompson, authorized any attorney of a court of record selected by the other party to confess judgment in any court of law of competent jurisdiction for the amount of any unpaid balance.

This suit was brought by Edward F. Gerber Company, a corporation, assignee of the Pennsylvania Sales Corporation, to recover a balance alleged to be due by the said Thompson upon the contract aforesaid. An affidavit was filed with the declaration in which was stated the amount which the plaintiff claimed the right to recover. When the case was called for trial, the plaintiff by its attorney appeared and moved to be permitted to confess judgment in favor of the plaintiff against the defendant, for the sum claimed in the affidavit. The defendant resisted this motion and asked to be allowed to file his counter affidavit and plea of *non assumpsit*. The court below declined to allow plaintiff's attorney to confess judgment, but permitted the counter affidavit to be filed, together with the plea of *non assumpsit*. Subsequently the defendant filed his special plea of *res judicata*. This special plea is based upon an at-

tachment proceeding instituted by the defendant against the Pennsylvania Sales Corporation in December, 1913. It appears that the defendant instituted in the circuit court of Harrison county an action in *assumpsit* in December, 1913, to recover the \$1,000 deposited by him under the contract. No service of process was had upon the defendant, but the jurisdiction was sustained by levying an attachment sued out in said cause on one of the machines shipped to Thompson for sale. Without any appearance on behalf of the Sales Corporation, a judgment was taken condemning the said machine to sale in satisfaction of plaintiff's demand. It was sold, the sale confirmed, and the proceeds thereof paid over to the plaintiff, and this proceeding Thompson now sets up as *res judicata* in this suit. A trial was had in the court below upon the issue raised by the plea of *res judicata* alone, and the court found thereon in favor of Thompson and rendered judgment accordingly, from which judgment this writ of error is prosecuted.

[1, 2] The plaintiff's first contention is that the court erred in not granting its motion to confess judgment by its attorney in its favor against the defendant because of the provision in the contract referred to. This contract created the defendant Thompson an agent for the sale of the Sales Corporation's goods at an agreed price. At the time it was entered into there was no amount due by Thompson, and the provision authorizing the confession of judgment simply provided that when any amount might become due and unpaid, in accordance with the terms of the contract, the plaintiff, through its attorney, might confess judgment in its favor. It will be observed that there is nothing in the contract from which such amount can be determined. It depended entirely upon the future dealings of the parties. Ordinarily an authority to confess judgment ought to be as certain in its terms as the judgment itself. The amount for which such judgment is to be confessed should be clearly stated, or else facts and figures given in the power itself from which the amount can be certainly determined. Such is not the case here, and for that reason alone the alleged power of attorney conferred no authority to confess judgment for any amount. 23 Cyc. 704; 15 R. C. L. 653; *Bennett v. Haley*, 142 Pa. 253, 21 Atl. 814; *Little v. Dyer*, 138 Ill. 272, 27 N. E. 905, 32 Am. St. Rep. 140; *Fortune v. Bartolomei*, 164 Ill. 51, 45 N. E. 274; *Holden v. Bull*, 1 Penn. & W. (Pa.) 460; *Connay v. Halstead*, 73 Pa. 354; 11 Ency. of Pleading & Practice, 981. The court did not err in denying plaintiff's motion to confess judgment and permitting the defendant to file his counter affidavit and plea.

[3] The plaintiff, however, contends that the court below erred in finding for the defendant on his special plea of *res judicata*.

As before stated, this special plea relied upon the judgment in an attachment suit brought by Thompson against plaintiff's assignor, in which no service of process was had, but which jurisdiction was sustained by reason of a levy made on one of the automobiles shipped to Thompson by the Sales Corporation. In this suit Thompson filed an account upon which he asked recovery, and it was for the \$1,000 advanced by him to the Sales Corporation under the contract. The judgment was in his favor for this sum, with its interest, and adjudged that the property attached was liable to be sold in satisfaction thereof. What is the effect of such a judgment? The defendant contends that it is conclusive of all controversies existing between the parties, while the plaintiff contends that it is conclusive of nothing except the fact that Thompson was entitled to have the particular property upon which the levy was made sold to satisfy his alleged debt. A proceeding by way of attachment partakes somewhat in its nature both of a proceeding in rem and one in personam. It is not, strictly speaking, a proceeding in rem, although it partakes more of the nature of such a proceeding where no service of process has been had than it does of a proceeding in personam. There is this difference, however. In a pure proceeding in rem, the judgment is conclusive against the world as to the right in the property or thing seized, or the status sought to be determined, while in a proceeding by attachment, where there is no service of process the attachment is only conclusive upon the parties to it and their privies. If a stranger claims to own the property, he would not be bound by the adjudication in the attachment proceeding, while in a pure proceeding in rem every one is bound by the adjudication. It will thus be seen that the effect of such a judgment is not as broad as a judgment in a proceeding purely in rem. *Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931; *Bigelow on Estoppel*, p. 330.

But what is the effect of such a judgment upon the parties to the proceeding? It is for no other purpose, and has no other effect, than to reach the property which a nonresident defendant may have in the state, where there is no personal service of process. It is confined exclusively to such property, and is of no further force when that is exhausted. It is evidence of nothing beyond this, and does not bind or conclude the defendant as to anything else. A suit could not be maintained on it in any other court in the same state or elsewhere, nor would the plaintiff in such a proceeding, in whose favor the judgment was rendered, be precluded from bringing another action on the original consideration for such balance as may be due after exhausting the property attached. To hold that a judgment thus rendered has any vitality after exhausting the only thing conferring the jurisdiction is violative of a principle inherent in our gov-

ernment which constitutes an inflexible rule of the common law, and that is that no one can be condemned unheard. It cannot be disputed that whatever interest the Pennsylvania Sales Corporation had in the property attached passed by the judgment and sale thereunder, but after exhausting that subject-matter the judgment is of no force or effect, and can afford no advantage to either party as an adjudication of any other matter. 7 *Robinson's Practice*, p. 51; *Stone v. Myers*, 9 Minn. 303 (Gil. 287), 86 Am. Dec. 104.

But the plaintiff argues that, even though the judgment relied upon be treated as one rendered upon default after service of process, it would not be a bar to this suit for two reasons: First, that this suit is brought by an assignee of the defendant in the former suit, and it does not appear whether the rights of the plaintiff here were acquired before or after the institution of the former suit, it being contended that, if such rights were acquired under the assignment before such suit was brought, the same could have no effect upon the plaintiff in this suit; and, second, that the subject-matter of this suit was neither involved nor litigated in the former suit.

[4-7] It is well settled that a judgment is conclusive, not only upon the parties to the litigation, but also upon all persons who are in privity with them. Privity is said to be a mutual or successive relationship to the same rights of property, and if it is sought to bind one as privy by an adjudication against his predecessor in title, it must appear that at the time he acquired the right, or succeeded to the title, it was then affected by the adjudication, for if the right was acquired by him before the adjudication then the doctrine cannot apply. *Black on Judgments*, § 549; *Freeman on Judgments*, § 162; *United States v. Louisville*, 169 U. S. 249, 18 Sup. Ct. 358, 42 L. Ed. 735; *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774; *Maxwell v. Leeson*, 50 W. Va. 361, 40 S. E. 420, 88 Am. St. Rep. 475; *Hudkins v. Crim*, 72 W. Va. 418, 78 S. E. 1043; *Steel v. Long*, 104 Iowa, 39, 73 N. W. 470. It will therefore be seen that it was necessary, not only to show that the plaintiff in this suit was the assignee of the defendant in the other suit, but that it became such assignee after the institution of such former suit. This does not appear from the proof submitted, and for that reason the court erred in his findings upon the plea of res judicata.

Nor can it be said, we think, that the matters involved in this suit were in any wise involved in the former proceeding which is set up as a bar to this action. The former litigation had no other object than the recovery of the \$1,000 advanced by Thompson to the Sales Corporation as security for property delivered to him for sale. It did not involve in any wise amounts which he might owe to the Sales Corporation. It is true the

Sales Corporation might have filed these amounts as offsets in that suit, and had this been done the same would have become involved, and the adjudication in that suit would have concluded the Sales Corporation as to the claim set up. But one who is sued upon a claim is under no obligation to plead offsets thereto, or to set up some independent cause of action in defense thereof. Even after he is served with process and allows a judgment to go against him by default, he is only concluded as to such matters as are defensive to the cause of action set up. He could not thereafter say, of course, that he did not owe the money for which suit was brought; but if he has a claim against the plaintiff in such suit he is not barred from setting it up in another and independent suit to recover the same. 23 Cyc. 1131 et seq.; 15 R. C. L. p. 987; *Lawson v. Conaway*, 37 W. Va. 159, 16 S. E. 564, 18 L. R. A. 627, 38 Am. St. Rep. 17; *Vanfleet's Former Adjudication*, § 217. We are therefore of the opinion that the court below was wrong in holding that the cause of action here was barred by the former proceeding, for the reason that it was in no wise involved in that proceeding, and there was no adjudication there affecting the cause of action relied upon in this suit.

[8] As before stated, the defendant in this suit pleaded the general issue of non assumption, as well as the special defense of res judicata. The issues upon these pleas should have been tried together. It is apparent, however, that the trial in the circuit court was only of the issue made upon the special plea of res judicata. Neither party objected to the suit proceeding in this way. In fact, it is apparent that it so proceeded with the consent and the desire of both parties.

Finding that the conclusions of the court below are wrong upon this issue, we will set aside the judgment rendered thereon and reverse the court's findings; but inasmuch as the issue joined upon the plea of non assumption has never been tried, we will not render judgment here in favor of either of the parties, but will remand the cause to the circuit court for a trial upon that issue.

(84 W. Va. 753)

**BUTLER v. CARLYLE et al.**

(Supreme Court of Appeals of West Virginia.  
Oct. 21, 1919.)

(Syllabus by the Court.)

1. CONTRACTS ⇨143, 170(1)—DEEDS ⇨90, 101—WHERE WORDS IN DEEDS ARE INDEFINITE, CONSTRUCTION BY PARTIES WILL BE CONSIDERED.

Where in a deed or contract the parties use words of general and indefinite signification, their meaning will be determined by a consider-

ation, not only of the language used, but of the conditions surrounding them at the time, the circumstances under which the contract or deed was made, and the purpose sought to be accomplished thereby; and if the parties have acted under the provisions of the contract or deed, their acts, amounting to a practical construction of it, will be given peculiar weight in coming to a conclusion as to the meaning of the language used.

2. DEEDS ⇨144(2)—RESERVATION BY GRANTOR OF RIGHT TO OCCUPY HOUSE WITHOUT OBLIGATION TO SUPPORT.

Where the owner of a tract of real estate, which is divided into two parcels by a county road, upon the whole of which there is a lien, conveys to his daughter and her husband one of such parcels, upon which the dwelling house then being occupied by the owner and the son-in-law's family is situate, for the consideration that the grantees discharge the lien upon the entire tract, with a provision in said deed that such owner shall have the right to make his home with the grantees therein, and all of the parties continue to live upon said land for a considerable length of time as one family, each contributing to the common support, such provision will be held as reserving to the grantor in the deed the right to occupy such dwelling house as his home in common with the grantees, but will not include an obligation upon the part of such grantees to maintain and support him.

Appeal from Circuit Court, Mason County.

Action by Joseph Butler against J. C. Carlyle and others. Decree for plaintiff, and defendants appeal. Modified and affirmed.

Somerville & Somerville, of Point Pleasant, for appellants.

J. E. Beller, of Point Pleasant, for appellee.

RITZ, J. Prior to the execution of the deed hereinafter referred to plaintiff was the owner of a tract of land situate in Mason county, consisting of about 38 acres, which was divided into two parts by a county road; 14½ acres, upon which was located the dwelling house, being on one side of the road, and the remainder upon which was located the stable and other farm buildings, on the opposite side of the highway. There was a lien upon this land by deed of trust for the sum of \$250 principal, which with interest at the time of the conveyance here involved amounted to a little more than \$350. In the year 1895 the defendant J. C. Carlyle married the only child of the plaintiff. At that time plaintiff was living upon this tract of land; his family consisting of himself, his wife, and his daughter, who intermarried with the defendant. In the year 1897 the plaintiff's wife died, and shortly thereafter the defendant J. C. Carlyle and his wife, at the solicitation of the plaintiff, moved into the house occupied by the plaintiff upon the tract of land above referred to, and they continued to reside there until the death of Mrs. Carlyle in the

year 1907. Carlyle's four children were born in this house. After the death of his wife, Carlyle procured a housekeeper, and his family continued to reside upon the tract of land with the plaintiff until the fall of the year 1912, or the spring of 1913, at which time the plaintiff left the house, and shortly after his leaving Carlyle took his four children and placed them in school in the city of Wheeling, where they have since remained, with the exception of the eldest, who is now receiving technical training as a nurse. Carlyle, at the time of his marriage, was and ever since has been engaged as a foreman upon construction work; his duties calling him away from home practically all of the time. Frequently he was away during all the summer and fall months, and only returned in the winter, to be gone again early in the spring for the balance of the year. During the time that his family lived upon the land he contributed the things necessary for their support. In the year 1905 the party who held the lien against the plaintiff's tract of land insisted upon the payment thereof. Plaintiff was unable to meet these demands, and proposed to the defendant Carlyle that, if he would pay off this lien, which was on the whole tract of land, he would convey to him the  $14\frac{1}{2}$ -acre tract upon which the house stood. Carlyle did this, and a deed was made conveying to him and his wife this  $14\frac{1}{2}$ -acre tract. In this deed there is a clause providing:

"It is understood and agreed by and between the parties hereto that the said Joseph Butler is to make his home with J. C. Carlyle and wife, if he so desires."

It is this provision in the deed which is the basis of this litigation. After the plaintiff left the house in the fall of 1912, he did not return, except occasionally, until in the year 1917, shortly before the bringing of this suit, when he desired to move into the house and occupy the same. Carlyle denied his right to do this, but offered to permit him to occupy one room therein. Plaintiff contended that he was entitled to more than this; that he was entitled to have his support and maintenance out of the property under the provision above referred to; and with a view of having his rights in the property fixed and determined he brought this suit. It is shown that during the time the parties lived together, as above indicated, the tract of land owned by the plaintiff and that owned by the defendants were cultivated to some extent, and the proceeds of the whole contributed to the support of the family. The plaintiff raised some agricultural products on his tract of land, some of which were used by the family, and some of which were fed to stock used by the family generally, and the agricultural products raised upon the defendants' part of the land were likewise used. Aside from this, the defendant Carlyle contributed all of the money which was necessary to the

support of his wife and children, as well as the plaintiff. In 1913, after the plaintiff left the house, he sold the tract of land owned by him, lying across the road from the tract here involved, and received the money therefor, so that he has not now any real estate, and only a small amount of personal property. Upon a hearing of the cause the court below decreed that the plaintiff was entitled to hold the tract of land for his sole use and benefit for his life, and that the defendants would come into possession of their estate therein only upon the death of the plaintiff. It is from this decree that the defendants prosecute this appeal.

[1] The sole question to be determined is: What interest, if any, did the plaintiff retain in the tract of land by reason of the provision in the deed above referred to? He contends that this provision that he was to have a home with the grantees in the deed was one for support and maintenance, while the defendants contend, if it has any effect at all, that it vested in him no other interest than a right to occupy one room in the house, without any obligation upon their part to maintain him. It will be observed that the language used by the parties in defining the interest of the plaintiff is very general, and where this is the case it is the end of all construction to arrive at the intention of the parties at the time the contract was entered into, and to this end consideration will be given to the subject-matter of the contract, the situation of the parties at the time it was entered into, the purpose sought to be accomplished, and the acts of the parties under the contract, which amount frequently to a practical construction of its terms and a declaration of their intentions. *Snider v. Robinett*, 78 W. Va. 88, 88 S. E. 599; *Clark v. Sayers & Lambert*, 55 W. Va. 512, 47 S. E. 312; *Vintroux v. Chilton*, 100 S. E. 496. Where the conduct of the parties affords no assistance in construing a paper of such general import as this, such a provision has been held not to include support and maintenance, but only a right to live in the house upon the land. *Shuttleworth v. Shuttleworth*, 34 W. Va. 17, 11 S. E. 714.

The plaintiff contends, however, that that case does not control here, for the reason that a practical construction has been placed upon this contract by the acts of the parties, and that, considering their situation at the time, the consideration paid for the land, the purpose sought to be accomplished, and their subsequent acts in performance of the contract, it must be held that the plaintiff reserved by this provision such interest in the land as would be sufficient for his support and maintenance, and the decree of the court below, giving him a full life estate therein, is no more than sufficient for that purpose. We are unable to agree with the plaintiff in this conclusion. The situation of the parties at

the time of the deed was that they were all living together in the dwelling on this tract of land; the plaintiff contributing to the support of the family such agricultural products as were produced from this land, as well as the other tract of land owned by him, and the defendant Carlyle making a much larger contribution from his earnings. The plaintiff's debt was pressing him, and in order to prevent a sale of all of his land under the deed of trust he agreed to sell this 14½-acre tract to the defendant Carlyle, in consideration that he pay off the lien upon the whole tract. It is alleged in the bill that this consideration of \$350 was grossly inadequate. This allegation is denied, and there is not a syllable of evidence to sustain it. The purpose intended to be accomplished by the parties, no doubt, was to remove the lien from the plaintiff's land, so that all of them might continue to occupy it as they had theretofore.

[2] However, the house was upon the tract conveyed to the defendant Carlyle and his wife, and without some reservation in the deed it is patent that the plaintiff would have no right to live therein. After the conveyance the relations of the parties continued the same as they had theretofore. All of them continued to reside in the dwelling upon the tract of land conveyed to the defendant Carlyle and his wife; each party contributing of his substance to the support of the family. This condition continued until the fall of 1912, when the plaintiff voluntarily left the dwelling and remained away for four or five years, living with other relatives. His reason for leaving, it appears, was his inability to get along with one of the housekeepers employed by Carlyle, and from his testimony it appears that he had very good cause for his grievances in this regard. After leaving the plaintiff sold his part of the land and received the consideration therefor, and he now returns and insists upon having appropriated to his use, so long as he lives, the whole of the tract which he conveyed to the defendant and his wife. Looking to the conditions which existed at the time of this conveyance, and the purpose sought to be accomplished by the parties, it is quite clear that this provision in the deed meant that the plaintiff should have the right to live in the dwelling upon this land. There was no dwelling house upon that part of it retained by him. The parties had been living in these intimate relations for about ten years. They were close relatives, and when we come to consider the acts done by the parties under the contract this conclusion is rendered absolutely certain. Each party, during the time they all lived in this dwelling, contributed to the common support, and it cannot be doubted from the plaintiff's evidence that the contributions made by him were quite sufficient for his own support and maintenance, and never did he contend

during that time that there was any obligation upon Carlyle to support and maintain him.

We are of opinion that this provision in the deed constitutes a reservation in favor of the plaintiff of a right to live in the dwelling house, without any obligation upon the part of Carlyle to support or maintain him. This right is not fully enjoyed by the occupancy of a single sleeping room in the dwelling. It goes further than that, and includes the right to use the dwelling in the way in which dwelling houses are ordinarily used by their occupants. He is not entitled to the exclusive use of it, but he is entitled to the use of it in common with the defendant, and he is entitled to such use free from any abuse or ill treatment upon the part of the defendant, or any of his employes, servants, or agents.

The decree of the circuit court grants to him more than he is entitled to. It will be modified as above indicated, and, as modified, will be affirmed, with costs to the appellant.

(84 W. Va. 741)

CARTER et ux. v. RESERVE GAS CO. et al.  
(No. 3483.)

(Supreme Court of Appeals of West Virginia.  
Oct. 14, 1919.)

(Syllabus by the Court.)

1. STATUTES  $\S$  239—MODIFICATION OF RULE IN SHELLEY'S CASE STRICTLY CONSTRUED.

Being in derogation of the common law, section 11 of chapter 71 of the Code (sec. 3749), modifying the rule in Shelley's Case, is limited in its operation to cases falling within its terms as well as its purpose, under the rule of strict construction.

2. DEEDS  $\S$  128—VESTING ESTATE FOR LIFE WITH REMAINDER TO HEIRS WITHIN MODIFICATION OF RULE IN SHELLEY'S CASE.

A deed upon a valuable consideration, vesting an estate in any person for his life, and after his death in his heirs, or the heirs of his body, is within the terms, as well as the purpose, of said statute.

3. DEEDS  $\S$  124(1)—WORDS IN DEED WORDS OF LIMITATION VESTING FEE-SIMPLE ESTATE IN GRANTEEES.

Words in a deed from a father to two of his sons, purporting to create remainders in fee in their heirs, after life estates vested in them, with a provision that, on the death of either of the sons, the other shall have a life estate in the whole of the land, are words of limitation, vesting fee-simple estates in the sons.

4. DEEDS  $\S$  165, 168—BREACH OF CONDITION SUBSEQUENT GIVES RIGHT OF FORFEITURE WITHOUT RE-ENTRY.

On the failure of the grantee in a deed from a father to a son, conveying to the latter

land for life, with a remainder in fee to his heirs, to perform a condition subsequent, requiring him comfortably to support, maintain, attend, and care for the grantor and his wife on the land, a right of forfeiture of the entire title accrues to the grantor, which he may enforce without re-entry, he being in possession, and his title may be quieted and cleared by a reconveyance to him by the grantee, by way of rescission, and in such case the remainder falls with the life estate.

**5. DEEDS §168—ON BREACH OF CONDITION SUBSEQUENT NEITHER CLAUSE OF RE-ENTRY NOR FORFEITURE NECESSARY.**

Neither a clause of re-entry nor one of forfeiture in such a deed is essential to the right of reacquisition of the title by forfeiture for nonperformance of the condition.

**6. DEEDS §129(4)—CREATING LIFE ESTATE IN GRANTEE WITH REMAINDER IN FEE SIMPLE TO HIS HEIRS.**

A conveyance of land to a person "to be held and enjoyed by said party during his life, and at his death to descend to his heirs," creates a life estate in such person and a remainder in fee simple in his heirs, by virtue of section 11 of chapter 71 of the Code (sec. 3749); the words "to descend" appearing by their context to have been used in their popular sense and to mean the same as the words "to go."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Descend.]

*(Additional Syllabus by Editorial Staff.)*

**7. WILLS §608(3)—"GIVEN," AS USED IN STATUTE MODIFYING RULE IN SHELLEY'S CASE, MEANS CONVEYED.**

The word "given," in Code, c. 71, § 11 (sec. 3749), modifying rule in Shelley's Case by providing that where an estate is given by deed or will to a person for life, and at his death to his heirs, or to the heirs of his body, the conveyance, vests an estate for life only in such persons, and a remainder in fee simple in his heirs or the heirs of his body, was used in the sense of "conferred," "passed," "conveyed," and the like.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Given.]

**Appeal from Circuit Court, Harrison County.**

Suit by Russell V. Carter and wife against the Reserve Gas Company to cancel an oil and gas lease, etc., with answer by defendant Gas Company averring title in itself, Harrison W. Carter and wife, and Cynthia Morrison. Decree dismissing the original and the three amended and supplemental bills, and retaining the cross-bills of Harrison W. Carter and the Reserve Gas Company for treatment as original bills, and further procedure thereon, and Russell V. Carter appeals. Decree, and order sustaining demurrers to first amended and supplemental bill, reversed, demurrers to first, second, and

third amended bills overruled, and cause remanded.

Smith & Jackson, of Clarksburg, for appellant.

Wm. H. Taylor, and Hoffheimer & Templeman, all of Clarksburg, for appellees Morrison and others.

Law & McCue, of Clarksburg, for appellees Harrison W. Carter and others.

**POFFENBARGER, J.** The decree appealed from in this cause was made and entered in a suit brought by Russell V. Carter and wife for cancellation of an oil and gas lease on a tract of land described as containing 100 acres, more or less, executed to the defendant, the Reserve Gas Company, by H. W. Carter and others, March 30, 1909, and for an accounting for the gas taken from said tract of land by the lessee. That company filed an answer in which it denied the plaintiff's alleged claim of title to the tract of land, beyond an estate therein for the life of Harrison W. Carter, one of its lessors, and avers title in itself, Harrison W. Carter, Sarah J. Carter, wife of Harrison, and Cynthia Morrison, to an estate in the remainder in fee simple therein, as to the oil and gas. The answer also sets up a lease of the land for oil and gas purposes to the respondent, executed by the plaintiffs themselves. This answer and the original and three amended and supplemental bills, with their exhibits, developed a state of facts under which the court entered a decree dismissing all of the bills, but retaining the cross-bills of Harrison W. Carter and the Reserve Gas Company, for treatment as original bills and further procedure thereon.

Geo. F. Carter, grandfather of Russell V. Carter, father of Harrison W. Carter, and the grandfather of the other defendants, except the Reserve Gas Company and the wife of Harrison W. Carter, reposing more confidence in the business capacity of two of his sons than was due them, executed three deeds, in each of which he provided for a life estate and a remainder in fee. Deeming himself to have reacquired what he conveyed by the first, he executed the second; and, supposing himself to have reacquired what was conveyed by it, he executed a third, under which the plaintiffs claim. The theories of the defense are that he never reacquired the remainders created by the first deed, and that, if he did, the one created by the second never came back to him. By the first deed, dated April 5, 1856, he and his wife conveyed the land to George J. Carter and Harrison W. Carter, his sons, in this way:

"To have and to hold the lands as long as they, the said parties of the second part, shall live, with a remainder to their heirs forever, and, in case of the death of either of the said

parties of the second part, said land shall be vested in the other of said parties during his life, with remainder as aforesaid."

A part of the consideration for this conveyance was the agreement of the grantees to pay to Tilton T. Carter, the youngest son of the grantor, \$600 on his attaining the age of 21 years, if he should live to that age. In case of his death under that age, they were relieved from this obligation. The deed also reserved to the grantor and his wife a life estate in the land. Tilton T. Carter having attained the age of 21 years, and George J. Carter having left the state, without payment of any portion of the \$600, the grantor instituted a suit in equity against George J. Carter, in which such proceedings were had that the latter's interest in the land was sold, and conveyed to George F. Carter by a special commissioner, March 18, 1871. Harrison W. Carter reconveyed to his father all the right, title, and interest he had in the land, by a deed dated March 24, 1871. About two years later, March 28, 1873, George F. Carter, believing himself to be the owner of the land, conveyed it to Harrison W. Carter, in consideration of \$1 and the covenant of the grantee comfortably to maintain and support the grantor and his wife, on the land, during their lives, and upon condition that he should do so. The clause imposing this condition and defining the estate granted reads as follows:

"It being expressly understood that this conveyance is made by the party of the first part to the party of the second part on the conditions aforesaid, and that the said party of the second part is not to sell or dispose of the said property, but is to hold the same for the purpose aforesaid; and to be held and enjoyed by said party of the second part, during his life, and at his death to descend to his heirs. The said party of the first part, in consideration of the said party of the second part performing the conditions aforesaid, grants," etc.

By a deed dated July 17, 1873, Harrison W. Carter reconveyed the land to George F. Carter, reciting, as the occasion and consideration thereof, dissatisfaction of the parties with the arrangement provided for by the deed of March 28, 1873, and their mutual desire to revoke and annul that deed. About six months thereafter, January 7, 1874, George F. Carter conveyed the land to Tilton T. Carter for his life, with a remainder in fee to his son, if he should have one, and, if not, to his daughters, for and in consideration of \$2,000, \$1,500 of which had been paid, and the residue of which was represented by two promissory notes for \$250 each. The grantor reserved to himself a life estate in the land, and provided for a gift over to John and Arthur Sullivan, in the event of the death of Tilton T. Carter without issue.

Treating the provision of the deed of April 5, 1856, for the heirs of George J. Carter

and H. W. Carter, as remainders in fee to them, counsel for the appellees insist that the reconveyances to George F. Carter, one by the special commissioner in the chancery cause, and the other by Harrison W. Carter, carried back to him only the estates for life created by that deed; that his subsequent conveyance to Harrison W. Carter passed nothing more than a life estate; that Harrison W. Carter's conveyance to George F. carried only a life estate; that George F.'s deed to Tilton T. Carter conveyed only estates for the lives of George J. and Harrison, the latter of whom is still living. George J. Carter died, leaving one son, Arthur B. Carter, who by a deed dated September 15, 1909, granted all of his right, title, and interest in the land to Harrison W. Carter, Sarah J. Carter, and Cynthia Morrison, wife and daughter, respectively, of Harrison. The claim is that by this deed they acquired the remainder in fee in one moiety of the land, and that title to the remainder in fee in the other is vested in Cynthia Morrison and L. H. Carter, the only children of Harrison W. Carter, one-half of which, being one-fourth of the entire tract, was conveyed, as to the oil and gas, to the Reserve Gas Company by L. H. Carter, by a deed dated June 5, 1909.

[1-3] Neither questioning nor denying the use of the word "heirs" in its technical sense, in the deed of 1856, counsel for all parties virtually agree that the words making provision for heirs therein are, by the common law, words of limitation, and that the deed would vest in the grantees fee-simple estates in the land. As to this the authorities are clear, however. 2 Min. Inst. (2d Ed.) 343; 2 Wash. Real Prop. 649; Fearne's Rem. 30, 33. The controversy, as regards the effect of this deed, arises over the interpretation of the statute (section 11 of chapter 71 of the Code [sec. 3749]), modifying or abolishing the famous common-law proposition, known as the rule in Shelley's Case, the application of which would have produced this result. For the appellant it is insisted that the statute is not broad enough in its terms to take this provision out of the operation of that rule. The contention is that there are three classes of cases falling within its operation, to which the statute does not extend: (1) A conveyance on a valuable consideration to a life tenant, with a remainder in fee to his heirs; (2) a conveyance to a person for the life of another, with such a remainder; and (3) a conveyance to a person for life, with a remainder mediately, not immediately, to his heirs—and that this deed is within all of the omitted classes.

The statute reads as follows:

"Where any estate, real or personal is given by deed or will to any person for his life, and after his death to his heirs, or to the heirs of

his body, the conveyance shall be construed to vest an estate for life only in such person, and a remainder in fee simple in his heirs or the heirs of his body."

It first appeared in the Code of 1849. Deeming it to be defective in these respects, in view of criticism made by Dr. Minor—2 Min. Inst. (4th Ed.) 411—and other high authorities, the Legislature of Virginia amended it. Virginia Code of 1887, § 2423. But in this state it remains in its original form. Dr. Minor intimates that it was adopted from a New York statute, but it more nearly resembles the Massachusetts statute.

Being in derogation of the common law and pertaining to property rights, it falls under the rule of strict construction. Bank of Weston v. Thomas, 75 W. Va. 321, 83 S. E. 985; Harrison v. Leach, 4 W. Va. 383; Davis v. Commonwealth, 17 Grat. (Va.) 617; Woodward v. Alston, 12 Helsk. (Tenn.) 581; Ex parte Buckley, 53 Ala. 42. Dr. Minor's criticisms of this statute are no doubt founded largely upon the application of this rule of interpretation. His construction agrees with that of some other text-writers.

"It may be questioned whether many of these statutes are comprehensive enough to accomplish their object. Thus the rule applies where the ancestor takes an estate of freehold, with remainder to his heirs, etc.; while many of the statutes abolishing it only embrace by their terms those cases where the ancestor's estate is for his life. The terms of these statutes, therefore, would not be applicable where the prior estate is to the ancestor for the life of another, nor, indeed, where he takes any freehold estate save only for his own life." 25 Am. & Ency. L. 663.

This rule of construction, however, does not require the words of a statute to be taken in their narrowest sense, nor in any particular sense, if they will bear such construction or interpretation as will effectuate the legislative intention. United States v. Hartwell, 6 Wall. 385, 18 L. Ed. 830. Effect must be given to the plain meaning of the language. Bolles v. Outing Co., 175 U. S. 262, 20 Sup. Ct. 94, 44 L. Ed. 156; United States v. Winn, 3 Sumn. 209, Fed. Cas. No. 16740. Such a statute includes what is within its spirit and terms, or a necessary implication arising from its purpose and terms, and nothing more. Bank of Weston v. Thomas, 75 W. Va. 321, 83 S. E. 985; Thompson v. Weller, 85 Ill. 197; Carpenter v. Mitchell, 50 Ill. 471; Lewis' Suth. Stat. Con. (2d Ed.) §§ 568, 573.

[7] Inasmuch as the word "given," used in the statute, has both a technical and a popular meaning, the presumption is that it was used in its popular sense. Mitchell v. Blanchard, 72 Vt. 85, 47 Atl. 98; State v. Jacksonville Terminal Co., 41 Fla. 363, 27 South. 221; Holman v. School District, 77 Mich. 605, 43 N. W. 996, 6 L. R. A. 534;

Southern Bell Tel. & Tel. Co. v. D'Alemberte, 39 Fla. 25, 21 South. 570. The principal requirement of the rule of strict construction is that the effect given to a statute shall not extend beyond the terms used in it. To allow this statute effect, in the case of a conveyance for valuable consideration, does not violate the rule in this respect. The legislative purpose was modification of the rule in Shelley's Case, in the construction of both deeds and wills. The term "given" was used in the sense of "conferred," "passed," "conveyed," and the like, and for convenience. Such a conveyance is therefore within both the spirit and the terms of the statute. Strict construction of a statute as a whole does not preclude liberal interpretation of some of the terms actually used, to the end that the legislative purpose may be accomplished, and necessary implications arising from the context and other terms carried out.

The terms of the statute accord with a form of grant, bequest, and devise very frequently and generally used from time immemorial, for establishment of certain relations between persons and property, creation of a life estate and a remainder in fee or fee tail to the heirs of the life tenant, immediately and directly after his life estate. There are other forms in which a second life estate is interposed between that of the first taker and right of possession in the remainderman, or in which the first taker is given an estate for the life of a third person. They are equally common and well known in conveyancing, but the Legislature has seen fit so to limit the terms of the statute that they literally apply only to the case of a grant, bequest, or devise to a person for his life, and after his death to his heirs or the heirs of his body. Such a gift or grant is manifestly not the same in character as one to a person for his life, and after his death to another for life and then to the heirs of the first life tenant. If it had been the legislative purpose wholly to abrogate the common-law rule, it could have been abolished by name, for it was well known, or by the use of terms broad enough to include every case falling within it.

Failure to adopt either of the two perfectly plain courses, and the use of terms limited to one class of limitations falling within the rule, argue strongly against intent to effect total abrogation. Statutes so dealing with the rule are universally construed as having modified it, and as not having wholly abolished it. Under the Rhode Island statute, which abolishes the rule in Shelley's Case in any instance in which a person takes an estate for his life, with a remainder in fee to his heirs, the court declined to apply it in any case in which, after a life estate, there was a limitation to the heirs of the body of the first taker. Manchester v. Durfee, 5 R. I. 549; Thurston v. Thurston, 6 R. I. 296;



Cooper v. Cooper, 6 R. I. 261; Andrews v. Lowthrop, 17 R. I. 60, 20 Atl. 97. The New Jersey statute relating to the subject, though much more elaborate in its terms than ours, is held, under the rule of strict construction, not to have wholly abolished the common-law rule, nor to extend beyond its clear terms. *Zabriskie v. Wood*, 23 N. J. Eq. 541; *Lippincott v. Davis*, 59 N. J. Law, 241, 28 Atl. 587; *Lamprey v. Whitehead*, 64 N. J. Eq. 408, 54 Atl. 873.

Under the New York statute (section 54, art. 3, c. 50, Cons. Laws 1909), the courts of that state hold that, under a deed like the one in question here, the words of limitation to the heirs are words of purchase. *Monarque v. Monarque*, 80 N. Y. 320; *Surdam v. Cornell*, 116 N. Y. 305, 22 N. E. 450. That interpretation, however, would fall within the terms of the New York statute, which does not define the life estate as ours does. It provides that if a remainder is limited to the heirs, or the heirs of the body, of a person to whom a life estate (any life estate) in the same premises is given, the persons who, on the termination of the life estate, are the heirs, or heirs of the body, of such tenant for life, shall take as purchasers. It is obvious that these terms do not contemplate a single life estate, with a remainder immediately limited upon it, as ours does. Under them, only two things are required, termination of a life estate and a remainder to heirs of the life tenant. Our statute, measured by its terms, contemplates immediate connection between the life estate and the remainder. Fairly interpreted, they exclude dispositions of a different kind, and, obviously, they do not include them by necessary or clear implication.

The deed now under consideration gave to the life tenants a joint estate in the land, for their lives, with the right of survivorship, and remainders in fee to their heirs. The statute saves a right of survivorship expressly created by deed or will. Code, c. 71, § 19 (sec. 3757). Under the rule in *Shelley's Case*, the deed vested estates in fee simple in Geo. J. and Harrison W. Carter. 2 Min. Inst. (2d Ed.) 346. The life tenants were seized per mie et per tout. Each of them had a concurrent interest in the whole of the land, not a life estate in a moiety of it, and it could not be divested by the death of his companion. Bl. Com. bk. 2, p. 184. In consequence of this, the heirs of one might or might not have taken immediately after him. It was certain that one set would so take and that the other would not, but altogether uncertain which set of heirs would be in either situation. The statute contemplates a taking by a person for his life and after his death by his heirs. Here one set of heirs were bound to take after a person of whom they were not heirs. Hence the case does not fall within the

terms of the statute, even though it may be within its spirit.

Against this conclusion the decision in *Irvin v. Stover*, 67 W. Va. 356, 67 S. E. 1119, is invoked as a precedent; but that decision proceeds upon the theory of a single life estate in the whole of the land, the life tenants being husband and wife, and each taking a life estate by entirety. They being, in contemplation of law, one person, there was technically and legally only one life estate, and the remainder was given immediately after it to the heirs of the life tenant. If an estate be given to a husband and wife together, they are not, at common law, either joint tenants or tenants in common. Both are seized of the entirety, per tout et non per mie. Bl. Com. bk. 2, p. 182. It is still so in the case of a life estate given to them. *Irvin v. Stover*, cited. Here there could have been no such life estate. The life tenants did not bear the relation essential to the creation of an estate by entirety. Our conclusion on this branch of the case is that George J. Carter and Harrison W. Carter took by the deed of 1856 estates in fee simple, which afterwards were reacquired by the grantor.

[4-6] All of the estates created by the deed of March 28, 1873, were conditional, and dependent for their future existence upon performance of the condition subsequent, rendition of care, attention, support, and maintenance to the grantors. It cannot be assumed logically that only the life estate was to be paid for by performance of this condition and the remainder in fee was to be a mere gratuity. Both were disposed of upon the same consideration, and maintenance of a hold upon both was essential to the protection of the grantor's right of support. That condition was never performed. Within less than four months, Harrison W. Carter reconveyed the land to his father, who had never been out of possession thereof. It is said there is no evidence of Harrison's failure to perform, since the deed of reconveyance does not recite it. On the contrary, it is said the deed on its face reveals mere mutual dissatisfaction and a cash consideration of \$400 as the motive of the reconveyance, and that, in point of law and fact, the transaction was a purchase by George J. Carter. We are of the opinion, however, that it was a rescission, on failure of performance of the condition. This is the only reasonable deduction from the facts disclosed by the deed, and the demurrer does not carry our inquiry beyond it. Harrison had the title for nothing but his covenant. In lieu of performance, he reconveyed for a release from the covenant and \$400 in cash. The result was infinitely worse than mere nonperformance. The deed of March 28, 1873, contains no forfeiture clause, nor any clause of re-entry; but such clauses are not essential

to the right of rescission in such cases. *Glocke v. Glocke*, 113 Wis. 303, 89 N. W. 118, 57 L. R. A. 458; *White v. Bailey*, 65 W. Va. 573, 64 S. E. 1019, 23 L. R. A. (N. S.) 232. For nonperformance of the condition there was a right of forfeiture, which the grantor could enforce by re-entry, if necessary, and which a court of equity would have protected by a decree quieting the title and canceling the deed. As the grantor was in possession, no re-entry was required or possible, and resort to a court of equity was rendered unnecessary by the reconveyance.

Intent to vest a fee-simple estate in Harrison W. Carter cannot be inferred from the use of the words "to descend," in this deed, for they must be considered in connection with their context. Harrison's estate is expressly limited to the duration of his life. The deed says the property is "to be held and enjoyed" by him "during his life." If this informal clause may be treated as an habendum, it limits the grant to one for life, for the premises grant the land in general terms. In such case, the estate is limited and defined by an habendum saying the grantee shall hold for life. *Freudenberger Oil Co. v. Simmons*, 75 W. Va. 337, 341, 83 S. E. 995, Ann Cas. 1918A, 873; 2 Min. Inst. (2d Ed.) 629; 2 Lomax, Dig. 215; *Humphrey v. Foster*, 13 Grat. (Va.) 653. If it is to be regarded as a part of the premises, the limitation is still more obvious. These express terms are not overthrown nor qualified by any presumption that the words "to descend" were used in their technical sense. A mere presumption always yields to the force of express words of negative import.

Nor does the inhibition of sale or disposition of the property clearly or conclusively import intention to grant a fee-simple title. It may have been intended to apply to a mere life estate as well as to a fee-simple estate. In some cases the word "descend" in wills and deeds has been allowed a strongly persuasive influence, in the interpretation of ambiguous or doubtful provisions found in other parts of the instruments or to resolve a doubt as to the intent expressed by an entire instrument. *Chippis v. Hall*, 23 W. Va. 504; *Browning, Petitioner*, 16 R. I. 441, 16 Atl. 717, 3 L. R. A. 209; *Eaton v. Tillinghast*, 4 R. I. 276; *Taney v. Fahmley*, 126 Ind. 88, 25 N. E. 882. In most, if not all, of these cases, it was invoked and applied in aid or enforcement of the theory of the vesting of fee-simple estates under the rule in *Shelley's Case*, with which it harmonized. There are many other cases in which it has been held to have been used in its common or ordinary sense, and to have meant the same as the word "go" or "pass." *Borgner v. Brown*, 133 Ind. 391, 33 N. E. 92; *Doren v. Gillum*, 136 Ind. 134, 35 N. E. 1101; *Halstead v. Hall*, 60 Md. 209; *Tate v. Townsend*, 61

Miss. 316; *Jones v. Crawley*, 68 Ga. 175; *Moore v. Weaver*, 16 Gray (Mass.) 305. That is the sense in which it was used in this deed, wherefore the deed vested a life estate in Harrison and a remainder in fee in his heirs, all of which failed by reason of non-performance of the condition subsequent, unless the case differs from what the bills and exhibits purport to make it.

The cause was argued here as if it had been disposed of upon full hearing. Two answers were filed, one of which was brought up as part of the record. The court below dismissed the original and first, second, and third amended bills. Nevertheless the final decree was pronounced on the demurrers to the third amended bill. It did not, in terms nor otherwise, so far as the record discloses, bring the cause on to be heard upon the answers, though they had been filed. Except in so far as it dismissed the bills, it was interlocutory, and was limited to the law arising only upon the allegations of the bills. It retained the answers for the purpose of awarding affirmative relief to the defendants, after dismissal of the bills, on the theory that the latter had fallen by reason of their own infirmities, not because their allegations had been refuted by the answers and proof. Obviously, therefore, the case as presented here does not justify the entry of a final decree. Our order will reverse the decree complained of, and the order of June 5, 1915, sustaining demurrers to the first amended and supplemental bill, overrule the demurrers to the first, second, and third amended bills, remand the cause, and award costs in this court to the appellants.

(85 W. Va. 25)

SIMMONS et al. v. SIMMONS et al.

(Supreme Court of Appeals of West Virginia.  
Oct. 21, 1919.)

*(Syllabus by the Court.)*

1. WILLS §311—IN CONTEST ON ISSUE DEVISAVIT VEL NON JURISDICTION ENDS ON DECREE.

In a suit to contest a will and upon an issue devisavit vel non the jurisdiction of the court ends with the decree adjudicating that issue.

2. ARBITRATION AND AWARD §57—CONFIRMATION OF AWARD OUTSIDE THE ISSUE, AND DECREE VOID.

Where the issue in such suit upon the petition of guardians for infants, filed pursuant to section 5 of chapter 108 of the Code (sec. 4504), is submitted to arbitration, the arbitrators have no authority or jurisdiction to go outside of the issue submitted, and their award beyond such issue and any decree confirming the same are absolutely void and of no effect.

**3. VENDOR AND PURCHASER ⇨240—DEFENSE OF INNOCENT PURCHASER MUST BE PLEADED.**

The defense of innocent purchaser without notice is an affirmative one and to be availing must be pleaded.

**4. VENDOR AND PURCHASER ⇨231(2) — PURCHASER BOUND TO TAKE NOTICE OF RECORD.**

Generally whatever is sufficient on the face of the record of title to land to direct a purchaser's attention to the prior rights and equities of third persons will put him upon an inquiry and will amount to notice to him. He is bound to take notice of everything disclosed by the record.

**5. LIS PENDENS ⇨11(2)—TO BE PROTECTED AS BONA FIDE PURCHASER UNDER JUDICIAL DECREE, COURT MUST HAVE HAD JURISDICTION.**

To be protected as an innocent purchaser from one who has purchased under a judicial decree and before appeal or suit to avoid the decree, upon principles enunciated in *Perkins v. Pfalzgraff*, 60 W. Va. 121, 53 S. E. 913, and *Dunfee v. Childs*, 59 W. Va. 225, 53 S. E. 209, the court pronouncing the decree must have the capacity, and by proper pleadings and proof must have acquired jurisdiction, to pronounce the decree.

**6. GUARDIAN AND WARD ⇨59 — COMPROMISE BY GUARDIANS MUST HAVE JUDICIAL SANCTION.**

To make a compromise by guardians effective against their wards in any case the judicial sanction thereof must be upon a real and not a perfunctory hearing. If such hearing is only formal and intended solely to employ the functions of the court to give validity to the prior agreement, it may be set aside.

**7. REFERENCE ⇨18—CONDITIONS PRECEDENT TO VACATION OF AWARD AGAINST INFANTS.**

In a suit to set aside an award against infants made in suits contesting the validity of a will and deed, purporting to have been had pursuant to chapter 108 of the Code (secs. 4500-4504), and the decree affirming such award, it is error on setting aside such award and decree, in advance of an adjudication of the issues involved in the contest suits to finally adjudicate the rights of the parties and refer the cause to a commissioner for a settlement of the rents, issues and profits to which plaintiffs may be entitled. Such reference is premature.

(Additional Syllabus by Editorial Staff.)

**8. ARBITRATION AND AWARD ⇨78 — DECREE SETTING ASIDE AWARD WITHOUT PREJUDICE REINSTATEMENT ORIGINAL SUIT.**

In suit to set aside an award against infants, made in suits contesting the validity of a will and deed, purporting to have been had pursuant to Code, c. 108 (secs. 4500-4504), and the decree affirming such award, decree setting aside the award and the decree affirming it without prejudice to defendants, plaintiffs in the original suits, to proceed as advised to attack the will and deed, effected a reinstatement of the original causes on the docket for trial.

**9. ARBITRATION AND AWARD ⇨82(6)—DECREE ON AWARD CONCLUSIVE OF CONTROVERSY.**

Upon a petition pursuant to Code, c. 108, § 5 (sec. 4504), the result of favorable action would submit the suit or controversy to arbitration, and the judgment or decree on the award necessarily determines such suit or controversy, and should be so construed.

**10. ARBITRATION AND AWARD ⇨78—IN SUIT TO VACATE AWARD, WRIT OF POSSESSION PROPERLY GRANTED.**

In suit to set aside an award against infants, made in suits contesting the validity of a will and deed, purporting to have been had pursuant to Code, c. 108 (secs. 4500-4504), and the decree affirming such an award, the court, on finding for plaintiffs, properly gave them a writ of possession in advance of the adjudication of their rights upon the issue *deviseavit vel non* involved in the original suits.

**11. ARBITRATION AND AWARD ⇨78—NECESSITY OF REPAYMENT IN SUIT TO VACATE AWARD AGAINST INFANTS.**

In such suit, the rights of the plaintiffs could not be in any way conditioned upon repayment of the amount paid by the beneficiaries on the award, of which neither the infants nor their guardians received any part, where there was no request by defendants herein for such order.

**12. ARBITRATION AND AWARD ⇨78—ALLOWANCE OF RENTS AND PROFITS IN SUIT TO VACATE AWARD AGAINST INFANTS.**

In such suit, wherein defendants made no claim for improvements or taxes paid, there was no error in not decreeing permanent improvements, in view of Code, c. 90, § 32 (sec. 4100).

**13. ARBITRATION AND AWARD ⇨78—NECESSARY PARTIES IN SUIT TO VACATE AWARD AGAINST INFANTS.**

In such suit, where all the persons who were parties to the arbitration suit were parties to the bills and cross-bill herein, and all persons claiming under the award and decree were properly impleaded and brought into the suit, there was no defect of parties.

**14. WILLS ⇨421 — JUDGMENT OF PROBATE CANNOT BE COLLATERALLY ATTACKED.**

In the case of wills, the judgment of probate has the force of an adjudication in rem, and is conclusive until set aside in the manner provided by law, and it cannot be collaterally attacked.

Appeal from Circuit Court, Roane County.

Suit by Earle Simmons against W. S. Simmons, Susan Simmons (now Rader), and Lula A. Simmons, with answer and cross-bill by them against W. S. Simmons and others, interpleaded defendants. Decree for plaintiff and defendants Susan Rader and Lula A. Simmons, referring cause to a commissioner for an accounting of rents and profits, and defendants W. S. Simmons and others appeal. Reversed as to the reference, and otherwise affirmed.

Geo. F. Cunningham, of Spencer, Warren Miller, of Ripley, Chas. E. Hogg, of Point Pleasant, S. M. Williamson, of Waynesburg, Pa., and Pendleton, Mathews & Bell, of Point Pleasant, for appellants.

Ryan & Boggess and Harper & Baker, all of Spencer, Smith D. Turner, of Parkersburg, and Geo. E. Price, of Charleston, for appellees.

**MILLER, P.** The common object of the original and two amended and supplemental bills filed by the plaintiff Earle Simmons and of the answer and cross-bill filed for and on behalf of Susan Simmons and Lula A. Simmons against the defendants interpleaded therein, was to show cause against and have removed as clouds upon their title to the home farm of the late James M. Simmons, their father, given them by his will, two certain decrees made on April 8, 1902, in a certain suit or proceeding purporting to have been begun and prosecuted by petition on behalf of the plaintiff Earle Simmons by H. D. Wells, his guardian, and on behalf of the respondents and cross-bill plaintiffs by P. A. Tallman, their guardian, and by J. P. Thomasson, committee for their mother Minnie B. Simmons, then an insane person, in the circuit court of Roane county, and also certain deeds and leases depending thereon and under which other of the defendants impleaded claimed right and title to said farm or parts thereof. Said petition named no parties defendants, but in the decrees made thereon the case is styled in the name of petitioners versus Z. T. Simmons, W. S. Simmons, M. F. Simmons, F. M. Simmons, G. B. Simmons, T. R. Simmons, Virena Vandevender, Mary E. Ferrell, and said Minnie B. Simmons, an insane person, and Lula A. Simmons, Susan Simmons and Earle Simmons, infants, defendants.

The petition showed that the adults named therein, except the said Minnie B. Simmons, were plaintiffs and contestants, and the said Minnie B. Simmons, widow, and petitioners were defendants and contestees in two certain suits then pending in the said circuit court, the object of one of which suits was to set aside the will, the other the deed of said James M. Simmons, both instruments having been made and executed by the testator and grantor on the same day. The petition also showed that in the suit to contest the will of the testator an issue devisavit vel non had been awarded and that issue had also been made up in the other suit to set aside said deed.

By the first of the decrees made on the petition it was adjudged, ordered and decreed that all the matters involved in said two suits be and the same were thereby referred to the consideration and arbitration of the three arbitrators named therein who were directed to hear proof and consider the pleadings and evidence taken in said two suits and adjust the matters in difference then between the

parties thereto and make report of their proceedings thereunder to the court.

The second of said decrees, confirming the report of said arbitrators, copied bodily into the decree and in strict accordance therewith, was that the said Z. T. Simmons and others, the contestants, do take and hold free of all claims of the said Minnie B. Simmons, Susan Simmons, Lula A. Simmons and Earle Simmons the tract of land lying in Smithfield district known as the James M. Simmons home farm and containing about one thousand acres; that they also take and hold the farm known as the Flat Fork Farm described in said will and deed; and that they do within thirty days from the date of the decree pay to J. B. Thomasson, committee of the said Minnie B. Simmons, the sum of three thousand dollars for the use and benefit of his insane ward, and that they do release all other rights, devises and bequests given to each of them under said will, and that in all other regards the said will and deed do stand and remain in full force and effect.

The decrees and proceedings sought to be set aside by the present suit purport to have been had and taken pursuant to section 5 of chapter 108 of the Code (sec. 4504), relating to arbitration. The present bills and cross-bill are predicated on the rights reserved in section 4 of said chapter (sec. 4503) to set aside awards for errors apparent or when procured by corruption or other undue means, or by mistake, or when there has been misbehavior in the arbitrators and the power of courts of equity over awards generally reserved by said section, and also upon the rights given infants by section 7 of chapter 132 of the Code (sec. 4941), within six months after attaining the age of twenty-one years to show cause against said decrees regardless of the provisions of section 4 thereof, which latter section gives the same validity to decrees executed pursuant to judicial decrees and orders on behalf of others as if executed by the parties themselves. So there can be no doubt of the right of plaintiffs to maintain this suit and obtain relief if sufficient cause has been shown therefor in the bills.

The bills and answers thereto are elaborate pleadings. The bills challenge the validity of the decrees and proceedings upon said petition, upon several grounds; first, that the award was void because the arbitrators exceeded their powers in undertaking to partition the home farm to the contestants of the will, when the questions submitted to them were limited to the issues in said two suits, whether the will and deed were the will and deed of said testator and grantor; second, because the judgment on said award was pronounced without a rule to show cause against it at the first term of the court after the parties had been summoned, as required by section 4 of chapter 108 of the Code; third, that said section 5 of chapter 108 conferred

no power or jurisdiction upon the court to authorize the guardians to arbitrate the title of the infants to the home farm given them by the will of the testator; fourth, that the award and the whole arbitration proceedings were a nullity for want of jurisdiction of the infants in the arbitration proceeding, as they were not made parties thereto; fifth, because of the misconduct of the arbitrators in failing to give notice of the time and place of hearing, to hold meetings for hearing, to take evidence as required by the order of submission, and because they adopted an award prepared for them by the attorneys for Thomasson and the older set of children; sixth, because the arbitrators themselves did not consider the evidence or act as triers of either the law or the fact, and were mere dummies to cover up a compromise already made between Thomasson and the other set of children, contestants, as agreed; seventh, that on the whole record the award was a gross fraud upon the infants and the result of an unconscientious, inequitable and fraudulent bargain between the contestants of the will and the said Thomasson and the guardians of said infants.

By demurrers and answers appellants question the sufficiency of the bills as bills to review the prior decrees and proceedings in the two suits instituted by them to set aside the will and deed, on several grounds, among them that neither the contents nor the substance of these proceedings are set forth therein, nor any excuse given for not doing so, and generally that the other facts alleged and relied on amount to conclusions and innuendoes.

The reply made to these points is that appellants have misconceived the purpose and scope of the present bills, and besides that all of the proceedings so far as existent were made part of the bill by reference thereto. The allegations and proof respecting the same are that the papers in these suits for the most part had been lost or were unobtainable, and moreover that no final orders or decrees had been entered therein reviewable on petition or bill by anyone, except in so far as the final order or decree made upon the petition in said arbitration proceedings ordered said former suits "dismissed agreed."

We have given very careful consideration to all the many questions presented by the very able and elaborate briefs of learned counsel on both sides of the controversy, but having reached the conclusion that the rights of the parties, including those of the defendants invoking protection as innocent purchasers without notice, depend on the following comprehensive propositions applicable to the facts pleaded and established by proof, in affirming the decree below giving to plaintiffs the decree prayed for, it will be unnecessary to respond to any of the many other propositions sought to be presented by the record.

These propositions are, that the only questions presented by the pleadings in the two original suits and within the jurisdiction of the court to decide and the only questions presented to the arbitrators in the arbitration suit or that could have been lawfully submitted to them was whether the will or deed involved or any part or parts thereof was the will or deed of the testator or grantor; that no power was conferred or could have been conferred on the arbitrators to go outside of the issues involved in these suits to otherwise settle or compromise the rights of the infants to whom the home farm had been devised by said will; that if the will or deed was valid the estate of the testator or grantor would go as devised or granted, if invalid it would go according to the law of descents and distributions.

[1] It is well settled by our decisions that upon an issue *devisavit vel non* the jurisdiction of the court ends with the decree adjudicating that issue, and that it has no power or authority therein to grant any other relief. *Coffman v. Hedrick*, 32 W. Va. 119, 9 S. E. 65; *Dower v. Church*, 21 W. Va. 23; *Couch v. Eastham*, 27 W. Va. 796, 55 Am. Rep. 346; *Ward v. Brown*, 53 W. Va. 227, 44 S. E. 488; *Mathews v. Tyree*, 53 W. Va. 298, 44 S. E. 526; *Childers v. Milam*, 68 W. Va. 503, 504, 505, 70 S. E. 118 and cases cited.

[2] And nothing is better settled in this state or elsewhere than that arbitrators cannot go outside of the order or contract of submission, and that their award beyond the submission, is absolutely void and of no effect. *Hines v. Fisher*, 61 W. Va. 565, 56 S. E. 904; *Insurance Co. v. Board of Education*, 49 W. Va. 360, 38 S. E. 679; *Goff v. Goff*, 78 W. Va. 423, 89 S. E. 9; *Raleigh Coal & Coke Co. v. Mankin*, 83 W. Va. 54, 97 S. E. 299; *Morse on Arbitration and Award*, 181-183.

In the case presented here the arbitrators made no response to the issues in the suits referred to them, but went wholly outside thereof and undertook to award to the contestants in said suits the land given the infants by the will. Where can authority or jurisdiction be found for such procedure? It is alleged, proven and nowhere denied, in fact it is admitted by those who were the actors in presenting and prosecuting the arbitration suit, that the proceeding was an invention to accomplish by indirection what the guardians of the infants and those cooperating with them could not do directly, namely to compromise the infants' rights by the semblance of an arbitration suit begun and prosecuted under section 5 of chapter 108 of the Code. The agreement of compromise preceded those proceedings, and it is manifest from the result that the interests of the infants were not in good faith or properly defended by any one. It is substantially demonstrated by the record that the infants

would have fared much better, by eight or nine thousand dollars, if they had gone undefended and the arbitrators had found the issue *devisavit vel non* in favor of the contestants. The home farm devised to them was estimated to be worth from twenty to twenty-nine thousand dollars, and if the will and deed had been adjudged invalid they would have shared with the others in the whole of the testator's estate, including the farm.

It is argued that the effect of the report of the arbitrators was to find that so much of the will as gave the home farm to the infants was invalid and the residue thereof the valid will of the testator. For the sake of argument let this be conceded; but would that finding have given the farm to the contestants? Certainly not; it would have gone to the heirs of the testator, not to the contestants. The will did not give it to them.

[3-5] As to those who were actors and parties in the previous suits there can be no question that their right and title falls with the affirmance of the decree. But are any of the other defendants protected as innocent purchasers? Some answered defending as such; others made no defense. The defense of innocent purchaser without notice is an affirmative one and must be pleaded. *Lohr v. George*, 65 W. Va. 241, 248, 64 S. E. 609; *Bowly v. De Witt*, 47 W. Va. 323, 327, 34 S. E. 919, and authorities cited. The decree does not undertake to set aside and remove as clouds the orders and decrees in the arbitration proceedings and the subsequent deeds and leases on the land except as they affect the right and title of the plaintiffs, and it should be so interpreted. If plaintiffs are entitled to the real estate under the will, the decree of course will go to their whole estate, but if the will shall be adjudged invalid, the decree will protect plaintiffs only to the extent of their rights and interests as heirs.

But can it be said upon reason or authority that any of the defendants were innocent purchasers without notice? The general rule is that whatever is sufficient to direct the attention of the purchaser to prior rights and equities of third persons so as to put him on inquiry to ascertain their nature, will operate as notice to him. *Diehl v. Middle States Loan, etc., Co.*, 72 W. Va. 74, 77 S. E. 549. Here and in Virginia it is held that a purchaser whose title depends on a decree is bound to take notice of everything disclosed by the record. *Saffell v. Orr*, 109 Va. 768, 775, 64 S. E. 1057; *Waldron v. Harvey*, 54 W. Va. 608, 620, 46 S. E. 603, 102 Am. St. Rep. 959; *Hoback v. Miller*, 44 W. Va. 635, 640, 29 S. E. 1014; *Oneal v. Stimson*, 61 W. Va. 551, 557, 56 S. E. 889; *Conrad v. Crouch*, 68 W. Va. 378, 385, 69 S. E. 888; *Williamson v. Jones*, 43 W. Va. 562, 574, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891.

But are any of the defendants innocent

purchasers without notice upon the principles enunciated in *Perkins v. Pfalzgraff*, 60 W. Va. 121, 53 S. E. 913? The correctness of that decision is challenged so far as it involves the rights of infants under section 7, chapter 132 of the Code. We cannot agree with counsel that that case ought to be overruled; it is well supported by the authorities. The same rule is laid down in *Dunfee v. Childs*, 59 W. Va. 225, 53 S. E. 209, syl. 8. But we do not think those cases control this case, indeed quite the contrary, for it is held in *Perkins v. Pfalzgraff* that a decree to be valid must be based on proper pleadings, without which it is void. There was no question in that case as to the jurisdiction of the court depending on pleading and process. The holding was that one who purchases land from a party who held under a decree afterwards reversed is not affected by such reversal if he was a complete purchaser. We hold in this case that the court acquired no jurisdiction, because of want of pleadings sufficient to justify the decree made upon the award of the arbitrators. It is well settled that in order to acquire jurisdiction to pronounce a valid decree or judgment the court must have not only the capacity to hear and determine causes of a class to which a given cause belongs, but actual cognizance of it, obtained by requisite process and pleadings. *Ensign Co. v. Carroll*, 30 W. Va. 532, 4 S. E. 782; *Railway Co. v. Wright*, 50 W. Va. 653, 41 S. E. 147; *Penna. R. R. Co. v. Rogers*, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 173; *Moore v. Holt*, 55 W. Va. 507, 510, 47 S. E. 251.

[8, 9] A number of other points are relied on to reverse the decree. One is that the circuit court in setting aside the award in the arbitration suit and the decree confirming it should have re-established the status quo by reinstating on the docket the original suits contesting the will and deed. It does not appear from the record that appellants made any such request in the court below. But the court of its own motion adjudged that said decree should be without prejudice to the defendants, who were plaintiffs in the original suits, to institute such proceedings as they might be advised, to attack said will and deed. The effect of this decree must be regarded as reinstating the original causes on the docket for trial. It is contended that the petition filed by the guardians for the infants and the committee for the insane wife was a separate and independent suit or proceeding, and that the order therein dismissing the original suits was not an order or decree in those causes. We do not concur in this view. Upon a petition pursuant to section 5, chapter 108, the result of favorable action thereon would submit the suit or controversy to arbitration, and the judgment or decree on the award would necessarily determine such suit or controversy, and should be so construed. Certainly this would be the result of

a submission by the parties under section 1 of said chapter (sec. 4500), and why not the proceedings of guardians or committees, under section 5 of that chapter?

[10] Another point is that the court should not have given to plaintiffs a writ of possession in advance of the adjudication of their rights upon the issue *devisavit vel non* involved in the original suits. But were not the plaintiffs entitled to be restored to the possession taken from them by the decree or order made upon the award against them? What rights can any of the appellants have as against the plaintiffs in this suit to hold possession against them under a void decree? Of course their rights to the whole tract depend on the validity of the will and until finally adjudicated are *prima facie* only. If conditions have arisen or shall arise pending the litigation calling for the preservation of the property from waste, the law affords adequate relief against such waste.

[11] Another point is that the court should have decreed a return of the three thousand dollars paid by the beneficiaries of the award, the older children, to Minnie B. Simmons. As neither the infants nor their guardians received any part of that sum and there was no request on the part of the appellants or either of them for such order, we see no error in the omission to decree repayment. Certainly there could be no decree against the plaintiffs therefor. The purpose of the present suit by plaintiffs was to show cause against the decree taking away their land. And certainly those rights can in no way be conditioned upon repayment of the three thousand dollars, or any other sum. *Poling v. Poling*, 61 W. Va. 78, 82, 55 S. E. 993.

[7, 12] Another point to be noticed is, that it was error to order an accounting for rents, issues and profits. The bill alleges and the answers deny the receipt of such rents, issues and profits. Appellants made no claim for improvements or taxes paid. Wherefore there was no error in not decreeing permanent improvements. Code, chapter 90, § 32 (sec. 4100); *Fishback v. Ball*, 34 W. Va. 644, 12 S. E. 856. But it now occurs to us that the order of reference to a commissioner was premature. If plaintiffs in the contest suit shall prevail in voiding the will and deed, the rights of the parties respecting rents and profits and for permanent improvements, if any, will be controlled by the law applicable to cotenants. We think the decree below should be amended in this particular, so as to postpone the settlement for rents and profits and for permanent improvements until the issues *devisavit vel non* have been tried and determined. If the will and deed shall prevail over the claims of appellants, the settlement for rents and profits and for permanent improvements must then be had according to the provisions of chapter 91 of the Code (secs. 4107-4121) which should be carefully observed.

[13] Next, as to parties, we can see no defect of parties in the bills and cross-bill. All the persons who were parties to the arbitration suit are parties to these bills, and so far as we can see all persons claiming the home farm or any part thereof under the award and decree of April 3, 1902, have been properly impleaded and brought into this suit.

#### On Rehearing.

[8] It was argued by counsel that the decree on the award ought to be regarded simply as a confirmation by or approval of the court of the prior compromise agreement between the parties. One objection interposed to this is that the decree was without rule or process against the parties, required by chapter 108 of the Code (secs. 4500-4504). If the rules there prescribed control the court on giving approval to a compromise of infants' rights, process or rule would be necessary, for the remedy being statutory and involving infants' rights should be strictly construed. Process would then be necessary to confer jurisdiction. *McGinnis v. Curry*, 13 W. Va. 29, 52; *Fowler v. Lewis' Adm'r*, 36 W. Va. 112, 128, 14 S. E. 447; *Hoback v. Miller*, *supra*; *Duff v. Core*, 27 W. Va. 232, 244. Undoubtedly a statutory proceeding to sell or otherwise dispose of infants' land, as these and other authorities hold, must be strictly complied with, or all rights acquired under them must fail. *Millsaps v. Estes*, 137 N. C. 535, 50 S. E. 227, 70 L. R. A. 170, 107 Am. St. Rep. 496. Another case in point is *Healy v. Isaacs*, 73 Ind. 226.

But the decree in the arbitration proceeding does not purport to approve an agreement of compromise, even if a guardian has authority with approval of the court to compromise the rights of infants in land. No agreement of compromise was presented to the court; the facts in relation thereto were not presented to the court, as is always necessary in such cases, and on which the judgment of the court must be founded; the proceedings referred the cases to the judgment of arbitrators, not to the court for approval of a supposed compromise; and it seems to us it would be going a long way for the court to construe its decree as one of approval of a compromise by the parties out of court. It is held by high authority that to make a compromise by guardians effective against infants in any case the judicial sanction must be upon a real and not a perfunctory hearing. If the hearing is merely formal and intended solely to employ the functions of the court to give validity to the prior agreement, it may be set aside. 1 *Elliott on Contracts*, § 306, p. 516; *Missouri Pac. Ry. Co. v. Lasca*, 79 Kan. 311, 99 Pac. 616, 21 L. R. A. (N. S.) 338 and note, 17 Ann. Cas. 605. It is conceded and the evidence establishes beyond controversy that the arbitration proceedings were gotten up simply as a means of giving validity to the prior

agreement, that the court never acted on the fact of such an agreement, and never undertook to approve it. Indeed we do not think the court could properly have given its consent to a compromise which gave away the whole of the infants' estate in the land and received for them nothing in return. The justification offered by the beneficiaries of the alleged agreement is that the infants will likely inherit from their mother the land and other property conceded to her and that this justified the contract and the award. But would a court of equity accept this as justification for an agreement or order taking away the whole of the estate of infants? This would be a dangerous precedent to recognize.

[14] Another proposition renewed on rehearing is that the award of the arbitrators should be treated as responsive and as a finding that so much of the will as gave the home farm to plaintiffs was invalid, and the will and deed in all other respects a valid disposition of property, thereby allowing the said home farm to go to the heirs according to the law of inheritance. Anciently it was doubted whether the question of title to land was an arbitrable matter. 2 R. C. L. 358, § 9. In the case of wills the judgment of probate has the force of an adjudication in rem, and is conclusive until set aside in the manner provided by law. *Harris v. Wyatt*, 113 Va. 254, 74 S. E. 189; *Woofter v. Matz*, 71 W. Va. 63, 76 S. E. 131. It cannot be collaterally attacked. *Estate of Carpenter*, 127 Cal. 582, 585, 586, 60 Pac. 162.

Our conclusion is that in so far as the decree prematurely referred the cause to a commissioner for an accounting of rents, issues and profits and fixes the principles of such accounting in advance of the final adjudication of the issues presented in the two causes involving the validity of the will and deed, the same must be reversed, set aside and annulled, but that in all other respects, as interpreted by this opinion, the same should be affirmed, with costs to appellants incurred in this court.

(85 W. Va. 23)

BLACK v. CROUCH et al. (No. 3678.)

(Supreme Court of Appeals of West Virginia.  
Oct. 21, 1919.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW. — §89(4), 276 — UNITED STATES. — §94 — ACT OF CONGRESS LIMITING ATTORNEY'S FEES IN COLLECTION OF CLAIMS AGAINST GOVERNMENT VALID.

The provision of Act Cong. March 4, 1915, limiting to 20 per cent. the payments to attorneys and agents, out of moneys appropriated by said act, for payment of certain claims against the United States, is not a denial of due pro-

cess, or of the liberty of contract, to an attorney who has rendered professional services in the prosecution of one of such claims, under a contract whereby he was to receive a fee equal to 50 per cent. of whatever might be awarded or collected.

2. UNITED STATES. — §119 — FUNDS OF ESTATE ON PAYMENT OF CLAIMS AGAINST GOVERNMENT NOT CHARGEABLE WITH FEES IN EXCESS OF STATUTE.

Funds in the hands of the personal representative of a deceased claimant, in favor of whose estate an appropriation has been made by said act, or in the hands of legatees under his will, cannot be charged with payment of the excess of such fee above the amount allowed by said act.

3. EQUITY. — §427(1), 431 — DECREE TO BE INTERPRETED IN LIGHT OF PLEADINGS.

A decree is to be interpreted in the light of the pleadings in the cause, and in so far as it purports to give relief beyond any foundation therefor laid in the pleadings it is void.

4. EXECUTORS AND ADMINISTRATORS. — §453 (4) — DECREE IN BILL TO CHARGE PARTICULAR FUND IS TO BE CONSTRUED AS CHARGING SUCH FUND.

A decree founded upon a bill seeking to charge a particular fund derived from, or belonging to, the estate of a deceased person, with payment of a debt, and disclosing no other assets of such estate, is properly interpreted a decree so charging such fund.

Appeal from Circuit Court, Randolph County.

Suit by Mary B. P. Black, administratrix, etc., against Andrew Crouch and others, executors, etc. Decree for plaintiff, and defendants appeal. Reversed and remanded, with leave to amend bill.

Arnold & Arnold and Harding & Harding, all of Elkins, for appellants.

C. O. Strieby, of Elkins, and Chas. F. Con-saul, of Washington, D. C., for appellee.

POFFENBARGER, J. The decree complained of stands upon the theory of partial unconstitutionality of an act of Congress passed in 1915 (Act March 4, 1915, c. 140, 38 Stat. 996) appropriating money for payment of war claims, and limiting to 20 per cent. the payments to be made to attorneys and agents representing the claimants, out of the moneys so appropriated.

[1] Since the entry of the decree the Supreme Court of the United States has rendered a decision in which the statute in question has been held to be valid and constitutional. *Capital Trust Co. v. Calhoun*, 250 U. S. 208, 39 Sup. Ct. 486, 63 L. Ed. —. It holds that the money appropriated by the act cannot be subjected in any manner to a charge for fees in excess of 20 per cent. In that case, the money, less 20 per cent., had passed out of the federal treasury into the hands of the administrator of the claimant, and the purpose



of the suit was to charge that fund with the payment of an amount equal to 30 per cent. of the sum appropriated; the department having previously paid 20 per cent. thereof to the attorney.

[2, 3] In this case the amount appropriated by the same act, to pay the claim of Jacob Crouch, was \$3,710. The contracts with the attorneys prosecuting the claim, made by him originally and by his executors after his death, provided for a contingent fee of 50 per cent. Out of the said sum of \$3,710 there was paid to the plaintiff herein, administratrix of the attorney, by the Treasury Department, the sum of \$742, and the residue thereof went into the hands of the executors of the estate of Jacob Crouch, Andrew Crouch and Newton Crouch, who also were entitled, as residuary legatees in the will of Jacob Crouch, to the money obtained upon the claim. After having paid \$500 out of it in satisfaction of another claim for services and expenses, they divided the balance, \$2,468, between themselves.

[4] While the decree does not in terms charge the plaintiff's demand, amounting to \$1,113, 30 per cent. of \$3,710, upon the said sum in the hands of the defendants as executors and legatees, but, on the contrary, adjudges, orders, and decrees "that the plaintiff do recover from the estate of Jacob Crouch, deceased, the sum of \$1,113, with interest," and that the defendants, executors as aforesaid, "do pay to the plaintiff the sum of \$1,113, with interest," out of any funds that may have come into their hands as such, it must be interpreted and held to be a decree charging the money they received from the appropriation as aforesaid. Upon the inquiry as to its meaning and effect, it must be read in the light of the pleadings. A judgment or decree cannot extend beyond the pleadings. In so far as it does so, it is void. *Conrad v. Crouch*, 68 W. Va. 335, 69 S. E. 888; *Waldon v. Harvey*, 54 W. Va. 608, 46 S. E. 603, 102 Am. St. Rep. 959; *Hoback v. Miller*, 44 W. Va. 635, 29 S. E. 1014. The bill in this cause traces no assets into the hands of the defendants other than this fund. Hence the decree must be deemed to relate to it only, and to charge the defendants on account thereof. Its tenor and purport accord with the subject-matter of its allegations. It claims right in the plaintiff to pursue and charge the fund received from the government. Thus interpreted, the decree is in conflict with the statute, and must fall.

The federal decision to which reference has been made does not construe the statute as invalidating such a contract in so far as it may bind or affect money or property of the claimant, or his estate, derived from sources other than the appropriation. As the plaintiff may be able to find other assets of the estate of Jacob Crouch liable to satisfaction of her claim, or liability on the part of some person

by reason of assets descended or distributed, she is entitled to have leave to amend her bill, if she shall be so advised. But nothing is now decided as to her right respecting other funds.

Our conclusion is to reverse the decree and remand the cause, with leave as aforesaid.

(85 W. Va. 54)

McELWAIN v. WOODS et al. (No. 3721.)

(Supreme Court of Appeals of West Virginia.  
Oct. 28, 1919.)

(Syllabus by the Court.)

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS  
§—393—TIME FOR RETURN BY TRUSTEE ON  
SALE OF ASSETS.

The trustee of an insolvent debtor who assigns all his property in trust for the payment of his debts has six months after making sale of the property within which to make a return to the clerk's office of his receipts and disbursements and vouchers therefor.

2. ASSIGNMENTS FOR BENEFIT OF CREDITORS  
§—393—SUIT TO COMPEL ASSIGNEE TO SETTLE  
ACCOUNTS NOT DEFEATING COMMISSIONS.

Where the insolvent assignor and assignee agree that the former shall remain in possession and sell the property and apply the proceeds to the payment of his debts, and he does so remain in possession for a considerable time and sells a portion of the property, but does not apply all the proceeds on his debts, and, ascertaining that fact, the assignee obtains possession of the remaining property, sells it and satisfies the creditors out of the proceeds, the assignor cannot, by bringing a suit to compel the assignee to settle his accounts before the expiration of six months after his sale, defeat his commissions.

Appeal from Circuit Court, Webster County.

Suit by Cora L. McElwain against William G. Woods, assignee, and others. Cause referred to a commissioner in chancery to report settlement of accounts of trustee, exceptions to report overruled, and report confirmed, except in one particular. Decree for W. G. Woods, assignee, and others, and plaintiff appeals. Affirmed.

W. S. Wysong, of Webster Springs, for appellant.

W. T. Talbott, of Webster Springs, for appellees.

WILLIAMS, J. Cora L. McElwain, a married woman conducting a retail store at Fenwick, Nicholas county, became involved in debt, and on the 18th of September, 1914, made an assignment of all her real and personal property, in which her husband W. D. McElwain joined, to William G. Woods, trustee, for the benefit of her creditors. The

stock of merchandise and claims due her were estimated at about \$3,200, and the debts owing by her at something over \$1,750. The assignor thought her assets were amply sufficient to pay all her debts, and the real purpose of the assignment was to enable her to gain time and make payment by continuing to sell goods at retail in the ordinary way, and an oral understanding was had between her and the trustee at the time of the assignment that she and her husband might remain in possession and continue to sell the goods as before and apply the proceeds to the liquidation of the debts; and in that event the trustee, who was her cousin, was to charge no commissions, nor was she or her husband to charge anything for their services.

The business was carried on under this arrangement for about 13 months, within which time three inventories were taken of the stock of goods, one on the 23d and 24th of September, 1914, showing \$2,761.94; another on June 21, 1915, showing \$1,548.88; and the third on the 15th of October, 1915, showing the stock of goods then on hand to be worth only \$1,305.58. Discovering about that time, as he swears, that the assignor was not applying all the proceeds of sales to the payment of the debts, the trustee demanded possession, and, being refused, procured a lock and key and locked the assignor and her husband out of the store building, and took possession on the 14th of October, 1915, and on the next day sold the stock of goods in bulk to Mrs. A. J. Goff at 75 per cent of the invoice, less \$37 discount on account of some damaged articles, realizing therefor \$939.41. In the meantime, and prior to June 21, 1915, when the second inventory was taken, the goods were moved by Mrs. McElwain and her husband from Fenwick to Cowen in Webster county, where the trustee sold the remaining portion of the stock.

Prior to making the general assignment, to wit, on the 15th day of August, 1914, Mrs. McElwain, her husband uniting in the deed, conveyed to the same trustee her house and lot in the village of Halo, Webster county, containing one-half acre, in trust to indemnify W. R. Woods and D. C. Hoover as her indorsers on a note for \$450, payable to the First National Bank of Webster Springs in three months from the date of said deed, and likewise to indemnify W. R. Woods and Floyd McElwain as indorsers on her note for \$250, bearing the same date and payable at the same time and place as the other. These notes were renewed once or twice, and the balances due thereon were finally reduced to judgment and paid by the indorsers. Whereupon they gave notice to the trustee to sell the house and lot. On the 29th of December, 1915, the trustee advertised that he would sell it at public auction on the 29th of January, 1916. Cora L. McElwain then brought the present suit, on the 11th

of January, 1916, praying that the trustee be enjoined from selling, and that he be required to settle his accounts as trustee under the deed of general assignment of September 18, 1914, and for general relief. The trustee, W. D. McElwain, plaintiff's husband, and her creditors were made parties defendant to the bill. An injunction was granted as prayed for on the 26th of January, 1916, and the trustee gave notice that he would move to dissolve it. The motion was heard on the 10th of March, 1916, at a special term, upon the bill and exhibits, the demurrer, answer, and cross-bill of the trustee filed in the clerk's office at the March rules, and upon the answers of some of the creditors, general replications thereto, and upon affidavits, upon consideration whereof the motion to dissolve was overruled. On the 7th of October, 1916, the cause was referred to James Woodzell, a commissioner in chancery, to take, state, and report a settlement of the accounts of said trustee with the said Cora L. McElwain and with her creditors. The commissioner filed his report on May 18, 1918, showing that the trustee had accounted for all the personal assets which had come into his hands, and had satisfied all the creditors, except the indorsers on the two aforesaid notes, who were indemnified by the trust deed given by Cora L. McElwain and her husband on her house and lot in Halo, and that he had actually paid on the general debts \$48.81 in excess of funds derived from the personal assets. The commissioner found that there was then due W. R. Woods, indorser on the aforesaid notes, a balance of \$240.75 on the \$450 note, and \$154.87 on the \$250 note, both as of the 28th of May, 1918, and that A. F. McElwain, one of the indorsers on the \$250 note, had been overpaid by \$7.07. He further found that the assignee was entitled to \$250 as a reasonable compensation for his services, and also to an attorney fee of \$50 paid to his attorney, W. T. Talbott.

Plaintiff filed written exceptions to the report, on the ground that it improperly allowed commissions of the trustee, because the trustee had made no settlement of his accounts until he was coerced to do so by this suit, and because the trustee had agreed to serve without compensation, because no appraisal of the assets had ever been made, and lastly because of the allowance of an attorney's fee of \$50 paid by the trustee to W. T. Talbott.

A final decree was entered on the 3d of June, 1918, reducing the amount of commissions allowed by the commissioner to \$75, overruling the other exceptions, and confirming the report, and decreeing \$240.75 to W. R. Woods and D. E. Hoover, \$154.87 to W. R. Woods, balance due him on the smaller one of the aforesaid notes, and also decreeing to W. G. Woods, the trustee, \$48.81 and \$75 as compensation for his services, and decreeing

said sums to be liens of equal dignity upon the house and lot, except the item of \$75 for the trustee's compensation, which was decreed as part of the costs of the suit.

Cora L. McElwain is the only party complaining, and she insists that the trustee is in default and not entitled to commissions: First, because he failed to have the assets appraised as provided by section 6a, chapter 72, Code 1918 (Code 1913, secs. 3784, 3785), and, second, because he failed to make a report of his receipts and disbursements to a commissioner of accounts as provided in the case of fiduciaries in chapter 87 of the Code (Code 1913, secs. 4026-4060). The commissioner's finding shows that plaintiff herself was responsible, in part at least, for the failure to have the property appraised. He reports that, by agreement between the parties, the plaintiff and her husband were left in possession of the goods for the purpose of selling them and making application of the proceeds of sale to the payment of her debts. She did remain in possession until October 14, 1915, a period of 13 months, before the trustee took possession. The trustee had qualified by giving bond in the manner required by statute on the 21st of September, 1914, but took possession only after he learned that the assignor was not making faithful application to her debts of all the money derived from sales, as she had agreed to do. None of the creditors are complaining, and she certainly cannot be allowed to take advantage of her own wrong. Having broken her own agreement, the trustee was no longer bound not to demand commissions.

[1, 2] Section 6a, chapter 72, Code, requires a trustee of an insolvent debtor, assigning all his property for the benefit of his creditors, to give bond before the clerk of the county court in a penalty double the amount of the ascertained value of the estate, and to take an oath that he will faithfully perform his duties as such trustee to the best of his skill and judgment, and that he will pay over all money that comes into his hands as such trustee. This provision of the statute further provides in such case that appraisers shall be appointed to appraise the estate of the insolvent debtor, in the same manner and by the same authority as appraisers for the estate of decedents are appointed, and that they shall be governed by the same laws and perform the same duties as appraisers of estates of decedents. This was not done in this case for the reason above stated. The same statute also provides

in such case that the trustee shall appear before one of the commissioners of accounts of the county court before which he qualified as trustee, and lay before him a report of his receipts and disbursements and his vouchers for the same, in all respects and with like effect as is provided for fiduciaries generally by chapter 87 of the Code. The trustee did not report an inventory of the property sold and an account of the sale made by him to the clerk of the county court, but it was not too late to do so when this suit was brought. Section 3, chapter 87, Code, provides that he shall have six months after making the sale to make return thereof to the clerk's office, and provides that failure to comply therewith shall forfeit his commissions.

Counsel for plaintiff insists that by his failure to comply with this provision of the statute the trustee has forfeited his commissions. A sufficient answer to this contention, we think, is that the time within which he could have made such return had not expired before plaintiff brought this suit. The trustee made his sale on the 15th of October, 1915, and had six months thereafter within which to return his inventory and account of sale to the clerk's office, and this suit was brought on the 11th of January, 1916, less than three months after the sale. Any settlement thereafter had to be made in the suit.

It must be remembered that Cora L. McElwain, the insolvent debtor, is the only person here complaining; and, having brought her suit against the trustee before the expiration of the time allowed him for making a report of the sale to the county clerk's office, and thereby prevented him from doing so within time thereafter, she has no right to insist on a forfeiture of his commissions. We do not say what effect such failure would have upon the rights of creditors; it is enough to say none are here complaining.

It is insisted that the trustee prematurely took the deposition of witnesses before the cause had been referred to a commissioner to settle the trustee's accounts and thereby caused unnecessary costs, which the court erroneously decreed against the appellant. Depositions were not taken until after the trustee had filed his answer and cross-bill in the clerk's office at March rules. They were not prematurely taken, and the decree of reference directed the commissioner to read and consider them in making his report.

We find no error in the decree, and it will be affirmed.

(24 Ga. App. 426)

## CREWS v. STATE. (No. 10743.)

(Court of Appeals of Georgia, Division No. 1.  
Nov. 7, 1919.)*(Syllabus by the Court.)*CRIMINAL LAW ⚡1160—HOMICIDE ⚡255  
(2) — EVIDENCE SUSTAINING CONVICTION OF  
VOLUNTARY MANSLAUGHTER.

The special grounds of the motion for new trial show no such material error as requires the grant of a new trial in this case. The verdict shows that the jury did not accept the theory of the defense that the accused, under the fears of a reasonable man that a felony was about to be committed on him, shot the deceased, and that they did not believe the statement of the accused. Under the evidence the killing was absolutely without justification, and the lowest grade of homicide of which it would be possible to find the defendant legally guilty under the evidence is that of voluntary manslaughter, and the jury having returned such a verdict, and the trial judge having approved it, this court will allow it to stand. *Vernon v. State*, 148 Ga. 709 (2), 712 (2), 92 S. E. 76, and cases cited.

Error from Superior Court, Charlton County; J. I. Summerall, Judge.

C. H. Crews was convicted of voluntary manslaughter, and he brings error. Affirmed.

John W. Bennett, of Waycross, and Jas. R. Thomas, of Jesup, for plaintiff in error.

A. B. Spence, Sol. Gen., of Waycross, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 385)

## WINDOM v. STATE. (No. 10914.)

(Court of Appeals of Georgia, Division No. 1.  
Nov. 6, 1919.)*(Syllabus by the Court.)*CRIMINAL LAW ⚡594(1) — CONTINUANCE;  
ABSENCE OF WITNESSES.

Where the defendant in a criminal case moves for a continuance thereof upon the ground of absent witnesses, and, upon the hearing of the motion, shows by uncontradicted testimony that the witnesses are absent because he was misled by the prosecuting solicitor, who told him that he need not have his witnesses or his lawyer present at the trial, as "it would be all arranged," the case is an exception to the rule, as laid down in section 987 of the Penal Code 1910, that it must be shown that the witnesses are not absent by the permission, directly or indirectly, of the movant.

Error from City Court of Carrollton; H. H. Revill, Judge.

Bill Windom was convicted of an offense, and he brings error. Reversed.

I. N. Cheney, of Bremen, for plaintiff in error.

Willis Smith, Sol., of Carrollton, for the State.

BROYLES, C. J. Upon the call of the case the defendant moved for a continuance thereof upon the ground of the absence of three material witnesses. Upon the hearing of the motion the defendant swore that the absent witnesses lived in the county, had been subpoenaed by him, that their testimony was material to his defense, that he expected to have the witnesses present at the next term of court, and that the application was not made for the purpose of delay, but to enable him to have the testimony of the absent witnesses. The defendant further set forth what he expected to prove by the witnesses, and it appears that this testimony would have been material to his defense. The defendant further testified that the witnesses were absent because the prosecuting solicitor had told him that he need not have them at the trial and not to have his lawyer present, as "it would be all arranged." None of this evidence was denied by the solicitor.

Under these peculiar circumstances, we think that this case presents an exception to the rule, as laid down in section 987 of the Penal Code, that it must be shown that the witnesses are not absent by the permission, directly or indirectly, of the movant. In our judgment the court erred in overruling the motion for a continuance, and the subsequent proceedings in the case were nugatory.

Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 260)

PYNETREE PAPER CO. v. WILKINSON  
COUNTY BANK. (No. 10525.)(Court of Appeals of Georgia, Division No. 1.  
Oct. 10, 1919.)*(Syllabus by the Court.)*1. BILLS AND NOTES ⚡93—PROMISE TO AC-  
CEPT AN EXISTING BILL IN HANDS OF IN-  
DORSEE.

The holder cannot sue the drawee on a promise made to accept an existing bill, where the promise was made to the drawer of the bill after it had passed into the hands of the holder, and where the money sued for was paid or advanced by the holder before the promise was made, and not upon the faith of the promise. 8 *Corpus Juris*, 315, 316, § 485, and authorities cited in note 74; *Lugrue v. Woodruff*, 29 Ga. 648, 650; 7 Cyc. 766; *Parrish v. Taggart-Delph Lumber Co.*, 11 Ga. App. 772, 76 S. E. 153; *Coolidge v. Payson*, 2 Wheat. 66, 4 L. Ed. 185;

Exchange Bank v. Rice, 107 Mass. 37, 9 Am. Rep. 1; Carr v. National Bank, 107 Mass. 45, 9 Am. Rep. 6.

**2. PROMISE TO ACCEPT EXISTING BILL—SUFFICIENCY OF PETITION.**

The amended petition, construed as a whole and most strongly against the pleader, clearly shows that the only money advanced by the plaintiff bank to the drawer of the draft was paid before the promise of the drawee to accept the draft was made, and that it was not paid on the faith of the promise. The petition, therefore, failed to set out a cause of action, and the court erred in overruling the general demurrer.

Error from Superior Court, Wilkinson County; J. B. Park, Judge.

Action by the Wilkinson County Bank against the Pynetree Paper Company. Demurrer to petition overruled, and defendant brings error. Reversed.

Strozler & Moore, of Macon, for plaintiff in error.

BROYLES, C. J. Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 348)

**KING v. STATE. (No. 10816.)**

(Court of Appeals of Georgia, Division No. 1. Nov. 4, 1919.)

*(Syllabus by the Court.)*

**1. SUFFICIENCY OF INSTRUCTIONS.**

None of the excerpts from the charge of the court complained of, when considered in connection with the charge as a whole, show cause for a reversal of the judgment below.

**2. MOTION FOR MISTRIAL.**

Under the facts of the case, the court did not err in denying the defendant's motion for a mistrial.

**3. SUFFICIENCY OF EVIDENCE.**

The verdict was authorized by the evidence.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Proceeding between Walter King and the State. Judgment adverse to King, and he brings error. Affirmed.

John R. Cooper and W. O. Cooper, Jr., both of Macon, for plaintiff in error.

John P. Ross, Sol. Gen., of Macon, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 349)

**THARPE v. STATE. (No. 10818.)**

(Court of Appeals of Georgia, Division No. 1. Nov. 4, 1919.)

*(Syllabus by the Court.)*

**CRIMINAL LAW §201—PLEA OF FORMER JEOPARDY INSUFFICIENT.**

The accused was indicted for making alcoholic liquors. He pleaded "former jeopardy," alleging "that he pleaded guilty in the United States District Court for the Southern District of Georgia for the offense of violation of the internal revenue laws of the United States; \* \* \* that the offense charged is the very same offense as that he is now charged with; that the United States District Court for the Southern District of Georgia had full jurisdiction to try him." The plea was properly stricken. It shows on its face that he pleaded guilty in a different jurisdiction, and to an indictment which charged a violation of a federal statute, and to the commission of a crime which is entirely different and distinct from the one for which he was indicted and tried in the state court.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

M. D. Tharpe was convicted of making alcoholic liquors, and he brings error. Affirmed.

John R. Cooper and W. O. Cooper, Jr., both of Macon, for plaintiff in error.

John P. Ross, Sol. Gen., of Macon, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 353)

**BAILEY v. STATE. (No. 10858.)**

(Court of Appeals of Georgia, Division No. 1. Nov. 4, 1919.)

*(Syllabus by the Court.)*

**1. MOTION FOR CONTINUANCE.**

Under the facts of the case, the court did not err in overruling the defendant's motion for a continuance of the case.

**2. SUFFICIENCY OF EVIDENCE.**

The evidence amply authorized the verdict, and the court did not err in refusing to grant a new trial.

Error from Superior Court, Barrow County; A. J. Cobb, Judge.

Proceedings between J. L. B. Bailey and the State. A judgment adverse to Bailey was rendered, and he brings error. Affirmed.

M. D. Irwin and I. L. Oakes, both of Lawrenceville, for plaintiff in error.

W. O. Dean, Sol. Gen., of Monroe, for the State.

**BROYLES, C. J.** Judgment affirmed.

**LUKE and BLOODWORTH, JJ.,** concur.

(24 Ga. App. 356)

**CRAWLEY v. STATE.** (No. 10876.)

(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)

*(Syllabus by the Court.)*

**SUFFICIENCY OF EVIDENCE.**

The evidence amply authorized, if it did not demand, the defendant's conviction; and none of the special grounds of the motion for a new trial show cause for a reversal of the judgment below.

Error from Superior Court, Pike County;  
W. E. H. Searcy, Jr., Judge.

Nat Crawley was convicted of an offense, and he brings error. Affirmed.

Redding & Lester, of Barnesville, for plaintiff in error.

E. M. Owen, Sol. Gen., of Zebulon, for the State.

**BROYLES, C. J.** Judgment affirmed.

**LUKE and BLOODWORTH, JJ.,** concur.

(24 Ga. App. 407)

**LOVETT v. VICKERS BROS.** (No. 10458.)

(Court of Appeals of Georgia, Division No. 2.  
Nov. 6, 1919.)

*(Syllabus by the Court.)*

**JUDGMENT §342(3)—SUFFICIENCY OF MOTION TO VACATE DEFAULT.**

This was a statutory motion to set aside a judgment. Civ. Code 1910, §§ 4358, 5958. It not affirmatively appearing on the face of the statutory motion to set aside the default judgment, nor from the evidence submitted on the hearing of that motion, that it was made dur-

ing term time, and this being essential to the validity of such a motion, the motion should have been dismissed; and the order of the court overruling the motion will be so construed. *Bedgood v. Floyd*, 20 Ga. App. 617, 93 S. E. 218.

Error from City Court of Nashville; J. D. Lovett, Judge.

Proceedings between O. F. Lovett and Vickers Bros. to set aside a judgment. A determination adverse to Lovett was rendered, and he brings error. Affirmed.

J. W. Powell, of Adel, for plaintiff in error.  
Story & Story, of Nashville, for defendant in error.

**SMITH, J.** Judgment affirmed.

**JENKINS, P. J., and STEPHENS, J.,** concur.

(24 Ga. App. 357)

**MULLINS v. STATE.** (No. 10879.)

(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)

*(Syllabus by the Court.)*

**CRIMINAL LAW §935(1) — CONVICTION ON CIRCUMSTANTIAL EVIDENCE.**

The defendant was convicted of having, possessing, and controlling intoxicating liquors. The evidence as to her connection with the whisky was entirely circumstantial, and failed to exclude every reasonable hypothesis save that of her guilt, and was consistent with the theory of her innocence. The court therefore erred in overruling her motion for a new trial.

Error from Superior Court, Harris County;  
G. H. Howard, Judge.

Carrie Mullins was convicted of having, possessing and controlling intoxicating liquors, her motion for a new trial was denied, and she brings error. Reversed.

Geo. C. Palmer, of Columbus, for plaintiff in error.

C. F. McLaughlin, Sol. Gen., of Columbus, for the State.

**BROYLES, C. J.** Judgment reversed.

**LUKE and BLOODWORTH, JJ.,** concur.

(24 Ga. App. 344)

**BARCLAY v. STATE.** (No. 10796.)(Court of Appeals of Georgia, Division No. 1  
Nov. 4, 1919.)*(Syllabus by the Court.)***1. DENIAL OF NEW TRIAL.**

The first and second special grounds of the motion for a new trial are merely elaboration of the general grounds.

**2. CRIMINAL LAW §828 — INSTRUCTIONS; NECESSITY FOR REQUEST.**

In the absence of a timely and appropriate written request for more particular instructions upon the law of reasonable doubt, the charge upon that subject as given was sufficient.

**3. SUFFICIENCY OF EVIDENCE.**

The evidence authorized the verdict, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Pike County;  
W. E. H. Searcy, Jr., Judge.

Proceedings between Wade Barclay and the State. A judgment adverse to Barclay was rendered, and he brings error. Affirmed.

Frank L. Adams, of Zebulon, for plaintiff in error.

E. M. Owen, Sol. Gen., of Zebulon, for the State.

**BROYLES, C. J.** Judgment affirmed.

**LUKE and BLOODWORTH, JJ.,** concur.

(24 Ga. App. 325)

**WILLIAMS v. STATE.** (No. 10741.)(Court of Appeals of Georgia, Division No. 1  
Nov. 4, 1919.)*(Syllabus by the Court.)***1. CRIMINAL LAW §1064(1, 4)—NEW TRIAL; GROUNDS OF MOTION.**

A special ground of a motion for a new trial must be complete within itself, and will not be considered by the reviewing court, when it is so incomplete as to require reference to the brief of the evidence, or to some other portion of the record, to make it understandable. In the instant case the first special ground of the motion for a new trial complains that a certain named witness was not allowed to testify, in answer to questions by the defendant, to certain statements alleged to have been made to him (and which are set forth in the ground) by a codefendant, at the time of the arrest of the defendant and his codefendant. The ground does not show, however, whether the witness was upon direct or cross examination, or that the court was apprised of the expected answers of the witness, or that any part of this conversation had already gone to the jury. This

ground of the motion is therefore too defective to be considered by this court.

**2. NECESSITY OF INSTRUCTIONS.**

Under all the facts of the case, the court did not err in failing to instruct the jury that the case was based entirely upon circumstantial evidence.

**3. POSSESSION OF STOLEN PROPERTY.**

The charge upon the subject of recent possession of stolen property was not erroneous.

**4. SUFFICIENCY OF EVIDENCE.**

The verdict was authorized by the evidence.

Error from Superior Court, Fulton County; John D. Humphries, Judge.

Proceeding between Mose Williams and the State. Judgment adverse to Williams was rendered, and he brings error. Affirmed.

Tillou Von Nunes, of Atlanta, for plaintiff in error.

John A. Boykin, Sol. Gen., and M. A. Stephens, both of Atlanta, for the State.

**BROYLES, C. J.** Judgment affirmed.

**LUKE and BLOODWORTH, JJ.,** concur.

**WHITE v. STATE.** (24 Ga. App. 336)  
(No. 10745.)(Court of Appeals of Georgia, Division No. 1  
Nov. 4, 1919.)*(Syllabus by the Court.)***LARCENY §15(3)—SIMPLE LARCENY; SUFFICIENCY OF EVIDENCE.**

The defendant was convicted of the offense of simple larceny. The proof showed that he was a farm hand on a farm; that as such employé he was directed to haul some wood to the house, and, after hauling the wood, to put up the team and do other work; that after hauling the wood he took the team from Monroe county and drove it 42 or more miles away to Macon, and tried to sell the mules, and finally did sell them. He contends that he was not guilty of simple larceny, but if guilty of crime he was guilty of larceny after trust. We do not think so. No such bailment was shown as is necessary to require his conviction of larceny after trust rather than simple larceny. This ruling is not in conflict with Mobley v. State, 114 Ga. 544, 40 S. E. 728. The conviction was demanded. It was not error to overrule the motion for a new trial, which was based solely upon the general grounds.

Error from Superior Court, Bibb County;  
H. A. Mathews, Judge.

Henry White was convicted of simple larceny, and he brings error. Affirmed.

— For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Thos. Arnold Jacobs, Jr., Olin J. Wimberly, and C. A. Cunningham, all of Macon, for plaintiff in error.

John P. Ross, Sol. Gen., of Macon, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 333)

**HUCKEBA v. STATE. (No. 10733.)**

(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)

*(Syllabus by the Court.)*

**1. SUFFICIENCY OF INSTRUCTIONS.**

None of the excerpts from the charge of the court excepted to, when considered in the light of the charge as a whole and the facts of the case, contains reversible error.

**2. EXCLUSION OF EVIDENCE.**

The court did not err in repelling the testimony as complained of in the fifth special ground of the motion for a new trial.

**3. DENIAL OF MISTRIAL.**

Under the facts of the case the court did not err in denying the defendant's motion to declare a mistrial.

**4. CRIMINAL LAW §828—INSTRUCTIONS, NECESSITY FOR WRITTEN REQUEST.**

The conviction of the defendant did not depend wholly on circumstantial evidence. The court, therefore, did not err in failing to instruct the jury upon the law of circumstantial evidence, there being no timely and appropriate written request therefor.

**5. RAPE §44—EVIDENCE; RELATIONS OF PARTIES.**

The admission of the testimony as to the defendant's relations, outside of Polk county, with the female with whom he was charged with having sexual intercourse, was not error, since the court specifically charged the jury as follows: "The court has permitted certain evidence to come before you regarding transactions that did not occur within the county of Polk. The court has no opinion, and expresses none, as to what has been proven in this regard, or as to any facts proven in the case. This evidence was admitted for the purpose of showing, if anything was shown, and you are the judges of what that evidence was or what was shown by this evidence, of the relations between the parties, and in aiding you, in so far as you think it may aid you, in determining the guilt or innocence of the defendant. I charge you that this alone would not warrant a conviction. In other words, you could not convict the defendant for anything that occurred outside the county of Polk, if anything did occur, or if any offense was committed outside of this county, this would not warrant the conviction of the defendant; but, as before stated, this is to aid you in determining the guilt or innocence of the

defendant, and to aid you in determining whether the charge in the bill of indictment is true, but it is a circumstance in the case, and you have the right to consider it to this extent only. You must find, in order to find the defendant guilty, that the offense was committed in the county of Polk." *Lipham v. State*, 125 Ga. 52, 53 S. E. 817, 114 Am. St. Rep. 181, 5 Ann. Cas. 66(3); *Nobles v. State*, 127 Ga. 212, 56 S. E. 125(3).

**6. SUFFICIENCY OF EVIDENCE.**

The conviction was amply warranted by the evidence, and the court did not err in overruling the motion for a new trial.

Error from City Court of Polk County; John L. Tison, Judge.

J. A. Huckleba was convicted of an offense, and he brings error. Affirmed.

Bunn & Trawick and W. W. Mundy, all of Cedartown, for plaintiff in error.

J. A. Wright, Sol., and E. S. Ault, both of Cedartown, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 346)

**GRANT v. STATE. (No. 10810.)**

(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)

*(Syllabus by the Court.)*

**1. CRIMINAL LAW §915—OVERRULING DEMURRER TO INDICTMENT NOT GROUND FOR NEW TRIAL.**

"The overruling of a demurrer to an indictment cannot properly be made a ground of a motion for a new trial." *Veal v. State*, 116 Ga. 589, 42 S. E. 705 (1); *Brown v. Wilkes*, 20 Ga. App. 92, 92 S. E. 553 (1), and cases cited.

**2. MOTION FOR NEW TRIAL.**

Under the qualifying note of the trial judge there is no merit in the fifth ground of the motion for a new trial.

**3. VOLUNTARY MANSLAUGHTER.**

The court did not err in charging the jury on voluntary manslaughter.

**4. SUFFICIENCY OF EVIDENCE.**

The evidence supports the verdict.

Error from Superior Court, Evans County; W. W. Sheppard, Judge.

Steve Grant was convicted of an offense, and he brings error. Affirmed.

P. M. Anderson, of Claxton, for plaintiff in error.

J. Saxton Daniel, Sol. Gen., of Claxton, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.



(24 Ga. App. 336)

**CLAYTON v. STATE.** (No. 10744.)(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)*(Syllabus by the Court.)***1. SUFFICIENCY OF INSTRUCTIONS.**

There is no material error in either of the excerpts from the charge complained of, when considered in the light of the facts of the case.

**2. SUFFICIENCY OF EVIDENCE.**

The evidence amply authorized the verdict, and the court did not err in refusing to grant a new trial.

Error from Superior Court, Bibb County;  
H. A. Mathews, Judge.

Proceedings between Sidney Clayton and the State. A judgment adverse to Clayton was rendered, and he brings error. Affirmed.

Hubert F. Rawls, of Macon, for plaintiff in error.

Jno. P. Ross, Sol. Gen., of Macon, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 345)

**POWELL v. STATE.** (No. 10803.)(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)*(Syllabus by the Court.)***DENIAL OF NEW TRIAL.**

The evidence in this case demanded a finding of guilty, and the error complained of (if error it be) in the court's ruling that the defendant by his statement had put his character in issue was harmless. It was not error to overrule the motion for a new trial.

Error from Superior Court, Macon County;  
Z. A. Littlejohn, Judge.

Cobb Powell was convicted of an offense, and he brings error. Affirmed.

Jno. B. Guerry, of Montezuma, for plaintiff in error.

Jule Felton, Sol. Gen., of Montezuma, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 414)

**GROOVER v. TERRELL.** (No. 10715.)(Court of Appeals of Georgia, Division No. 2  
Nov. 6, 1919.)*(Syllabus by the Court.)***APPEAL AND ERROR §1005(2)—VERDICT APPROVED BY TRIAL JUDGE CONCLUSIVE.**

In this case the motion for a new trial contained only the usual general grounds. There was evidence to authorize the verdict; and, the verdict having been approved by the trial judge, we are, under the repeated rulings of the Supreme Court and of this court, powerless to interfere.

Error from City Court of Hinesville; W. C. Hodges, Judge.

Action between Charlie Groover and J. M. Terrell. Judgment for the latter. Motion for new trial overruled, and the former brings error. Affirmed.

Ben A. Way, of Hinesville, for plaintiff in error.

O. C. Darsey, of Hinesville, for defendant in error.

SMITH, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(24 Ga. App. 400)

**SIMMONS v. COMMERCIAL BANK OF SAVANNAH.** (No. 10397.)(Court of Appeals of Georgia, Division No. 2  
Nov. 6, 1919.)*(Syllabus by the Court.)***1. BILLS AND NOTES §467(2), 497(1)—VALIDITY; PRESUMPTION OF BONA FIDE TRANSACTION FOR VALUE.**

The Commercial Bank of Savannah sued Tucker, Pearson, Simmons, and Anderson on a promissory note made by Tucker and payable to the other defendants. The petition alleged that the note was "discounted or sold" by Tucker to petitioner before maturity; that it had been protested for nonpayment; that petitioner had served each of the defendants with the statutory notice of suit in order to collect attorney's fees. The defendant Simmons filed on his own behalf both a demurrer and an answer. The purport of the demurrer was that the petition failed to show whether the note was bought or discounted; that, if bought, it failed to show what was paid for it, and, if discounted, what amount was retained therefor. The answer of Simmons set up that he was merely a surety on the note, and had given the statutory notice to that effect; that the note sued on was a renewal of a similar previous note; that he had signed the original note at the request of Tuck-

er, and upon the faith of Tucker's representations made to him that the other indorsers were responsible; that, prior to his signing the renewal note sued on, the other indorsers "had conveyed their property to their wives, and had apparently prepared to defeat the collection of this debt," which fact, although unknown to defendant, and though known to both Tucker and the bank at the time the renewal note was executed, was not disclosed to him by either of them. Defendant says that by reason of these facts the plaintiff had so increased his risk and liability as to work a discharge in his favor. The court overruled the demurrer, and on motion struck the defendant's answer, except as it related to attorney's fees, and, after hearing evidence upon the issue as to the giving of notice for attorney's fees, rendered judgment against all the defendants as prayed for. *Held*, the demurrer was properly overruled. The necessary meaning of the petition is that plaintiff became owner and holder of the note before maturity, and the transaction is therefore presumed to have been bona fide and for value. Civil Code 1910, § 4288. The word "discounted," as here used, necessarily has the meaning, and in terms is shown to have been used as synonymous with, "sold," and in such a case it is not required that the purchaser of a note shall state the price paid therefor. *McCall v. Herring*, 116 Ga. 235, 242, 42 S. E. 468; 3 R. C. L. p. 977, § 187.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Discounted.]

## 2. BILLS AND NOTES ⇨239—INDORSEMENT; PROCUREMENT BY FRAUD.

There was no error in striking the plea. It does not appear that the bank was guilty of any fraud on its part. The plea sets forth that the original note was signed purely at the request of Tucker, and that the defendant relied only upon Tucker's representations as to the responsibility of the other indorsers. It does not even appear that the bank knew that such representations had been made, or that it knew that defendant was merely a surety. No duty devolved upon the bank to voluntarily furnish information concerning the solvency of the other indorsers or sureties, in order to prevent the renewal by defendant of a note already signed by him purely at the instance of another, and solely upon that person's representations. *Broughton v. Lazarus Co.*, 13 Ga. App. 153, 78 S. E. 1024.

## 3. JUDGMENT FOR PLAINTIFF.

There was sufficient evidence as to service upon defendant of the required notice to collect attorney's fees, and the court did not err in entering up judgment for the plaintiff.

Error from City Court of Savannah;  
Davis Freeman, Judge.

Suit by the Commercial Bank of Savannah against Daniel Simmons and others. Demurrer of defendant Simmons to petition overruled, judgment entered for plaintiff, and defendant Simmons brings error. Affirmed.

W. B. Stubbs, of Savannah, for plaintiff in error.

U. H. McLaws, of Savannah, for defendant in error.

JENKINS, J. Judgment affirmed.

STEPHENS and SMITH, JJ., concur.

(24 Ga. App. 367)

## ABBOTT v. STATE. (No. 10721.)

(Court of Appeals of Georgia, Division No. 1.  
Nov. 5, 1919.)

(Syllabus by the Court.)

### 1. JURY ⇨108—COMPETENCY; VIEW AS TO CAPITAL PUNISHMENT.

When, in answer to the question, "Are you conscientiously opposed to capital punishment?" a juror upon his voir dire, in a case in which the offense charged may be punished with death, answers, "Not as a principle, but in a case of this character, where a woman is the defendant, I am opposed to capital punishment," it is proper for the court to hold that he is incompetent.

### 2. CHARGE ON VOLUNTARY MANSLAUGHTER.

Under the evidence in this case, the court properly submitted to the jury the law of voluntary manslaughter.

### 3. CRIMINAL LAW ⇨956(12) — NEW TRIAL; PREJUDICE FROM ERRONEOUS ADMISSION OF EVIDENCE.

Where, in a criminal case, a letter of such a character as to prejudice the minds of the jurors against the defendant has been excluded from the evidence, and by inadvertence is handed by the solicitor general to the jury with the documentary evidence in the case, and remains with the jury until their verdict is returned, the presumption is that the jurors read it before arriving at their verdict, and that the defendant's cause was prejudiced thereby. If all of the jurors testify that they did not read the letter before arriving at their verdict, the presumption is rebutted and a new trial is not required. Where, however, it is not so testified by all of the jurors, the presumption remains and a new trial becomes necessary. This is true even though all the members of the jury testify that the letter did not influence their verdict.

### 4. CRIMINAL LAW ⇨957(5)—CONSIDERATION BY JURY OF EXCLUDED EVIDENCE; FAIR AND IMPARTIAL TRIAL.

In this case a letter, which was unaddressed and signed "B. B.," and which was prejudicial to the defendant, had been offered in evidence by the state, and its admission, upon proper objection, had been refused by the court upon the ground that it "could serve no other purpose than an attack on her character," etc., but by accident or inadvertence it was handed to the jury by the solicitor general with other documentary evidence introduced by the state. Some members of the jury read the letter, and one of them understood that it was written to the defendant; others did not; some did not read it;

all say they were not influenced by it. No man can tell with certainty what influences his mind—what evidence or parts of evidence had least or most to do in leading him to a conclusion. While one may be a competent witness when sworn and examined in open court in a case in which he is serving as a juror, no juror can, while the jury are deliberating upon a case properly submitted, introduce evidence in the jury room by reading or submitting to other members of the jury documentary evidence, or anything reflecting upon the character of the defendant, which has been denied admission by the court. When such a state of facts exists, a new trial must be had. For this reason, in this case it was error to overrule the defendant's motion for a new trial. To hold otherwise where, as in this case, a prejudicial letter, which seriously reflected upon the good character of the defendant, found its way into the hands of the jury, would be to permit the jury to base their finding upon evidence not adduced in their hearing in court, and upon a view not authorized by the court. Anything which has the effect of destroying the impartiality, decorum, and decency of jury trial lessens, and in time will destroy, the best safeguard of the liberty and property rights of the people of the state. No defendant charged with crime has had a fair and impartial trial, even though he be guilty, unless the trial was in keeping with orderly legal procedure. See *Woolfolk v. State*, 81 Ga. 559, 8 S. E. 724; *Smith v. State*, 122 Ga. 154, 50 S. E. 62; *Shedden v. Stiles*, 121 Ga. 637, 49 S. E. 719; *Killen v. Sistrunk*, 7 Ga. 283; *Walker v. Hunter*, 17 Ga. 364; *Griffin v. State*, 5 Ga. App. 43, 62 S. E. 635.

#### 5. OTHER ASSIGNMENTS OF ERROR.

The other assignments of error have been considered, and are without merit, or the alleged errors are not likely to recur on the next trial of the case.

Error from Superior Court, Fulton County; J. D. Humphries, Judge.

Proceeding by the State against Stella Abbott, and, from the judgment, she brings error. Reversed.

E. W. Martin and Reuben R. Arnold, both of Atlanta, for plaintiff in error.

John A. Boykin, Sol. Gen., and E. A. Stephens, both of Atlanta, for the State.

LUKE, J. Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 350)

THOMAS v. STATE. (No. 10819.)

(Court of Appeals of Georgia, Division No. 1. Nov. 4, 1919.)

(Syllabus by the Court.)

#### 1. INTOXICATING LIQUORS §167—EVIDENCE OF ILLICIT MANUFACTURE.

One who is present at a distillery when whisky is being manufactured, and who person-

ally assists in the manufacture of the same, is guilty of manufacturing whisky, and it is immaterial whether or not he owns the distillery, or whether or not he is hired to work thereat.

#### 2. SUFFICIENCY OF EVIDENCE.

There is no substantial merit in any of the special grounds of the motion for a new trial, the defendant's conviction was authorized by the evidence, and the court did not err in refusing to grant a new trial.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

L. L. Thomas was convicted of manufacturing whisky, and he brings error. Affirmed.

John R. Cooper and W. O. Cooper, Jr., both of Macon, for plaintiff in error.

John P. Ross, Sol. Gen., of Macon, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 350)

THOMAS v. STATE. (No. 10820.)

(Court of Appeals of Georgia, Division No. 1. Nov. 4, 1919.)

(Syllabus by the Court.)

#### 1. CRIMINAL LAW §292(2) — SUFFICIENCY OF PLEA OF FORMER CONVICTION.

A plea of former conviction is good as against demurrer only when it sets out the record of the former trial and conviction and judgment, and such a state of facts as will show that the former conviction was for the same offense for which the defendant is about to be arraigned. See *Blair v. State*, 81 Ga. 629, 7 S. E. 855.

(a) It was not error to strike the plea in this case.

#### 2. SUFFICIENCY OF EVIDENCE.

The evidence amply authorized the conviction, and there is no error in the charge of the court. For no reason assigned did the court err in overruling the motion for a new trial.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

L. L. Thomas was convicted of a misdemeanor, and he brings error. Affirmed.

John R. Cooper and W. O. Cooper, Jr., both of Macon, for plaintiff in error.

John P. Ross, Sol. Gen., of Macon, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 314)

WHITE et al. v. STALLINGS. (No. 10452.)

(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)*(Syllabus by the Court.)***STRIKING PLEA—DIRECTED VERDICT.**

The record in this case does not show that the court erred either in striking the plea of the defendants or in thereafter directing a verdict for the plaintiff.

Error from Superior Court, Monroe County; W. E. H. Searcy, Jr., Judge.

Action by W. W. Stallings against E. G. White and others. Defendants' plea stricken, and verdict directed for plaintiff, and defendants bring error. Affirmed.

B. H. Manry, of Barnesville, and A. M. Zellner, of Forsyth, for plaintiffs in error.

Jas. M. Smith, of Barnesville, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 344)

BLOOD v. STATE. (No. 10797.)

(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)*(Syllabus by the Court.)***CRIMINAL LAW §742(1)—CREDIBILITY OF WITNESSES FOR JURY.**

This case is presented here upon the general grounds only. There is evidence to support the verdict. It was the right and province of the jury to credit such witnesses and circumstances as they, under appropriate charge, deemed satisfied them beyond a reasonable doubt of the defendant's guilt. It was not error to overrule the motion for a new trial.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Louis Blood was convicted of an offense, and he brings error. Affirmed.

C. A. Picquet, of Augusta, for plaintiff in error.

A. L. Franklin, Sol. Gen., of Augusta, and Jno. M. Graham, of Atlanta, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 346)

SMITH v. STATE. (No. 10811.)

(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)*(Syllabus by the Court.)***1. SUFFICIENCY OF INSTRUCTIONS.**

The single excerpt from the charge of the court complained of, while slightly inaccurate and perhaps inapplicable to a case of assault with intent to rape, does not, under all of the facts of the case and the entire charge of the court, require a new trial. The charge of the court was a very exhaustive and fair presentation of the law of the case, and clearly and fully presented all of the contentions of the defendant, and gave him the benefit of all of the defenses offered, or which could have been offered, by him.

**2. SUFFICIENCY OF EVIDENCE.**

The verdict was amply authorized by the evidence, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Wilcox County; O. T. Gover, Judge.

Frank Smith was convicted of assault with intent to rape, and he brings error. Affirmed.

M. B. Cannon, of Abbeville, and Eldridge Cutts, of Fitzgerald, for plaintiff in error.

J. B. Wall, Sol. Gen., of Fitzgerald, and Hal Lawson, of Abbeville, for defendant in error.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 342)

CLEMENTS v. STATE. (No. 10786.)

(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)*(Syllabus by the Court.)***SUFFICIENCY OF EVIDENCE.**

There is evidence to support the verdict. The motion for a new trial contains no special grounds, and was properly overruled.

Error from Superior Court, Meriwether County; J. R. Terrell, Judge.

Proceeding between Clark Clements and the State. A judgment adverse to Clements was rendered, and he brings error. Affirmed.

Justiss & Hay and R. A. McGraw, all of Greenville, for plaintiff in error.

C. E. Roop, Sol. Gen., of Carrollton, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 337)

**CHILDS v. STATE.** (No. 10751.)(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)*(Syllabus by the Court.)***INSTRUCTIONS AND EVIDENCE.**

The court did not err in charging the jury on voluntary manslaughter, there is ample evidence to support the verdict, and the motion for new trial was properly overruled.

Error from Superior Court, Putnam County; J. B. Park, Judge.

John (alias Bully) Childs was convicted of an offense, and he brings error. **Affirmed.**

Davidson & Callaway, of Eatonton, for plaintiff in error.

Doyle Campbell, Sol. Gen., of Monticello, for the State.

**BLOODWORTH, J.** Judgment affirmed.

**BROYLES, C. J., and LUKE, J.,** concur.

(24 Ga. App. 315)

**CLARKE & WOOD v. BROOKE et al.**  
(No. 10545.)(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)*(Syllabus by the Court.)***1. MOTION TO DISMISS BILL OF EXCEPTIONS—  
RULING.**

The motion to dismiss the bill of exceptions is overruled.

(a) The cases cited and relied upon by defendant in error to sustain the first and second grounds of the motion to dismiss are all prior to the act approved August 21, 1911, and found in Laws 1911, p. 149. See sections 3 and 4 of that act, and Bank of Dalton v. Clark, 19 Ga. App. 729, 92 S. E. 40 (3).

(b) Counsel for defendant in error cites certain cases to sustain the third ground of his motion to dismiss. These were decided prior to the act of 1896 (Laws 1896, p. 45). See Hammond v. Hammond, 135 Ga. 770, 70 S. E. 588 (3); Harnage v. State, 7 Ga. App. 573, 67 S. E. 694 (1).

**2. RULING ON CERTIORARI.**

The judge of the superior court properly overruled the petition for certiorari.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by J. P. Brooke and others, for use, etc., against Clarke & Wood. Judgment for plaintiffs, and defendants bring error. **Affirmed.**

A. E. Wilson, of Atlanta, for plaintiffs in error.

W. H. Lewis, of Atlanta, and J. P. Brooke, of Alpharetta, for defendants in error.

**BLOODWORTH, J.** Judgment affirmed.

**BROYLES, C. J., and LUKE, J.,** concur.

(24 Ga. App. 347)

**WALLER v. STATE.** (No. 10815.)(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)*(Syllabus by the Court.)***1. MOTION FOR NEW TRIAL.**

The court did not err in charging the jury as complained of in the amendment to the motion for new trial.

**2. SUFFICIENCY OF EVIDENCE.**

There is ample evidence to support the verdict, and the judgment is affirmed.

Error from City Court of Macon; Du Pont Guerry, Judge.

Proceeding between Rogers Waller and the State. A decision adverse to Waller was rendered, and he brings error. **Affirmed.**

H. F. Rawls, of Macon, for plaintiff in error.

Will Gunn, Sol., of Macon, for the State.

**BLOODWORTH, J.** Affirmed.

**BROYLES, C. J., and LUKE, J.,** concur.

(24 Ga. App. 369)

DAVID v. STATE. (No. 10877.)

(Court of Appeals of Georgia, Division No. 1.  
Nov. 5, 1919.)*(Syllabus by the Court.)*

## 1. INSTRUCTIONS AS TO ALIBI.

The exception to the charge of the court upon the defense of alibi is not subject to the criticism urged against it. It was understandable, not confusing, and correctly charged upon this particular defense. See *Smith v. State*, 3 Ga. App. 803, 61 S. E. 737.

2. CRIMINAL LAW  $\S$ 1159(4)—REVIEW OF QUESTIONS OF FACT ON CONFLICTING EVIDENCE.

The evidence for the state, if believed by the jury, demanded the verdict, which has the approval of the trial judge. This court cannot set a verdict aside where the jury who sees and heard the witnesses give credit to one version rather than the other. The court did not err in overruling the motion for a new trial.

Error from Superior Court, Harris County; G. H. Howard, Judge.

Proceedings between the State and E. C. David. A judgment adverse to David was rendered, and he brings error. Affirmed.

Geo. C. Palmer, of Columbus, for plaintiff in error.

C. F. McLaughlin, Sol. Gen., of Columbus, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 338)

JENKINS v. STATE. (No. 10775.)

(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)*(Syllabus by the Court.)*INTOXICATING LIQUORS  $\S$ 236(19) — SUFFICIENCY OF EVIDENCE; ILLEGAL MANUFACTURE.

The defendant was indicted for distilling, manufacturing and making alcoholic, intoxicating, and spirituous liquors, and malted liquor and mixed liquor and beverages, part of same being alcoholic. The jury were authorized, and did find, that the defendant had in his house an outfit that had been when assembled, and could be, used to distill whisky, and had in his house beer that is used for distillation; that such beer was intoxicating; and that such concoction at the time it was so found was fermenting in a barrel, over the head of which a quilt was placed; that the still outfit had been in recent use, and that "low wine," or the first run of whisky, had been through the still and pipes. Such evidence, under appropriate charge

of the court, was sufficient to authorize a verdict of guilty against the defendant. The trial judge having approved the verdict and no error of law being assigned which requires a new trial, the judgment is affirmed.

Error from Superior Court, Lee County; Z. A. Littlejohn, Judge.

Will Jenkins was convicted of unlawfully manufacturing intoxicating liquors, and he brings error. Affirmed.

W. G. Martin, of Albany, for plaintiff in error.

Jule Felton, Sol. Gen., of Montezuma, for the State.

LUKE, J. The judgment is affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 371)

BALLARD et al. v. MORGAN COUNTY et al.  
MORGAN COUNTY et al. v. BALLARD et al.  
(Nos. 10732, 10748.)(Court of Appeals of Georgia, Division No. 2  
Nov. 5, 1919.)*(Syllabus by the Court.)*1. COURTS  $\S$ 488(1) — TRANSFER FROM SUPREME COURT TO COURT OF APPEALS OF CONSTITUTIONAL QUESTIONS.

This case, under the writ of error, was transmitted from the superior court to the Supreme Court, and the latter court by a formal order transferred it to this court. From this order it necessarily follows that in the judgment of the Supreme Court the constitutional question attempted to be raised in the case was not properly presented.

2. COUNTIES  $\S$ 183(4)—PROCEEDING TO VACATE VALIDATION OF BONDS.

Where, at a special term of the superior court of Morgan county held on June 28, 1919, upon a petition duly filed, praying for the validation of certain county bonds, all the proceedings appeared on their face to have been regular, including the notice provided for by law, and the court rendered a judgment validating the bonds, and 16 days thereafter, and after the court had adjourned, certain persons filed a petition merely alleging that they were taxpayers and asking that the order validating the bonds be vacated or reopened and that they be heard on the question as to the regularity or irregularity of the election held to authorize the bonds, the court did not err in dismissing the petition on the ground that it came too late.

Error from Superior Court, Morgan County; J. B. Park, Judge.

Proceeding by W. W. Ballard and others against Morgan County and others. Petition dismissed and plaintiffs bring error, and defendants take a cross-bill of exceptions. Af-

affirmed on main bill of exceptions, and cross-bill dismissed.

Sam'l H. Sibley, of Union Point, and Orrin Roberts, of Monroe, for plaintiffs in error.

Williford & Lambert, of Madison, and Doyle Campbell, Sol. Gen., of Monticello, for defendants in error.

SMITH, J. Judgment affirmed on main bill of exceptions; cross-bill dismissed.

JENKINS, P. J., and STEPHENS, J., concur.

(24 Ga. App. 364)

BOATRIGHT v. EASON. (No. 10611.)

(Court of Appeals of Georgia, Division No. 1. Nov. 5, 1919.)

*(Syllabus by the Court.)*

1. COURTS  $\S$ 188(8)—JURISDICTION OF MUNICIPAL COURT IN ACTION TO TENANTS.

The city court of Blackshear has jurisdiction of the trial of proceedings to evict a tenant holding over. See Acts 1911, p. 211; Dorrough v. Morris, 21 Ga. App. 477, 94 S. E. 641, and cases cited.

2. LANDLORD AND TENANT  $\S$ 294—DETERMINATION OF RIGHT OF POSSESSION.

The proceeding authorized by section 5382 et seq. of the Civil Code (1910) is not for the trial of title to land. The sole purpose of this section and the rights thereunder is to determine the right of possession between one claiming to be a landlord, on one side, and a person claimed by him to be his tenant, on the other side. See Jordan v. Jordan, 108 Ga. 483, 30 S. E. 265; Bullard v. Hudson, 125 Ga. 393, 54 S. E. 132; Grizzard v. Roberts, 110 Ga. 41, 35 S. E. 291; Willis v. Harrell, 118 Ga. 906, 45 S. E. 794.

3. APPEAL AND ERROR  $\S$ 169, 174—QUESTIONS OF LAW NOT RAISED BELOW NOT REVIEWABLE.

Questions of law not raised in the trial court cannot be raised here for the first time.

(a) The warrant in this case was proceeding in the name of a guardian for his ward, and issue was joined by the defendant as such; and the point cannot for the first time be raised here, by the brief of the plaintiff in error, that the guardian did not introduce in evidence his letters of guardianship, no such question having been raised in the trial court by plea as would put the plaintiff in the court below to such proof. See Haslehurst v. Morrison, 48 Ga. 397; Western & Atlantic R. Co. v. Harris, 128 Ga. 394, 57 S. E. 722.

4. EVICTION.

The trial judge, who by agreement heard the case without the aid of a jury, did not err in rendering judgment in favor of the plaintiff.

Error from City Court of Blackshear; W. A. Milton, Judge pro hac.

Action by W. M. Eason, guardian against R. B. Boatright. Judgment for plaintiff, and defendant brings error. Affirmed.

W. W. Bennett, of Baxley, for plaintiff in error.

Memory & Memory, of Blackshear, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 355)

HARRIS v. STATE. (No. 10869.)

(Court of Appeals of Georgia, Division No. 1. Nov. 4, 1919.)

*(Syllabus by the Court.)*

SUFFICIENCY OF EVIDENCE.

The evidence did not authorize the conviction of the defendant upon the charge of unlawfully possessing intoxicating liquors. It was error to overrule her motion for a new trial.

Error from City Court of Dublin; R. D. Flynt, Judge.

C. L. Harris was convicted of unlawfully possessing intoxicating liquors, and she brings error. Reversed.

Smyth Burch and W. A. Dampier, both of Dublin, for plaintiff in error.

LUKE, J. Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 360)

KEYS v. STATE. (No. 10887.)

(Court of Appeals of Georgia, Division No. 1. Nov. 4, 1919.)

*(Syllabus by the Court.)*

1. INSTRUCTIONS AS TO LARCENY.

The court did not err in failing to charge the jury upon the law of larceny.

2. CRIMINAL LAW  $\S$ 938(1)—NEW TRIAL ON GROUNDS OF NEWLY DISCOVERED EVIDENCE.

The alleged newly discovered evidence, which is the basis of the second special ground of the motion for a new trial, is cumulative in character, and is not such evidence as would probably cause a different result upon another trial of the case.

3. SUFFICIENCY OF EVIDENCE.

The evidence amply authorized the verdict, and the court did not err in refusing to grant a new trial.

Error from Superior Court, Bartow County; M. C. Tarver, Judge.

C. W. Keys was convicted of an offense, and he brings error. Affirmed.

W. C. Henson, of Cartersville, and A. L. Henson, of Calhoun, for plaintiff in error.

J. M. Lang, Sol. Gen., of Calhoun, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 326)

WALTON v. STATE. (No. 10708.)

(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)

(Syllabus by the Court.)

1. CRIMINAL LAW ¶762(3)—INSTRUCTIONS; EXPRESSING OPINION AS TO PROOF.

The following excerpt from the charge is complained of: "Assault with intent to commit a rape is an assault made with the intent to have carnal knowledge of a female, forcibly and against her will. If a person should make an assault upon a woman with the intent to have carnal knowledge of her, forcibly and against her will; if he entered upon that assault and should seize the woman with that intention and that was his intention, then if he desisted by reason of fear or from an inability to commit the offense, why then that would not acquit him of the offense of assault with intent to commit a rape." This portion of the charge is not subject to the only exception thereto argued in the brief of counsel for the plaintiff in error, to wit, that the court therein expressed or intimated an opinion as to what had been proved in the case.

2. CRIMINAL LAW ¶1178—APPEAL; ABANDONMENT OF OBJECTIONS.

The other special grounds of the motion for a new trial, not being referred to in the brief of counsel for the plaintiff in error, are treated as abandoned.

3. REFUSAL OF NEW TRIAL.

The verdict was authorized by the evidence, and the court did not err in refusing to grant a new trial.

Error from Superior Court, Stewart County; Z. A. Littlejohn, Judge.

Willard Walton was prosecuted for a crime, and from the judgment, and the denial of his motion for a new trial, he brings error. Affirmed.

N. B. Butt and G. Y. Harrell, both of Lumpkin, for plaintiff in error.

Jule Felton, Sol. Gen., of Montezuma, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 379)  
TATE v. STATE. (No. 10688.)

(Court of Appeals of Georgia, Division No. 1.  
Oct. 14, 1919.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION ¶186 — NATURE OF MOTION TO QUASH.

A motion to quash an accusation is merely a demurrer to the accusation. Thomasson v. State, 22 Ga. 499 (1).

2. INDICTMENT AND INFORMATION ¶147 — GROUNDS OF DEMURRER.

An accusation is not demurrable for any matter dehors the pleadings and the record. Jackson v. State, 64 Ga. 344 (1).

3. STRIKING MOTION TO QUASH AFFIDAVIT.

Under the above rulings the court did not err in striking the motion to quash the accusation.

Error from City Court of Macon; Du Pont Guerry, Judge.

Proceeding by the State, on accusation against Fred Tate. From a judgment striking his motion to quash the accusation, Tate brings error. Affirmed.

Wallace Miller, of Macon, for plaintiff in error.

Will Gunn, Sol., of Macon, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 357)

HARGETT et al. v. STATE. (No. 10878.)

(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)

(Syllabus by the Court.)

1. MOTION FOR NEW TRIAL.

The special ground of the motion for a new trial points out no error which would require the grant of a new trial.

2. CRIMINAL LAW ¶1159(2), 1160—REVIEW OF QUESTIONS OF FACT.

This court is a court for the correction of errors of law alone. "It has no authority to entertain an assignment of error that the verdict is contrary to the evidence, if there is any evidence at all to support the verdict. This ground in the motion for new trial is addressed to the discretion of the trial judge, upon whom is imposed the duty of being satisfied with a verdict before he approves it." Bell v. Aiken, 1 Ga. App. 36, 57 S. E. 1001. On questions of fact the jury is the final arbiter. The trial judge by overruling the motion for a new trial expressed his satisfaction with the verdict, and this court will not interfere.



Error from Superior Court, Harris County; G. H. Howard, Judge.

Proceedings between Charlie Hargett and others, and the State. Judgment adverse to Hargett and his coparties was rendered, and they bring error. Affirmed.

Geo. C. Palmer, of Columbus, for plaintiffs in error.

C. F. McLaughlin, Sol. Gen., of Columbus, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 402)

**MARSHALL v. ARMOUR FERTILIZER WORKS.** (No. 10453.)

(Court of Appeals of Georgia, Division No. 2. Nov. 6, 1919.)

(Syllabus by the Court.)

**1. TIME §9(4)—COMPUTATION OF TIME FOR JUDICIAL SALES.**

"Whenever any officer of this state shall have taken possession of any property under process in any case of trover, and neither the plaintiff nor defendant shall replevy such property, and such property remains in the hands of such officer, and is of a perishable nature or liable to deterioration from keeping, or there is expense attending the keeping of the same, the same may be sold under the provisions of section 6068 of the Code." Civ. Code 1910, § 5153; Glisson v. Heggie, 105 Ga. 30, 31 S. E. 118; Our Bank v. Corry, 145 Ga. 385, 89 S. E. 365; Phillips v. Taber, 83 Ga. 565, 10 S. E. 270. Under the provisions of section 6069 of the Code, if the property be live stock, it may be sold as therein provided after three days' notice. Where a sale is advertised on December 25th to take place on December 27th, there is a failure to comply with the legal requirement governing the sale, since where a number of days is prescribed for the exercise of any privilege, or the discharge of any duty, only the first or last day shall be counted. Pol. Code 1910, § 4, par. 8; English v. Ozburn, 59 Ga. 392; Rusk v. Hill, 117 Ga. 722, 726, 45 S. E. 42.

**2. JUDICIAL SALES §11, 50(1), 53—PURCHASER AT VOID SALE ACQUIRES NO TITLE.**

While it is true that a purchaser of property at a void sale acquires no title thereto (Kirkland v. Gaskins, 20 Ga. App. 235, 92 S. E. 965; Bacon v. Hanesley, 22 Ga. App. 704, 97 S. E. 101), the mere fact that the sheriff had not advertised a sale of personal property had under the provisions of sections 5153, 6068, and 6069 of the Civil Code 1910, for the full three days as therein provided, would not of itself render the sale void. The purchaser at a sheriff's sale depends upon the "judgment, the levy, and the deed," all other questions being between parties to the judgment and the officer; it being sufficient for the purchaser that

the sheriff had obtained authority to sell and had executed to him a title. The provisions of law governing the advertisement of the property for a particular time or in a particular way are merely directory to the sheriff, and the effect of any such neglect on his part results in subjecting him to a suit for damages at the instance of the party injured, but does not affect the title of the purchaser unless there was actual fault on the purchaser's part, such as collusion between him and the sheriff. Brooks v. Rooney, 11 Ga. 423, 56 Am. Dec. 430; Civ. Code 1910, § 6059; Hendrick v. Davis, 27 Ga. 167, 73 Am. Dec. 726; Solomon v. Peters, 87 Ga. 251, 256, 92 Am. Dec. 69; Wallace v. Trustees, 52 Ga. 165, 166; Jeffries v. Bartlett, 75 Ga. 230; Conley v. Redwine, 109 Ga. 640, 644, 35 S. E. 92, 77 Am. St. Rep. 898. Even the fact that the purchaser was put upon notice that such a merely directory duty of the officer had not been complied with would not of itself, and in the absence of fraud or collusion on the part of the purchaser, render the sale void and thus impair the title so acquired. Johnson v. Reese, 28 Ga. 353, 355, 73 Am. Dec. 757.

**3. JUDICIAL SALES §3—AUTHORITY OF SHERIFF TO SELL.**

It being undisputed that the plaintiff in this case had authorized the sheriff to notify the defendant of the plaintiff's intention to apply for leave to sell, this is equivalent to a permission for the sheriff to proceed in the plaintiff's name in obtaining such an order, and it therefore becomes unnecessary in this case to decide whether in such a proceeding the sheriff would ordinarily have the right to proceed in the name of the plaintiff rather than in his own.

**4. DIRECTION OF VERDICT.**

Under the rulings made in the two preceding paragraphs, the court erred in directing a verdict for the plaintiff.

**5. MALICIOUS PROSECUTION §16, 25(3), 34—RECOUPMENT FOR MALICIOUS USE OF LEGAL PROCESS.**

The court did not err, however, in refusing to allow the defendant's claim for damages by way of recoupment, in which the defendant sought to thus recover for the alleged malicious use by the plaintiff of the present legal process. There are three essential elements which must appear before one can recover for malicious use of legal process: (1) Malice; (2) want of probable cause; and (3) that the proceeding complained of had terminated in favor of the defendant therein before suit for damages based upon it was brought. Thus, where a plaintiff had instituted a bail trover action against a defendant, the defendant could not in the same case, by way of recoupment, recover damages for such alleged malicious use of the legal process, since the proceeding complained of had not terminated in the defendant's favor. Fender v. Ramsey, 131 Ga. 440, 62 S. E. 527. In point of fact, the record as now presented precludes the possibility of even a future recovery on such a ground, since the judgment in favor of the plaintiff in the trover proceeding, even though erroneous, is nevertheless sufficient to conclusively establish the existence of such a

probable cause as will prevent the maintenance of such an action. *Short v. Spragins*, 104 Ga. 628, 30 S. E. 810; *McElreath v. Gross*, 23 Ga. App. 287, 98 S. E. 190.

Error from Superior Court, Taylor County; G. H. Howard, Judge.

Action by the Armour Fertilizer Works against C. B. Marshall. Judgment on a directed verdict for plaintiff, new trial was denied, and defendant brings error. Reversed.

Armour Fertilizer Works instituted bail trover proceedings against Marshall to recover certain mules to which the plaintiff claimed title. The defendant answered that he had purchased the property at a sheriff's sale had by virtue of a previous bail trover proceeding instituted by the plaintiff against one D. A. Youngblood. He also sought to recoup damages against the plaintiff for malicious use of the present legal process, alleging that the proceeding was instituted and prosecuted maliciously and without probable cause, and that plaintiff was a nonresident corporation. Upon the trial of the case it was disclosed: That on March 23, 1916, D. A. Youngblood was indebted to the Armour Fertilizer Works in the sum of \$383, which indebtedness was evidenced by a promissory note payable October 1, 1916, and, to secure the payment thereof, he had executed a bill of sale to the fertilizer works to said live stock. Youngblood having failed to pay the note when due, the Armour Fertilizer Works had instituted bail trover proceedings against him, and the sheriff had seized the property described in the bill of sale. Neither the Armour Fertilizer Works nor Youngblood replevied the property, and the judge of the superior court being absent from the county, the sheriff, after proper notice, applied to the ordinary in the name of the Armour Fertilizer Works, for leave to sell such property as perishable and expensive to keep, under the provisions of the Civil Code 1910, § 5153.

On December 25, 1916, the ordinary granted an order directing the sheriff to sell the property, and the sheriff advertised the same to be sold on December 27, 1916, and did sell it on that date. The attorney for the Armour Fertilizer Works appeared at the sale and entered his objections, stating to the sheriff and to the public, including Marshall, that the property was being sold illegally on account of it not having been properly advertised. The sheriff, despite such objection, proceeded with the sale, and C. B. Marshall, the defendant in the present proceeding, bought the two mules now in controversy, paying therefor the sum of \$235.70. The Armour Fertilizer Works then instituted the present bail trover proceedings, claiming title to the property under the bill of sale executed by Youngblood, and contending that

the sheriff's sale was void because not properly advertised, and that the defendant, having bought the property with notice of this fact, had acquired no title thereto. After hearing the evidence, the court directed a verdict against the defendant's plea of recoupment, claiming damages for malicious use of legal process, and then proceeded to direct a verdict in favor of the plaintiff on the main branch of the suit in trover. The defendant made a motion for a new trial assigning error upon the several rulings thus made by the court, which motion for a new trial being overruled, defendant now excepts.

Jere M. Moore, of Montezuma, and C. B. Marshall, of Reynolds, for plaintiff in error.

C. W. Foy, of Butler, for defendant in error.

JENKINS, P. J. Judgment reversed.

STEPHENS and SMITH, JJ., concur.

(24 Ga. App. 327)

DAVIS v. STATE. (No. 10710.)

(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)

(Syllabus by the Court.)

ROBBERY  $\Rightarrow$  24(5) — EVIDENCE; FORCE AND INTIMIDATION.

The defendant was convicted of the offense of robbery. The evidence failed to show that any force or intimidation was used, or that there was a sudden snatching, taking, or carrying away, such as is defined to be robbery. Pen. Code 1910, § 148; *Williams v. State*, 9 Ga. App. 170, 70 S. E. 890. His conviction of the offense of robbery was unauthorized by the evidence. A conviction of larceny from the person would have been authorized if he had been indicted for that offense. For the reason that the evidence did not authorize his conviction, his motion for a new trial, upon the general grounds, must be granted.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

John Davis was convicted of robbery, his motion for a new trial upon the general grounds was overruled, and he brings error. Reversed.

Shelby Myrick, of Savannah, for plaintiff in error.

Walter C. Hartridge, Sol. Gen., of Savannah, for the State.

LUKE, J. Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 363)

**WEATHERS v. STATE.** (No. 10523.)(Court of Appeals of Georgia, Division No. 1.  
Nov. 5, 1919.)*(Syllabus by the Court.)***1. CRIMINAL LAW §112(4) — VENUE; EMBEZZLEMENT OF CHECKS ISSUED BY BANK PRESIDENT IN ANOTHER COUNTY.**

Where the president of a bank, by reason of his official position with it, embezzles its funds by drawing them by checks issued in another county, the venue of the crime is not improperly laid in the county in which the bank is situated. See *Mangham v. State*, 11 Ga. App. 427-436, 75 S. E. 512(2); *Rose v. State*, 4 Ga. App. 588, 62 S. E. 117.

**2. OVERRULING OF MOTION FOR NEW TRIAL.**

The evidence in this case authorized the verdict, which has the approval of the trial judge, and for no reason assigned did the court err in overruling the motion for a new trial.

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

Proceeding by the State against A. H. Weathers, and from the judgment and the denial of his motion for a new trial he brings error. Affirmed.

J. P. Knight and Wm. Story, both of Nashville, W. O. Lankford, of Douglas, and W. W. Bennett, of Baxley, for plaintiff in error.

C. E. Hay, Sol. Gen., of Thomasville, and W. D. Buie, of Nashville, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 338)

**RUMPH v. STATE.** (No. 10765.)(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)*(Syllabus by the Court.)***1. CRIMINAL LAW §769, 824(10)—INSTRUCTIONS—IMPEACHMENT OF WITNESSES—CORROBORATION.**

While "the law is well settled that when a judge undertakes to charge the law on any subject, he must charge all of it upon that subject that is material and applicable to the case" (*Harper v. State*, 17 Ga. App. 561, 87 S. E. 808 [2]), in this case the charge of the court upon the subject of impeachment of witnesses sufficiently covered all of that subject which was material and applicable.

(a) Several of the state's witnesses were sought to be impeached by proof that on the commitment trial of the defendant their testimony was materially different from what it was on this trial, but none of them admitted that his testimony on the former trial was

false; on the contrary they all denied that their testimony on the two trials was different. Under these facts it was not error for the court, in the absence of a timely and appropriate written request, to fail to charge the jury that if a witness willfully and knowingly swore falsely as to a material matter, his testimony ought to be disregarded entirely unless corroborated by circumstances or other unimpeached evidence. *Robison v. State*, 114 Ga. 446, 447, 40 S. E. 253. See, also, *Millen & Southwestern R. Co. v. Allen*, 130 Ga. 656, 61 S. E. 541(5).

(b) The excerpt from the charge of the court complained of was not error for any reason assigned.

**2. SUFFICIENCY OF EVIDENCE.**

The verdict was authorized by the evidence, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Macon County; Z. A. Littlejohn, Judge.

Dock Rumph was convicted of an offense, and he brings error. Affirmed.

John B. Guerry, of Montezuma, for plaintiff in error.

Jule Felton, Sol. Gen., of Montezuma, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 330)

**GOOLSBY v. STATE.** (No. 10729.)(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)*(Syllabus by the Court.)***1. EVIDENCE TO SUSTAIN CONVICTION OF ROBBERY.**

The evidence in this case authorized the conviction of the offense of robbery.

**2. INSTRUCTIONS—INTENT TO STEAL.**

The charge of the court is not subject to the criticism that it failed to instruct the jury upon the question of intent to steal being a necessary ingredient of the crime of robbery. The jury was instructed that robbery was charged to have been committed by the defendant, and the elements of robbery were fully charged.

**3. OVERRULING OF THE MOTION FOR NEW TRIAL.**

The court fully charged upon the subject of alibi as a defense. The verdict being authorized, and there being no error assigned which entitles the defendant to a new trial, it was proper for the court to overrule the motion for a new trial.

Error from Superior Court, Oglethorpe County; W. L. Hodges, Judge.

Mose Goolsby was convicted of an offense, his motion for a new trial was denied, and he brings error. Affirmed.

Joel Cloud and Hamilton McWhorter, Jr., both of Lexington, for plaintiff in error.

A. S. Skelton, Sol. Gen., of Hartwell, and Paul Brown, of Lexington, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 370)

GOEN v. STATE. (No. 10904.)

(Court of Appeals of Georgia, Division No. 1.  
Nov. 5, 1919.)

(Syllabus by the Court.)

1. CRIMINAL LAW §1064(7) — NEW TRIAL; SUFFICIENCY OF MOTION.

A special ground of a motion for a new trial must be complete within itself. The second special ground of the motion for a new trial in the instant case is as follows: "(2) Because the court failed to charge the law of circumstantial evidence." It is not even alleged in this ground that the defendant's conviction depended wholly upon circumstantial evidence; consequently the ground cannot be considered.

2. LARCENY §64(7)—EVIDENCE; POSSESSION OF RECENTLY STOLEN GOODS.

The evidence failed to show definitely how recent was the possession of the stolen property. It does, however, appear from the record that the goods were stolen in September, 1918, and that the defendant was indicted in January, 1919. The defendant's conviction, however, did not depend entirely upon his recent possession of the stolen goods, but the evidence showed other incriminatory facts, and therefore the defendant's conviction was not contrary to the following ruling in *Calloway v. State*, 111 Ga. 832, 36 S. E. 63, cited by counsel for the plaintiff in error: "While recent possession of stolen goods unexplained will justify a conviction for larceny, the mere possession of goods several months subsequent to the time they were alleged to have been stolen and the failure to satisfactorily account for such possession will not *alone* authorize a conviction" (*italics ours*).

3. OVERRULING MOTION FOR NEW TRIAL.

The verdict was authorized by the evidence, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Spalding County; W. E. H. Searcy, Jr., Judge.

Aswell (alias Minor) Goen was convicted of an offense, his motion for a new trial was denied, and he brings error. Affirmed.

C. L. Redman, of Jackson, for plaintiff in error.

E. M. Owen, Sol. Gen., of Zebulon, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 352)

CULBERSON v. STATE. (No. 10852.)

(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)

(Syllabus by the Court.)

CRIMINAL LAW §935(1), 1160—NEW TRIAL; DISCRETION OF TRIAL COURT—REVIEW.

"In this case the motion for a new trial contained only the usual general grounds. There was some slight evidence authorizing the verdict; and, the verdict having been approved by the trial judge, under the repeated and uniform rulings of this court and of the Supreme Court, a reviewing court is powerless to interfere. When the verdict is apparently decidedly against the weight of the evidence, the trial judge has a wide discretion as to granting or refusing a new trial; but whenever there is any evidence, however slight, to support a verdict which has been approved by the trial judge, this court is absolutely without authority to control the judgment of the trial court." *Bradham v. State*, 21 Ga. App. 510, 94 S. E. 618, and cases cited.

Error from Superior Court, Harris County; G. H. Howard, Judge.

Proceeding between the State and Addis Culberson, and from the judgment Culberson brings error. Affirmed.

J. B. Burnside, of Thomson, for plaintiff in error.

C. F. McLaughlin, Sol. Gen., of Columbus, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 280)

BURNS et al. v. F. S. ROYSTER GUANO CO. (No. 10690.)

(Court of Appeals of Georgia, Division No. 1.  
Oct. 14, 1919.)

(Syllabus by the Court.)

EXECUTION §166 — ILLEGALITY; DISMISSAL OF AFFIDAVIT OF.

This is the second appearance of this case in this court (*Proctor v. F. S. Royster Guano Co.*, 21 Ga. App. 617, 94 S. E. 821), and it is here now on exception to the dismissal of an affidavit of illegality, in which the execution issued upon the judgment in question was attacked on the ground that "it does not appear that the said F. S. Royster Guano Company is either an individual trading under said name, or is a copartnership composed of named individuals, nor is a corporation under the laws of any state of America," etc. The petition shows that the suit proceeded in the name of "F. S. Royster Company, a corporation." The judgment is regular, and the execution issued and proceeded in accordance with the judgment.

There is no merit in the affidavit of illegality, and the court properly dismissed it.

Error from City Court of Millen; G. C. Dekle, Judge.

Proceeding on execution by the F. S. Royster Guano Company against J. M. Burns and others, with affidavit of illegality. From a judgment dismissing the affidavit of illegality, defendants bring error. Affirmed.

A. S. Anderson and Thos. L. Hill, both of Millen, for plaintiffs in error.

Brinson & Hatcher, of Waynesboro, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 342)

KINSEY v. STATE. (No. 10790.)

(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)

(Syllabus by the Court.)

1. HOMICIDE  $\S$ 145—EVIDENCE; PRESUMPTION AS TO INTENT.

Under the facts of this case the court did not err in failing to charge the jury on the law of involuntary manslaughter. The accused was charged with murder, the indictment alleging that he "did kill and murder by striking and cutting the said Charlie Clover with a certain heavy piece of timber and club and knife." The evidence showed that the wounds from which the deceased died were made by a scantling, which was three or four inches wide, about three inches thick, and four or five feet long, and by a knife. A witness swore that the defendant cut the deceased "with a knife on the left side of the chin, and on his arm; the cut made a deep gash; I suppose to the bone. He also cut him on the left arm between the shoulder and elbow." Another witness swore that the deceased was "cut on the side of the jaw. The gash was about an inch and a half wide and went to the bone. He was cut to the bone on the chin; \* \* \* his jawbone was broken. \* \* \* He seemed to be crushed in several places, and also three places on the left side of his head was skinned; had rose up kinder; had departed from the skull, and was full of water, soft like. This wound was inflicted by some kind of a blunt instrument. The wound on his chin could have been made by some sort of a knife." "All men are presumed to intend the natural and proximate consequences of their ac-

tion. When a man kills another by the use of means appropriate to that end, he is presumed to have intended that end. 'When death results from the unlawful use of a deadly weapon, the law by presumption imputes to the slayer an intention to kill.' *Gallery v. State*, 92 Ga. 463, 17 S. E. 863. 'When one voluntarily shoots at another and the shot kills, the homicide cannot be involuntary.' *Smith v. State*, 73 Ga. 79 (3). See, also, *Stovall v. State*, 106 Ga. 444 (3), 447, 32 S. E. 586; *Johnson v. State*, 4 Ga. App. 59, 60 S. E. 813." *Conley v. State*, 21 Ga. App. 135, 94 S. E. 261. Counsel for plaintiff in error relies upon *Wrye v. State*, 99 Ga. 34, 25 S. E. 610. That case is not binding authority upon this point, as appears from the following: "While there cannot be either murder or voluntary manslaughter without an intent to kill, yet where the weapon used by the slayer was a pocketknife, and he stabbed the deceased in the back with it, the intent to kill may be presumed; and it was not necessary that the evidence should affirmatively show that the knife used was a weapon likely to produce death. *Johnson v. State*, supra. The two cases cited by counsel for the plaintiff in error (*Wrye v. State*, 99 Ga. 34, 25 S. E. 610, and *Warnack v. State*, 3 Ga. App. 590, 60 S. E. 288) to sustain their contention that the court should have charged the law of involuntary manslaughter although that theory of defense was raised solely by the defendant's statement, are not binding authorities upon this point, for the reason that the general statements in the decisions of those cases, which apparently so hold, are obiter; it appearing that in the *Wrye Case* there was a timely written request to give such a charge, and that in the *Warnack Case* the theory of involuntary manslaughter was raised, not only by the defendant's statement, but also by the sworn testimony." *Lott v. State*, 18 Ga. App. 748, 90 S. E. 727 (3).

2. HOMICIDE  $\S$ 255(2) — SUFFICIENCY OF EVIDENCE.

The verdict of voluntary manslaughter was authorized by the evidence, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Laurens County; J. L. Kent, Judge.

Cluck Kinsey was convicted of voluntary manslaughter, and he brings error. Affirmed.

J. S. Adams, of Dublin, for plaintiff in error.

E. L. Stephens, Sol. Gen., of Wrightsville, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

$\Leftarrow$  For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(24 Ga. App. 341)

**BARKSDALE v. STATE. (No. 10778.)**(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)*(Syllabus by the Court.)***1. SUFFICIENCY OF EVIDENCE.**

The court substantially charged as requested by the defendant, and, in view of the evidence, the charge of the court was most fair to the defendant.

**2. CRIMINAL LAW §1160—REVIEW OF VERDICT APPROVED BY TRIAL COURT.**

The evidence amply authorized the jury to find that the defendant was in possession of many gallons of whisky, and material and equipment for making more. He had in his house clothes and shoes covered with the "slops" from the still, etc. The trial court approved the verdict; no error of law is shown; the defendant had a fair trial by a jury of his people; it was proper to overrule the motion for a new trial.

Error from Superior Court, Lincoln County; B. F. Walker, Judge.

Sandy Barksdale was convicted of an offense, and he brings error. Affirmed.

Colley & Colley, of Washington, Ga., for plaintiff in error.

R. C. Norman, Sol. Gen., of Washington, Ga., for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 422)

**STARLING et al. v. STATE. (No. 10667.)**(Court of Appeals of Georgia, Division No. 1.  
Nov. 7, 1919.)*(Syllabus by the Court.)***1. CRIMINAL LAW §1064(1, 4)—NEW TRIAL; GROUNDS OF MOTION.**

Even if the assignment of error in the fourth ground of the motion for a new trial was properly made, we do not think the court committed error in admitting the evidence of which complaint is made. However, under previous rulings of this court, we are not called upon to consider this ground of the motion, the opening sentence of which is as follows: "Because the court, over the objection of defendant's counsel, allowed the following testimony, to wit." Then follows the testimony of some witness not named. In *Adams v. State*, 22 Ga. App. 252, 95 S. E. 877 (1), it is held that "a ground of a motion for a new trial, which complains of the admission of specified testimony, must state the name of the witness whose testimony is complained of. *Hayes v. State*, 18 Ga. App. 68, 88 S. E. 752; *Peeples v. Butler*, 21 Ga. App. 310, 94 S. E. 278."

See, also, *Hunter v. State*, 148 Ga. 566, 97 S. E. 523 (1). Further on in this ground of the motion it is alleged that "defendant's counsel moved the court to exclude the testimony of the several witnesses as to what Gus Odom told Jack Cox, John Robinson, and Charlie McLain." The names of the "several witnesses" are not given. Even if from the language used we could reach the conclusion that the witnesses referred to were Cox, Robinson, and McLain, it would be necessary to search through the entire brief of evidence, to see what each swore, before we could determine whether the evidence was improperly admitted, and this we are not required to do. Both this court and the Supreme Court have held that "grounds of a motion for new trial, which are incomplete, and cannot be understood without resorting to an examination of the brief of evidence, fail to present any question for decision. *Head v. State*, 144 Ga. 383, 87 S. E. 273; *Sims v. Sims*, 131 Ga. 262, 62 S. E. 192." *Smiley v. Smiley*, 144 Ga. 546 (2), 87 S. E. 668; *Braxley v. State*, 17 Ga. App. 197(4), 86 S. E. 425.

**2. CRIMINAL LAW §912½, 1020½—CONSTITUTIONAL QUESTIONS; MOTION FOR NEW TRIAL.**

By the fifth ground of the motion for a new trial it was sought to raise a constitutional question, and this case was sent to the Supreme Court. That court held: "Under the ruling made in *Hendry v. State*, 147 Ga. 260, 93 S. E. 413 (8), 'a question as to the constitutionality of a law cannot be raised for the first time in a motion for new trial, where it was not made either by demurrer to the pleadings, or by objections to the evidence, or in some other appropriate way pending the trial.' The plaintiff in error in the instant case was accused and convicted of a misdemeanor. In his motion for new trial an attack is made for the first time upon the constitutionality of the statute for the violation of which he was convicted. Under the ruling quoted above, concurred in by a majority of the court, no constitutional question is properly made in the case. The case is not one of which the Supreme Court has jurisdiction, and direction is given that it be transferred to the Court of Appeals, which has jurisdiction to hear and determine the case." *Starling v. State*, 149 Ga. —, 99 S. E. 619.

**3. CRIMINAL LAW §1178 — NEW TRIAL; ABANDONMENT OF GROUNDS.**

Grounds 6 and 7 of the motion for a new trial, not having been argued in the brief of plaintiff in error, will be treated as abandoned.

**4. KNOWLEDGE OF CONTRACT—CONVICTION.**

In the brief of counsel for plaintiff in error the only reason assigned why the verdict should be set aside under the general grounds of the motion for new trial is that "it nowhere appears in the evidence that either of the defendants knew that any of the persons taken from Boyd's employé [employment?] was under a contract of employment." That defendant Odom knew of the contract of employment there can be no doubt, and we think the facts were sufficient to authorize the jury to conclude that Odom was representing Starling in the

transaction, and therefore we think that the judgment as to both of them should be affirmed.

Error from City Court of Cairo; L. W. Rigby, Judge.

B. L. Starling and others were convicted of a misdemeanor. Their writ of error to the Supreme Court was by it (149 Ga. —, 99 S. E. 619) transferred to the Court of Appeals. Affirmed.

W. V. Custer, of Bainbridge, for plaintiffs in error.

Ira Carlisle, Sol., and S. P. Cain, both of Cairo, for the State.

BLOODWORTH, J. Affirmed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 345)

KELLEY v. STATE. No. 10805.)

(Court of Appeals of Georgia, Division No. 1. Nov. 4, 1919.)

(Syllabus by the Court.)

1. CRIMINAL LAW §1178—APPEAL; WAIVER OF ERROR.

The exceptions pendente lite cannot be considered, as no error was assigned thereon, either in the main bill of exceptions or in this court by counsel for the plaintiff in error before the case was submitted. *Jones v. Ragan*, 136 Ga. 653, 71 S. E. 1098 (7).

2. CRIMINAL LAW §915—NEW TRIAL; OVERRULING OF DEMURRER TO INDICTMENT.

It is well settled that the overruling of a demurrer to an indictment or accusation cannot be a ground of a motion for a new trial.

3. ADMISSION OF EVIDENCE.

The admission of the evidence complained of in the fifth ground of the motion for a new trial was not error for any reason assigned.

4. CRIMINAL LAW §730(1) — ARGUMENT OF COUNSEL CURED BY ACTION OF COURT.

Under all the facts of the case, including the notes of the trial judge, it cannot be said that the court erred in denying the several motions of the defendant to declare a mistrial, because of the various alleged improper and prejudicial remarks of the prosecuting solicitor during his argument to the jury. Some of these alleged prejudicial remarks were proper and authorized by the evidence, and the court specifically instructed the jury that those remarks of the solicitor which were improper were not in the case, and should not be considered by them.

5. PROPRIETY OF INSTRUCTIONS.

While the charge of the court is subject to criticism in several particulars, none of its errors of commission or of omission complained of requires a new trial.

6. CRIMINAL LAW §938(1) — NEW TRIAL; NEWLY DISCOVERED EVIDENCE.

The alleged newly discovered evidence is largely impeaching in its character, and is not such evidence as would probably produce a different result upon another trial of the case.

7. CRIMINAL LAW §510—ACCOMPLICE TESTIMONY NEED NOT BE CORROBORATED IN MISDEMEANOR CASES.

The rule that in a criminal case the defendant cannot legally be convicted upon the uncorroborated testimony of an accomplice does not apply in misdemeanors. In the instant case the verdict was amply authorized by the evidence, and the court did not err in overruling the motion for a new trial.

Error from City Court of Greenville; H. H. Revill, Judge.

Robert Kelley was convicted of an offense, and he brings error. Affirmed.

N. F. Culpepper and McLaughlin & Jones, all of Greenville, for plaintiff in error.

J. F. Hatchett, Sol., and M. Z. O'Neal, both of Greenville, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 328)

PERKINS v. STATE. (No. 10718.)

(Court of Appeals of Georgia, Division No. 1. Nov. 4, 1919.)

(Syllabus by the Court.)

CRIMINAL LAW §935(1), 1160—REVIEW OF VERDICT APPROVED BY TRIAL JUDGE; DISCRETION IN AWARD OF NEW TRIAL.

While the evidence in this case is rather weak, the court cannot say as a matter of law that the verdict is without evidence to support it. "The verdict having been approved by the trial judge, under the repeated and uniform rulings of this court and of the Supreme Court, a reviewing court is powerless to interfere. When the verdict is apparently decidedly against the weight of the evidence, the trial judge has a wide discretion as to granting or refusing a new trial; but whenever there is any evidence, however slight, to support a verdict which has been approved by the trial judge, this court is absolutely without authority to control the judgment of the trial court." *Bradham v. State*, 21 Ga. App. 510, 94 S. E. 618, and citations.

Error from City Court of Millen; G. C. Dekle, Judge.

Proceeding by the State against Randall Perkins, Jr. From the verdict and judgment and from the overruling of his motion for a new trial, Perkins brings error. Affirmed.

A. S. Anderson and E. G. Weathers, both of Millen, for plaintiff in error.

Wm. Woodrum, Sol., of Millen, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 351)

PACELEY v. STATE. (No. 10825.)

(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)

*(Syllabus by the Court.)*

1. CRIMINAL LAW  $\S$  1064(1)—NEW TRIAL; GROUNDS OF MOTION.

"Under repeated rulings of this court and of the Supreme Court, a ground of a motion for a new trial must be complete in itself. When it is so incomplete as to require this court to refer to the pleadings or to the brief of evidence, it will not be considered. *Bridges v. Griffin*, 20 Ga. App. 598 (2), 599, 93 S. E. 170. See, also, *Copeland v. Ruff*, 20 Ga. App. 217 (2), 92 S. E. 955; *Head v. State*, 144 Ga. 383, 87 S. E. 273; *Smiley v. Smiley*, 144 Ga. 546 (2), 87 S. E. 668." *Caesar v. State*, 22 Ga. App. 796, 97 S. E. 255 (1). Under the rulings in the cases cited neither of the two special grounds of the motion for new trial in this case can be considered by this court.

2. EVIDENCE TO SUPPORT VERDICT.

There is ample evidence to support the verdict.

Error from Superior Court, Dooly County; O. T. Gower, Judge.

Proceeding between the State and Huel Paceley, and from the judgment and the overruling of his motion for a new trial Paceley brings error. Affirmed.

Powell Lumsden, of Vienna, for plaintiff in error.

J. B. Wall, Sol. Gen., and Jesse Grantham, both of Fitzgerald, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 332)  
INGRAM v. STATE. (No. 10730.)

(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)

*(Syllabus by the Court.)*

1. CRIMINAL LAW  $\S$  814(17), 1064(4)—REVIEW; GROUNDS OF MOTION FOR NEW TRIAL; GROUNDS MUST BE COMPLETE; INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE.

(a) "A ground of a motion for a new trial, which complains of the admission of specified testimony, must state the name of the witness whose testimony is complained of." *Adams v. State*, 22 Ga. App. 252, 95 S. E. 877 (1), and cases cited.

(b) "Under repeated rulings of this court and of the Supreme Court, a ground of a motion for a new trial must be complete in itself. When it is so incomplete as to require this court to refer to the pleadings or to the brief of evidence, it will not be considered." *Caesar v. State*, 22 Ga. App. 796, 97 S. E. 255(1), and cases cited.

(c) "It is only where a case is wholly dependent upon the law of circumstantial evidence that the trial judge is required to give the law of circumstantial evidence." *Williamson v. State*, 22 Ga. App. 787, 97 S. E. 195, and cases cited.

The above rulings dispose of the special grounds of the motion for a new trial.

2. CRIMINAL LAW  $\S$  1160—APPEAL; AFFIRMANCE.

The evidence is sufficient to support the verdict, which has the approval of the trial judge, and, no error of law appearing, the judgment is affirmed.

Error from City Court of Carrollton; Jas. Beall, Judge.

Proceeding by the State against Mollie Ingram. From the verdict, and the denial of her motion for a new trial, she brings error. Affirmed.

Boykin & Boykin, of Carrollton, for plaintiff in error.

Willis Smith, Sol., of Carrollton, for the State.

BLOODWORTH, J. Affirmed.

BROYLES, C. J., and LUKE, J., concur.

$\S$  For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes



(24 Ga. App. 380)

**JOHNSON v. STATE.** (No. 10892.)(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)*(Syllabus by the Court.)***DRUNKARDS §11—INDICTMENT FOR DRUNKENNESS.**

An indictment under section 442 of Penal Code 1910, which charges the defendant with being and appearing drunk upon a certain highway, is subject to special demurrer, unless it contain the further allegation that such drunkenness was caused by "the excessive use of intoxicating wines, beers, liquors, or opiates." In this case it was error to overrule the ground of the demurrer which pointed out this specific defect. There is no merit in the other grounds of the demurrer. The court having erroneously overruled the demurrer, everything thereafter occurring was nugatory.

Error from Superior Court, Floyd County; Moses Wright, Judge.

J. L. Johnson was convicted of being drunk on a highway, and he brings error. Reversed.

W. B. Mebane, of Rome, for plaintiff in error.

C. H. Porter, Sol. Gen., of Rome, for the State.

LUKE, J. Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 428)

**SLAUGHTER v. STATE.** (No. 10886.)(Court of Appeals of Georgia, Division No. 1.  
Nov. 7, 1919.)*(Syllabus by the Court.)***1. MOTION FOR NEW TRIAL.**

We find no merit in any of the grounds of the amendment to the motion for new trial.

**2. CRIMINAL LAW §935(1)—NEW TRIAL; VERDICT AGAINST WEIGHT OF EVIDENCE.**

In *Hampton v. State*, 6 Ga. App. 778, 65 S. E. 816, it was held: "The defendant's guilt of the crime of burglary being wholly dependent upon the inference arising from the possession of stolen goods after the burglary, and this possession being shown by uncontradicted and unimpeached testimony to be consistent with defendant's innocence of burglary, though he may have been guilty of receiving stolen goods, the verdict was contrary to the evidence, and a new trial should have been granted." This ruling was followed in *Gibbs v. State*, 8 Ga. App. 107, 68 S. E. 742 (2). In discussing the latter case Judge Russell said (8 Ga. App. 108, 68 S. E. 742): "Upon the evidence submitted the conviction of the defendant was not authorized. The corpus delicti was proved, it is true, but the only circumstance connecting the

defendant with the perpetration of the offense was the possession of part of the stolen property, and this possession was so explained by uncontradicted testimony as necessarily to rebut the inference arising from possession of the stolen property. The decision must be controlled by the ruling in *Hampton v. State*, 6 Ga. App. 778, 65 S. E. 816, and similar cases. If the witness who corroborated the defendant's statement had been impeached or discredited in any way, we should not feel authorized to disturb the verdict. If there were any circumstances which would supply a reason why the jury did not believe this witness, we would not interfere. If there had been any testimony that the witness was unworthy of belief, on account of general bad character or of a conflict between portions of the witness' own testimony, if the witness had made contradictory statements either previously or upon the trial, or if there had been any evidence directly or circumstantially in conflict with her testimony, the verdict would be authorized; but a jury cannot arbitrarily disregard testimony which is wholly unimpeached and not contradicted, unless it is in relation to a matter which is unreasonable or impossible. If upon another trial the witness is shown by testimony to be unworthy of credit, for any legal reason or by any method provided by law, the testimony delivered upon this trial might be discredited and the jury authorized to disregard it; but, in the absence of some testimony to this effect upon the trial now under review, it appears to us that the jury merely arbitrarily disregarded uncontradicted and unimpeached evidence, and it is beyond their power to do this in any case." See, also, *Williams v. State*, 125 Ga. 268, 54 S. E. 166; *Brooks v. State*, 21 Ga. App. 661, 94 S. E. 810. Applying these rulings to the facts in this case, the judge erred in overruling the motion for new trial.

Broyles, C. J., dissenting.

Error from Superior Court, Terrell County; W. C. Worrill, Judge.

West Slaughter was prosecuted for an offense, and from this judgment and the denial of his motion for a new trial he brings error. Reversed.

W. H. Gurr, of Dawson, for plaintiff in error.

B. T. Castellow, Sol. Gen., of Cuthbert, and R. R. Arnold, of Atlanta, for the State.

BLOODWORTH, J. Judgment reversed.

LUKE, J., concurs.

BROYLES, C. J. (dissenting). I think that the jury were authorized to find that the defendant's explanation of his recent possession of the stolen property was not satisfactory to them. The witness introduced by the defendant to corroborate his statement does not corroborate all of the defendant's explanation as given in the statement, but, on the contrary, contradicts it in material parts. In my opinion the judgment should be affirmed.

(24 Ga. App. 387)

COPELAND v. GILBERT. (No. 10334.)

(Court of Appeals of Georgia, Division No. 2.  
Nov. 6, 1919.)*(Syllabus by the Court.)***1. APPEAL AND ERROR ⇨299—DIRECT BILL OF EXCEPTIONS; NECESSITY OF EXCEPTION TO JUDGMENT.**

A direct bill of exceptions which excepts to the verdict and to a ruling of the court necessarily controlling the verdict, viz. the direction of a verdict, which is brought up under section 6144, Civil Code 1910, is not subject to dismissal upon the ground that the plaintiff in error failed to except to the final judgment.

**2. APPEAL AND ERROR ⇨165—MOTION FOR NEW TRIAL; BILL OF EXCEPTIONS.**

A motion for a new trial will not operate to deprive the movant of his right to a direct bill of exceptions, complaining of a ruling of the trial judge that controlled the verdict, when such motion for a new trial had been dismissed before the signing and filing of the bill of exceptions; and such direct bill of exceptions, when tendered in due time, will not be dismissed on the ground that the plaintiff in error had elected to move for a new trial, instead of coming to this court on a direct bill of exceptions. See, in this connection, *Wright v. Hollywood, etc.*, 112 Ga. 884, 893, 894, 38 S. E. 94, 52 L. R. A. 621.

**3. LANDLORD AND TENANT ⇨328(2)—LANDLORD'S LIEN; TROVER BY ONE PURCHASING CROPS FROM TENANT.**

The questions of law which were decided in this case upon general demurrer when brought before this court as reported in *Gilbert v. Copeland*, 22 Ga. App. 752, 97 S. E. 251, have no application to the case as here presented under the evidence. The evidence upon the trial showed that the relation of landlord and tenant existed between the defendant Copeland, as landlord, and a third party by the name of Bell, as his tenant; that the rent was to be paid in kind, the landlord receiving part of the crop; that the crop sued for had been delivered to the landlord by the tenant for the payment of rent for the premises upon which it had grown. As a landlord holds a lien for rent upon all the crops raised by his tenant upon the rented premises, a trover suit, therefore, cannot be maintained by a third party, claiming title under contract with the tenant, to recover the crops raised by the tenant on the rented premises and delivered by the latter to the landlord for the payment of rent, until the lien in favor of the landlord has been discharged. The fact that the tenant was under contract with the third party (plaintiff in trover) to deliver to such third party certain parts of the crop in question, which was raised from seed furnished by plaintiff and the title to which crop, under the contract, was to remain in the plaintiff, would not operate to destroy the landlord's lien for rent on all of the crops raised on his land, including those described in the contract with the plaintiff in trover. The

court therefore erred in directing a verdict for the plaintiff.

Error from City Court of Thomasville; W. H. Hammond, Judge.

Trover by D. H. Gilbert against H. C. Copeland. Directed verdict for plaintiff, and defendant brings error. Reversed.

Titus, Dekle & Hopkins, of Thomasville, for plaintiff in error.

O. E. Hay and Eldon L. Joiner, both of Thomasville, for defendant in error.

STEPHENS, J. Judgment reversed.

JENKINS, P. J., and SMITH, J., concur.

(24 Ga. App. 329)

STANDIFER v. STATE. (No. 10724.)

(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)*(Syllabus by the Court.)***1. CRIMINAL LAW ⇨1064(4)—APPEAL; ERROR IN ADMISSION OF EVIDENCE; GROUNDS OF NEW TRIAL.**

Every special ground of a motion for a new trial must be complete and understandable within itself. It is impossible for this court, from a reading of the first special ground of the motion for a new trial, to say whether the court erred in admitting the testimony therein complained of. A reference to the brief of the evidence would be necessary to decide that question. This ground, therefore, cannot be considered.

**2. HOMICIDE ⇨223—EVIDENCE; TESTIMONY GIVEN AT CORONER'S INQUEST.**

Upon the trial of one charged with murder, it is not permissible for the state to introduce in evidence the sworn testimony of the accused, given as a witness at the coroner's inquest, where the accused, although not then under arrest, was sworn, not on his own motion, but on that of the coroner, and where the accused, although questioned by the coroner in regard to the homicide and his connection with it, was not informed of his right to refuse to answer any question which might tend to incriminate him. Under such circumstances the testimony elicited by the coroner could not be considered as having been voluntarily given. See, in this connection, *Adams v. State*, 129 Ga. 248, 58 S. E. 822, 17 L. R. A. (N. S.) 468, 12 Ann. Cas. 158; *Tuttle v. People*, 83 Colo. 243, 79 Pac. 1035, 70 L. R. A. 33, 3 Ann. Cas. 513.

**3. EVIDENCE; TESTIMONY OF ACCUSED AT CORONER'S INQUEST.**

Under the foregoing ruling the court erred in admitting in evidence, over the timely and appropriate objections of the defendant, the sworn testimony of the accused, given at the

coroner's inquest held upon the body of the deceased.

Error from Superior Court, Jasper County; J. B. Park, Judge.

Henry Standifer was convicted of a crime, his motion for a new trial was denied, and he brings error. Reversed.

W. S. Florence and Greene F. Johnson, both of Monticello, for plaintiff in error.

Doyle Campbell, Sol. Gen., of Monticello, for the State.

BROYLES, C. J. Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 386)

BROOKS v. PITTS et al. (No. 10329.)

(Court of Appeals of Georgia, Division No. 2.  
Nov. 6, 1919.)

(Syllabus by the Court.)

1. BANKRUPTCY  $\Leftrightarrow$  423(1), 437—EVIDENCE  $\Leftrightarrow$  817(15)—FRAUD  $\Leftrightarrow$  12—TRIAL  $\Leftrightarrow$  105(2)—DISCHARGE: LIABILITY FOR OBTAINING PROPERTY BY FALSE PRETENSES OR REPRESENTATIONS; HEARSAY EVIDENCE.

While it is true that a discharge in bankruptcy does not release a bankrupt from liability for obtaining property by false pretenses or false representations (Orr Shoe Co. v. Upshaw, 13 Ga. App. 501, 79 S. E. 362[2]; Brandt v. Klement, 20 Ga. App. 664, 93 S. E. 255[1]), and that false representations may consist in the purchasing of goods with no present purpose of paying for them, and in contemplation of a fraudulent insolvency, and that it is a question for the jury to determine from the evidence whether the circumstances adduced, even though they be slight, are sufficient to carry conviction of the existence of fraud perpetrated by false pretenses (Atlanta Skirt Mfg. Co. v. Jacobs, 8 Ga. App. 299, 68 S. E. 1077[2]), still there was in this case no evidence whatever to show that the goods, for the purchase price of which the present suit was brought, were obtained by false pretenses or representations, consisting in the purchase thereof with no present purpose of paying therefor, and in contemplation of a fraudulent insolvency, or the insolvency of the defendant was in fact fraudulent. The mere fact that the defendant procured credit and promised to pay for an ordinary current purchase of goods and subsequently failed to meet his obligation prior to the time that he voluntarily went into bankruptcy (some 34 days thereafter) is not of it-

self sufficient to bring the case within the ruling above announced, for ordinarily promises to perform some act in the future will not amount to fraud in legal acceptance, although subsequently broken without excuse, and especially is this true of a promise to pay money. Otherwise any breach of contract would amount to fraud. Atlanta Skirt Mfg. Co. v. Jacobs, supra. The statement of the plaintiff that he heard, a week or ten days after the sale, that the defendant was contemplating taking bankruptcy, was hearsay, and, even though admitted without objection, is without probative value. Michigan Mutual Life Ins. Co. v. Parker, 10 Ga. App. 697, 73 S. E. 1096(1); Rabon v. Commercial National Bank, 21 Ga. App. 43, 93 S. E. 524(1).

2. BANKRUPTCY  $\Leftrightarrow$  425, 436(3) — DEBTS DISCHARGED; EXCEPTIONS.

Under the provisions of the present National Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. §§ 9585-9656), a discharge in bankruptcy releases a bankrupt from all his provable debts except those specifically mentioned by section 17 of the act (section 9601), which includes those that have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or knowledge of the proceedings in bankruptcy. Peterson v. Calhoun, 137 Ga. 799, 74 S. E. 519; Bank of Wrightsville v. Four Seasons, 21 Ga. App. 453, 94 S. E. 649, and cases cited. Thus, the defendant in this case having introduced in evidence a certified copy of his discharge in bankruptcy, and it being admitted by the plaintiff that he had actual knowledge of such bankruptcy proceedings in ample time to have proved his debt against the bankrupt, the evidence demanded a verdict for the defendant, and the superior court erred in dismissing the certiorari upon the ground that there was a disputed issue of fact involved, and that the defendant's remedy was an appeal to a jury in the justice's court. See Toole v. Edmondson, 104 Ga. 776, 31 S. E. 25; Schultes v. Campos, 5 Ga. App. 277, 63 S. E. 23.

Error from Superior Court, Polk County; A. L. Bartlett, Judge.

Action by W. R. and R. O. Pitts, Jr., against W. T. Brooks. Verdict for plaintiffs, certiorari dismissed, and defendant brings error. Reversed.

J. L. Tison, of Cedartown, for plaintiff in error.

Ault & Wright, of Cedartown, for defendants in error.

JENKINS, P. J. Judgment reversed.

STEPHENS and SMITH, JJ., concur.

$\Leftrightarrow$  For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(24 Ga. App. 358)

**WILLIAMS v. CITY OF DUBLIN.**  
(No. 10882.)(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)*(Syllabus by the Court.)***1. MUNICIPAL CORPORATIONS — §642(1)—CERTIORARI; FILING OF BOND NECESSARY.**

One who seeks a writ of certiorari to review the judgment of a recorder's court of any town or city, and who does not file an affidavit in forma pauperis, must, as a condition precedent to obtaining the writ, file such a bond as is required by law, and this fact must be affirmatively shown by the petition; and it is not so shown by the mere statement in the petition that the bond required by law in such a case has been filed, or words to that effect, such a statement being a mere conclusion of the petitioner.

Where a certified copy of the bond is not attached to the petition, "the petition must set forth all the essential substantive facts which are necessary to enable the judge of the superior court to intelligently decide whether or not the bond given is really such a bond as is demanded by the statute." *Hubert v. City of Thomasville*, 18 Ga. App. 756, 90 S. E. 720.

**2. MUNICIPAL CORPORATIONS — §642(1)—CERTIORARI; NECESSITY OF BOND.**

One of the essentials of a bond given by one who seeks to review by certiorari a judgment of a recorder's court of any city or town is that the bond shall be made payable to the municipal corporation under which the court exists. *Park's Ann. Code*, § 5191(a).

**3. BOND IN CERTIORARI.**

In the instant case the petition for the writ of certiorari sought to review a judgment of the recorder's court of the city of Dublin. No pauper's affidavit as to the petitioner's inability to give the required bond was filed, and the petition failed to show that the bond given was made payable to the city of Dublin. The court, therefore, did not err in refusing to sanction the writ.

Error from Superior Court, Laurens County; J. L. Kent, Judge.

Petition for certiorari by Elsie Williams against the City of Dublin, to review a judgment of the recorder's court. Judgment for defendant, and petitioner brings error. Affirmed.

W. A. Dampier and J. A. Merritt, both of Dublin, for plaintiff in error.

T. W. Evans, of Dublin, for defendant in error.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 359)

**GRIFFIN v. CITY OF DUBLIN.** (No. 10880.)(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)*(Syllabus by the Court.)***CONTROLLED CASE.**

This case is controlled by the decision of this court in *Williams v. City of Dublin* (No. 10882) 100 S. E. 777, this day decided.

Error from Superior Court, Laurens County; J. L. Kent, Judge.

Petition for certiorari by Ella Griffin against the City of Dublin. Judgment for defendant, and petitioner brings error. Affirmed.

W. A. Dampier, of Dublin, for plaintiff in error.

T. W. Evans, of Dublin, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 359)

**POWELL v. CITY OF DUBLIN.**  
(No. 10881.)(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)*(Syllabus by the Court.)***1. MUNICIPAL CORPORATIONS — §642(1)—REVIEW; PETITION FOR CERTIORARI.**

The petition for certiorari in this case contains the following: "Petitioner avers that he has given the bond as required by law in such cases made and provided, conditioned that he be and appear personally to answer any judgment, order, sentence, or decree of either the recorder's court of the city of Dublin or of the superior court of Laurens county, which bond was duly approved by the chief of police of the city of Dublin, who is clerk of the recorder's court of said city of Dublin, which bond was duly filed with said clerk and chief of police, J. J. Flanders." Section 5191a of *Park's Ann. Civ. Code* (Acts 1902, p. 106) provides that "any person who shall seek a writ of certiorari to review and correct the judgment of any recorder's court, or of other police court, of any town or city, by whatever name known, shall first file with the clerk of said court or if no clerk, with the judge of said court, except when the defendant is unable from poverty to give bond and a proper pauper affidavit is furnished, a bond payable to the municipal corporation under which such court exists, in amount and with surety acceptable to and approved by the said clerk or judge, as the case may be, conditioned for the personal appearance of the defendant to abide the final order, judgment, or sentence of said court, or of the superior court,

in said case." The petition in this case does not show that the bond alleged to have been given was "a bond payable to the municipal corporation under which such court exists," and contains no reference to the amount of the bond. The pauper affidavit provided by the statute was not attached to the petition, nor was a copy of the alleged bond incorporated in the petition or attached thereto. Under the rulings in *Hubert v. City of Thomasville*, 18 Ga. App. 756, 90 S. E. 720, and *Gillespie v. Mayor and Council of Macon*, 19 Ga. App. 1, 90 S. E. 970, the judge did not err in refusing to sanction the certiorari. See *Williams v. Dublin* (No. 10882) 100 S. E. 777, this day decided.

Error from Superior Court, Laurens County; J. L. Kent, Judge.

Petition for certiorari by Cleveland Powell against the City of Dublin. Judgment for defendant, and plaintiff brings error. Affirmed.

W. A. Dampier, of Dublin, for plaintiff in error.

T. W. Evans, of Dublin, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 323)

SUGGS v. STATE. (No. 10680.)

(Court of Appeals of Georgia, Division No. 1. Nov. 4, 1919.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION  $\S$ 191(8)—RAPE  $\S$ 13, 16(1), 59(9)—CONVICTION OF "ASSAULT WITH INTENT TO RAPE."

One charged with the crime of rape by having sexual or carnal knowledge of a female child under the age of 14 years may if the evidence authorizes, be convicted of the offense of assault with intent to rape.

(a) The girl alleged to have been raped in this case being 13 years of age, and the evidence only authorizing and the state only asking a conviction of assault with intent to rape, it was not error for the court to give in charge to the jury the act of the Legislature (Georgia Laws 1918, p. 259), which fixes the age at which female children may consent to acts of sexual intercourse.

(b) The crime of assault with intent to rape is committed when a man undertakes to have sexual intercourse with an unmarried female child under the age of 14 years, by attempting to insert his private parts into her private parts, and where penetration of the vagina is not made only because force sufficient is not used,

even though the child may have consented to the attempted sexual intercourse.

(c) Since the passage of the act of 1918, supra, the age of consent to sexual intercourse by a female child in this state is 14 years, subject to the sole exception that the person having sexual intercourse with the female child may have been previously married to her.

(d) This case is controlled almost entirely by the construction of the statute referred to. The defendant contends that in this case, if the attempted act of sexual intercourse was without "force" and not against the will of the female child who was over 10 years of age, with no penetration of the vagina, he could not be convicted of the offense of assault with intent to rape; and that the statute was not applicable and was improperly given in charge to the jury. It is an open question in this state, but authority from other states, in the construction of apparently similar statutes, seems to be almost uniform in holding contrary to the position of the defendant. See *Callison v. State*, 37 Tex. Cr. R. 211, 39 S. W. 300; *Loose v. State*, 120 Wis. 115, 97 N. W. 526. And see 22 R. C. L.  $\S$  69, p. 1231, and section 71, p. 1233.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Assault with Intent to Commit Rape.]

2. CRIMINAL LAW  $\S$ 1160—VERDICT APPROVED BY TRIAL COURT.

According to the testimony of the state's witnesses, the defendant was on top of the girl, who was lying down on her back with her legs spread apart, and with her clothes up and his private member exposed to her private parts; and the jury credited these witnesses in preference to the defendant's witnesses, whose testimony, if believed by the jury, would have authorized them to find that no such thing happened. The defendant was represented at his trial and is represented here by able counsel, and a jury of his fellows did not believe his statement or the testimony of the witnesses he offered to overcome the evidence of the witnesses for the state. The trial judge has approved the verdict. For no reason assigned was it error to overrule the motion for a new trial.

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

Jim Suggs was convicted of a crime. His motion for a new trial was overruled, and he brings error. Affirmed.

J. P. Knight, of Nashville, for plaintiff in error.

Clifford E. Hay, Sol. Gen., of Thomasville, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

$\Leftrightarrow$ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(24 Ga. App. 416)

ARNOLD v. BOOTH. (No. 10484.)

(Court of Appeals of Georgia, Division No. 1.  
Nov. 7, 1919.)*(Syllabus by the Court.)*1. SALES ¶479(2, 15)—RETENTION OF TITLE;  
RIGHT OF SELLER TO RECOVER IN TROVER.

The seller of personal property on a credit may take a note for the purchase price and retain, as security for the debt, a legal title to the property so sold, and in the same instrument, to better secure the debt, title may be passed by the purchaser to other personal property, and, upon the maturity of the note thus secured, the seller may recover the property in trover. When the vendor elects to take a money verdict, the purchaser, of course, would be entitled to credit for such sums of money as may have been paid upon the note. See *Scott v. Glover & Co.*, 7 Ga. App. 182, 66 S. E. 380.

2. CHATTEL MORTGAGES ¶6 — CONDITIONAL  
SALE CONTRACT OR MORTGAGE.

The instrument whereby title was retained to property sold, and title to other property as additional security was conveyed in this case, was not a mortgage, but was, as properly construed by the court, a conveyance carrying title for the security of a debt. See *Ellison & Chew v. Wilson*, 7 Ga. App. 214, 66 S. E. 631.

3. EVIDENCE ¶460(11)—IDENTIFICATION OF  
PROPERTY SOLD.

The court did not err in admitting evidence as between the parties, for the purpose of identifying one animal described in the bill of sale. See *Emerson v. Knight*, 130 Ga. 100, 60 S. E. 255; *Thomas Furniture Co. v. Furniture Co.*, 120 Ga. 879, 48 S. E. 333; *Reynolds v. Jones*, 7 Ga. App. 123, 66 S. E. 395. Such testimony did not vary the terms or render conditional the unconditional promise to pay.

4. WITNESSES ¶159(1)—COMPETENCY; TRANS-  
ACTION WITH DECEDENT.

The court did not err in excluding from the consideration of the jury testimony of the defendant Arnold with reference to the transaction had with Booth in the present case, which was proceeding in the name of the representative of the estate of Booth. See *Dowdy v. Watson & Lewis*, 115 Ga. 47, 41 S. E. 266.

5. NEW TRIAL ¶99—NEWLY DISCOVERED IM-  
PEACHING EVIDENCE.

The newly discovered evidence, which was cumulative and impeaching in its character, and in addition thereto was contradicted by the counter showing made by the plaintiff, does not require a new trial.

6. CHARGE OF COURT—RULING ON MOTION FOR  
NEW TRIAL.

The charge of the court was full and fair, and the verdict was authorized by the evidence. For no reason assigned did the court err in overruling the motion for a new trial.

Error from Superior Court, Bartow County; Andrew J. Cobb, Judge.

Action by R. L. Booth, executor, against G. N. Arnold. Judgment for plaintiff, motion for new trial denied, and defendant brings error. Affirmed.

G. A. Johns, of Winder, for plaintiff in error.

Wolver M. Smith, of Athens, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., concurs. BLOOD-  
WORTH, J., concurs dubitante.

(24 Ga. App. 298)

BARRETT v. MAYNARD. (No. 10469.)

(Court of Appeals of Georgia, Division No. 2  
Oct. 20, 1919.)*(Syllabus by the Court.)*1. LANDLORD AND TENANT ¶309—TRIAL, ¶  
296(2)—DISPOSSESS PROCEEDINGS; CHARGE.

The various excerpts from the charge of the court, excepted to, when considered with the charge in its entirety and the facts of the case, are not erroneous for any reason assigned.

2. DISPOSSESS PROCEEDINGS — MOTION FOR  
NEW TRIAL.

The verdict was authorized by the evidence, and the court did not err in overruling the motion for a new trial.

*(Additional Syllabus by Editorial Staff.)*3. LANDLORD AND TENANT ¶315 — DISPOS-  
SESS PROCEEDINGS; QUESTION FOR JURY.

In dispossessory proceedings on ground that tenant had failed to pay rent due, wherein the whole contention was upon an express agreement that certain improvements and repairs were to have been made on the property for which tenant claimed a recoupment or set-off, there was a question of fact for the jury, which was concluded by their verdict.

4. APPEAL AND ERROR ¶1001(1)—REVIEW OF  
QUESTIONS OF FACT.

The general grounds of a motion for a new trial need not be considered where there was evidence to support the verdict.

Error from Superior Court, Hall County; J. B. Jones, Judge.

Action by Mrs. A. E. Maynard against J. M. Barrett. Verdict and judgment for plaintiff, motion for new trial denied and defendant brings error. Affirmed.

H. V. Johnson and Sloan & Sloan, all of Gainesville, for plaintiff in error.

W. M. Oliver, of Gainesville, for defendant in error.

SMITH, J. [1] 1. The fourth and fifth grounds of the motion for a new trial may be

considered together. In these grounds the defendant (the plaintiff in error) complains of the language used in the charge to the jury in reference to improvements or repairs which he insisted had been made by him under an agreement with the agent of the plaintiff. He criticizes the use of the language "to make improvements, build fences and fix door knobs, or doors, or hot houses, or cleaning out a well," and insists that there was nothing in the pleadings or in the contentions of the parties, or in the evidence, as to the matter of improvements. There was a contention by him that, under an agreement had by him with the agent of the plaintiff, he did make certain improvements or repairs upon the property, and that he was entitled to recoup this amount. While in the first part of the paragraph of the charge of the court set out in the fourth ground the words used are somewhat inaccurate, yet the latter part and this excerpt from the charge, as well as the excerpt set out in the fifth ground, taken together with the whole charge, shows that the question of improvements or repairs was substantially and clearly presented to the jury. There is no merit in these two grounds of the motion. See section 3699 of the Civil Code, which is as follows:

"The landlord must keep the premises in repair, and is liable for all substantial improvements placed upon them by his consent."

[3] There was no contention or evidence in this case that the premises had become in bad repair and that the landlord had been notified of the defects, and after a reasonable time had failed to make the repairs, but the whole contention was upon an express agreement that certain improvements or repairs were to be made upon the property, and that the defendant claimed a recoupment or set-off for the amount of such repairs. This raised a question of fact for the jury, and was concluded by their verdict.

[2] 2. The sixth and seventh grounds of the motion for a new trial may also be considered together. The complaint made in these two grounds relates to excerpts from the charge where the court adds after the words, "You see, if at the time Mr. Barrett didn't owe anything to Mrs. Maynard his rent was paid up and he wasn't in arrears," the following:

"He was not a tenant holding over and beyond the time for which he had rented, or if there had been no breach of the contract by him

by failing to pay rent, if he was over or ahead in payment of rent, in other words, if he wasn't in such position as subjected him to a proceeding of this kind at that time, then you couldn't find in favor of Mrs. Maynard for any amount."

The court further charged:

"If she was entitled to sue out this process at this time, as I stated, when Barrett was a tenant holding over, or his contract had been breached by failure to pay rent, then Mrs. Maynard would recover the full amount of the rent from then down to the time of the trial, down to date, she would recover double that amount."

It is insisted that all the language used in these two excerpts relating to the defendant holding over or beyond the term for which he had rented was error and prejudicial to the defendant. In order to understand the question raised, it is necessary to go back to the pleadings and the evidence. The affidavit to dispossess the defendant was founded upon the single ground that he had failed to pay rent due. The counter affidavit denied that any rent was due, and then went further and denied that he was holding over beyond the term for which he had rented the property. He testified that he had rented the property for one year, the rent being payable monthly at the end of each month. He denied that he owed any rent, and he denied that he was holding the property beyond the term for which he had rented it. The excerpts from the charge of the court set out in these grounds of the motion, so far as they relate to a tenant holding over, were not applicable to the contentions or the evidence in the case; but the charge, taken as a whole, including these excerpts, clearly and fully submitted the real issues to the jury, and the verdict was for the exact amount of double rent from the date of suing out the warrant to dispossess and the date of the trial. Therefore the instructions complained of were not misleading, but mere surplusage.

That amount of the verdict finding the defendant liable for rent prior to the issuance of the dispossessory warrant was written off by the plaintiff in the court below, and so the verdict is cured as to this matter.

[4] 3. The general grounds of the motion for a new trial need not be considered, as there was evidence to support the verdict.

Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(24 Ga. App. 347)

**DALTON v. STATE.** (No. 10812)(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)*(Syllabus by the Court.)***CRIMINAL LAW** ¶1159(1)—**REVIEW OF VERDICT.**

The defendant was charged with possessing intoxicating liquors in violation of law. The evidence authorized his conviction; and, this being true (there being no error of law complained of), this court is powerless to set the conviction aside.

Error from City Court of Macon; Du Pont Guerry, Judge.

Will Dalton was convicted of possessing intoxicating liquors in violation of law, and he brings error. Affirmed.

Olin J. Wimberly, Thos. A. Jacobs, and C. A. Cunningham, all of Macon, for plaintiff in error.

Will Gunn, Solicitor. of Macon, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 279)

**ELDERS v. STATE.** (No. 10689.)(Court of Appeals of Georgia, Division No. 1.  
Oct. 14, 1919.)*(Syllabus by the Court.)***HOMICIDE** ¶309(4)—**INSTRUCTION ON MANSLAUGHTER REQUIRED BY EVIDENCE OF DEFENDANT.**

Plaintiff in error was tried for murder and convicted of voluntary manslaughter. The only ground of the motion for a new trial which is argued in the brief of counsel for the plaintiff in error is that one which alleges that the court erred in charging the jury on voluntary manslaughter. In *Cain v. State*, 7 Ga. App. 24, 65 S. E. 1069, this court said: "It is well settled by repeated rulings of the Supreme Court and this court that on a trial for murder, if there is anything deducible from the evidence or the defendant's statement that would tend to show manslaughter, voluntary or involuntary, it is the duty of the court to instruct the jury fully on the law of manslaughter. *Crawford v. State*, 12 Ga. 142(6); *Jackson v. State*, 76 Ga. 473; *Wynne v. State*, 56 Ga. 113; *Bell v. State*, 130 Ga. 865, 61 S. E. 996; *Strickland v. State*, 133 Ga. 76, 65 S. E. 148; *Pyle v. State*, 4 Ga. App. 811, 62 S. E. 540. In the *Crawford* Case, *supra*, the court strongly expresses itself on the subject as follows: 'When a defendant is put upon trial for murder, and there is any doubt as to the grade of homicide of which he is guilty, it is the duty of the

court clearly and distinctly to instruct the jury as to the law, defining the several grades of homicide as recognized by the Penal Code, and then leave it to the jury to find from the evidence of what particular grade he is guilty.' In *Jackson v. State*, *supra*, the court uses still stronger language, and holds that 'where there is evidence sufficient to raise a doubt, however slight, upon the point whether the case is murder or manslaughter, voluntary or involuntary, the court should instruct the jury upon these grades of manslaughter as well as murder.'" Under these rulings as applied to the facts of this case, the trial judge did not err in charging on voluntary manslaughter.

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Isabelle Elders was convicted of voluntary manslaughter, her motion for new trial was denied, and she brings error. Affirmed.

W. F. Way, of Moultrie, for plaintiff in error.

C. E. Hay, Sol. Gen., of Thomasville, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 308)

**RINGWALD et al. v. J. R. WATKINS MEDICAL CO.** (No. 10370.)(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)*(Syllabus by the Court.)***PRINCIPAL AND AGENT** ¶47—**EXCLUSIVE AGENCY IN CERTAIN TERRITORY.**

The determination of this case depends upon the construction of a contract. The part in controversy is as follows: "That for and in consideration of the promises and agreements hereinafter contained, to be kept and performed by the party of the second part, the company promises and agrees to sell and deliver to the party of the second part, free on board cars at Winona, Minnesota, or at its option, at any of its regular places of shipment, any and all medicines, extracts, and other articles manufactured or sold, or which may hereafter be manufactured or sold by it, unless prevented by fire, insurrection, invasion, strikes, or other cause, at the usual and customary wholesale prices, as the party of the second part may reasonably require for sale by him from time to time, from the date hereof until the first day of March 1916, as hereinafter provided, in the following described territory, excepting the incorporated municipalities therein located, to wit: In the state of Georgia, Evans county." The plaintiffs in error (defendants) contend that the court erred in holding that the contract did not grant exclusive rights to the sale of the medicines in the county of Evans, excepting the municipalities in that county. The



defendant in error contends that no exclusive right was given to the sale of the medicines in Evans county except the municipalities therein. We are of the opinion that, when the contract is properly construed (especially when the contract as a whole is read), exclusive right to the sale of the medicines, etc., is granted in the county of Evans, excepting the municipalities. The very fact that the municipalities are excepted is a strong indication that it was the purpose and intent of the parties to grant exclusive right of sale in the remainder of Evans county. Of course, by the terms of the contract the purchaser could only expect delivery for sale of such number of articles and amount of goods as he might reasonably require for sale by him from time to time. Differing as we do with the trial judge in his construction of the contract, we hold that it was error to sustain the demurrers to the pleas of the defendants, and in thereafter rendering judgment in favor of the plaintiff.

Error from City Court of Statesboro; Remer Proctor, Judge.

Action by the J. R. Watkins Medical Company against M. O. Ringwald and others. Demurrers to defendants' plea sustained and judgment for plaintiff, and defendants bring error. Reversed.

Anderson & Jones, of Statesboro, for plaintiffs in error.

Brannen & Booth, of Statesboro, for defendant in error.

LUKE, J. Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 319)

DAVIS v. STATE. (No. 10617.)

(Court of Appeals of Georgia, Division No. 1. Nov. 4, 1919.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS  $\S$ 143½, New, vol. 2A Key-No. Series — "APPARATUS FOR THE DISTILLING OR MANUFACTURING."

Section 22 of the act of the General Assembly of the state of Georgia at its extraordinary session held in March, 1917 (Laws 1917, p. 18), provides that "it shall be unlawful for any corporation, firm or individual in this state to knowingly permit or allow any one to have or possess or locate on his premises any apparatus for the distilling or manufacturing of the liquors and beverages specified in this article." Under this law an indictment was found against the accused, alleging that he "did unlawfully permit and allow, and did have and possess and locate on his premises, \* \* \* apparatus for the distilling and manufacturing of spirituous, vinous, malted, and fermented and intoxicating liquors and beverages, said apparatus consisting of a complete still and two

barrels of 'mash' and 'mobby.'" On the trial of the case a witness testified: "I found a copper still and two barrels of 'mobby' on Mr. Davis' premises. The still was in running order, all except the worm and condenser. I found the body part of the still. To constitute a complete still it takes what we call the 'pot,' or body part of the still (that is the part they put the 'mobby' in), the boiler and a cap (that is the top that goes over the boiler), and worm leading to the condenser, leading through a barrel of water." Held:

Neither "mash" nor "mobby" is a part of the "apparatus for the distilling or manufacturing" of the liquors referred to in the statute.

2. INTOXICATING LIQUORS  $\S$ 223(2) — VARIANCE—COMPLETE STILL.

The evidence quoted above does not show that a "complete still" was found on the premises of the accused, and therefore is insufficient to support the allegation in the indictment.

Error from Superior Court, Glascock County; B. F. Walker, Judge.

J. V. Davis was convicted of a violation of the liquor laws, and he brings error. Reversed.

E. T. Shurley, of Warrenton, for plaintiff in error.

R. C. Norman, Sol. Gen., of Washington, Ga., for the State.

LUKE, J. Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 414)

AUTREY v. STATE. (No. 10460.)

(Court of Appeals of Georgia, Division No. 1. Nov. 7, 1919.)

(Syllabus by the Court.)

1. CRIMINAL LAW  $\S$ 1144(14)—PRESUMPTION ON APPEAL; CHARGE AS TO CONTENTIONS OF PARTIES.

In the absence of a certificate by the trial judge to the contrary, the statement in the charge as to the contentions of the parties will be presumed correct. *Wilson v. A. & C. Ry. Co.*, 82 Ga. 386, 9 S. E. 1076(2); *Robinson v. State*, 109 Ga. 506, 34 S. E. 1017(5); *Wrightsville & Tennille R. R. Co. v. Gornto*, 129 Ga. 204(2), 206(2), 58 S. E. 769.

2. CRIMINAL LAW  $\S$ 772(6)—DEFENSES IN GENERAL.

The contentions of the defense in a criminal case are not confined exclusively to the contentions of the defendant as made in his statement to the jury, but include such contentions as may be made and argued by defendant's counsel before the court and jury.

**3. CRIMINAL LAW — 828—INSTRUCTIONS; REQUEST FOR STATEMENT OF DEFENDANT'S CONTENTIONS IN WRITING.**

Under the preceding rulings and the facts of this case, there is no merit in the special grounds of the motion for a new trial which are based in substance upon the alleged error of the court in misstating the contentions of the defense. The note of the trial judge shows that the contentions of the defense as argued by the defendant's counsel before the court and jury were substantially and in spirit those given in the charge, and that the same counsel orally requested the court to charge the jury upon the principles of law involved in such contentions. Counsel, not having put the request in writing, cannot complain of the particular language employed by the judge in complying with his request. The charges complained of in these grounds of the motion are not erroneous for any other reason assigned.

**4. HOMICIDE — 310(2)—SHOOTING AT ANOTHER; INSTRUCTION.**

"To constitute the offense of assault with intent to murder, there must be a specific intent to kill. This intent is not necessarily or conclusively shown by the use of a weapon likely to produce death, in a manner likely to produce death. Under the proof in this case, the jury should have been given the discretion to convict of the lower offense included in the higher felony charged, if they believed the evidence did not show a specific intent to kill. The failure of the court to charge as to the statutory offense of shooting at another was error. *Fallon v. State*, 5 Ga. App. 661, 63 S. E. 806, and cases cited." *Ripley v. State*, 7 Ga. App. 679, 67 S. E. 834(3). Under this ruling and the facts of the instant case the court properly instructed the jury upon the offense of shooting at another.

**5. HOMICIDE — 316—APPEAL; UNAUTHORIZED CHARGE ON MANSLAUGHTER HARMLESS.**

Conceding that neither the evidence nor the defendant's statement, nor both combined, authorized a charge upon the law of manslaughter, the error of the court in instructing the jury upon the law of manslaughter does not require a new trial, since the evidence for the state demanded a finding either of assault with intent to murder, or of shooting at another; and the defendant's statement and the evidence introduced by him tended merely to establish that the defendant was not present at the time and place of the shooting, and did not otherwise contradict the testimony for the state. The jury, in their finding, having evidently rejected the defense of alibi (and the evidence authorized them so to find), and having given the defendant the benefit of all the leniency legally possible under the undisputed testimony for the state (undisputed in all respects except as to the alibi), he will not be heard to demand a new trial for alleged inaccuracies in the charge of the court upon the subject of manslaughter. See, in this connection, *Fallon v. State*, 5 Ga. App. 659, 663, 63 S. E. 806.

**6. ABANDONMENT OF MOTION FOR NEW TRIAL.**

The fifth and twelfth special grounds of the motion for a new trial are expressly abandoned in the brief of counsel for the plaintiff in error, and no substantial merit appears in any of the other special grounds of the motion not already dealt with.

**7. SUFFICIENCY OF EVIDENCE; MOTION FOR NEW TRIAL.**

The evidence authorized the verdict, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Forsyth County; N. A. Morris, Judge.

V. D. Autrey was convicted of an offense, his motion for a new trial was overruled, and he brings error. Affirmed.

See, also, 97 S. E. 753.

R. B. Russell, of Atlanta, and J. P. Brooke, of Alpharetta, for plaintiff in error.

John T. Dorsey, Sol. Gen., of Marietta, and Wm. Butt, of Blue Ridge, for the State.

**BROYLES, C. J.** Judgment affirmed.

**LUKE and BLOODWORTH, JJ.,** concur.

(24 Ga. App. 371)

**SOUTHERN RY. CO. v. COLLINS.**  
(No. 10348.)

(Court of Appeals of Georgia, Division No. 1.  
Nov. 6, 1919.)

(Syllabus by the Court.)

**SUFFICIENCY OF EVIDENCE.**

The evidence authorized the verdict, which has the approval of the trial judge, and for no error assigned was it error to overrule the motion for a new trial.

Error from Superior Court, Wayne County; J. P. Highsmith, Judge.

Proceedings between E. C. Collins and the Southern Railway Company. A decision adverse to the railway company was rendered, a new trial denied, and it brings error. Affirmed.

Bennet, Twitty & Reese, of Brunswick, and Jas. W. Poppell, of Jesup, for plaintiff in error.

**LUKE, J.** Judgment affirmed.

**BROYLES, C. J., and BLOODWORTH, J.,** concur.

(24 Ga. App. 310)

**HUDSON v. STATE.** (No. 10405.)(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)*(Syllabus by the Court.)***CONVICTION OF VOLUNTARY MANSLAUGHTER—EVIDENCE.**

The defendant's conviction of voluntary manslaughter was unauthorized by the evidence, and the court erred in refusing to grant a new trial.

Error from Superior Court, Glimmer County; N. A. Morris, Judge.

Plato Hudson was convicted of voluntary manslaughter, his motion for a new trial was denied, and he brings error. Reversed.

Herbert Clay, of Marietta, and B. L. Smith, of Blue Ridge, for plaintiff in error. John T. Dorsey, Sol. Gen., of Marietta, and Wm. Butt, of Blue Ridge, for the State.

LUKE, J. Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 329)

**SANDERS v. STATE.** (No. 10723.)(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)*(Syllabus by the Court.)***EVIDENCE TO SUSTAIN VERDICT.**

The evidence did not authorize the verdict, and the judge erred in overruling the motion for new trial.

Error from City Court of Albany; Clayton Jones, Judge.

Proceeding by the State against Joe Sanders. From the judgment after overruling of his motion for a new trial, Sanders brings error. Reversed.

Benton Odum, of Newton, and Peacock & Gardner, of Albany, for plaintiff in error.

S. B. Lippitt, Sol. pro tem., of Albany, for the State.

BLOODWORTH, J. Judgment reversed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 372)

**NEWTON v. STATE.** (No. 10522.)(Court of Appeals of Georgia, Division No. 1.  
Nov. 6, 1919.)*(Syllabus by the Court.)***INSTRUCTIONS AS TO REASONABLE FEAR.**

Under the facts of this case, in the absence of a timely and appropriate written request, it

was not error to fail to charge the law as to reasonable fears. See *Alexander v. State*, 118 Ga. 26, 44 S. E. 851. Neither the evidence nor the defendant's statement at the trial raised a theory which would require such a charge. The evidence authorized the verdict, which has the approval of the trial judge, and for no reason assigned was it error to overrule the motion for a new trial.

Error from Superior Court, Madison County; W. L. Hodges, Judge.

Proceedings between Clifford Newton and the State. A verdict adverse to Newton was rendered, and he brings error. Affirmed.

Gordon & Gordon and Berry T. Moseley, all of Danielsville, for plaintiff in error.

A. S. Skelton, Sol. Gen., of Hartwell, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 385)

**MILLER v. OGLETHORPE UNIVERSITY.** (No. 10361.)(Court of Appeals of Georgia, Division No. 2.  
Nov. 6, 1919.)*(Syllabus by the Court.)***1. SUBSCRIPTIONS ⇐5—CONSIDERATION; EXPENDITURE OF MONEY.**

While, as a general rule, a promise to donate money to a charitable purpose is gratuitous and unenforceable unless some consideration therefor exists, a consideration for such a promise is supplied where the promisee, during the life of the promisor and before a withdrawal of the promise and in reliance thereon, expends money and incurs enforceable liabilities in furtherance of the contemplated enterprise, or if such a promise be a mutual subscription for a common object, the promise of the others is a good consideration for the promise of each. Civ. Code 1910, § 4246; *Wilson v. First Presbyterian Church*, 56 Ga. 554; *Owenby v. Georgia Baptist Assembly*, 137 Ga. 698, 74 S. E. 56, Ann. Cas. 1913B, 238; *Y. M. C. A. v. Estill*, 140 Ga. 291, 78 S. E. 1075(3), 48 L. R. A. (N. S.) 783, Ann. Cas. 1914D, 136. That the promisor should receive a personal benefit or consideration is not a necessary prerequisite to the validity of such a contract.

**2. SUBSCRIPTIONS ⇐21(5) — EVIDENCE OF CONSIDERATION.**

The defendant having admitted a prima facie case in favor of the plaintiff and set up as a defense a want of consideration, he thereby assumed the burden of proof, and the duty rested upon him of establishing his affirmative defense by a preponderance of evidence; for, as was said in *Red Cypress Lumber Co. v. Perry*, 118 Ga. 876, 879, 45 S. E. 674, 675: "When a contract is valid in the absence or existence of certain facts, but otherwise void, it is, in

⇐ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the absence of evidence, presumed to be valid; and the burden of proving the absence or existence of such facts lies upon him who asserts its invalidity.' Greenhood on Pub. Pol. 118, Rule CXXX." See, also, Hyer v. Holmes & Co., 12 Ga. App. 837, 79 S. E. 58. The entire purport of the defendant's evidence going merely to show that he received no personal benefit or consideration from his undertaking, the municipal court did not err in rendering judgment in favor of the plaintiff, and the superior court properly overruled the petition for certiorari.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by the Oglethorpe University against F. O. Miller. Judgment for plaintiff, petition for certiorari overruled, and defendant brings error. Affirmed.

A. M. Brand, of Atlanta, for plaintiff in error.

Horace Russell, of Atlanta, for defendant in error.

JENKINS, J. Judgment affirmed.

STEPHENS and SMITH, JJ., concur.

(24 Ga. App. 352)

ADAMS v. STATE. (No. 10851.)

(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)

(Syllabus by the Court.)

CRIMINAL LAW  $\S$  1160—APPEAL; REFUSAL OF NEW TRIAL.

This case is here upon the sole assignment of error that the evidence does not authorize the verdict. The state made a case by the witnesses offered to prove the crime. The defendant by his witness and statement contradicted the evidence offered by the state. The jury believed the witnesses for the state, and convicted the defendant. The trial judge has approved the verdict. The judgment overruling the motion for a new trial must be affirmed.

Error from Superior Court, Harris County; G. H. Howard, Judge.

A. J. Adams was convicted of an offense, and he brings error. Affirmed.

Henry C. Cameron, of Columbus, for plaintiff in error.

C. F. McLaughlin, Sol. Gen., of Columbus, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 410)

AKIN et al. v. TODD. (No. 10576.)

(Court of Appeals of Georgia, Division No. 2.  
Nov. 6, 1919.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE  $\S$  208(5)—CERTIORARI; QUESTION OF FACT NOT REVIEWABLE.

Notwithstanding a petition for certiorari may contain an assignment of error raising a question of law, yet, where the determination of the case depends entirely upon a contested issue of fact, a judgment rendered by the magistrate is not reviewable by certiorari. Therefore the judge of the superior court did not err in dismissing the certiorari sued out by the losing party. See Toole v. Edmondson, 104 Ga. 776, 31 S. E. 25, and cases there cited.

2. JUSTICES OF THE PEACE  $\S$  208(1)—CERTIORARI; REASON FOR DECISION BELOW.

"It can make no difference for what reason the writ of certiorari was dismissed in this case; the court did right in dismissing the same, and affirming the judgment of the justice." Wilson v. Burks, 71 Ga. 862; McPherson v. Stroup, 100 Ga. 228, 28 S. E. 157(1).

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Proceedings between F. D. Akin and others, receivers, and Louise Todd. From a judgment of the superior court dismissing a writ of certiorari to review judgment of magistrate. Akin and his coparties bring error. Affirmed.

Collins & Stanfield, of Reidsville, for plaintiffs in error.

SMITH, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(24 Ga. App. 357)

MACON v. STATE. (No. 10762.)

(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)

(Syllabus by the Court.)

1. CRIMINAL LAW  $\S$  826—REVIEW; REFUSAL TO CHARGE.

The ground of the motion for a new trial based upon the refusal of the judge to comply with the written request to charge cannot be considered, since it does not appear that the request was tendered to the court before the jury retired to consider the case. Seaboard Air Line Ry. v. Barrow, 18 Ga. App. 261, 89 S. E. 383(4).

2. INSTRUCTIONS AS TO MANSLAUGHTER.

Under the facts of the case, the court did not err in instructing the jury upon the law of manslaughter.

**3. INSTRUCTIONS TO JURY.**

None of the excerpts from the charge of the court excepted to, when considered with the entire charge and the facts of the case, contains material error.

**4. SUFFICIENCY OF EVIDENCE.**

The verdict was authorized by the evidence, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Jones County; J. B. Park, Judge.

Proceedings between W. K. Macon and the State. A judgment adverse to Macon was rendered, and he brings error. Affirmed.

E. T. Dumas and J. A. Henderson, both of Gray, and John R. Cooper and W. O. Cooper, Jr., both of Macon, for plaintiff in error.

Doyle Campbell, Sol. Gen., of Monticello, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 344)

**JACKSON v. STATE.** (No. 10798.)

(Court of Appeals of Georgia, Division No. 1. Nov. 4, 1919.)

*(Syllabus by the Court.)*

**DENIAL OF NEW TRIAL.**

The motion for a new trial in this case contained the usual general grounds only. The evidence authorized the verdict, and the judgment is affirmed.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Proceedings between Money Jackson and the State. A judgment adverse to Jackson was rendered, and he brings error. Affirmed.

C. A. Picquet, of Augusta, for plaintiff in error.

A. L. Franklin, Sol. Gen., of Augusta, and Jno. M. Graham, of Atlanta, for the State.

BLOODWORTH, J. Affirmed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 349)

**SMITH v. STATE.** (No. 10817.)

(Court of Appeals of Georgia, Division No. 1. Nov. 4, 1919.)

*(Syllabus by the Court.)*

**SUFFICIENCY OF EVIDENCE.**

The evidence in this case almost demanded the conviction of the defendant, who was charg-

ed with burglary. The defendant had the benefit of a fair trial under a most favorable charge of the court. It was not error to overrule the motion for a new trial.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Lillian Smith was convicted of burglary, and she brings error. Affirmed.

John R. Cooper and W. O. Cooper, Jr., both of Macon, for plaintiff in error.

John P. Ross, Sol. Gen., of Macon, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 371)

**WILLIAMS et al. v. HART.** (No. 10366.)

(Court of Appeals of Georgia, Division No. 1. Nov. 6, 1919.)

*(Syllabus by the Court.)*

**1. BILLS AND NOTES §502—ADMISSIBILITY OF NOTE IN ACTION THEREON.**

The defendant having admitted in his plea the execution of the note sued on, it was not error to admit the note in evidence without requiring the plaintiff and holder of the note to prove its execution.

**2. APPEAL AND ERROR §1058(2)—EXCLUSION OF EVIDENCE HARMLESS ERROR.**

There is no merit in the assignments of error upon the rejection of evidence, since the brief of evidence shows that subsequently to the rulings complained of such testimony was admitted.

**3. ACTION ON NOTES.**

The plaintiff had legal title to the note sued upon; the evidence authorized the verdict, which has the approval of the trial judge; and no error of law is complained of which requires a new trial.

Error from City Court of Nashville; J. D. Lovett, Judge.

Action by J. M. Hart against J. C. Williams and others. Judgment for plaintiff, and defendants bring error. Affirmed.

R. A. Hendricks, of Nashville, for plaintiffs in error.

Jos. A. Alexander, of Nashville, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 335)

O'NEAL v. STATE. (No. 10740.)

(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)*(Syllabus by the Court.)*1. CRIMINAL LAW  $\S$  1130(2)—BRIEF; SUFFICIENCY.

The entire brief of the attorney for plaintiff in error is in one sentence, as follows: "He insists on all the grounds of error set forth in his petition for certiorari, and says that the court erred on each and every ground thereof." This is not an argument. It has been repeatedly held by this court and the Supreme Court of the state that assignments of error, not argued in the brief of counsel for plaintiff in error, will be treated as abandoned. *Cheek v. State*, 22 Ga. App. 788, 97 S. E. 203(5); *Sulter v. State*, 22 Ga. App. 105, 95 S. E. 532(1); *Harbin v. Flannigan*, 22 Ga. App. 30, 95 S. E. 320(1); *Pelham Phosphate Co. v. Daniels*, 21 Ga. App. 549, 94 S. E. 848, and cases cited.

## 2. SUFFICIENCY OF EVIDENCE.

There is evidence to support the verdict, and the judge of the superior court did not err in overruling the petition for certiorari.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Proceeding between Julius O'Neal and the State. A judgment adverse to O'Neal was rendered, and he brings error. Affirmed.

See, also, 99 S. E. 891.

Loundes Calhoun, of Atlanta, for plaintiff in error.

Lowry Arnold, Sol., John A. Boykin, Sol. Gen., and E. A. Stephens, all of Atlanta, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 361)

SAYLER v. STATE. (No. 10899.)

(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)*(Syllabus by the Court.)*

## AFFIRMANCE OF JUDGMENT.

The special grounds of the motion for new trial are devoid of merit; there is evidence sufficient to support the verdict, which has the approval of the trial judge, and the judgment is affirmed.

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Proceeding by the State against Jack Sayler. From the judgment and the denial of

his motion for new trial, the latter brings error. Affirmed.

Hixon & Pace, of Americus, for plaintiff in error.

Jule Felton, Sol. Gen., of Montezuma, for the State.

BLOODWORTH, J. Affirmed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 362)

TOWLER v. STATE. (No. 10915.)

(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)*(Syllabus by the Court.)*CRIMINAL LAW  $\S$  911, 1156(1)—RULING ON EXTRAORDINARY MOTION FOR NEW TRIAL; DISCRETION; REVIEW.

All extraordinary motions for new trial are addressed to the sound discretion of the trial judge, and this court cannot reverse a judgment of a trial judge in overruling such a motion, unless his discretion has been manifestly abused. We cannot say, in view of the precedents of the Supreme Court by which we are bound, that the trial judge, in hearing the showing and counter-showing upon the extraordinary motion, has manifestly abused the discretion with which by law he is charged. See, in this connection, *Brown v. State*, 141 Ga. 783, 82 S. E. 238, and cases cited. The case as originally made was weak; but there was some evidence to authorize the verdict, and this court affirmed the judgment overruling the motion for a new trial. Necessarily this court must depend upon the trial courts, who have the parties and witnesses before them, to unreservedly approve or disapprove verdicts had in the trial court. The exercise of a discretion by a trial judge where the liberty of a human being is involved is a solemn duty, and where so exercised it must appear that such discretion has been manifestly abused before this court can set a judgment aside which is the result of a conclusion reached in the exercise of such discretion.

Error from Superior Court, Gwinnett County; A. J. Cobb, Judge.

Dint Towler was prosecuted for assault with the attempt to rape, and, from the judgment and the denial of his extraordinary motion for a new trial, he brings error. Affirmed.

See, also, 100 S. E. 42.

Kelley & Kelley, O. A. Nix, and W. L. Nix, all of Lawrenceville, and John R. Cooper, of Macon, for plaintiff in error.

W. O. Dean, Sol. Gen., of Monroe, and N. L. Hutchins, of Lawrenceville, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 377)

**GOOLSBY v. STATE.** (No. 10722.)(Court of Appeals of Georgia, Division No. 1.  
Nov. 6, 1919.)*(Syllabus by the Court.)***DIVORCE** ¶326 — **INVALIDITY OF FOREIGN DIVORCE.**

The defendant in this case was convicted of bigamy. The evidence was conclusive that he had a living wife at the time of marrying another as alleged in the indictment. He claimed to have been divorced from his first wife by a decree of the circuit court of the Fifth judicial circuit of Randolph county, state of Alabama. The evidence authorized the jury to find that he was a resident of the state of Georgia at the time he instituted his divorce proceeding in Alabama against his wife, who also was a resident of Georgia at the time of the institution of that proceeding; and that service of the divorce proceeding was had only by the constructive service of publication in Alabama. The conviction of the defendant was proper. The divorce decree relied upon by him was a nullity. See *Matthews v. Matthews*, 139 Ga. 123, 78 S. E. 855; *Solomon v. Solomon*, 140 Ga. 379, 78 S. E. 1079. The court did not err in overruling the motion for a new trial.

Error from Superior Court, Heard County;  
J. R. Terrell, Judge.

Ed Goolsby was convicted of bigamy, his motion for new trial was overruled, and he brings error. Affirmed.

M. U. Mooty, of La Grange, for plaintiff in error.

C. E. Roop, Sol. Gen., of Carrollton, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 284)

**WEAVER v. STATE.** (No. 10701.)(Court of Appeals of Georgia, Division No. 1.  
Oct. 14, 1919.)*(Syllabus by the Court.)***CRIMINAL LAW** ¶510 — **ACCOMPLICE; CORROBORATION OF IN MISDEMEANOR CASE.**

The only point argued in the brief of counsel for the plaintiff in error is that the defendant was illegally convicted, because the only testimony connecting him with the offense charged was that of uncorroborated accomplices. The rule of law that the defendant in a criminal case cannot legally be convicted upon the uncorroborated testimony of an accomplice does not apply to misdemeanor cases.

Error from City Court of Millen; G. C. Dekle, Judge.

Tom Weaver was convicted of a misdemeanor, and he brings error. Affirmed.

A. S. Anderson and Earle V. Norman, both of Millen, for plaintiff in error.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 372)

**BARNES v. STATE.** (No. 10552.)(Court of Appeals of Georgia, Division No. 1.  
Nov. 6, 1919.)*(Syllabus by the Court.)***1. HOMICIDE** ¶127 — **INDICTMENT AND INFORMATION** ¶110(17), 189(8)—**VOLUNTARY MANSLAUGHTER; SUFFICIENCY OF INDICTMENT.**

The indictment in its formal parts followed section 954 of the Penal Code of 1910. It also named the accused, showed the date and venue of the offense, and further alleged that the accused "did \* \* \* unlawfully and with malice aforethought kill and murder [a named decedent] by shooting him \* \* \* with a pistol." Such an indictment sufficiently charges the offense of murder. *Thomas v. State*, 71 Ga. 47, 48 (5). It also embraces the minor offense of voluntary manslaughter. *Reynolds v. State*, 1 Ga. 222 (1); *Watson v. State*, 116 Ga. 607, 43 S. E. 32. Notwithstanding the language of the Code sections defining these offenses, it is not necessary to allege in the indictment that the accused was "of sound memory and discretion," or that the person killed was "a human being," or was "in the peace of the state." *Dumas v. State*, 63 Ga. 600 (1); *Sutherland v. State*, 121 Ga. 591, 49 S. E. 781 (1). The demurrer to the indictment was therefore properly overruled.

**2. BAIL** ¶42—**ADMISSION TO BAIL IN DISCRETION OF COURT.**

Pending a motion for a new trial by one who has been indicted for murder and been convicted of voluntary manslaughter, it is within the sound discretion of the presiding judge to grant or refuse admission to bail upon application therefor by the movant. *Crumley v. Gibbs*, 149 Ga. —, 99 S. E. 297.

**3. CRIMINAL LAW** ¶377—**GENERAL CHARACTER OF ACCUSED PRESENTED IN STATEMENT.**

While the prisoner alone can put his general character in issue in any criminal case, yet he can do so as effectively by his statement to the court and jury as by sworn testimony introduced in his behalf. *Jackson v. State*, 76 Ga. 551; *Doyle v. State*, 77 Ga. 515 (2); *Crawley v. State*, 137 Ga. 777, 74 S. E. 537 (1).

**4. CRIMINAL LAW** ¶378, 683(1)—**EVIDENCE IN REBUTTAL OF GOOD CHARACTER OF ACCUSED.**

Evidence may be offered by the state in any criminal case to rebut any material fact asserted by the prisoner in his statement to the

court and jury. *Doyle v. State*, 77 Ga. 515 (2); *Goolsby v. State*, 133 Ga. 427, 66 S. E. 159 (2). Good character is such a fact (*Shropshire v. State*, 81 Ga. 589, 8 S. E. 450), and an assertion of good character by the prisoner in his statement, or a narrative therein of facts, with an argument deduced therefrom to show his general good character, authorized the introduction of evidence to the contrary.

#### 5. ISSUE AS TO GOOD CHARACTER OF PERSON ACCUSED OF CRIME.

In view of the principles announced in the two preceding paragraphs, that portion of the prisoner's statement set out in the record put his general character in issue, and authorized the introduction of evidence to the contrary.

#### 6. INSTRUCTIONS IN CRIMINAL CASES.

It was not error to refuse the request to charge on disparity of size. See *Strickland v. State*, 98 Ga. 84, 25 S. E. 908; *Alexander v. State*, 118 Ga. 26 (3), 28, 44 S. E. 851. (Luke, J., dissenting.)

#### 7. SUFFICIENCY OF EVIDENCE.

All the assignments of error have been considered, the evidence authorized the verdict, and for no reason assigned was it error to overrule the motion for a new trial.

Error from Superior Court, McDuffie County; Henry C. Hammond, Judge.

J. M. Barnes was convicted of murder, and he brings error. Affirmed.

Sam L. Olive, of Augusta, B. J. Stevens, of Thomson, and Hines, Hardwick & Jordan, of Atlanta, for plaintiff in error.

A. L. Franklin, Sol. Gen., of Augusta, John M. Graham, of Atlanta, and John T. West, P. B. Johnson, and J. B. Burnside, all of Thomson, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., concurs.

LUKE, J. I concur in each of the rulings of the majority of the court, except the ruling announced in paragraph 6 of the decision. The plaintiff in error was indicted by the grand jury of McDuffie county for the offense of murder; it being alleged in the indictment:

"That the said John M. Barnes, in the county aforesaid, on the 3d day of February, 1919, with force and arms, did then and there unlawfully and with malice aforethought kill and murder one J. O. J. Lewis, by shooting him in the body with a pistol, contrary to the laws of said state, the good order, peace, and dignity thereof."

To that indictment the accused demurred generally, contending that no offense was set forth, and specially because it was not alleged that at the time of the homicide the accused was "of sound memory and discretion," or that the decedent was "in the peace of the state." The demurrer was overruled,

and exceptions pendente lite were taken. Upon trial the accused was convicted of voluntary manslaughter. He then moved for a new trial and applied for admission to bail. His application for admission to bail being denied, he excepted pendente lite; and his motion for a new trial being overruled, he brings the case here for review. Other facts, in so far as they are material here, will be set out in connection with the points decided.

1, 2. The first and second headnotes need no elaboration.

3-5. After the prisoner had made his statement, the court permitted a number of witnesses to testify as to his general bad character, and particularly as to his character for violence. This evidence was admitted on the theory that the prisoner's statement had raised the issue, and was admitted over the objections, first, that the issue could not be so raised; and, second, that the issue had not been so raised, even if, under the law, it could be done. Numerous grounds of the amended motion for a new trial complain of the judgment of the court admitting such evidence over the objections stated. That portion of the prisoner's statement here in point was as follows:

"My residence in this community covers a period of nearly 40 years after I became of age, and during that entire period I have never had a fight with any one, nor was there even a semblance of a fight with any one, with the exception of a trivial affair with the late Ira Farmer, in which he struck me, and in which no weapons were drawn upon either side. Afterwards I became postmaster at Thomson, and held the place for years. During all that time I was not engaged in any quarrels, broils, or fights. Later I was United States marshal, under Judge Emory Speer, and for about nine years was marshal and revenue officer, in which positions there is so likely to be conflicts with lawbreakers and with others, and in which shootings and killings so often occur in the course of what the marshal and his deputies consider the performance of duty. I was so extremely careful of human life that it was never necessary for me to lay the hand of violence upon a human being. Never did it become necessary for me to even point a pistol at any one, much less to fire it. I stood so well as a man and as a citizen that the controlling powers in the county placed my name on the grand jury list, and the grand jury itself, composed entirely of Democrats, had repeatedly chosen me for foreman, although it was well known that I was a Republican. Gentlemen, as I may have told you before, I have always lived among you. I challenge any respectable member of this community, who is not my embittered and deadly enemy, to say whether I have been guilty of dirty work of any kind, whether I have not always stood for what I considered clean, honest, and upright, and whether I have not always taken sides with the poor and oppressed. If you think that such a man would have no more sense and no more manhood than to commit deliberately a cold-



blooded murder upon an unarmed man, you will, of course, find me guilty. But I again challenge the prosecution to prove me a man of this character."

In view of the principles announced and the authorities cited in the headnotes, the trial court was clearly right in holding that the portions of the prisoner's statement above set out put his character in issue and authorized the introduction of the evidence of which complaint is now made. The prisoner may, as a matter of right, make to the court and jury such statement "as he may deem proper in his defense" (Penal Code, § 1036); but he cannot, as a matter of right, prevent the jury from hearing from the other side of the case upon the subject-matter which he thereby injects into the case.

6. The prisoner, in his statement, claimed that the homicide was justifiable; that he acted solely in self-defense, under the fears of a reasonable man that his eyesight was about to be destroyed and that his life was in danger. The court fully and fairly instructed the jury as to the principles of law applicable to such a killing. By way of showing a basis for the reasonable fears and the consequent justification which he claimed, the prisoner further stated that he was surprised and unexpectedly assaulted by the decedent, who was a powerful young man, in the prime of health and life, while he, the accused, was an old man, whose eyesight had become dim from age, whose left arm had been useless since childhood, and who was at the time of the homicide, and for a long time had been, suffering from a double hernia of such a nature that any physical struggle on his part might likely result in his death from strangulation of the hernia. The statement of the prisoner as to the disparity in size and strength of the combatants was partly corroborated by the sworn testimony. The court nowhere instructed the jury that they might consider, along with the other evidence in the case any inequality found by them to have existed in the relative size and strength of the combatants, in arriving at the real truth of the case. But the prisoner's counsel duly requested in writing, and the court refused to give, an instruction as follows:

"In determining whether the defendant was justified in shooting the deceased in self-defense, or under the influence of reasonable fears, you can take into consideration any inequality of the relative sizes of the defendant and the deceased, and difference between the physique and strength of the defendant and the deceased, and any rupture from which the defendant was

suffering, if such things appear from the evidence."

I cannot say that such a charge, if given, would or would not have affected the verdict returned. But under the facts of this case it was the prisoner's right to have the jury instructed in accordance with his request, or in other appropriate language; and having done all in his power to obtain that right, and having nevertheless failed to obtain it, a new trial, in my opinion, should be granted, so that the jury's application of the law to the facts as they believed them to be may not be left as a matter of conjecture; and for this reason alone I dissent to the affirmance of the judgment of the trial court.

(24 Ga. App. 369)

FORDHAM v. STATE. (No. 10763.)

(Court of Appeals of Georgia, Division No. 1.  
Nov. 5, 1919.)

(Syllabus by the Court.)

1. HOMICIDE  $\S$  309(4) — VOLUNTARY MANSLAUGHTER; NECESSITY OF INSTRUCTION.

In this case some of the evidence showed that, immediately preceding the killing, the deceased and the defendant had a quarrel and a tussle, and cursed each other, that each secured a pistol, and that the defendant shot and killed the deceased while the latter, with his hand on a pistol in his pocket, was advancing on the defendant. Under this evidence the jury were authorized to infer a mutual intent to fight on the part of both parties, and the court did not err in charging the law of voluntary manslaughter.

2. RULING ON MOTION FOR NEW TRIAL.

The court did not err, as complained of, in excluding certain evidence. For no reason assigned was it error to overrule the motion for a new trial.

Error from Superior Court, Bleckley County.

Henry Fordham was convicted of crime, his motion for a new trial was overruled, and he brings error. Affirmed.

J. M. Bleckley, of Cochran, and M. H. Boyer, of Hawkinsville, for plaintiff in error.  
W. A. Wooten, Sol. Gen., of Eastman, for the State.

LUKE, J. Judgment affirmed

BROYLES, C. J., and BLOODWORTH, J., concur.

$\Leftarrow$  For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(24 Ga. App. 411)

DYSUN v. SELLERS. (No. 10587.)

(Court of Appeals of Georgia, Division No. 2.  
Nov. 6, 1919.)*(Syllabus by the Court.)*EVIDENCE  $\Leftrightarrow$  471(21) — EVIDENCE; CONCLUSIONS OF WITNESS.

There is no merit in the assignment of error that the trial judge permitted a witness to testify positively that he measured certain logs and there was a certain number of feet therein. Such testimony was not based on opinion from observation, but was based on facts known to himself. The ruling is not in conflict with *Allison v. Wall*, 121 Ga. 822, 49 S. E. 831. The evidence amply authorized the judgment, and the court did not err in overruling the certiorari.

Error from Superior Court, Grady County;  
W. M. Harrell, Judge.

Action between T. F. Dyson and R. W. Sellers. Judgment for the latter, certiorari overruled, and the former brings error. Affirmed.

L. W. Rigsby, of Cairo, for plaintiff in error.

Ira Carlisle, of Cairo, for defendant in error.

SMITH, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(24 Ga. App. 307)

SOUTHERN EXPRESS CO. v. STATE.  
(No. 10132.)(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)*(Syllabus by the Court.)*1. INTOXICATING LIQUORS  $\Leftrightarrow$  138 — TRANSPORTATION AND DELIVERY BY EXPRESS COMPANY TO PHYSICIAN.

This case came to the Court of Appeals and a decision was rendered therein. 23 Ga. App. 376, 98 S. E. 272. By writ of certiorari the case was carried to the Supreme Court and the finding of the Court of Appeals reversed; the Supreme Court holding as follows:

"1. The act of 1917 (Acts Ex. Sess. 1917, p. 7), amending and supplementing the prohibition laws of this state, authorizes a common carrier to transport and deliver to a practicing physician, who is the sole proprietor of a drug store, pure alcohol for medicinal purposes, under certain conditions specified in the act, from one point within the state to another point within the state of Georgia."

2. INTOXICATING LIQUORS  $\Leftrightarrow$  138, 139 — TRANSPORTATION BY CARRIER OF ALCOHOL TO PHYSICIAN.

"2. Under the facts of this case, it was error to hold that the common carrier was guilty of a

misdeemeanor for transporting pure alcohol shipped by a wholesale druggist living at a point within this state to a practicing physician living at another point within this state, where it appeared that such physician had an office and kept drugs therein for the purpose of compounding his own medicine, and where such alcohol was to be used for medicinal purposes only, and all the conditions of the act relative to receiving and delivering the alcohol had been complied with by the physician and the common carrier. Nor was it illegal under the act of 1917 for such common carrier, under such circumstances, to have pure alcohol in its possession."

See full opinion of the Supreme Court, 149 Ga. —, 100 S. E. 709.

In view of these rulings of the Supreme Court, the clerk of this court is directed to enter an order vacating the original judgment affirming the judgment of the court below in this case, and the judgment of that court is reversed.

Error from Superior Court, Mitchell County;  
W. M. Harrell, Judge.

The Southern Express Company was convicted of unlawfully transporting and of having control and possession of intoxicating liquors, and it brings error. Original judgment of the Court of Appeals, affirming the conviction, vacated, and judgment of the court below reversed, in conformity to opinion of the Supreme Court (149 Ga. —, 100 S. E. 709).

Pope & Bennet, of Albany, and Robt. C. & Philip H. Alston, of Atlanta, for plaintiff in error.

R. C. Bell, Sol. Gen., of Cairo, and F. A. Hooper, of Atlanta, for the State.

BLOODWORTH, J. Reversed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 313)

HUMPHRIES v. STATE. (No. 10424.)

(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)*(Syllabus by the Court.)*BURGLARY  $\Leftrightarrow$  41(4) — SUFFICIENCY OF EVIDENCE TO SHOW BREAKING AND ENTERING.

The motion for a new trial in this case contained the usual general grounds only. The sole question for determination was whether or not the evidence was sufficient to show that there had been a breaking and entering of the house alleged to have been burglarized. The members of this court thought the evidence sufficient to establish the burglary, but the decision in *Lester v. State*, 106 Ga. 371, 32 S. E. 335, seemed to forbid such a finding. This court therefore certified to the Supreme Court the following questions: "(1) Is the foregoing evidence [the evidence in this case] sufficient to authorize a finding that there had been a breaking and entering of the house? (2) Is the decision in *Lester v. State*, 106 Ga. 371, 32 S. E.

335, that the evidence there was not sufficient to show a breaking and entering, a correct ruling?" The Supreme Court answered both questions in the affirmative, holding that "the evidence set forth in the question propounded by the Court of Appeals is sufficient to authorize a finding that there had been a breaking and entering of the house, and this is not in conflict with the decision in the case of *Lester v. State*, 106 Ga. 371, 32 S. E. 835, where it was held that the evidence was not sufficient to show a breaking and entering. An examination of the record in the case just referred to discloses that certain material facts do not appear in the official report of that case; but, when these facts are considered, the ruling made by the court was undoubtedly correct." 149 Ga. —, 100 S. E. 637.

## 2. AFFIRMANCE.

There being evidence to authorize the verdict, the judgment is affirmed.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Will Humphries, alias E. K. Davis, was convicted of burglary, and on error the Court of Appeals certified questions to the Supreme Court. Affirmed, in conformity to answers of the Supreme Court (149 Ga. —, 100 S. E. 637) to certified questions.

Park & Stone, of Blakely, and Hubert F. Rawls, of Macon, for plaintiff in error.  
John P. Ross, of Macon, for the State.

BLOODWORTH, J. Affirmed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 351)

## JOYCE v. STATE. (No. 10839.)

(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)

(Syllabus by the Court.)

### 1. CRIMINAL LAW §919(5) — ARGUMENT OF COUNSEL, NOT OBJECTED TO, NOT GROUND FOR NEW TRIAL.

A new trial will not be granted because of alleged improper remarks made by counsel, when it does not distinctly appear from the record that the remarks were heard by the court, and when no objection was made by the opposite party, and no action of the court invoked in reference to the remarks. *O'Dell v. State*, 120 Ga. 152, 47 S. E. 577, and cases cited.

## 2. REFUSAL OF NEW TRIAL.

The second special ground of the motion for a new trial is disapproved by the trial judge, and no error in the trial of the case is shown by the other special grounds of the motion.

## 3. SUFFICIENCY OF EVIDENCE.

The evidence amply authorized the defendant's conviction of bigamy, and the trial judge, approving the verdict, properly overruled the motion for a new trial.

Error from Superior Court, De Kalb County; C. W. Smith, Judge.

P. J. Joyce was convicted of bigamy, and he brings error. Affirmed.

Ernest G. Bentley and Walter A. Sims, both of Atlanta, for plaintiff in error.

Geo. M. Napier, Sol. Gen., of Atlanta, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 352)

## WOODS v. STATE. (No. 10846.)

(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)

(Syllabus by the Court.)

## REFUSAL OF NEW TRIAL.

The motion for a new trial contained only the usual general grounds. There was some slight evidence which authorized the verdict, and the court did not err in refusing to grant a new trial.

Error from Superior Court, Talbot County; G. H. Howard, Judge.

Proceedings between Palm Woods and the State. A decision adverse to Woods was rendered, and he brings error. Affirmed.

J. H. McGehee and J. A. Smith, both of Talbotton, for plaintiff in error.

C. F. McLaughlin, Sol. Gen., of Columbus, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

☞ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(24 Ga. App. 834)

## RAFE v. STATE. (No. 10734.)

(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)*(Syllabus by the Court.)*

## 1. HOMICIDE — 137 — INDICTMENT; SUFFICIENCY OF INDICTMENT FOR MURDER.

An indictment for murder is sufficient, and not subject to demurrer upon the ground that it "wholly omits to disclose the death of the alleged injured person, in that such death was caused or brought about by the alleged act of the defendant," where the indictment charges that the defendant did "with force and arms wrongfully, unlawfully, and with malice aforethought, kill and murder one Jeff Peoples, a human being in the peace of the state then and there being, by then and there striking the said Jeff Peoples with a certain heavy brick and rock, and thereby inflicting upon the said Jeff Peoples a mortal wound," etc.

## 2. REOPENING CASE FOR INTRODUCTION OF TESTIMONY.

The trial judge did not abuse the discretion with which he is by law charged, in allowing the state to reopen the case and introduce other testimony after the defendant closed his evidence.

## 3. INSTRUCTIONS AS TO MANSLAUGHTER.

It was not error, under the evidence in this case, for the court to charge upon the law of voluntary manslaughter. The evidence authorized the verdict, which has the approval of the court, and for no error assigned did the court err in overruling the motion for a new trial.

Error from Superior Court, Morgan County; J. B. Park, Judge.

Gus Rafe was convicted of murder, and he brings error. Affirmed.

E. W. Butler and M. C. Few, both of Madison, for plaintiff in error.

Doyle Campbell, Sol. Gen., of Monticello, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 339)

## FINCH v. STATE. (No. 10777.)

(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)*(Syllabus by the Court.)*

## 1. ABANDONMENT OF GROUNDS OF NEW TRIAL.

The first special ground of the motion for a new trial is expressly abandoned in the brief of counsel for the plaintiff in error.

## 2. CRIMINAL LAW — 828 — INSTRUCTIONS; NECESSITY OF REQUESTS.

In the absence of a timely and appropriate written request, the court did not err in failing to charge the jury specifically that the burden was on the state to establish the guilt of the defendant beyond a reasonable doubt. The charge of the court on the subject of a reasonable doubt sufficiently informed the jury that that burden was on the state. *Thomas v. State*, 129 Ga. 419, 59 S. E. 246 (4).

## 3. INSTRUCTIONS AS TO ALIBI.

The charge upon the subject of alibi contained no material error.

## 4. CRIMINAL LAW — 778(3), 828 — INSTRUCTIONS; PRESUMPTION OF INNOCENCE.

In a criminal case it is error for the judge, even in the absence of a timely and appropriate written request, to fail to charge the jury substantially to the effect that the defendant enters upon his trial with the presumption of innocence in his favor, and that this presumption of innocence remains with him throughout the trial, until his guilt is established by proof. *Gardner v. State*, 17 Ga. App. 410, 87 S. E. 150, and cases cited. In the instant case the court erred in failing to charge the jury substantially to the above effect, and, under all the facts of the case, this error requires a new trial.

Error from Superior Court, Clarke County; Andrew J. Cobb, Judge.

Rosa Finch was convicted of illegally possessing intoxicating liquor, and she brings error. Reversed.

L. O. Rucker and Austin Bell, both of Athens, for plaintiff in error.

W. O. Dean, Sol. Gen., of Monroe, for the State.

BROYLES, C. J. [4] The fourth headnote alone needs elaboration. The holding there is not in conflict with the ruling in *Roberts v. State*, 92 Ga. 451, 17 S. E. 262 (3), which is as follows:

"Alleged errors in 'failing to charge as to the legal presumption of innocence,' and in 'failing to explain the legal meaning of reasonable doubt,' there being no proper requests to charge on these subjects; in 'making the charge in argumentative form,' without stating how; in withdrawing or admitting evidence, without plainly and distinctly setting forth what the evidence was; in 'expressing an opinion as to the effect of certain documentary evidence,' without stating what the expression was—and other like assignments of error, are too vague, indefinite, and uncertain to be considered, and afford no cause for a new trial."

In our opinion the Supreme Court there, notwithstanding the clauses, "there being no proper requests to charge on these subjects," and "and afford no cause for a new trial,"

did not intend to pass upon the merits of the assignments of error, but merely intended to hold that they were so fatally defective in form (in that they were "too vague, indefinite, and uncertain to be considered") that the assignments of error were not reviewable by the Supreme Court, and therefore afforded no ground for a new trial. We are strengthened in this view by an examination of the original record in the Roberts Case, of file in the office of the clerk of the Supreme Court, which shows that the particular assignment of error now being considered was merely as follows:

"Because the court erred in failing to charge the jury as to the legal presumption of innocence."

In the instant case the assignment of error was:

"Because the court erred in failing to charge the jury that the defendant entered upon the trial with the presumption of innocence in her favor, and that that presumption remained with her throughout the trial, until her guilt was established by proof."

Nor is the present ruling in conflict with the decision of this court in *Mauldin v. State*, 23 Ga. App. 537, 99 S. E. 50. In that case the same omission in the charge of the court as is now under review was excepted to, and it was there held, in substance, that the failure of the court to specifically so charge was not error, since the principle of the law was substantially and sufficiently given by the explicit and comprehensive charge on the subject of reasonable doubt, together with the further charge that—

"Clarence Mauldin [the defendant] pleads not guilty, and that puts upon the state the burden of proving his guilt, and satisfying your judgments beyond a reasonable doubt that he is guilty of this charge, *in order to overcome the presumption that he is innocent*, before you could find a verdict of guilty" (italics ours).

The charge in the instant case did not contain any specific reference whatever to the subject of the presumption of innocence, and the instructions given upon the subject of reasonable doubt were not alone sufficient to meet the requirements of the law. "Even Homer sometimes nods," and we think in this instance the learned and upright trial judge committed reversible error, and that another trial of the case is required. We have reached this conclusion the less reluctantly because of the fact that the great preponderance of the evidence was in favor of the defendant, and the evidence which authorized her conviction was slight and unsatisfactory. Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 341)

# FINCH v. STATE. (No. 10776.)

(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)

(Syllabus by the Court.)

## COMPANION CASE.

This case is a companion one to that of *Finch v. State*, 24 Ga. App. —, 100 S. E. 793, and is controlled by the opinion in that case.

Error from Superior Court, Clarke County; Andrew J. Cobb, Judge.

Rosa Finch was convicted of illegally selling intoxicating liquor, and she brings error. Reversed.

L. C. Rucker and Austin Bell, both of Athens, for plaintiff in error.

W. O. Dean, Sol. Gen., of Monroe, for the State.

BLOODWORTH, J. Judgment reversed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 404)

# COLLINS v. HARRISON. (No. 10455.)

(Court of Appeals of Georgia, Division No. 2.  
Nov. 6, 1919.)

(Syllabus by the Court.)

## 1. LANDLORD AND TENANT §252(2)—CROPS: RIGHTS OF BONA FIDE PURCHASER.

"A bona fide purchaser, without notice, of a crop grown on rented premises, will be protected against the lien, general or special, of the landlord for rent." *Thornton v. Carver*, 80 Ga. 397, 6 S. E. 915.

## 2. LANDLORD AND TENANT §270(14)—LIEN FOR RENT; RIGHT OF BONA FIDE PURCHASER OF CROPS.

In the record it is alleged that the court erred in charging the jury as follows: "If the defendant in *fi. fa.* were indebted to the plaintiffs in *fi. fa.* for rent of the land on which the alleged crops were raised for the year in which they were raised, and sold such crops to the claimant without paying the rent, and claimant bought such crops without notice that said rent had not been paid, the claimant took such property subject to the plaintiff's claim of rent, due for the premises as aforesaid, and under such circumstances such property would be subject to the *fi. fa.* for whatever amount may still be due for such rent." This is clearly error, under the ruling made above and under the particular facts of this case.

## 3. APPEAL AND ERROR §928(1)—PRESUMPTIONS; APPLICABILITY OF INSTRUCTIONS.

The two excerpts complained of in the second and third grounds of the amendment to the motion for a new trial are as follows: "Notice sufficient to excite attention and party on inquiry is notice of everything to which it afterwards found such inquiry might have led." "If, at the time claimant purchased the property in dispute as contended by him, the defendants in *fi. fa.* were due the plaintiffs rent for the

premises on which said property was raised as alleged by plaintiff, and at the time of such purchase the circumstances were sufficient to put the claimant on notice that such rent was due and unpaid, then such property would be subject for whatever amount is due plaintiff for such rent." These instructions contain correct abstract statements of the law, and, in the absence of the entire charge (which is not specified in the bill of exceptions or brought up in the record, and which does not affirmatively appear to have been reduced to writing and to be therefore available to this court), it must be assumed by this court that these instructions, when considered in connection with the remainder of the charge, were applicable to the case. *Corbin v. McCrary*, 22 Ga. App. 472, 96 S. E. 445(4).

Error from Superior Court, Montgomery County; E. D. Graham, Judge.

Proceeding on a distress warrant, M. A. Harrison against three parties, with claim to property in dispute by J. C. Collins. Judgment for plaintiff, and claimant brings error. Reversed.

A. C. Saffold, of Vidalia, for plaintiff in error.

M. B. Calhoun, of Mt. Vernon, for defendant in error.

SMITH, J. This case grew out of a distress warrant proceeding instituted by the defendant in error against three named parties for rent due upon certain described premises. On the levy of the distress warrant J. C. Collins filed a claim to the property in dispute. The trial of the claim case resulted in a verdict finding the property subject. The claimant admitted that the rent was due as alleged in the distress warrant, but contended that he was a bona fide purchaser for value of the crops levied upon before the levy was made, and that he had no notice that the rent was not paid.

The case was tried upon the following agreed statement of facts:

"It is admitted as true that A. M. Moses rented the land described in the distress warrant proceeding to W. J., J. W., and R. A. Whitlock, and they executed notes for said rent, and that the notes were transferred by him to M. A. Harrison, and that the sum distrained for is due and unpaid by said Whitlocks for the rent of said land for the year 1916, as in the affidavit alleged. It is further admitted as true that the corn and hay, as shown by the entry of the levying officer, was grown upon the premises described in the distress warrant proceedings the year 1916, and that at the time of the suing out of the distress warrant there was no crops on the rented premises, the same having been, prior to the levy, disposed of by W. J., J. W., and R. A. Whitlock, and that said Whitlocks were insolvent and had no property out of which the rent claimed could be realized.

"J. C. Collins, claimant, sworn in his own behalf testified as follows: I am the son-in-law of W. J. Whitlock, having married his daughter, and J. W. and R. A. Whitlock are my brothers-in-law. I own the corn and hay levied upon. I bought it from W. J. Whitlock before the distress warrant proceeding was sworn out. Mr. Whitlock hauled this corn to my place, putting a part of it in the barn and the balance in the smokehouse. The hay I had Mr. Whitlock put in the barn on the premises of Mrs. Lou C. Gibbs. I didn't pay for this corn and hay as

soon as it was placed, but I had paid Mr. W. J. Whitlock for it before it was levied on. I paid him in the barber shop in Uvalda, in the presence of Mr. B. F. Hart and Mr. C. B. Anderson, and I asked them to witness the payment of the money. I give one dollar a bushel for corn, and \$17 per ton for hay. I bought it to speculate on, and in 1917, in early spring, Mr. W. J. Whitlock's sons hauled some of this corn and hay from my house. I sold it to them for more than I gave for it, and I also sold some corn and hay to other parties in the neighborhood. I practiced medicine and paid for the corn and hay with money I made in that way and from the farm. I knew when I bought the corn and hay that it was grown on land rented by W. J., J. W., and R. A. Whitlock, but did not know that the rent had not been paid; never asked anything about this; didn't know but what they were selling the corn and hay to pay rent. I bought the corn and hay in good faith and paid for the same as I had agreed to.

"B. F. Hart, sworn for the claimant, testified as follows: A few days before the corn and hay levied upon was seized, Dr. J. C. Collins stated to me that he wanted me to witness the payment by him to Mr. W. J. Whitlock, some money that he (Collins) owed Whitlock for some corn and hay that he had bought, and I saw Mr. Collins deliver to Mr. Whitlock a considerable sum of money; I don't know how much. 'This money,' J. C. Collins said, when he gave it to Whitlock, 'is what I owe you for corn and hay I bought from you.' This was in the barber shop in Uvalda one Saturday night. Mr. C. B. Anderson was present also.

"C. B. Anderson, sworn for the claimant, testified: Before the corn and hay was levied on, the claimant, Dr. J. C. Collins, came to me in Uvalda, Ga., one Saturday night, and said to me that he wanted me to witness his payment to Mr. W. J. Whitlock some money that he owed for some corn and hay. I saw Dr. J. C. Collins deliver to W. J. Whitlock on this occasion quite a sum of money, I don't know how much. J. C. Collins said to W. J. Whitlock at the time he paid it, 'This is the money for the corn and hay that I bought from you.' Mr. B. F. Hart was also present when this money was paid."

It is not necessary to add anything further to the rulings in the headnotes.

Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

NOTE BY THE COURT.—After the judgment of this court in this case had been pronounced and entered upon the minutes, and the remittitur issued and transmitted to the trial court, and there received, information came to this court that a mistake had been made by the clerk of the court below in transcribing the record, and that in fact the court below in the charge to the jury did not use the word "without," which appears in the excerpt set out in the second headnote of the foregoing decision, but did use the word "with." An adjudication was had upon the record as certified by the clerk of that court. No mistake or error, even by inadvertence, was made by this court in arriving at its judgment, nor by its clerk in transmitting the remittitur. This court lost jurisdiction of the case after its judgment had been rendered and entered on the minutes, and the remittitur transmitted to the court below and there received; and consequently this mistake of the clerk of the court below cannot be corrected. But in justice to the trial judge this court takes pleasure in adding this note to the decision. See *Knox v. State*, 113 Ga. 929, 39 S. E. 330; *Seaboard Air Line Railway v. Jones*, 119 Ga. 907, 47 S. E. 320.

(24 Ga. App. 365)

**RIVERS v. STATE.** (No. 10669.)(Court of Appeals of Georgia, Division No. 1.  
Nov. 5, 1919.)*(Syllabus by the Court.)***HOMICIDE**  $\S$ 309(3)—**INSTRUCTION ON MANSLAUGHTER ERRONEOUS WHERE IT WAS NOT IN ISSUE.**

Under the evidence and the defendant's statement, the law of manslaughter was not involved, and the court erred in instructing the jury upon that law.

Error from Superior Court, Clay County; W. C. Worrill, Judge.

Proceedings between Charlie Rivers and the State. A judgment adverse to Rivers was rendered, and he brings error. Reversed.

P. C. King, of Ft. Gaines, and A. L. Miller, of Edison, for plaintiff in error.

B. T. Castellow, Sol. Gen., of Cuthbert, and R. R. Arnold, of Atlanta, for the State.

**BROYLES, C. J.** Judgment reversed.

**LUKE and BLOODWORTH, JJ.,** concur.

(24 Ga. App. 361)

**BRIDGES v. STATE.** (No. 10913.)

(Court of Appeals of Georgia. Nov. 4, 1919.)

*(Syllabus by the Court.)***1. CHARGE OF COURT—EXPRESSION OF OPINION.**

The excerpt from the charge of which complaint is made in the special ground of the motion for new trial does not express or intimate the opinion of the presiding judge "as to what has or has not been proved or as to the guilt of the accused," and, when read in connection with the entire charge, contains no error which requires this court to reverse the judgment of the trial court.

**2. EVIDENCE TO SUSTAIN VERDICT.**

The verdict rendered is approved by the trial judge, and there is ample evidence to support it.

Error from Superior Court, Terrell County; W. C. Worrill, Judge.

Proceeding by the State against George Bridges. From the judgment, the latter brings error. Affirmed.

C. W. Worrill, of Cuthbert, and W. B. Parks, of Dawson, for plaintiff in error.

B. T. Castellow, Sol. Gen., of Cuthbert, and R. R. Arnold, of Atlanta, for the State.

**BLOODWORTH, J.** Judgment affirmed.

**BROYLES, C. J., and LUKE, J.,** concur.

(24 Ga. App. 320)

**BRITT v. STATE.** (No. 10707.)(Court of Appeals of Georgia, Division No. 1.  
Nov. 4, 1919.)*(Syllabus by the Court.)***1. CRIMINAL LAW**  $\S$ 278(2), 507(7), 510 — **PLEA IN ABATEMENT THAT ONLY WITNESS WAS PARTY TO FORNICATION BAD.**

A plea in abatement to the indictment, which charged fornication, was properly stricken, when the ground thereof was that the only witness before the grand jury was the other party to the illicit intercourse. While the other party was an accomplice (*Solomon v. State*, 113 Ga. 192, 38 S. E. 332 [1]), yet fornication is a misdemeanor, and in such cases the law allows a conviction on the evidence of a single witness, even though that witness be an accomplice. (Pen. Code 1910, § 1017).

**2. CRIMINAL LAW**  $\S$ 1064½ — **GROUND OF AMENDMENT TO MOTION FOR NEW TRIAL NOT REVIEWABLE.**

The fourth ground of the amendment to the motion for new trial will not be considered, as the trial judge refused to approve it.

**3. CRIMINAL LAW**  $\S$ 918(5) — **WITNESSES**  $\S$ 248(1) — **EXAMINATION OF WITNESS IN COURT NOT GROUND FOR NEW TRIAL.**

The remaining special grounds of the motion are without merit, especially when considered in the light of the qualifying note of the presiding judge. "The court may properly propound questions to a witness on the stand, with a view to elicit the truth of the case; and if in such examination the court does not express or intimate an opinion as to the credibility of the witness, or as to what has or has not been proved, the mere fact that competent testimony of the witness so elicited may be detrimental to the interest of a party will not be cause for granting him a new trial. The questions which the court asked the witness, as set out in the motion for a new trial in the present case, were not calculated to impress the jury with the idea that the judge believed the party who gained the case in the court below should prevail." *Johnson v. Leffler Co.*, 122 Ga. 670, 50 S. E. 488 (7).

**4. CRIMINAL LAW**  $\S$ 1159(2)—**REVIEW; EVIDENCE TO SUPPORT VERDICT.**

Counsel for plaintiff in error insists that the verdict in this case is without evidence to support it, because the evidence shows that the defendant was guilty of rape, instead of fornication. He made a timely and appropriate request in writing that this issue be submitted to the jury, and the presiding judge certifies that this was done. On questions of fact the jurors are the final arbiters. This court is a court for the correction of errors of law alone. Where the jury passes upon issues of fact, this court cannot say as a matter of law that the verdict is contrary to law, if there is any evidence at all to support the verdict. The jury have said that this defendant is guilty of fornication; there is evidence to support such a finding, the verdict has the approval of the presiding judge, and the judgment is affirmed.

Error from Superior Court, Appling County; J. P. Highsmith, Judge.

Randolph Britt was convicted of fornication, his motion for a new trial was denied, and he brings error. Affirmed.

W. W. Bennett, of Baxley, for plaintiff in error.

Alvin V. Sellers, Sol. Gen., of Baxley, for defendant in error.

BLOODWORTH, J. Affirmed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 379)

MAY v. STATE. (No. 10742.)

(Court of Appeals of Georgia, Division No. 1.  
Nov. 6, 1919.)

(Syllabus by the Court.)

**1. ABANDONMENT OF SPECIAL GROUND ON MOTION FOR NEW TRIAL.**

The first special ground of the motion for a new trial is virtually abandoned in the brief of counsel for the plaintiff in error.

**2. CRIMINAL LAW §918(10, 11)—NEW TRIAL; APPLAUSE AT TRIAL.**

In the light of the note of the trial judge there is no merit in the special ground of the motion for a new trial which complains of alleged applause and demonstration against the defendant by the audience during the progress of the trial. Moreover, no motion for a mistrial was made, nor any ruling invoked upon which error is assigned. In this connection, see *Harrison v. State*, 20 Ga. App. 157, 92 S. E. 970(6), and cases cited.

**3. CRIMINAL LAW §867—MISTRIAL; EXCLUSION OF EVIDENCE.**

"Where, in answer to questions propounded by the solicitor general certain evidence was elicited from a witness, but upon objection from counsel for the accused such evidence was excluded and the presiding judge instructed the jury that it was withdrawn from their consideration, and should have no weight with them, and should be given no consideration by them, there was no error in declining to grant a mistrial upon motion because such evidence had been heard by the jury." *Withrow v. State*, 136 Ga. 337, 71 S. E. 139(3); *Esa v. State*, 19 Ga. App. 14, 90 S. E. 732(3); *Biggers v. State*, 19 Ga. App. 604, 91 S. E. 919(1, 2). Under this ruling the court did not err in denying the defendant's motion to declare a mistrial.

**4. CRIMINAL LAW §1064(4) — NEW TRIAL; SUFFICIENCY OF GROUNDS.**

The ground of the motion for a new trial which complains of the exclusion of an alleged statement made by the defendant to another person in regard to the homicide, near the body of the person he had killed, is too incomplete

to be considered. The ground alleges that the statement was admissible as a part of the res gestæ, and yet the ground does not show how near to the time of the homicide the statement was made. "It should appear from the ground itself that they [the statements] were 'so nearly connected [with the homicide] in time as to be free from all suspicion of device or after-thought.'" *Reeves v. State*, 22 Ga. App. 628, 97 S. E. 115(5). The allegation in the ground now under consideration that the statement was made "as movant insists the evidence shows immediately after the homicide, to the first person to enter the building after the homicide," does not show this necessary fact, but is a mere argumentative conclusion of the movant, without sufficient facts upon which to base it; and a reference to the brief of the evidence would be necessary to decide this question.

**5. MOTION FOR NEW TRIAL.**

In the light of the notes of the trial judge the fifth, ninth, twelfth, thirteenth, and fourteenth special grounds of the motion for a new trial are without merit.

**6. QUESTION TO WITNESS.**

The court did not err in propounding the question to the witness, as complained of in the sixth special ground of the motion for a new trial.

**7. MOTION FOR NEW TRIAL.**

The seventh and eighth special grounds of the motion for a new trial are without substantial merit.

**8. CRIMINAL LAW §1178—APPEAL; ABANDONMENT OF OBJECTION IN BRIEF.**

The tenth special ground of the motion for a new trial is not referred to in the brief of counsel for the plaintiff in error, and will be treated as abandoned.

**9. MOTION FOR NEW TRIAL.**

There is no merit in the eleventh special ground of the motion for a new trial.

**10. MISCONDUCT OF JURORS.**

In the light of the note of the trial judge, and the counter showing made by the state, there is no merit in the fifteenth and sixteenth special grounds of the motion for a new trial which complain that some of the jurors, during a recess of the court and while quartered in an hotel, talked over the long-distance telephone.

**11. CRIMINAL LAW §655(1), 918(10, 11) — REMARK OF COURT TO JURY; FAILURE TO OBJECT.**

It was improper for the court, in the presence of the jury and during the progress of the trial, on a Saturday afternoon, to inquire if it would be agreeable to counsel (addressing counsel for both sides) to allow the jury to attend church services on the following Sunday. However, as shown by the note of the trial judge, "no motion or objection of any kind was made to such inquiry or suggestion of the court, or any ruling invoked concerning the same until the above-stated ground of the motion." Under these facts this inadvertent



impropriety of the court does not require a new trial.

#### 12. CHARGE OF COURT.

None of the excerpts from the charge of the court, as complained of in the eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth special grounds of the motion for a new trial, when considered in connection with the charge as a whole, and the facts of the case, shows cause for a new trial.

#### 13. HOMICIDE ⚡309(4) — VOLUNTARY MANSLAUGHTER; INSTRUCTIONS.

The court did not err in instructing the jury upon the law of voluntary manslaughter. (Luke, J., dissenting.)

#### 14. CRIMINAL LAW ⚡830 — REQUEST TO CHARGE; SERIES OF PROPOSITIONS.

It was not error to refuse the request to give in charge to the jury a series of propositions presented en bloc, since some of the propositions were unsound and inapplicable to the facts of the case. Although not all of the propositions were on the same sheet of paper, all of the sheets containing the propositions were attached together and so presented to the judge, and the only request to charge was on the first sheet of paper, and the request was that the court "charge the jury each and all of the following written requests, to wit," and then followed eight propositions of law, numbered first, second, third, fourth, fifth, sixth, seventh, and eighth. *Western Union Telegraph Co. v. Owens*, 23 Ga. App. 169, 98 S. E. 116(5), 118(5), and authorities cited. As a matter of fact, however, the legal propositions that were sound and applicable to the case were sufficiently covered by the charge given.

*(Additional Syllabus by Editorial Staff.)*

#### 15. HOMICIDE ⚡309(4)—EVIDENCE AUTHORIZING CHARGE ON VOLUNTARY MANSLAUGHTER.

The law of voluntary manslaughter may properly be given in charge on trial of one indicted for murder, where, from the evidence or from defendant's statement to the jury, there is anything deducible which would tend to show manslaughter, voluntary or involuntary, or which would be sufficient to raise a doubt as to whether the homicide was murder or manslaughter.

#### 16. CRIMINAL LAW ⚡554—JURY'S RIGHT TO PASS ON DEFENDANT'S STATEMENT.

It is the prerogative of the jury to accept the defendant's statement as a whole, or to reject it as a whole, to believe it in part, or disbelieve it in part, and in the exercise of this discretion they are unlimited.

Error from Superior Court, Decatur County; W. M. Harrell, Judge.

R. H. May was convicted of crime, his motion for a new trial was denied, and he brings error. Affirmed.

E. E. Cox, of Camilla, R. L. Cox, of Donalsonville, A. E. Thornton, and Hartsfield & Conger, all of Bainbridge, and Pottle & Hofmayer, of Albany, for plaintiff in error.

R. C. Bell, Sol. Gen., of Cairo, F. A. Hooper & Son, of Atlanta, and M. E. O'Neal, of Bainbridge, for the State.

BROYLES, C. J. [13] The thirteenth head-note alone needs elaboration. While there was no eyewitness to the homicide, the defendant in his statement to the jury admitted that he killed the deceased, under the following circumstances, as narrated by him: The deceased came into the defendant's office in the bank of which the defendant was cashier, and demanded that the defendant sign a certain paper (which was a release by the bank of certain assets of the deceased held as collateral security), which the defendant refused to do, and upon the defendant telling the deceased that he (the defendant) was going to leave the building, the deceased said, "No, you are not going to leave this building until you sign this paper." The defendant then closed the doors of the bank's vault, and, as he backed out of the vault and was closing the "gate" of the vault, to use his own language:

"I heard Mr. Richardson [the deceased] behind me; he came up, and he says—the words I heard, he says, 'God damn you; you have ruined me, and I will fix you' \* \* \* and I turned around, and he was coming to me just in this position (illustrating). I was standing there at that end of the door, that little gate, fixing to pull it in, and I looked back, and the picture I saw of Mr. Richardson was that piece of iron—of course I will call it a crank: I didn't know at the time what it was—but he had this piece of iron, and he made this threat, and he was just in this position, as best I remember, and he had made this threat, and he was right on me then practically close enough to hit; gentlemen, I have had a lot of tussles with Mr. Richardson. He was an athlete; he was an awfully strong fellow; anybody will tell you that; and when he came on to me like that, of course I couldn't see anything but death. I jumped back as far as I could into that vault door; it was the only way of escape. This door here I couldn't have gotten out there, and I went back into the vault door as far as I could, and I remember falling back in there, and I remember shooting one time. Now, when I shot Mr. Richardson he was just in this motion, and the picture I drew of Mr. Richardson after I shot one time went around this way over that desk, that slanting desk, and, as I say, just as I shot the first time, and he in this position (indicating). The last picture I saw of him he went right over this way, and of course I don't remember anything about the shots."

The defendant further said in his statement that he told the first man that came into the building after the homicide:

"Mr. Deese, I have had to kill Mr. Richardson. I says, 'He was trying to kill me, and I had to kill him in defense of my own life.'"

The evidence showed that an automobile crank was found, shortly after the homicide, on the floor near the body of the deceased.

[15, 16] It is well settled by numerous rulings of the Supreme Court and of this court that the law of voluntary manslaughter may properly be given in charge to the jury on the trial of one indicted for murder, where, from the evidence or from the defendant's statement to the jury, there is anything deducible which would tend to show that he was guilty of manslaughter, voluntary or involuntary, or which would be sufficient to raise a doubt as to whether the homicide was murder or manslaughter. *Reeves v. State*, 22 Ga. App. 629, 97 S. E. 115. It is likewise well settled that it is the prerogative of the jury to accept the defendant's statement as a whole, or to reject it as a whole, to believe it in part, or disbelieve it in part. In the exercise of this discretion they are unlimited. *Brown v. State*, 10 Ga. App. 50 (1), 54, 55, 72 S. E. 537.

Under the above rulings the jury were authorized to disbelieve the following part of the defendant's statement (which was really an argument and a conclusion on his part):

"And when he come on to me like that, of course I couldn't see anything but death."

The jury were also authorized either to reject that part of the statement which showed that the defendant stated to a third person, some time after the killing, "I have had to kill Mr. Richardson. I says, 'He was trying to kill me, and I had to kill him in defense of my own life;'" or, if they believed he had made this self-serving declaration, to disbelieve the truth of it. With these portions of the defendant's statement eliminated, the remainder of the statement authorized the jury to infer that, or at least made it a doubtful question whether, the defendant killed the deceased without any malice, either express or implied, and not under the fears of a reasonable man that a felonious assault was about to be committed upon him. The evidence did not show that the automobile crank which the defendant alleged the deceased used in the assault was a weapon likely to produce death, but merely that it was a weapon with which death could be produced. However, conceding (but not deciding), as argued by able counsel for the plaintiff in error, that this court should take judicial cognizance of the fact that an automobile crank is such a weapon as would likely produce death, the defendant's state-

ment (the evidence is silent on this question), as disclosed by the record, does not demand a finding that the deceased, at the time of the assault, was using this weapon in a way calculated to take human life, or in such a manner as would arouse the fears of a reasonably courageous man that a felonious assault was about to be committed on him. The record does not disclose how or in what manner the deceased attempted to use the weapon. The deceased made no threat to kill the defendant, or to commit a felony upon his person; the only threat being that he was going to "fix" him. The record is silent as to what the defendant meant by the word "fix." Was he going to "fix" the defendant by killing him, or committing a felony upon his person, or by merely giving him such a beating as would not have amounted to a felonious assault? While it is probably true that the jury were authorized to infer that the deceased, by his threat to "fix" the defendant, meant that he intended to kill him, or to commit a felonious assault upon him, such an inference was not demanded. The portions of the defendant's statement which the jury, as shown by their verdict, evidently believed, authorized them to find that, immediately preceeding the homicide, the deceased made an actual assault upon the defendant, accompanied by threats and menaces, but that the weapon employed by the deceased in making the assault (conceding that it was a weapon likely to produce death) was not being used by the deceased at the time of the assault in a way calculated to take human life; that the defendant, in killing the deceased, was not actuated by malice, either express or implied, but that the homicide was the result of a sudden and violent heat of passion aroused in the defendant by the unprovoked assault made upon him by the deceased. From what has been said it follows that the court was authorized to instruct the jury upon the law of voluntary manslaughter.

The verdict was authorized by the evidence, and has been approved by the trial judge; no reversible error of law appears to have been committed upon the trial; and the court did not err in overruling the motion for a new trial.

Judgment affirmed.

BLOODWORTH, J., concurs.

LUKE, J. I concur in every conclusion reached by a majority of the court, except the ruling announced in the thirteenth headnote. I do not think that under the evidence the court should have instructed the jury upon the law of voluntary manslaughter.

(21 Ga. App. 389)

**HARRELL v. SHEALEY.** (No. 10392.)(Court of Appeals of Georgia, Division No. 2  
Nov. 6, 1919.)*(Syllabus by the Court.)*

1. **ARMY AND NAVY**  $\S$ 34—**DEFAULT JUDGMENT; FAILURE TO FILE AFFIDAVIT THAT DEFENDANT IS NOT IN MILITARY SERVICE.**

Article 2,  $\S$  200, of the Act of Congress approved March 8, 1918, c. 20, 40 Stat. 441 (U. S. Comp. St. 1918,  $\S$  3078 $\frac{1}{4}$ bb), and known as the "Soldiers' and Sailors' Relief Act," provides: "That in any action or proceeding commenced in any court if there shall be a default of an appearance by the defendant the plaintiff before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. \* \* \* If any judgment shall be rendered in any action or proceeding governed by this section against any person in military service during the period of such service or within thirty days thereafter, and it appears that such person was prejudiced by reason of his military service in making his defense thereto, such judgment may, upon application, made by such person or his legal representative, not later than ninety days after the termination of such service, be opened by the court rendering the same and such defendant or his legal representative let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof." Under the provisions of this act, a default judgment cannot be opened for failure to file such affidavit, unless it appears from the record that the person against whom the judgment was rendered was as a matter of fact in the military service. The court therefore erred in opening the default judgment against the defendant in this case, notwithstanding the plaintiff did not make and file the affidavit provided for in this act, since neither his motion to vacate nor the record as a whole showed that he was engaged in the military service of his government at the time judgment was rendered.

2. **COURTS**  $\S$ 189(15)—**CITY COURT; CONTROL OVER JUDGMENTS AND ORDERS.**

"Under the act creating the city court of Thomasville (Acts 1905, p. 383), as amended by the act approved August 22, 1907 (Acts of 1907, p. 238), it is the duty of the trial judge to call the appearance docket, and, if no defense is filed on or before the call of the docket, the judge must, upon sufficient proof submitted by the plaintiff, render a judgment in his favor. There is nothing, however, in the provisions of the act creating the city court of Thomasville, or in its amendments, which abrogate the general rule that during the term the court has plenary power over all of its judgments and orders, and may modify or vacate them for good cause shown." But "where, under the provisions of the act creating the city court of Thomasville, no defense is filed within the time required by the act, and judgment is rendered in favor of the plaintiff, such a judgment will not be vacated, even during the same term, at the instance of a defendant who shows no reason good in law for his failure to appear and file

his defense within the time required by the act. The discretion vested by law in the trial judge is a legal discretion and will be exercised only in cases where the defendant shows a legal reason for its exercise." *Florida Central R. Co. v. Luke*, 11 Ga. App. 290, 75 S. E. 270 (1 and 2). No such reason having been shown in this case, the judge erred in vacating the judgment.

Error from City Court of Thomasville;  
W. H. Hammond, Judge.

Action by W. H. Harrell against D. W. Shealey. Default judgment against defendant, and, from an order vacating it, plaintiff brings error. Reversed.

W. V. Custer and Hartsfield & Conger, all of Bainbridge, for plaintiff in error.

J. M. Austin, of Thomasville, for defendant in error.

SMITH, J. Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(24 Ga. App. 390)

**COLUMBUS POWER CO. v. PUCKETT.** (No. 10393.)

(Court of Appeals of Georgia. Nov. 6, 1919.)

*(Syllabus by the Court.)*

1. **ELECTRICITY**  $\S$ 15(2), 18(2)—**MAINTAINING HIGH-TENSION WIRE; DANGER TO TELEGRAPH EMPLOYEES.**

An electric company which, after the erection of a telegraph company's line, erects and maintains over and across the line of telegraph wires, or in close proximity thereto, a high-tension wire which carries a dangerous current of electricity, is bound to exercise ordinary diligence in the erection and maintenance of its poles and wires so as to permit an employé of the telegraph company, who ascends a pole of his company in the discharge of his regular duties, to perform his work in reasonable safety; and an employé of the telegraph company, while in the exercise of ordinary care for his own protection, has the right to assume that such high-tension wires are properly placed and insulated so as to render them reasonably safe. See *Ridgeway v. Sayre Electric Co.*, 258 Pa. 400, 102 Atl. 123, L. R. A. 1918A, 991, Ann. Cas. 1918D, 4, and notes, for a full discussion of the law applicable to this case. See, also, *Atlanta Con. St. Ry. Co. v. Owings*, 97 Ga. 663, 25 S. E. 377, 33 L. R. A. 798; *City of Dawson v. Smith*, 18 Ga. App. 603, 90 S. E. 76; *Trammell v. Columbus Railroad Co.*, 9 Ga. App. 98, 70 S. E. 892.

2. **ELECTRICITY**  $\S$ 18(3), 19(12)—**CONTRIBUTORY NEGLIGENCE QUESTION FOR JURY.**

Where one, especially one who is experienced in his business, has the choice of two ways of doing a given piece of work, the one safe and the other dangerous, he is under a duty to select the former; and if, instead of so doing, he voluntarily selects the latter, when

he knows or ought in the exercise of due care on his part to know of the danger, he is guilty of a lack of ordinary care (Columbus Railway Co. v. Dorsey, 119 Ga. 363, 366, 46 S. E. 635; Southern Cotton Oil Co. v. Skipper, 125 Ga. 368, 54 S. E. 110 [5]); but, under the facts alleged in the petition in this case, it was for the jury to determine from the evidence whether or not there were two ways, one safe and the other dangerous, in which the plaintiff could have performed the work in which he was engaged, and, if so, whether or not he voluntarily selected the dangerous way with actual or imputable knowledge of the danger incident to doing the work in that way.

3. ELECTRICITY ⇐19(12)—NEGLIGENCE ⇐  
136(14, 26)—CONTRIBUTORY NEGLIGENCE FOR JURY.

While it is true that, if the plaintiff could, by ordinary care, have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover (Civil Code of 1910, § 4426), still questions as to diligence and negligence, including contributory negligence, are questions peculiarly for the jury, and the court will decline to solve them by decision on demurrer, except in plain and undisputable cases. Southern Cotton Oil Co. v. Gladman, 1 Ga. App. 259, 58 S. E. 249(8); International Cotton Mills v. Webb, 22 Ga. App. 309, 96 S. E. 16(4). Applying these principles of law to the petition in this case, it cannot be said that the facts disclosed show, as a matter of law, that no other legal conclusion could be reached save that the plaintiff was guilty of a lack of ordinary care, or that he was injured by reason of his own negligence. So long as it can reasonably be said that fair-minded men might disagree upon these questions, the propriety of the plaintiff's conduct under all the circumstances alleged is a question for determination by the jury, and not by the court.

4. ELECTRICITY ⇐19(2)—INJURY TO THIRD PERSON; SUFFICIENCY OF PETITION.

The plaintiff having originally brought his action jointly against his master, the telegraph company, and the defendant electric company, and having subsequently by amendment stricken the telegraph company as a party defendant, the doctrine known as the "master and servant rule" is not involved. Thus, after the plaintiff had alleged that he did not know and could not by the exercise of ordinary care have discovered the danger to which he was exposed, the further allegations as contained in paragraphs 35, 36, 37, and 38 of the amendment, to the effect that the plaintiff did not know and had no opportunity of knowing that his master had furnished to him an unsafe place to work, and that he did not have equal means with his master of knowing or discovering that the place was dangerous, or of knowing or discovering that the place had been rendered dangerous in which to work, were immaterial and irrelevant to the issues involved, and the special demurrer should for this reason have been sustained. Otherwise the petition as amended, and construed as a whole, was not subject to the demurrers interposed, and the court did not err in so holding.

5. CASES DISTINGUISHED.

The facts presented in the cases of Columbus Railroad Co. v. Dorsey, 119 Ga. 363, 46

S. E. 635, Dorsey v. Columbus Railroad Co., 121 Ga. 697, 49 S. E. 698, and Zachery v. Mayor and Council of Madison, 18 Ga. App. 490, 89 S. E. 594, while in some respects similar, are distinguishable from the allegations made by the present petition, and the rulings there made are not in conflict with what is here decided. Some of the distinguishing features, which are likewise here applicable, are pointed out in the case of City of Dawson v. Smith, 18 Ga. App. 603, 605, 90 S. E. 76. In this case it is alleged that the danger existing by reason of defective insulation was in fact unknown to petitioner, and that after inspection from the ground could not be ascertained, nor was it discoverable by petitioner while in the act of climbing the pole. This court cannot say, as a matter of law, that the defects as described in the petition were patent. It is also alleged in this case, while it does not so appear in the cases just cited, that certain rules were of force requiring that the high-tension wire of defendant should be placed a specified safe distance from the underlying telegraph wires, and that an inspection of same, as made by plaintiff, would and did fail to disclose their dangerous proximity. We are not prepared to say, as a matter of law, that this allegation is necessarily untrue.

Error from Superior Court, Muscogee County; G. H. Howard, Judge.

Action by James G. Puckett against the Columbus Power Company to recover for personal injury. General demurrer and special demurrers to petition overruled, and defendant brings error. Affirmed in part, and reversed in part, with direction.

James G. Puckett brought an action against the Postal Telegraph-Cable Company and the Columbus Power Company jointly to recover damages for personal injuries alleged to have been sustained by him. Subsequently he amended his petition by striking therefrom the Postal Telegraph-Cable Company as a party defendant. The allegations of the petition as amended are substantially as follows:

That on or about the 13th day of December, 1916, at about 4 o'clock in the afternoon, petitioner was in the employ of the Postal Telegraph-Cable Company in the capacity of a lineman, when he was injured as is hereinafter more fully set forth, while he was then and there engaged about the business of the Postal Telegraph-Cable Company; that M. C. Welch was at the time employed by the telegraph company in the capacity of district foreman of maintenance of lines for the states of Georgia and Florida, having then and there general supervision and direction of petitioner as well as other employes of the telegraph company while engaged in the prosecution of the work of said company; that on the occasion referred to petitioner, together with Jonah Puckett, D. Harrison, and two negro laborers whose names petitioner does not know, were

under the direction, charge, and control of and working under the supervision of said district foreman, C. M. Welch, then and there engaged in taking down certain wires of the telegraph company, which wires were suspended on poles running along Front street near the Georgia end of the lower concrete bridge in the city of Columbus, which bridge spans the Chattahoochee river leading from Georgia to Alabama, when your petitioner was horribly, seriously, dangerously, and permanently injured, as is hereinafter more fully set forth.

The petition further alleges that at the time petitioner was injured, in obedience to a command of M. C. Welch, he had climbed one of the telegraph company's high telegraph poles, which pole is approximately 50 feet high, and is located at the intersection of Ninth and Front streets in the city of Columbus. As petitioner reached the cross-arms of said telegraph wires at the top of the pole, he was seized, as hereinafter more fully described, he being then and there in the exercise of all ordinary care and diligence, by a strong current of electricity of approximately 11,000 volts, drawing him across the double cross-arms at the top of said pole and along and over a span of telegraph wires of the telegraph company, with his left foot and leg near or against a high-powered wire of the defendant, which wire was carrying 11,000 volts of electricity, with his right arm between the elbow and shoulder resting on one of the telegraph wires, and his left hand on another wire of the telegraph company, and in this position, lying on his back across said telegraph wires with his left leg near or in actual contact with said high-powered wire, and the bottom of his right foot against one of said wires, your petitioner lay for some 15 minutes with the aforesaid current of 11,000 volts of electricity passing through his body and limbs; that your petitioner lay in this position until an officer of the defendant arrived on the scene after having been telephoned that petitioner was caught in said current, and until the officer could telephone the power plant of the defendant to cut off the current. This required about 15 minutes. In the meantime petitioner was being literally burned and cooked to death as he lay on said wires with the aforesaid high voltage current passing through his body, and by reason of which he was injured as is described in the petition.

It is further alleged that at the time petitioner was injured the high-powered wire of the defendant crossed over and above the Postal Telegraph-Cable Company's wires, which petitioner had gone up the pole to cut down, about 3 feet north of the telegraph pole; that the high-powered wire carried 11,000 volts of electricity, and was suspended only 5¼ inches above the telegraph wires; that at the time of the injury, petitioner,

together with other employes of the telegraph company already mentioned, was engaged in cutting down the telegraph wires and removing a "lead" of telegraph wires and poles from the west side of Front street to near the curb on Front street so as to comply with the requirements of a city ordinance of the city of Columbus; that the number of volts carried by said high-powered wire was not known to petitioner; and that the telegraph wires were ordinarily only charged with a light current of electricity and were harmless.

It is further alleged that several weeks previous to the injury the telegraph company was notified that the high-powered wire of the defendant was so close to the telegraph company's wires as to render their position unsafe and make dangerous the place at the top of the telegraph pole for the telegraph company's employes to work; that during the morning of the day on which petitioner was injured, up until about 10 o'clock, the employes of the defendant were at work on the high-powered line and poles bearing said line; that the telegraph company's wires were fastened to double arms at the top of the telegraph pole to arms on either side of the pole, with the telegraph wires fastened to insulators on both arms; that the telegraph wires and line had been standing at this point for about ten years, and the high-powered wires of the defendant had been suspended by defendant over the telegraph wires for about three years; that the high-powered wire had been placed by defendant dangerously near, that is to say, 5¼ inches above, the telegraph wires, and had remained in this condition for about three years; that petitioner was a stranger in the city of Columbus, and had only been at work in Columbus not quite two days when he was injured.

It is further alleged that the petitioner, being in the exercise of all ordinary care and diligence before climbing the pole, made the usual examination of the pole and wires, that is to say, he looked up the telegraph pole and examined visually from the ground, the pole, cross-arms thereon, and wires at and near the top of the pole, and also the relative height of the poles on either side of the telegraph pole on which the high-powered wires were strung, and, from the foot of said pole, the pole and cross-arms appeared to be safe, and both the wires of the telegraph company and the defendant appeared to be properly spaced, and having no reason to apprehend that the high-powered wire was improperly spaced from the telegraph wires, petitioner proceeded, he being then and there in the exercise of all ordinary care and diligence, to climb the pole for the purpose of cutting down the wires; that, after he had ascended the pole some 7 or 8 feet, he called out to a negro helper, whose name petitioner does not know, to throw him a rope, which the negro

did, and as the negro threw the rope petitioner reached out with both hands and caught it; that petitioner cannot remember drawing his body back to the pole or placing his hands on the pole again, and from that moment until he regained consciousness in the hospital many days thereafter he suffered, on account of the injury sustained, a complete lapse of memory, and his mind is still blank as to everything that transpired from the moment he caught the rope until he regained consciousness in the hospital; that after he caught the rope he proceeded to climb on up towards the top of the pole in the performance of his duties, he being then and there in the exercise of all ordinary care and diligence, and when he came in contact with the telegraph wires at the top of the pole, which were ordinarily charged with a light current of electricity and harmless, being then and there in the exercise of all ordinary care and diligence, he was seized by a current of 11,000 volts of electricity which was being transmitted from the high-powered wire to the telegraph wires.

It is further alleged that where said wires crossed there were a number of wires, some 20-odd wires, some of which were on the telegraph pole, and the remainder of which were resting on the high-powered poles standing on either side of and adjacent to the high telegraph pole; that the wires attached to the high-powered pole crossed the telegraph wires about at right angles thereto, and the crossing of the wires was about midway between the two poles of the high-powered line; that several weeks previous to petitioner being injured the defendant was notified that its high-powered wire was so close to the telegraph wires as to render their position unsafe and make dangerous the place at the top of the telegraph pole for the telegraph company's employes to work; that, unknown to petitioner at the time he climbed the pole, the high-powered wire was so near the telegraph wires as that in swinging a current of electricity intermittently flowed therefrom to the telegraph wires at the top of the pole; that on the occasion aforesaid the telegraph company ordered petitioner to go to the top of said telegraph pole to cut down its telegraph wires, and that the defendant knew of and had actual knowledge of the dangerous condition of said wires and their proximity each to the other and of said wires to the top of the telegraph pole several weeks before petitioner was assigned to the work of cutting down the telegraph wires; that as petitioner climbed up said pole to and against the telegraph wires, he being then and there in the exercise of all ordinary care and diligence, his back was to the high-powered wire, and for this reason he could not and did not see the high-powered wire, and did not and could not know of its close proximity to the telegraph wires and their

dangerous position; that in order to climb said pole it was necessary to do so by the use of spurs fastened to petitioner's feet and lower legs, and to accomplish the climbing of the pole it was necessary to stick the spurs by jabbing or kicking them into the pole, and thereby supporting the weight of his body as he climbed the pole on the spurs as he stuck them into the pole; as he climbed it was necessary to pull the spurs out of the pole and jab them higher, and thus, with his hands around the pole and his eyes on his feet and on the pole to select suitable and safe places to stick his spurs, as his duties required him to do, he being then and there in the exercise of all reasonable care and diligence, he performed the difficult task of climbing to the top of the pole up to and against the telegraph wires with his back to the high-powered wire, not knowing or having any opportunity to know of the aforesaid proximity of said telegraph wires to the high-powered wires, or their unsafe position and condition as aforesaid; that the telegraph pole was crooked and twisted, and had what is commonly known among linemen as a "belly" and a "back"; that petitioner climbed the back of the pole, which was the usual, ordinary, and safe way of climbing the pole, it being unsafe and insecure to climb the belly of the pole, for, among other reasons, the spurs worn on the linemen's feet were liable to slip out of the belly of the pole and precipitate the lineman to the ground, and petitioner, while climbing the back of the pole, climbed between the telegraph wires on the north side of the telegraph pole.

The petition further alleges that it was the duty of the defendant to warn petitioner that the high-powered wire was dangerously near to the telegraph wires which he was ordered to and required to cut down; that the rules of the telegraph company, and which were known to the defendant, required that no high-powered wire should be strung and maintained at a distance less than 42 inches above its telegraph wires, and that the defendant, through its agents and employes, knew that said wires were much closer together than 42 inches; that they knew that these wires were approximately only 5½ inches apart, and had been in that close proximity for several weeks or months prior to the time petitioner was injured; that petitioner did not know and had no opportunity of knowing that he was encountering any danger in going to the top of the telegraph pole to cut down the wires.

It is further alleged that petitioner did not know and had no opportunity of knowing that his master, the telegraph company, had furnished to him an unsafe place to work; that he did not have equal means with his master of knowing or discovering that the place was dangerous, or of knowing or discovering that the place had been rendered

dangerous in which to work; that petitioner did not know and had no means or opportunity of knowing of the aforesaid unsafe proximity of said high-powered wire to the telegraph wires, and at the time aforesaid petitioner's attention was directed to the difficult work of climbing the pole; that he did not see and had no opportunity of seeing or discovering the unsafe proximity of the high-powered wire to the telegraph wires, and that it was not discoverable by him while in the exercise of ordinary care he was engaged about his duties as aforesaid; that he climbed the pole in the line of his duties, he being then and there in the exercise of all reasonable and ordinary care and diligence, to discharge the labors he had been ordered to do, apprehending no danger whatever.

The petition further alleges that the defendant was negligent in that when said high-powered line was originally constructed the high-powered wires were placed within a closer distance to the telegraph wires than 42 inches, and allowed its high-powered wire gradually during the three years to sag until it had come within  $5\frac{1}{4}$  inches of said telegraph wires; that the defendant knew, or in the exercise of ordinary care and diligence should have known, that its high-powered wire, being suspended within  $5\frac{1}{4}$  inches above the telegraph wires, rendered the telegraph wires dangerous, and also made dangerous the wires attached to the telegraph pole, and dangerous to the telegraph company's men who chanced to work on said wires; that he did not see the high-powered wire sagging down, for the reason that his attention was directed to the work of climbing the pole, and that it was not discoverable by him while in the exercise of ordinary care he was engaged about his duties; that it was no part of petitioner's duty to inspect said wires to ascertain their relation to each other; that he climbed to the top of said pole as he had been ordered to do, assuming, as he had a right to do, that it and its wires were in a safe condition; and that he had never climbed or been on said telegraph pole before.

It is further alleged that it was the duty of the defendant from time to time to inspect said wires, which it negligently failed to do, and to see to it that said wires were not placed or allowed to sag dangerously near the telegraph wires, so as to protect the employes of the telegraph company from harm while they were engaged about their duties of working on the telegraph pole and wires as aforesaid; that the defendant knew at the time it strung its wire only  $5\frac{1}{4}$  inches from the telegraph wires that it would be necessary for the employes of the telegraph company to ascend said pole to keep its wires, cross-arms, and insulators in repair, as well as to string new wires and take down old wires; that the defendant did

know that the employes of the telegraph company were engaged in taking down the telegraph wires on the date petitioner was injured, and likewise knew that they would be exposed, while so engaged, to the danger of the aforesaid current of 11,000 volts which was being carried on its high-powered line being transmitted from the high-powered wire to the telegraph wires and from the telegraph wires to the bodies of the telegraph company's employes while they were engaged at work on said pole and telegraph wires; that the defendant was further negligent in that it failed to warn petitioner of the unsafe condition of said wires, and permitted him, although the employes of the defendant knew that the wire had sagged down and thereby made it extremely dangerous, to go to the top of the pole for the purpose of cutting down the wires, without giving petitioner any warning of their dangerous condition.

It is further alleged that the double cross-arms on the telegraph pole were fastened to the pole about 7 or 8 inches from the top thereof; that the double cross-arms were about 8 feet long, and supported three wires on either side of the pole, and each of these wires was fastened to a pair of insulators on the double cross-arms; that, in order to get in a position to cut down the telegraph wires, it was necessary for petitioner to climb up between the wires next to and adjacent to the pole, and while he was climbing between these wires, with his back to the high-powered wire, he received the electric shock and was injured; that the defendant owed to the employes of the telegraph company the duty to have its high-powered wire properly and efficiently insulated, and, failing in this, to place its high-powered wire a sufficient distance, not less than 42 inches, away from and above the telegraph wires, so as to give reasonable protection to the telegraph wires against the high-powered current, and to prevent the telegraph wires from coming in contact with the high-powered wire, as well as to provide reasonable safety for the telegraph company's employes, against danger of its high-powered current while they were working in and about the performance of their duties at or near the top of the telegraph pole; that the high-powered wire of the defendant company was an insulated wire; that the defendant was negligent in that at the point where the current was transmitted from its high-powered line to the telegraph wires the insulation on the high-powered line was defective, and in two places was blistered or swollen, so as to permit, while petitioner was climbing up between the telegraph wires at or near the top of the pole, with his back toward the high-powered wire, as a result of the telegraph wires shaking and swinging, being caught on the clothes or tools of petitioner, and raised so that the telegraph wires

came close enough to the high-powered wire for the current to arc from the high-powered wire at the point of the defective insulation thereon to the telegraph wires and thence into petitioner's body, injuring him as stated, which defects in the insulation were unknown to petitioner, and not discoverable or discernible by him from the ground or from the telegraph pole upon which he was at work; that the defects in the insulation were latent defects, and were not discoverable by petitioner whilst in the exercise of all ordinary and reasonable care and diligence he was engaged in the performance of his duties; that the defendant was negligent in that it allowed the insulation on its high-powered wire to become defective as aforesaid. The petition further alleges that at the time of the injury petitioner was 24 years old; that by reason of the injuries thus sustained he had been damaged in the sum of \$100,000, and for this sum he prayed judgment.

To the petition as amended the defendant demurred on the general grounds that no cause of action was set out; that the facts alleged show that the petitioner, by the exercise of ordinary care on his part, could have avoided the injuries alleged to have been sustained, and that, if the high-powered wire was in unsafe proximity to the wires of the telegraph company, the petitioner by the exercise of ordinary care on his part could have known thereof before he received his injuries; that it does not appear from the facts alleged that the negligence of the defendant was the proximate cause of the injury; and that it appears that the cause of petitioner's injuries was his own negligence.

Defendant also specially demurred to the petition on the grounds: That it is not alleged that the high-powered wire ever came in contact with the wires of the telegraph company, caused by the negligence of the defendant; that it is not alleged that the petitioner made any effort to see or discover the distance the high-powered wire was from the wires of the telegraph company after he had started to ascend the pole, and no fact is alleged to show that he could not see the alleged unsafe proximity of said wires to each other by the exercise of ordinary care on his part; that the allegations of the petition that the plaintiff exercised ordinary care and diligence in performing his duties, or in ascending the pole which he did ascend, are merely conclusions of the pleader, and no facts are alleged to show that he did so exercise ordinary care and diligence; that it does not appear from the facts alleged that any act of negligence on the part of defendant was the proximate cause of the injury to the plaintiff; that no facts are alleged to show how or in what manner the petitioner "was seized" by a current of elec-

tricity, and the allegations that he was so "seized" are too indefinite and vague to enable this defendant to make its defense. The defendant also specially demurred to that portion of the petition wherein it is alleged that the high-powered wire was so near the wires of the telegraph company as that in swinging a current of electricity intermittently flowed from said high-powered wire to the telegraph wires, upon the grounds: (a) Because it is not alleged how near the high-powered wire was to the telegraph wire; (b) because said allegation is too indefinite; (c) because said allegation is a mere conclusion of the pleader, and does not sufficiently definitely set forth facts as to the distance apart of the wires of the two companies to enable the defendant to make its defense. Defendant demurred specially to the allegations of the petition that the plaintiff could not see the high-powered wire, and could not know of its close proximity to the telegraph wires and their dangerous position, upon the grounds: (a) Because no facts are alleged to show why petitioner could not see the high-powered wire and why he could not know of its close proximity to the telegraph wires and their dangerous position; (b) because said allegations are mere conclusions of the pleader. Defendant also demurred specially to paragraph 31 of the amendment to the petition, which alleged that "petitioner climbed said pole in the usual and ordinary and safe way," upon the grounds: (a) Because it is not alleged what was the usual and ordinary and safe way of climbing the telegraph pole; (b) because said allegations are mere conclusions of the pleader, and do not set forth facts specifically enough to enable this defendant to make its defense. In paragraphs 46 and 47 it is alleged:

"The telegraph pole was crooked and twisted and had what is commonly known among linemen as a 'belly' and a 'back.' Petitioner climbed the back of the pole, which was the usual, ordinary, and safe way of climbing the pole; it being unsafe and insecure to climb the belly of the pole."

Defendant also demurred specially to that portion of paragraph 34 of the amendment to the petition wherein it is alleged that "petitioner did not know and had no opportunity of knowing that he was encountering any danger in going to the top of said telegraph pole to cut down said wires," upon the grounds: (a) Because no facts are alleged to show why he had no such opportunity; (b) because said allegation is a mere conclusion of the pleader. Defendant demurred specially to paragraphs 35, 36, 37, and 38 of the amendment to the petition, which alleged that the plaintiff did not know and had no opportunity of knowing that his master had furnished to him an unsafe place to work; that he did not have equal means with his



master of knowing or discovering that the place was dangerous, or of knowing or discovering that the place had been rendered dangerous in which to work, upon the ground that said paragraphs are immaterial, irrelevant, and surplusage. Defendant also demurred specially to the petition upon the grounds: That no facts are alleged to show why the plaintiff did not know, discern, and why he did not discover the defective insulation, or why he could not have known, discerned, or discovered the defective insulation; that it does not appear from any facts alleged why the defects were latent, and because it does appear that the defects were not latent. Defendant also demurred both generally and specially upon the ground that it appeared from the facts alleged that the plaintiff had the choice of two ways of doing the work which he was endeavoring to do at the time he was injured, and immediately before the time he was injured, the one safe and the other dangerous, and that, instead of doing it in the safe way, he voluntarily selected the latter or unsafe way, when he knew or ought to have known of the danger.

After hearing argument of counsel, the trial court overruled both the general and special demurrers, and to this judgment the defendant excepts.

F. U. Garrard, A. S. Bradley, and A. W. Cozart, all of Columbus, for plaintiff in error.

Atkinson & Born, of Atlanta, and Ed Wohlwender, of Columbus, for defendant in error.

JENKINS, J. Judgment affirmed in part and reversed in part, with direction that the costs be taxed against the plaintiff in error.

STEPHENS and SMITH, JJ., concur.

(125 Va. 565)

BLACKSBURG MINING & MFG. CO. v.  
BELL et ux.

(Supreme Court of Appeals of Virginia. Sept. 17, 1919.)

1. MINES AND MINERALS §55(8) — AMBIGUOUS DESCRIPTION OF MINERAL DEED JURY QUESTION.

Question whether deed, conveying minerals on land lying "north of Toms creek and on Brush mountain," described only such land as was on the mountain or included a tract of about 100 acres lying between the creek and the mountain, held for jury; the description being ambiguous and the question being one of intention as to actual location of disputed line.

2. MINES AND MINERALS §55(8) — BURDEN OF PROOF ON PLAINTIFF TO LOCATE LANDS CLAIMED BY IT.

In action of ejectment by plaintiff claiming under mineral deed against successors of grantors, involving issue of whether land in dispute was included in description, burden was on plaintiff to locate land claimed by it and to show that such land was within the lines of the title papers upon which it relied.

3. ADVERSE POSSESSION §80(2) — DEED NOT COLOR OF TITLE TO MINERALS ON LAND NOT INCLUDED IN DESCRIPTION.

Where there was a dispute as to whether a certain tract of land was included in ambiguous mineral deed description, grantor's successors could not acquire by adverse possession title to minerals on the land of which they were not in actual possession; they having no color of title if deed did not cover land.

4. ADVERSE POSSESSION §68 — BEYOND ACTUAL OCCUPANCY MUST BE UNDER COLOR OF TITLE.

Adverse possession to extend beyond limits of actual occupancy must be under color of title; mere claim of title being insufficient.

5. ADVERSE POSSESSION §71(2), 80(2) — INSTRUMENT TO BE COLOR OF TITLE MUST DESIGNATE LAND WITH CERTAINTY.

It is immaterial that the title paper relied upon as color of title is defective, or even void as passing title, but the paper to constitute color of title must designate the land with certainty; the principal office of color of title being to define boundaries.

6. EVIDENCE §258(1) — POWERS OF PRESIDENT TO BIND CORPORATION BY DECLARATIONS.

In absence of proof to the contrary, president of a corporation is not presumed to have authority to bind corporation by declarations as to claims of the corporation with respect to location of disputed boundary.

7. EVIDENCE §244(2) — DECLARATIONS OF PRESIDENT OF CORPORATION TO BOUNDARY DISPUTE BINDING.

Where president of corporation was in general charge of the lands of the corporation and actively looking after the establishment of boundaries, his declarations as to what the corporation claimed with reference to a disputed boundary line was binding on corporation.

8. ADVERSE POSSESSION §31 — NOTICE TO LESSEE BY DEFENDANTS NOT IN PRESENCE OF REPRESENTATIVE OF PLAINTIFF.

In ejectment, where defendants claimed title by adverse possession, evidence of a conversation in which defendant told plaintiff's lessee that the land belonged to the defendants was inadmissible, where conversation was not in presence of any agent or representative of plaintiff, and did not appear to have been communicated to plaintiff, and where there was no evidence that lessee was plaintiff's agent, since notice to lessee was not notice to plaintiff.

9. WITNESSES  $\Leftrightarrow$  158 — COMPETENCY AS TO TRANSACTION WITH PLAINTIFF THROUGH DECEASED AGENT.

In ejectment involving question of location of boundary under description in deed and also question of whether defendant had acquired title by adverse possession, incompetency of defendant to testify as to compromise agreement with plaintiff through its deceased agent, under Code 1904, § 3348, did not render witness incompetent to testify as to adverse possession; the two matters being separate and distinct and neither being collateral to the other.

10. BOUNDARIES  $\Leftrightarrow$  36(5) — NOTES OF SURVEY ADMISSIBLE.

In ejectment involving boundary dispute, a paper in handwriting of deputy county surveyor, containing notes of survey which evidence showed was made for purpose of locating division line in controversy in the presence and under the supervision of plaintiff's agent and defendant, *held* admissible.

Error to Circuit Court, Montgomery County.

Action by the Blacksburg Mining & Manufacturing Company against William A. Bell and wife. Judgment for defendants, and plaintiff brings error. Reversed and remanded, with directions.

Hall, Wingfield & Apperson, of Roanoke, for plaintiff in error.

Harless & Colhoun, of Christianburg, for defendants in error.

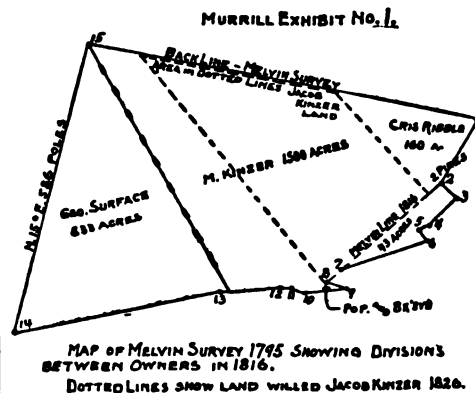
KELLY, J. This is an action of ejectment in which the plaintiff and the defendants trace title from a common source. The plaintiff, the Blacksburg Mining & Manufacturing Company, claims under a deed from one Jacob Kinser, conveying the coal and minerals in and upon a tract of land lying "north of Toms creek and on Brush mountain." The defendants, Bell and wife, who have succeeded to whatever title remained in Kinser after making the foregoing deed, contend that the plaintiff is claiming the coal and minerals on a part of the Kinser land not embraced in that conveyance.

The base of Brush mountain lies a short distance north of Tom's creek. The land between the creek and the mountain, comprising about 100 acres, is the land in dispute. The final and decisive question is whether the descriptive words, "north of Toms creek and on Brush mountain," must be construed as confining the conveyance to lands on *the mountain*, thereby excluding the 100 acres in controversy. The answer to this question depends, as we shall see, upon a number of considerations, some of which appear in the deed and others of which are shown by extrinsic evidence.

The jury found for the defendants and to a judgment upon their verdict this writ of error was awarded.

Prior to 1816, Michael Kinser, the father of Jacob Kinser, owned a large boundary of land containing several thousand acres situate on the waters of Tom's creek, and on which he resided. This land all lay south of the creek, with the exception of about 60 acres on the north extending in the direction of but not as far as the foot of Brush mountain.

By deed dated September 13, 1816, Kinser acquired from Ebenezer Melvin an additional tract of 43 acres adjoining on the north the boundary already owned by him. This purchase by Kinser covered the intervening territory between his then northern line and the base of the mountain, and gave him about 100 acres north of Tom's creek. The 43 acres thus acquired by him was a part of a large tract of land owned by Melvin, containing in all about 2,500 acres, which was originally embraced in one survey and grant from the commonwealth to a predecessor in title of Ebenezer Melvin. The greater part of this tract was on Brush mountain. Shortly after the acquisition by Michael Kinser of the 43 acres above mentioned, Ebenezer Melvin conveyed the residue of the 2,500-acre boundary to Michael Kinser, Christopher Ribble, and George Surface, and in a division of the same among the latter it appears that Michael Kinser got 1,500 acres, Christopher Ribble 160 acres, and George Surface 833 acres. The accompanying map shows the exterior lines of the original 2,500-acre tract and the subdivision here mentioned. The controversy in this case, as indicated above, involves the coal and minerals in and upon about 100 acres lying between Tom's creek (not shown on the map), on the south, and the upper line of the 43-acre Melvin tract on the north.



It thus appears that in 1816 Michael Kinser was the owner of a very large estate in land situated on both sides of Tom's creek, and he continued to hold the same until his death, in 1826. By his will, which was probated in August, 1826, Michael Kinser disposed of all his real estate, making the fol-

lowing provisions material to the present controversy:

"Item: I give and bequeath to my beloved wife, Hester Kinser, during her natural life, part of the land whereon I now live, viz.: the orchard and pasture lots, being the same comprehended below the cross fence running from Kipp's line near my mill house N. 30 E. poles passing a big white oak between the mill house and the still house, crossing the creek to a swamp Spanish oak below the mill dam; thence up the creek N. 47 W. to a black oak near the mill dam; thence up the creek to a hollow leading up back of the barn; thence crossing the mill dam, a northwest course, till it strikes the back line of the big survey, thence with said survey an easterly course to the extent of that survey, till it strikes the line or lines of John Robinson's old orchard to a large white oak in a line between my old tract and the above mentioned Robinson; thence a south course to a cross fence, the furthest from my dwelling house, and with said fence across the field to a white oak near the fence, between twenty-five and thirty poles leading between my house and John McDonald's, and thence to the beginning. \* \* \* (Italics added.)

"Item: To my daughter Katherine I give \* \* \* four hundred acres of my mountain land, beginning at a white oak in the Miami hollow, and running with Keister Bank and Henry Price, and corners opposite the widow Cromer's old sawmill, and from thence to the back line supposed to contain four hundred acres. \* \* \*

"Item: To my son Jacob I give and bequeath all the landed property which I have devised to my wife for life, being the first bequest in this my last will and testament \* \* \*

"Item: I \* \* \* also give and bequeath to my sons Jacob, George and Christian about four hundred acres of my mountain tract of land running with the line mentioned in the devise to my son Jacob to the back line of said survey, and thence down the Miami hollow, and thence to the beginning." (Italics added.)

Thereafter by partition proceedings or otherwise, Jacob Kinser acquired the interest of his brothers George and Christian in the mountain land. Upon the death of his mother, Hester Kinser, he became the owner, *inter alia*, of all the land north of Tom's creek in which she had been given a life estate. The evidence does not make entirely clear just what were the boundaries of the land north of Tom's creek which Jacob Kinser got in fee and as remainderman, respectively; but it is certain that from both sources he acquired under the will of his father all of the land in controversy in this suit, and quite a good deal in addition thereto, and that he did not acquire any land north of Tom's creek from any other source.

By deed dated February 19, 1853, Jacob Kinser and wife conveyed to George Falconer and William H. Peck "all their right, title, interest and claim in and to all the coal, iron and all other mineral substances lying or being in, upon or under the ground, upon, within or under the boundaries of his the said

Kinser's tract of land lying in the county of Montgomery, north of Tom's creek and on Brush mountain, the said survey supposed to contain one thousand acres, upon which there is a coal bank opened, being land formerly owned by his father, the late Michael Kinser."

By deed of April 27, 1853, Falconer and Peck conveyed to the plaintiff, the Blackburg Mining & Manufacturing Company, the coal and minerals acquired by them under the deed of February 19, 1853, from Jacob Kinser and wife.

Jacob Kinser died without a will, leaving two children, one of them being Sarah E. Bell, wife of William A. Bell, and the other Kizzie Payne, wife of Charles H. Payne. These two children inherited all the real estate owned by their father, and by deed of December 15, 1886, Charles H. and Kizzie Payne conveyed their interest to William A. and Sarah E. Bell, the defendants in the present action.

A number of very interesting questions arise upon the record, and they have been presented both in the oral arguments and in the briefs with the clearness and force characteristic of the distinguished counsel representing the respective sides of the controversy.

The defendants relied upon: (1) Failure of the plaintiff to show that the Jacob Kinser deed embraced the land in dispute; and (2) adverse possession in the defendants and those under whom they claim for the statutory period. The assignments of error fall naturally into three general divisions, the first relating exclusively to the plaintiff's claim of title; the second exclusively to the defendants' claim of adverse possession; and the third, in some measure, to both aspects of the case.

1. The plaintiff requested the court to give an instruction designated in the record as instruction 1, which reads as follows:

"The court instructs the jury that the legal effect of the deed of January 19, 1853, from Jacob Kinser and wife to George Falconer and William H. Peck, under which the plaintiff derived title, was to convey to Falconer and Peck the iron, coal, and other mineral substances and under all of the land of the said Jacob Kinser in Montgomery county lying on the north of Tom's creek, which was formerly owned by Jacob Kinser's father, the late Michael Kinser, the survey of said land being supposed to contain 1,000 acres, and this is true regardless of how Jacob Kinser derived title to said land; that is to say, whether he got it under the clause of the will giving a life estate to Hester Kinser, with remainder to Jacob Kinser, or whether he got it under the clause of the will making the joint devise to Jacob Kinser and his two brothers, or whether he got it under the clause of the will giving to Jacob Kinser all the balance of the tract not already devised on the south side of the plantation on which Michael Kinser lived."

The court refused to give this instruction as offered, but amended it by substituting for the words, "lying on the north of Tom's creek," the words, "lying on the north of Tom's creek on Brush mountain," thus following the descriptive language of the deed except as to the important omission of the word "and" appearing in the latter. The instruction as thus amended was given over the objection of the plaintiff, and is known in the record as instruction No. 1a.

We are of opinion that both instructions were wrong. The description in the deed taken on its face is ambiguous, and may plausibly be understood to mean either: (1) All the land, extending northward from Tom's creek and running up on Brush mountain which was owned by Jacob Kinser and acquired by him from his father; or (2) all the land on Brush mountain which was owned by Jacob Kinser and acquired by him from his father.

Many circumstances of more or less significance are relied upon by each party to the controversy to sustain the construction or meaning of the deed as respectively contended for by them. We need not undertake to recount them all. Conspicuous among them on the part of the plaintiff are the following: That the deed referred to a coal bank as having been opened on the land, whereas, according to plaintiff's assertion, no coal bank had been opened north of the northern line of the 43-acre tract; that the deed reserves the right to dig and use coal for the grantor and his family, whereas, according to the plaintiff's assertion, the coal outcrop was below the northern boundary of the Melvin tract, and there was practically no coal above that tract; that the deed reserved the right to use the lands for agricultural purposes, whereas none of the land north of the Melvin line was cleared or fit for agricultural purposes, and practically all below that line was in cultivation; that if the land in dispute is embraced in the deed, the specified area of 1,000 acres will be about covered thereby, whereas a shortage of 100 acres will exist if the land in dispute is not held to be within the description; that Jacob Kinser owned no land north of Tom's creek except what his father owned, and that he owned all of such land, having acquired the same either by direct devise in fee or as remainderman after his mother's death.

On the other hand, and on behalf of the defendants, some of the considerations relied upon as showing that the description in the deed was not intended to embrace the land between the creek and the mountain are as follows:

That the reference in the deed to "*his the said Kinser's tract of land*" \* \* \* being land formerly owned by his father the late Michael Kinser meant the separate tract which he acquired in fee under the will of

his father, and did not mean any part of the adjoining tract which fell to him as remainderman after the death of his mother; that he conveyed *one* tract and not *a part of two tracts*; that the true location of the line in dispute was the northern line of the land in which his mother was given a life estate; that such northern line was the northern line of the Melvin 43-acre tract, because, as averred by defendants, Michael Kinser considered his lower or farm lands—not his mountain lands—"the big survey," and because it was necessary to treat the northern line of the 43-acre tract as "the back line of the big survey" in order to satisfy the description in the will calling for "an easterly course to the extent of that survey until it strikes the line or lines of John Robinson's old orchard"; that the plaintiff has not mined or tried to mine to any extent below, and has mined for a number of years above the Melvin tract, which lies at the foot of the mountain, thus showing that it has recognized and acquiesced in the line as now claimed by the defendants.

[1] 1. Practically all these claims and counterclaims, and others of like general character, rest upon questions of fact, or of opinion and judgment upon facts, affecting the meaning of the language used by the parties in describing the land. In other words, the final question is one of intention as to the actual location of the disputed line, and thus falls properly within the province of the jury.

"The construction of a deed is for the court, but if the language of the deed will permit more than one inference to be drawn from it, and such inferences depend on controverted facts, the jury is to pass on the deed, and if the construction is dependent upon the meaning of the parties attached to the words, or upon extrinsic facts in connection with the deed, the question is a mixed one of law and fact. If the description is ambiguous, a disputed question of fact as to the grantor's intention, it is one for the jury, and so it is a question of fact if the ambiguity is created by a collateral matter. \* \* \*

It is the duty of the court to construe a deed according to its legal effect in the absence of ambiguity. Where there is ambiguity, however, the question should be submitted to the jury. The interpretation may in some cases be a mixed question of law and fact." 2 Devlin on Deeds (3d Ed.) § 835, pp. 1505, 1506.

"Evidence aliunde is admissible in all cases where there is a doubt as to the true location of the survey, or a question as to the application of a grant to its proper subject-matter. It is not a question of construction, but of location. It is a question of fact, to be determined by the jury by the aid of extrinsic evidence." *Reusens v. Lawson*, 91 Va. 228, 235, 21 S. E. 347, 349.

"As a general rule, the construction of all written documents in evidence belongs to the court exclusively, but it is equally well settled that the location of a disputed boundary line is a question of fact for the jury." *Wheaton v. Doughty*, 116 Va. 566, 574, 82 S. E. 94, 97.

In *Walker v. Gateway Milling Co.*, 121 Va. 217, 227, 92 S. E. 826, 829, the same principle was recognized in the following statement:

"The true meaning of the terms of the contract depends upon controverted facts and conflicting evidence, and the question was therefore one for the jury, upon proper instructions, to determine. *Camp v. Wilson*, 97 Va. 265, 270, 83 S. E. 591; *Strause v. Richmond, etc., Co.*, 109 Va. 724, 729, 730, 65 S. E. 659, 132 Am. St. Rep. 93."

We agree, therefore, with the contention of counsel for the defendants that the question of the location of the land embraced in the deed was within the province of the jury, and that instruction No. 1, if it had been given, would have improperly taken that question from the jury by peremptorily instructing them that the deed was intended to convey the coal and mineral on all of the Jacob Kinser land lying north of Tom's creek.

But we are further of opinion that the court injected exactly the same error into the amendment. Instruction No. 1 absolutely disregarded Brush mountain as having any possible significance, and observance of its terms would have compelled the jury to find for the plaintiff. Instruction No. 1a made it equally imperative upon them to disregard every consideration in the location of the land except Brush mountain, and compliance with it necessitated a verdict for defendants.

The court should have submitted to the jury the question of the true location of the land as described, with an instruction to the general effect that they had the right to take into consideration in determining that question all the facts and circumstances disclosed by the evidence which tended to throw light upon the intention of the parties.

Instruction 2 for the defendants was as follows:

"The court instructs the jury that if they believe from all the evidence that the boundaries of the mineral interest in the land conveyed by the deed under which plaintiff claims are in such doubt and uncertainty that they cannot say whether or not they embrace the land in controversy, they must find for the defendants."

[2] The giving of this instruction is made the ground of one of the assignments of error; and, while we do not think it could be made the basis of a reversal, we are of opinion that some slight modification would have presented more clearly the legal proposition involved. The instruction as given is perhaps equivalent to telling the jury that the burden was on the plaintiff to locate the land claimed by it, and to show that the same was within the lines of the title papers upon which it relied. This is the law. 4 *Michie's Dig.* 904; *Wood v. Phillips*, 117 Va. 878, 881, 86 S. E. 101, and cases cited. But it would have been better to instruct the jury more nearly in the language of the proposition as we have here stated it.

With the important and vital exception of the error as to instruction No. 1a, we perceive no substantial errors in the instructions given at the trial in so far as they affect the question of the plaintiff's original title to the land in controversy.

2. This brings us to the defendants' claim of title by adverse possession. The judgment must be reversed for the error already pointed out, but some of the questions presented under this second branch of the case will probably arise if the case is tried again, and it is proper that we should decide them now. The most important and far-reaching of these questions is involved in the plaintiff's contention that in no view of the case can the defendants claim title by adverse possession beyond the limits of their actual coal openings and mining operations, for the alleged reason that they had no color of title whatever to the coal and minerals. The argument is this: If the line in dispute is, as defendants contend, the northern line of the Melvin 43-acre tract, then the plaintiff itself has no shadow of title to the coal and minerals south of that line, and no question of adverse possession arises, for the obvious reason that the defendants themselves have the very title against which the adverse possession would have to operate; and if, on the other hand, the line in dispute is, as plaintiff contends, at Tom's creek, the defendants, who lay no claim to any paper title by descent cast or otherwise, except under Jacob Kinser, from whom they got whatever title they have, are wholly without any color of title. If this argument is sound, then the case in respect to the defense of adverse possession was tried upon an erroneous theory, and practically all of the instructions in regard thereto were wrong.

[3] We are unable to see upon what theory the defendants can claim any color of title in this case. *They either have an absolutely and decisively good paper title or no paper title at all.* Both parties claim under Jacob Kinser, and the sole question, so far as the title papers are concerned, is one of boundary. It is no answer to the argument to say that perhaps the jury found the line as claimed by defendants, and that if so the deed covered the land and would constitute color of title. If the jury did so find there was no room in the case for any color of title or any adverse possession, and no question as to either was involved. The plaintiff must prevail, if at all, purely by reason of the fact that its deed covered the land in dispute. On the other hand, the defendants must prevail, if at all, either (1) because the plaintiff has failed to show title, or (2) because the defendants themselves have shown adverse possession. If they prevail under the former defense, they have shown title by descent to all the land south of the Melvin line. If they fail as to the first and are

forced to rely upon the second defense, it is plain that they cannot claim any color of title from Jacob Kinser, simply because in this view of the case his title to the minerals stopped at the Melvin line. To express the idea differently, the title they derived from Kinser either did or did not cover the land in controversy. If it did, no question of color of title or adverse possession arises or can arise; if it did not, they are solely dependent upon their defense of adverse possession, they are wholly without color of title under Kinser, and, having shown none from any other source, they are limited under that defense to their actual possession of the minerals.

[4, 5] It is well settled that there can be no constructive possession of real estate under a mere *claim of title*, that adversary possession to extend beyond the limits of actual occupancy must be under color of title, and that the principal office of color of title is to define the boundaries. It is immaterial that the title paper relied on as color is defective or even void as passing title. Indeed, as already indicated in what we have said, and as stated in *Baber v. Baber*, 121 Va. 740, 755, 94 S. E. 209, 213—

"It is inherent in color of title that the title claim thereunder is invalid—is in fact no title—and the writing may indeed be absolutely void."

This is necessarily true because color of title is only important in cases of claim under adverse possession, and the occasion to invoke adverse possession never arises where the party in possession has the superior paper title. A failure in description, however, is fatal to any paper as color of title. A description "which contains sufficient terms to designate the land in question with such certainty that the boundaries thereof can be ascertained by the application of general rules, governing the location of land conveyed by any deed" is absolutely essential. There can be no color of title to land not described in the paper relied on as color. These propositions have been the subject of much consideration and discussion, and are now too well settled to require or warrant further elaboration. See discussion of Color of Title, by Judge Sims (1896) 2 Va. Law Reg. 551; *Graves' Notes on Real Property*, § 141 and notes; *Stover v. Stover*, 60 W. Va. 285, 292, 54 S. E. 350; *Creekmur v. Creekmur*, 75 Va. 430, 438; *Chilton v. White*, 72 W. Va. 545, 78 S. E. 1048; *Goad v. Walker*, 73 W. Va. 431, 80 S. E. 875; 2 *Minor on Real Property*, § 1041, p. 1119; section 1042, p. 1122; 1 *Cyc.* 1089, 1090; 1 *Am. & Eng. Enc. L.* (2d Ed.) 858, 864, 865.

We are of opinion that the instructions as to adverse possession, in so far as they were based on the theory that the defendants had color of title, were erroneous, and should have been refused.

[6, 7] 3. We come now to the assignments of error based upon the admission of testimony.

The witness, W. F. Wall, was allowed to testify over the objection of the plaintiff, that at one time while he was making a survey of a line some two miles west of the land involved in this suit, Col. Newlee, then the president of the plaintiff company, said that he did not claim anything south of the Melvin line. It is contended by the plaintiff, that this alleged remark of Col. Newlee related, not to the Melvin land here involved, but to another tract. We do not think this contention is correct, and are of opinion that the reference was to the Melvin line involved in this case. In the absence of proof to the contrary, the president of a corporation is not presumed to have authority to bind it by declarations of this character. The evidence here, however, sufficiently shows that Col. Newlee, as president of the company, was in general charge of its lands, and was actively looking after the establishment of the boundaries. Under these circumstances he must be regarded as the authorized spokesman of the company, and his declarations in disparagement of its title, like those of an individual owner, are admissible in evidence.

[8] The witness, C. W. Schaeffer, was allowed to testify, over the objection of the plaintiff, that his father, Solomon Schaeffer at one time leased a mine from the plaintiff company, and had started to mine coal south of the Melvin line, when the defendant, Bell, told him that he was working on his (Bell's) land, and would have to stop, and that the father of the witness accordingly stopped and moved to a point above the Melvin line. This conversation did not take place in the presence of any agent or representative of the plaintiff, and does not appear ever to have been communicated to the company in any way. So far as the record shows, Schaeffer was merely a lessee, and not an agent of the company. Notice to him was not notice to the company. This evidence should have been excluded.

The witness, H. P. Smith, was allowed, over the objection of the plaintiff, to testify that he had a conversation with Col. Newlee, in which the latter stated that he and Bell had made a settlement regarding the line in dispute. The mention made by this witness of a settlement may perhaps fairly be construed as referring to the running of the line by Surveyor Peck, as testified to by the witnesses Sibold and Fizer. In that view the statement which Smith attributed to Newlee, in which the latter is alleged to have said that the line was settled and he was glad of it, would be a statement in conflict with the position of the company in the instant case, and therefore admissible upon the same ground as that upon which we have held that Wall's testimony was properly received.

Section 3348 of the Code, invoked by plaintiff, did not render Smith incompetent as a witness because he was not a party to the transaction within the meaning of that section.

By far the most important as well as the most interesting question arising with reference to the admission of evidence is that which involved the testimony of the defendant W. A. Bell. This witness was offered in an attempt to prove that there had been a compromise agreement entered into between Col. Newlee and Bell, fixing the Melvin line as the southern boundary of the plaintiff's mineral interest in the land. Since it appeared that Col. Newlee, the agent who was alleged to have acted for the plaintiff corporation in this transaction, was dead, the plaintiff objected to his testimony on the ground that he was an incompetent witness under section 3348 of the Code. That section is as follows:

"And where such contract or transaction was personally and solely made or had with an agent of one of the parties thereto, and such agent is dead or otherwise incapable of testifying, the other party shall not be admitted to testify in his own favor or in favor of a person having an interest adverse to the principal of such agent, unless he be first called to testify on behalf of said principal or some person claiming under him, or the testimony of such agent be first read or given in evidence by his principal or other person claiming under him, or unless the said principal has first testified."

The witness testified to some extent in regard to the alleged compromise agreement with Col. Newlee, but did so with the understanding that the court was reserving its ruling on the competency of the witness, and the court subsequently took action in regard thereto as indicated by the following statement which was incorporated in the record:

"Now, gentlemen, in regard to the evidence of Mr. Bell and the motion made by counsel for the plaintiff, I want the record to show that the motion of the plaintiff by counsel was sustained by the court. Whereupon, the defendant, by his counsel, moved the court to strike out the foregoing evidence of Mr. Bell from the record so far as it pertains to the establishment of the line between the plaintiff company and the defendant, as had with Col. Newlee, or Dr. Black, both of whom are dead, which motion the court allowed, and to which action of the court the defendant by counsel excepted, and the court instructed the jury not to regard the evidence of Mr. Bell with reference to the establishment of said line nor to consider any part thereof.

"And the plaintiff by counsel objected to the witness being allowed to testify at all in the case; having been rendered incompetent in the case for one purpose, he is incompetent for all; but the court overruled the objection of the plaintiff, and permitted the witness to testify, over the objection of the plaintiff, to which action of the court the plaintiff excepted."

Thereafter the witness Bell was recalled, and was permitted to testify, over the objection of the plaintiff, at some length with regard to the acts of adverse possession of the defendants. The point made against the admissibility of this evidence is that the witness, having been shown to be incompetent for one purpose, could not be permitted to testify as to any fact in the case. This objection is based upon the authority of *Mason v. Wood*, 27 Grat. (68 Va.) 783; *Grigsby v. Simpson*, 28 Grat. (69 Va.) 348; *Mutual Life Ins. Co. v. Oliver*, 95 Va. 485, 28 S. E. 594, and cases of that type.

[9] The question here presented is not free from difficulty. The cases relied upon in support of the objection, or some of them, undoubtedly in terms declare that a witness incompetent for one purpose cannot be permitted to testify to any fact in the case. See *Ely v. Gray*, 125 Va. —, 100 S. E. 660. We believe, however, that all of these cases have involved single indivisible contracts or subjects of investigation upon which alone the result of the litigation necessarily depended. In the instant case, from the defendants' standpoint, two distinctly separate subjects of investigation are involved, namely: (1) The question of boundary under the description in the Peck and Falconer deed; (2) the claim of adverse possession on the part of the defendants. These are two wholly separate and distinct matters, and neither is merely collateral or incidental to the other. In this view of the case it seems to us that the witness Bell might very properly have been held incompetent to testify as to any matter relating to the true location of the disputed line, and at the same time competent as to any matters relating to adverse possession. His testimony, however, upon the subject of adverse possession was, as we have seen, put to an improper purpose, because, when viewed in the light of the instructions, it would have tended to establish by adverse possession title to the entire boundary in dispute, when as a matter of fact the actual possession by the defendants, as testified to by Bell, affected only a small part of the minerals, and no color of title to the residue was shown. In our opinion it was proper to permit Bell to testify as to the acts of adverse possession which he mentioned in his evidence, but the jury should have been given to understand that, in the absence of color of title, the defendants could not hold any part of the land in dispute by adverse possession, except such as they had acquired title to by virtue of their mining operations for the statutory period. Of course their possession of the surface does not affect the case because if the deed from Jacob Kinzer to Peck and Falconer covered the land in dispute, that deed effected a severance of the title to the surface from the coal and minerals.

[10] The remaining objection to evidence

(126 Va. 72)

JOHN P. PETTYJOHN &amp; SONS v. BASHAM.

(Supreme Court of Appeals of Virginia. Sept. 17, 1919.)

involves the admission of a paper in the handwriting of a deputy county surveyor, C. D. Peck, marked "Survey of the Part of the Melvin Tract which the Coal Company is Interested in," and containing the notes of a survey which the evidence tends to show was made for the purpose of locating the division line in controversy here in the year 1889, in the presence and under the supervision of Col. Newlee and Mr. Bell. There was no error in admitting this paper. *Va. Coal & Iron Co. v. Ison*, 114 Va. 144, 153, 75 S. E. 782; 5 Cyc. 965-967.

For the reasons indicated in the course of this opinion, the judgment complained of must be reversed, and the case remanded for a new trial to be had not in conflict with the views herein expressed.

Reversed.

(126 Va. 178)

DICKINSON v. ARMSTRONG et al.

(Supreme Court of Appeals of Virginia. Sept. 23, 1919.)

#### ELECTIONS ¶51 — ELECTORAL BOARD; APPOINTMENT OF ELECTION OFFICIALS.

Under Code 1904, § 117, it is the duty of the electoral board of each city and county to appoint the judges and clerks of elections, who are to hold all elections to be held in their respective precincts for one year, beginning on the 1st day of June following appointment; but the statute does not inhibit the appointment of the same person from year to year.

Petition for a writ of mandamus. Judgment reversed.

**PER CURIAM.** The court is of the opinion that it is the duty of the electoral board of each city and county, under the provisions of section 117 of the Code (1904), to appoint the judges and clerks of election who are to hold all elections to be held in their respective election precincts for one year beginning on the 1st day of June following their appointment, or until their successors are appointed; that this duty is required to be performed by said boards in the month of May in each year, and that the appointments should be made annually as contemplated by the statute; but that as the statute does not inhibit the appointment of the same man to the same position from year to year, and as it does not appear that there are any vacancies to be filled, the mandamus prayed for, if granted, would accomplish no useful or beneficial result, and hence should be refused.

Reversed.

#### 1. APPEAL AND ERROR ¶1011(1)—REVIEW OF FINDING OF COURT AFTER DISAGREEMENT OF JURY.

Finding by the court to which the cause was submitted after disagreement of the jury, being supported by evidence, is unassailable on appeal.

#### 2. APPEAL AND ERROR ¶1008(2)—REVIEW OF FINDINGS BY COURT AFTER DISAGREEMENT OF JURY.

Where the jury was discharged because of inability to agree, and questions of fact submitted to trial court, the decision of the trial judge is not entitled to the same weight as if case had been submitted without intervention of jury.

#### 3. NEGLIGENCE ¶32(1)—DUTY TO LICENSEES DEFINED.

An occupant of land is charged with knowledge of the use of his premises by a licensee, and while not chargeable with the duty of provision or preparation for the safety of the licensee, he is chargeable with the duty of lookout.

#### 4. NEGLIGENCE ¶32(1)—DUTY TO INVITEES DEFINED.

An occupant of land owes to an invitee, to the extent of the invitation, the duty of provision, preparation, and lookout, and must use ordinary care to see that his premises are in a reasonably safe condition.

#### 5. NEGLIGENCE ¶32(2)—WHEN INVITATION AND LICENSE WILL BE INFERRED.

Usually an invitation will be inferred where the visit is of common interest or mutual advantage to the parties, while a license will be inferred where the object is the mere pleasure or benefit of the visitor.

#### 6. TRIAL ¶105(1) — EVIDENCE; EFFECT OF FAILURE TO OBJECT.

That no exception was taken to the admission of testimony merely affects its admissibility, and does not give it any greater weight than it would have had if exception had been taken.

#### 7. NEGLIGENCE ¶32(2)—SCOPE OF INVITATION.

Where the general contractor employed a subcontractor to do the plumbing in the building, an employé of the subcontractor, who had a safe and easy method of access to the roof through a dormer window, cannot recover for his injuries received when a scaffold built by the general contractor for its carpenters broke when he was attempting to use it to reach the roof; his use of the scaffold being that of a licensee and not an invitee.

Sims, J., dissenting.

Error to Law and Chancery Court of City of Roanoke.



Action by one Basham against John P. Pettyjohn & Sons. There was a judgment for plaintiff, and defendants bring error. Reversed.

Staples & Cocke, of Roanoke, and Wilson & Manson, of Lynchburg, for plaintiffs in error.

Jackson & Henson, of Roanoke, for defendant in error.

BURKS, J. John P. Pettyjohn & Sons contracted with the owners to build an addition to Hotel Roanoke, in the city of Roanoke. They employed the Roanoke Sheet Metal Company, as a subcontractor, to do the plumbing on the addition, and the plaintiff was an employé of this subcontractor. In the course of the construction of the building the defendants, who were doing the carpenter's work themselves, erected a scaffold along the face of the south gable of the building for the purpose of enabling their workmen to "case" certain window frames in the gable and to put the cornices thereon. This work had been completed, but the scaffold had not been taken down. The work for which the scaffold was primarily designed did not require the workmen to go beyond the west face of the last window on the west from which the support for the scaffold projected. The supports for the scaffold upon which the floor of the scaffold rested are spoken of by the witnesses as "pudlocks." They were 2x12 inch joists, set on edge, run out of the window, and nailed at the other end to uprights run from the scaffold below. The floor of the scaffold consisted of loose boards laid on the pudlocks, but not nailed thereto. This floor extended a short distance beyond the last pudlock. The carpenter's work on the gable had been completed and the scaffold had proven safe and satisfactory for the purpose for which it was constructed. The plaintiff came out upon the scaffold through the east window in the face of the gable, walked the length of the scaffold the west end thereof, and, while endeavoring to climb from the scaffold over the eaves onto the roof where his work was to be done, the scaffold gave way and precipitated him to the ground causing a compound comminuted fracture of one leg and breaking one of his arms. For this injury, the present action was brought. The case was submitted to a jury; but, being unable to agree upon a verdict, they were discharged, and, by consent of the parties, it was then submitted to the judge of the trial court upon the evidence which had been adduced before the jury, and the trial court gave judgment for the plaintiff for the sum of \$2,000.

The declaration alleged negligence on the part of the plaintiff in error: (1) In the use of defective materials; (2) in the fail-

ure to nail the floor of the scaffold; and (3) in the failure properly to construct and brace the scaffold. The first two of these allegations were abandoned at the hearing in this court. The plaintiffs in error defended on the ground that they had not been guilty of any negligence in the construction of the scaffold, and, if they had, the defendant in error was a mere licensee who took things as he found them, and they did not owe him the duty of making the scaffold safe for the use made of it by him.

[1, 2] The evidence is not clear as to how much of the scaffold fell down, and the parties advanced different theories as to how and why it fell. It is admitted, however, that it fell while the defendant in error was upon it in the discharge of his duties as a plumber. It was claimed by the defendant in error that the pudlock was not properly nailed and braced at the end next to the gable, while the plaintiffs in error claimed that the defendant in error fell from the roof to the scaffold, causing the latter to give way, or that he walked out on the ends of the boards of the floor beyond the last pudlock, causing them to tilt and give way, or that his efforts to climb upon the roof from the scaffold caused a lateral pressure upon the scaffold, which the latter was not built to sustain. There was evidence tending to sustain each of these theories, and verdict in favor of either could not have been said to have been clearly against the evidence, or without evidence to sustain it. The trial court, sitting in place of a jury, found for the defendant in error, and its finding on this point cannot be disturbed. Generally, where questions of fact are submitted to the decision of the trial judge, without the intervention of the jury, his decision thereof is entitled to the same weight as the verdict of a jury. *Delaware L. & W. R. Co. v. Cotten*, 113 Va. 563, 565, 75 S. E. 122. But where the jury have been discharged because of their inability to agree upon a verdict, the decision of the trial judge upon the same testimony which was submitted to the jury is not entitled to the same weight as it would otherwise have had.

[3] The position of the plaintiff in error, however, is that Basham was a mere licensee and assumed the risk of danger from the scaffold if it was defectively constructed. He was not a servant of Pettyjohn & Sons, but of a metal company by whom he was employed. As to Pettyjohn & Sons he was a mere third person, and third persons can only come upon the permanent premises of another in the capacity of trespassers, licensees, or invitees. But there is a marked difference between the duties which the occupant of land owes to trespassers, licensees, and invitees, respectively. Trespassers and bare licensees, as a

rule, take the risk of the place as they find it. Generally, the owner or occupant of the soil does not owe to a trespasser the duty of prevision, preparation, or lookout, but only the duty not to injure him intentionally or wantonly. If, however, the trespass is of such nature and so frequent as to charge the occupant with notice thereof, and of the danger likely to ensue to the trespasser, then the owner is chargeable with the duty of lookout for such trespasser, with such equipment and appliances as he is then using in the ordinary conduct of his business; but he does not owe him the duty of prevision or preparation.

In the case of licensees, the occupant is charged with knowledge of the use of his premises by the licensee, and, while not chargeable with the duty of prevision or preparation for the safety of the licensee, he is chargeable with the duty of lookout, with such equipment as he then has in use to avoid injury to him at the time and place where the presence of the licensee may be reasonably expected. The duties of the occupant to the licensee and to the known frequent trespasser are the same, but the licensee is exempt from responsibilities of a trespasser.

[4] The duties of the occupant to the invitee are entirely different. The latter comes by invitation, express or implied, and may reasonably expect to come with safety. The invitation, however, is rarely, if ever, unlimited, and especially when implied, but to the extent of the invitation the occupant owes to the invitee the duty of prevision, preparation, and lookout. He must use ordinary care to see that his premises are in a reasonably safe condition for the use of the invitee in the manner, and to the extent, that he has invited their use. The cases on the subject of the duty to trespassers, licensees, and invitees, respectively, are very numerous, and there is very little conflict in the holdings. We cite by way of illustration a few of them from this jurisdiction. Those from other jurisdictions are too numerous to cite, but will be found in any well considered article on negligence. Many of them are referred to in the cases hereinafter cited. *Seaboard Air Line Ry. v. Joyner*, 92 Va. 354, 23 S. E. 773; *Lunsford v. Colonial Coal & C. Co.*, 115 Va. 346, 79 S. E. 348; *Walker v. Potomac, etc., R. Co.*, 105 Va. 226, 53 S. E. 113, 4 L. R. A. (N. S.) 80, 115 Am. St. Rep. 871, 8 Ann. Cas. 862; *Norfolk & W. R. Co. v. De Board*, 91 Va. 700, 22 S. E. 514, 29 L. R. A. 825; *Blankenship v. Ches. & O. Ry. Co.*, 94 Va. 449, 27 S. E. 20; *Ches. & O. Ry. Co. v. Rogers*, 100 Va. 324, 41 S. E. 732; *Norfolk & W. R. Co. v. Wood*, 99 Va. 156, 37 S. E. 846; *Williamson v. Southern Ry. Co.*, 104 Va. 146, 51 S. E. 195, 70 L. R. A. 1007, 113 Am. St. Rep. 1032; *Chesapeake & O. Ry. Co. v. Farrow*, 106 Va. 137, 55 S. E. 569, 10

Ann. Cas. 12; *Nichols v. Washington, O. & W. R. Co.*, 83 Va. 99, 5 S. E. 171, 5 Am. St. Rep. 257; *Richmond & M. R. Co. v. Moore*, 94 Va. 493, 27 S. E. 70, 37 L. R. A. 258; *Clark v. Fehlhaber*, 106 Va. 803, 56 S. E. 817, 13 L. R. A. (N. S.) 442. We express no opinion as to the rights of the house guests or the duties owing to them.

[5-7] Upon the evidence, viewed from the standpoint of a demurrer to the evidence, we must hold that the scaffold was improperly and insecurely constructed for the use to which it was put by the plaintiff. If Basham was a mere licensee, then he took upon himself the risk of the scaffold as he found it, and cannot recover; but if he was an invitee, and the invitation extended to that use of the scaffold, then Pettyjohn & Sons are liable to him for the injury sustained in consequence of its fall. But it is sometimes difficult to determine whether the circumstances make a case of invitation, in a technical sense, or of mere license. Usually, an invitation will be inferred where the visit is of common interest or mutual advantage to the parties, while a license will be inferred where the object is the mere pleasure or benefit to the visitor. *Bennett v. Railroad Co.*, 102 U. S. 577, 26 L. Ed. 235. The extent of the invitation also is not free from difficulty, where the invitation is implied.

In the case at bar, the evidence fails to show that the use of the scaffold by Basham for getting upon the roof was for the common interest and mutual benefit of both parties. It was built for use in doing work on the face of the gable, and was never intended to be used as a means of access to the roof. There were communicating doors between all the rooms in this part of the building, and there were two dormer windows in the roof affording safe, convenient, and easy access to the roof at a point not more than three or four feet distant from the point at which the plaintiff would have landed if he had succeeded in his efforts to climb upon the roof from the scaffold. There was no work that the plaintiff could have done while standing on the scaffold. His work was on the roof and not on the gable. If the scaffold was attractive, the plaintiff was not a child, and temptation was not invitation. If simply convenient, the use of it was as a licensee and not as an invitee. The attempted proof of a custom or usage of trade for subcontractors to use scaffolds left in place by the general contractors was unsuccessful; even if it could have affected the result in a case where the use was not necessary. The only testimony on this subject was that of two members of the firm by which Basham was employed at the time of his injury. No foundation was laid as to either of them for proving a general custom or usage of trade, or any knowledge on the

part of Pettyjohn & Sons of either a general or special usage in such case. The entire testimony of these witnesses on this subject was as follows:

D. P. McGann: "Q. In a case of that kind, where a contractor has entered into a contract to do work or erect a building, and a subcontractor contracts with him to do the plumbing work, or other portion of the work, I will ask you to state what is contemplated, in a situation of that sort, in referring to who shall furnish the scaffolding that is necessary for the employe of the subcontractor to do the work?"

"A. We always use the scaffolds for executing the work that were there."

D. E. Argenbright: "Q. What is the custom and what is in contemplation by the parties as to the erection and use of scaffolding in cases of that kind?"

This question was objected to, but the objection was overruled. The examination then proceeded:

"A. Most of the work we do is specification work; we work under specifications.

"Q. I asked you what is contemplated by the parties and what is the custom in regard to the use of the scaffolds?"

"A. The general contractors generally build the scaffolds or do the scaffolding work."

There was no other testimony on this subject. The fact that no exception was taken to this testimony simply affected its admissibility. It did not give it any greater weight than it would have had if exception had been taken thereto.

This is far from proving a usage of trade to the extent and for the purpose of showing that the plaintiff was invited to use the scaffold upon which he had no work to do as a means of access to the roof. The language of this court in *Southwest Va. M. Co. v. Chase*, 95 Va. 50, 57, 27 S. E. 826, 829, is entirely apposite to the situation here. It is said there:

"It has been doubted in some cases whether one witness is sufficient to prove a local custom or usage, but it seems now to be settled that a jury may be justified in regarding the usage as established by one witness where it appears that he has full knowledge and long experience on the subject about which he speaks, and testifies explicitly to the duration and universality of the usage, and is not contradicted. *Robinson v. United States*, 15 Wall. 363 [20 L. Ed. 653]; *Jones v. Hoey*, 128 Mass. 584; 1 *Greenleaf on Ev.* § 260 and note. There is nothing in the record to show that this witness, who was an interested party, had any such knowledge or experience on the subject as would enable him to prove the custom. Neither does he prove, as the law requires, that it was an established usage or custom, general and notorious in that locality. *Hansborough v. Neal*, supra [94 Va. 722, 27 S. E. 593]."

The evidence does not establish a custom or usage of business, general and notorious in that locality. As applied to the case at

bar, the evidence does not establish anything more than a permissive use of the scaffold, a use as a licensee, or, if it can be so extended as to amount to an invitation, the invitation is limited to a use for work to be done while standing on the scaffold. If an invitation is to be implied at all, it is restricted to such a use as was reasonably necessary, and is not extended to uses not contemplated nor reasonably to be expected, though apparently convenient. It would place too great a burden upon the general contractor to hold him responsible for any use of the scaffold that was simply convenient to the plaintiff. In order for the plaintiff to occupy the position of invitee, it must appear that the use was not merely convenient, but reasonably necessary for the work to be done. If it could not have been reasonably anticipated that any such use would have been made of the scaffold, an invitation to make such use will not be implied. Mere convenience is not invitation. There are cases where convenient access is prepared for the use made of it, and in such case the preparation of the convenience amounts to an invitation. Such was the case of *Nichols v. Washington, O. & W. Co.*, supra. But this case does not belong to that class.

The evidence before us shows that perfectly safe, easy, and convenient access to the roof was afforded by two dormer windows, and Basham admitted on his cross-examination that such access would have placed him on the roof at a point not more than three or four feet from where he would have landed if he had succeeded in climbing over the eaves. It is true that he seeks to show that access by the dormer windows was not equally as convenient as by the scaffold, and that he "couldn't have gotten to the stack from there." But no amount of reasoning on the subject can overcome the force of his admission that access from the dormer window would have placed him within three feet of the very gable around which he was going to climb. There was no necessity, therefore, for his going upon the scaffold. It may have been a "convenient and easy" mode of access, but it was not reasonably necessary. But it was urged upon us both in the oral argument and in the brief that an invitation to use the scaffold was implied because such use was "an easy, convenient, and apparently safe way \* \* \* to reach the roof," and it was insisted that subcontractors and their employes had the right to use the scaffolds "wherever and whenever it is necessary or convenient for them to do so." This right is insisted upon because "this scaffold afforded a convenient and easy method of reaching the roof." The trial court apparently took this view, but we cannot concur therein. The fact that access by way of the scaffold was "easy and convenient" did not warrant the implication of an invitation to use it, when

another means of access existed that was perfectly safe, easy, and convenient. No authority is cited for such a position, and we have not been able to find any. Indeed, the cases on somewhat similar questions seem to hold to the contrary. In *Morrissey v. Boston & Me. R. Co.* (1918) 230 Mass. 171, 119 N. E. 675, the defendant contracted with several contractors for the erection of a building. The steel work was to be done by McClintock, Marshall & Co. by whom the plaintiff was employed. The masonry and carpenter's work was to be done by the Pike Company. Masons of the Pike Company left a ladder in place against one of the walls. The plaintiff was ordered by one of the foremen of the McClintock, Marshall & Co. to go to the roof. He went by way of the ladder, and getting on the ladder to return he fell and was injured. Suit was brought against the Boston & Maine Company and the Pike Company. It was held that, while the ladder was placed where it was found by employees of the Pike Company, the evidence would not warrant a finding that the plaintiff was invited to use it. There were other ways of reaching the roof, and there was nothing to show that the ladder was placed there for the use of the employees of McClintock, Marshall & Co., and hence the plaintiff did not use it by invitation of the Pike Company, but in using it was merely a licensee.

In *Smith v. Trimble* (1901) 111 Ky. 861, 64 S. W. 915, a paper hanger was injured by stepping onto a balcony leading from an upper porch to an adjacent room, when the balcony fell, precipitating him to the ground. It was not necessary to use the balcony in going to or from the rooms upon which he was at work, but he did use it, without the knowledge or consent of the appellee, for his (appellant's) greater convenience in calling to a fellow workman below. The court said:

"We are of opinion, and so hold, that appellant, while engaged in that work in using such parts of the appellee's premises as were *reasonably necessary* to enable him to do his work, was on the premises under the assurance in law by appellee that such parts *so necessarily* used were reasonably safe for the purposes of such use. But beyond that appellee owed appellant no duty greater than to a stranger or trespasser. And when appellant, without invitation or knowledge of the owner, went into or upon other parts of the premises, *not necessary for the performance of his labor*, he assumed all the risk of doing so. He was neither required, expected, nor allured to be at the place where he was injured, consequently appellee was under no duty to him to provide there a place of safety." (Italics supplied.)

In *Hutchinson v. Cleveland Cliff Co.* (1905) 141 Mich. 346, 104 N. W. 698, the plaintiff was employed to cover pipes in the defendant's mill, and fell through an open unguarded hatchway. His work did not call him nearer than within 20 to 40 feet of the hatch-

way, and he had to step over a steam pipe a foot high from the floor to get there. He had no call to go there and no invitation. His excuse for going there is that it was near night, and he wished to ask the foreman whether he should mix another quantity of plastic. He had seen the foreman go in a northwesterly direction from him and disappear from his sight around a still, a few feet from him. The mill was in operation and was lighted by electricity. Plaintiff testified that the light was dim. He started in the same direction and went around the still, ultimately walking into the trap, which he did not see or notice. The railing had been removed to facilitate the raising of the cumbersome machinery. The foreman was not produced as a witness. It was defendant's contention that it owed no duty to plaintiff, who had not been invited to enter that portion of the mill, and that he was guilty of contributory negligence. It was held that the defendant owed him no duty of protection.

In *Vaughan v. Transit Development Co.* (1917) 222 N. Y. 79, 118 N. E. 219, the plaintiff was a motorman of the defendant company. He went into the toilet room of one of the company's power plants, as had been the custom of himself and other employees of the defendant for years, without objection from the defendant. Plumbers had been working just inside the door and had left open a trapdoor in the floor. The plaintiff fell into the opening and was hurt. It was held that there could be no recovery as he was there as a licensee only, and that the defendant did not owe to him the duty of active vigilance to see that he was not injured while upon its premises for his own convenience. It was said that the plaintiff was there by permission for his own convenience and his status was that of a bare licensee; that long-continued acquiescence in such did not become an invitation; and that the law does not so penalize good nature or indifference, nor does permission ripen into right.

In *Ryan v. Toop*, 114 App. Div. 165, 99 N. Y. Supp. 590, a subcontractor for the plastering in the building in process of construction ordered his servant to plaster along a stairway, and he attempted to do so by standing on iron treads on the stairs, which treads were not built or intended to work on, but were to serve merely as a sheathing for stone treads. One of the treads gave way and the plaintiff was injured. It was held that the contractor was not liable, as the plaintiff was not there by invitation.

In *Holbrook v. Aldrich*, 168 Mass. 15, 46 N. E. 115, 38 L. R. A. 493, 60 Am. St. Rep. 364, the plaintiff, a child under seven years of age, entered defendant's shop with her father, who was going to make a purchase. She intended to buy some candy, but in the first place accompanied her father to a part of the shop some distance from the candy

counter, and went to the coffee grinder. He let go her hand to get his money and she went over to the coffee grinder, put her hand up the spout out of which the ground coffee came, hoping to get some whole kernels, and lost her fingers. It was held that the defendant was under no obligation to look out for the child and to see that it did not injure itself by placing its fingers in the grinder. It was said that the plaintiff was not within the scope of the defendant's implied invitation, and therefore was not entitled to protection against possibility of harm to herself, and that even if she had been buying coffee the rule would have been the same; that the defendant's invitation in that case would have been for due care for the safety of those working in the neighborhood while simply moving about, but it would not have been to look out or prevent wrongful acts by the plaintiff. Temptation is not always invitation.

In *Maguire v. Magee* (Pa. 1888) 13 Atl. 551, Magee was contractor for all the walls, brickwork, etc., and had charge of the scaffolding. The residue of the work was done by the owners. All of the workmen, whether employed by Magee or the owners, used the scaffolds to pass from one part of the building to the other. Magee was a laborer employed by the owners of the building and not by the contractor, and was engaged in painting the crib work on the building. While working on the scaffold he stepped on what proved to be a trap in the scaffold and fell and was injured. The court held that there could be no recovery against the contractor; that the plaintiff was a bare licensee; that the scaffold was of temporary character; and that the defendant did not owe him the duty of having it in safe condition for his use.

See, also, *Plummer v. Dill*, 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463; *Kidder v. Sadler*, 117 Me. 194, 103 Atl. 159; *Blackstone v. Chelmsford Foundry Co.*, 170 Mass. 321, 49 N. E. 635; *Eldred v. Mackie*, 178 Mass. 1, 59 N. E. 673.

The fact that the scaffold was repaired after the accident is no evidence that it was left in place for the plumbers. The walls of the building had been erected, and the roof was ready for the slate; but there is no evidence that any painting had been done, and it is probable that the repairs were made for the use of the painters or some other workmen who had to stand upon it to do work on the gable.

An effort was made to prove an invitation to use the scaffold, which was on the south gable, by showing that a similar use had been made of the scaffold on the north gable, with the knowledge and acquiescence of the defendants. But the evidence shows that there were no dormer windows on the north side, from which access to the roof could be had with safety and convenience as there were

on the south side, and that if such use was made of the scaffold on the north gable it was a reasonably necessary use, and that the scaffold on that gable had stood the test.

We are of opinion that Basham, the defendant in error, went upon the scaffold as licensee of the plaintiff in error and not as an invitee, and hence is not entitled to recover of the plaintiff in error for the injury sustained by him in the fall off the scaffold. The judgment of the court of law and chancery will therefore be reversed, and this court will enter judgment for the plaintiff in error as that is the judgment which should have been entered by the trial court.

Reversed.

SIMS, J. (dissenting). I cannot agree with the majority opinion on the subjects mentioned below.

1. The opinion states that—

"The evidence fails to show that the use of the scaffold by Basham for getting upon the roof was for the common interest and mutual benefit of both parties. It was built for use in doing work on the face of the gable and was never intended to be used as a means of access to the roof. \* \* \* The attempted proof of a custom or usage of trade for subcontractors to use scaffolds left in place by the general contractor was unsuccessful. \* \* \*"

There follows the quotation of extracts from the testimony of two witnesses for the plaintiff, both members of the subcontracting firm which employed him; the first question and answer quoted being from the testimony of one of such witnesses and the second question and answer quoted being from the other of such witnesses. Later on in the opinion it is said:

"The evidence does not establish a custom or usage of business, general and notorious in that locality. As applied to the case at bar, the evidence does not establish anything more than a permissive use of the scaffold, a use as a licensee, or, if it can be so extended as to amount to an invitation, the invitation is limited to a use for work to be done while standing on the scaffold."

The opinion also states that the right of the plaintiff to use the scaffold is insisted upon, "because 'this scaffold afforded a convenient and easy mode of reaching the roof.' The trial court apparently took this view, but we cannot concur therein."

It seems plain to me from the record and briefs in the case that the plaintiff did not seek recovery in the trial court, nor did the trial court rest its judgment on the ground that because the scaffold was a convenient and easy mode of access to the roof therefore the plaintiff was an invitee and was not a mere licensee in making such use thereof. The issue on this subject as made by the

declaration was distinctly this: That the use of the scaffold in question was "reasonably necessary," and that when the contract between the defendants, the general contractors, and the employers of the plaintiff, the subcontractors, was entered into, and under that contract, "it was contemplated by the parties that the servants of the" (subcontractors, amongst whom was the plaintiff) "who should be engaged in the performance of (the) plumbing work, should use the scaffold \* \* \* whenever it became reasonably necessary. \* \* \*." And it appears throughout the record that the case was tried and decided in the court below in favor of the plaintiff upon that issue.

Now the testimony aforesaid, quoted in the opinion of Judge BURKS, was introduced by the plaintiff as tending to show the understanding aforesaid, and that the true construction of the contract between the general and subcontractors was that contended for by the plaintiff, when such contract is read in the light or the custom or usage mentioned. And, as I see it, this testimony was not introduced to prove a mere local custom or usage, but a general custom or usage on the subject, prevailing everywhere. And the testimony, in the absence of any objection thereto (and there was none), or of any evidence in any way limiting its effect (of which there was none), was amply sufficient to prove such general custom or usage. Indeed, this is in effect admitted in the concluding brief for the defendant, where it said:

"We submit that while there was evidence tending to show that it was customary for such employes to use such scaffolding when necessary, there was no proof at all of such custom attending mere convenience."

As the case comes before us, therefore, with the decision of the trial court in favor of the plaintiff, we must, as I think, regard the fact as concluded that under the contract between the defendants and the employers of the plaintiff, when construed in the light of the general custom or usage of the trade of the subject, it was contemplated by the parties that the plaintiff should use the scaffold in question, as he did, for access to the roof of the building, if it was reasonably necessary for him so to do in the progress of his work thereon as a plumber. That is to say, it must be taken to have been within the contemplation of the defendants when they contracted for the plumbing work with the employers to the plaintiff, that the plaintiff would use the scaffold as he did, if it became reasonably necessary for him so to do in the progress of such work; and hence the plaintiff was in such case an invitee in such use of such scaffold and the consequent duties of reasonable prevision and care to make the scaffold at that place reasonably safe for such use devolved upon the defendants. See

note of Judge Freeman to *Griffin v. Jackson Light Co.* (Mich.) 92 Am. St. Rep. 551, and there are many other authorities to the same effect.

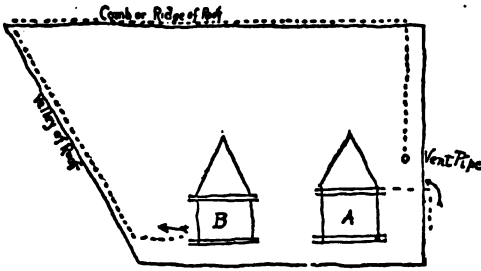
2. I think, too, that the question whether the use made of the scaffold by the plaintiff, as a means of access to his place of work on the roof, was a reasonably necessary use, is concluded in favor of the plaintiff by the decision of the court below.

On this question the evidence is very conflicting.

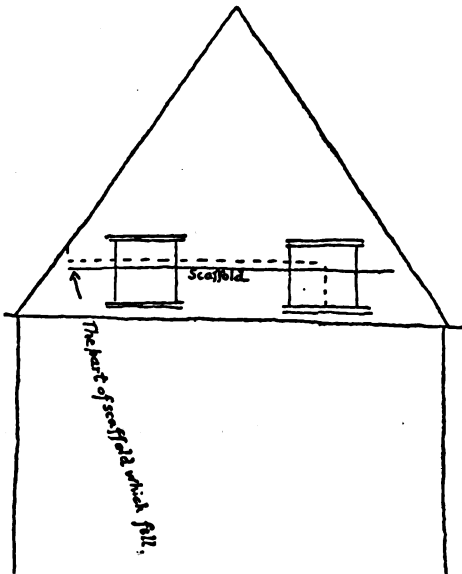
The evidence for the defendants, it is true, is to the effect that such use was not reasonably necessary but merely a convenient use. That evidence is in substance that there was only one way of ascent to the roof provided by the defendants for the carpenters employed by them, and also for the plumbers employed by the subcontractors, and that was (in so far as such way is material in this case) through one of the two dormer windows on the west side of the roof over the south gable of the building (such window being the window nearest the valley of the roof, the exit from this window being some distance to the north of the vent or stack pipe on which the plaintiff was about to place a collar and lower down on the roof than such pipe), thence northward and away from such vent pipe to and up the valley of the roof, on a 2x12 timber with cleats on it, to the comb or ridge of the roof (a still greater distance away from the vent pipe), thence back, southward, on the comb or ridge of the roof until a point was reached immediately above the vent pipe, thence down the steep roof to the vent pipe—a much longer and more difficult route to travel on the roof than the route by way of the scaffold where the plaintiff was traveling when the accident occurred, and one which, it is apparent from the plan of the building in evidence, was a more dangerous route to travel and would have caused a considerable loss of time for the plaintiff to traverse, as compared with the route which he in fact took, namely, through a window on the east side of the south gable of the building on the scaffold standing there, which according to the evidence for plaintiff was on a level above the sills of the windows in such gable, to wit, above half-way up on or about the center of such windows, thence along the scaffold westwardly to the cornice on the western edge of the roof over the gable, thence, but a step, over the cornice on to a board that extended along the roof below but within reach of the vent, or stack pipe, without having to climb up or down, or climb or slide down on the steep roof.

The evidence in the record does not definitely locate the dormer windows or the vent pipe aforesaid on the roof, but sufficiently so to indicate approximately the respective routes on the roof aforesaid, the former

route being indicated by dotted lines ( . . . ) and the latter route by dash lines ( - - - ) on the following sketch:



It is true there was testimony for the defendants to the effect that the roof was not steep—that a wheelbarrow could be rolled about on it. But the testimony for the plaintiff was to the contrary; and the plan of the roof in evidence refutes this contention of the defendants, as will appear from the following tracing from the elevation of such roof as shown from the front of the south gable (on which the location of the scaffold and route of the plaintiff aforesaid are also indicated by the solid and dash lines):



An important question of fact in the case was whether the scaffold was on a level with the bottom sills of the dormer windows in the roof or higher up. This involved the question of whether if the plaintiff had gone through the dormer window, A, shown on the above sketch, he would have reached the roof on the same level as by the scaffold route, the testimony for the defendant being that the scaffold was on the same level as the sills of the south gable and the sills of the dormer windows. But the testimony for the plaintiff was in direct conflict with that for the defendants on that point, and was very positive

and definite to the effect that the scaffold level was about halfway up on the south gable windows and that the level thereof when projected around on the roof was the same elevation above the sills of the dormer windows aforesaid.

And just here is the turning point in the case, as I see it, on the question of whether the route or way taken by the plaintiff was a reasonably necessary route to his place of work, namely, the question whether the scaffold was or was not on the same level with the dormer window sills; for, if so, as contended by the defendants, the plaintiff by going through the dormer window, A, would have been, when emerging from that window and as he stood on its sill, at its south corner, within three or four feet from a point directly underneath the vent pipe, and on the same level as he was when he stood on the scaffold at the cornice aforesaid, and he could have thus stepped to the board aforesaid on the roof leading to the vent pipe and thence reached such pipe as readily as he could have done so by using the scaffold route. But the testimony being in conflict, as aforesaid, on this point, this question of fact is concluded against the defendants by the finding of the court below; so that the fact must be regarded by us as being that by going through the window, A, the plaintiff would not have been within reach of the vent pipe or of the board on the roof beneath it, but would have had to climb the steep roof from the window sill to a point within reach of the vent pipe, and the plaintiff expressly testified on this subject as follows:

" \* \* \* When you got out there, the climbing of this steep part of the roof, \* \* \* you couldn't make it up there." (Record, p. 30.)

And, indeed, the testimony for the defendants is not that the route through the dormer window, A, was that provided for the plaintiff, but the route through the dormer window, B, as shown on the sketch above which, as aforesaid, is a far more circuitous, a farther and more difficult and dangerous route on the roof than that by the scaffold, the latter requiring, as the plaintiff testified, only one step on the roof after reaching it from the scaffold ("just a step on the roof," page 30, Record), and that step being on the board aforesaid, which ran "across there from the Mansard" (page 36, Record), by which he would have attained a point directly underneath his place of work and within reach of it by standing there on such board.

And, as tending to weaken the testimony for the defendant to the effect that the dormer window, B, route was provided by them as the route or way to the roof for all workmen on the building, it was shown by the testimony for the plaintiff that the plumbers did not use that way in putting the collars on the vent or stack pipes, on the roof of the north

gable (which preceded the work about which the plaintiff was engaged when the accident occurred), but used for that work a scaffold there erected. And further: One of the carpenters who had worked on the erection of the building, a witness for the defendants, disclosed in his testimony on cross-examination that the scaffold which fell with the plaintiff had been theretofore frequently used by the carpenters, who were employes of the defendants, in descending from the roof. This witness testified that he himself had made such use of this scaffold "many a time." If so used for descending from the roof, no good reason is perceived why the same use of it should not have been made as a reasonably necessary use (and doubtless was made of it), for ascending to the roof by all workmen on the building being at or near that end of the building and having occasion in the progress of their work to go upon the roof. And it would seem that the most ordinary forethought and prevision of the defendants would have led them to anticipate this. Their consequent duty seems to me to have been plain, namely, to have exercised reasonable care that the scaffold in question should have been so constructed as to have been reasonably safe for such use.

3. The testimony of the plaintiff is very explicit on the point as to what the defect was in the construction of the scaffold which caused it to fall with the plaintiff. That was to the effect that it was not braced at all underneath the end of it which fell, and that such bracing was reasonably necessary to support the scaffold for the use of it aforesaid by the plaintiff and other workmen as a means of ascent to the roof.

Such being the case as shown by the record, I feel that there was no error in the action of the trial judge in finding for the plaintiff, and I am unwilling to disturb his decision.

(126 Va. 729)

# PICKARD v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia.  
Sept. 17, 1919.)

## 1. PHYSICIANS AND SURGEONS §6(1)—PRACTICING WITHOUT CERTIFICATE.

One who announced that he was ready to examine human beings physically, to diagnose their ailments, and furnish, for compensation, a remedy which would relieve the same, and did engage in the business of examining persons, diagnosing their ailments and furnishing medicine which he claimed would relieve them, violated the statute prohibiting the practice of medicine without obtaining a certificate, although such person claimed that he did not charge for the diagnosing, but only for the medicine, and that the diagnosing was for the purpose of advertising his medicine.

## 2. CRIMINAL LAW §1172(1)—HARMLESS ERROR IN INSTRUCTIONS.

Where the appellate court can see from the entire record that no other verdict could rightly have been found under correct instructions, or that the accused could not have been prejudiced by erroneous rulings of the trial court, it will not reverse the judgment and set aside the verdict.

### Error to Corporation Court of Roanoke.

One Pickard was convicted for practicing medicine without having obtained a certificate from the State Board of Medical Examiners, and he brings error. Affirmed.

Willis, Adams & Penn and A. B. Coleman, all of Roanoke, for plaintiff in error.

Jno. B. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and F. B. Richardson, of Richmond, for the Commonwealth.

WHITTLE, P. This was a prosecution against the plaintiff in error, a colored man, residing in the city of Roanoke, for practicing medicine without having obtained a certificate from the state board of medical examiners. He was convicted and sentenced to pay a fine of \$250, and to confinement in jail for three months.

Accused for a number of years had been engaged in the business of selling, through the agency of a drug store, certain proprietary medicines of his own manufacture. He maintained an office in the city, where his patrons would resort to consult him, and he would advise them which of his remedies, if any, was suited to their case, and direct them to the drug store where it could be bought. Subsequently he had his business incorporated, and sold his medicines direct to the trade without the intervention of a druggist. He describes his general course of business substantially as follows: When a customer would call for a particular medicine, he would sell the remedy wanted, while others would describe their symptoms, and he would prescribe which of his medicines would suit the case.

In such instance he stated that he made no charge for advice and only received the price of the medicine.

A witness for the commonwealth testified that her son, five years of age, was ill, and she took him to the office of the accused for medical advice and treatment; that he placed the child on a table and felt his pulse and examined his tongue for a few minutes, and said: "Well, I tell you this child has the kidney trouble, and has it right bad, and if I didn't attend to it right away it would go into meningitis or something bad." Witness then became alarmed, and asked: "Doctor, can you cure the child?" To which inquiry he replied: "I can; with 10 or 15 days' treatment I think it will be all right." He also



told her that he thought the case would "go into something bad," if he did not attend to it. Witness then requested him to prepare the right medicine for the child; but he said it would take him a long time, and told her to come back the next day. She returned accordingly and paid him \$2 for the medicine. She had heard that he could tell what was the matter with the child as soon as he saw it, and went to his office to consult him as a physician. He did not tell her the name of the remedy, but said he would prepare a medicine that would be suitable treatment. After giving the medicine the child grew worse, and she called the accused to the phone and told him of the child's condition. He advised her to give him one or two table-spoonsful of Syrup of Figs until it acted, and then give him his medicine again. The accused, in essentials corroborated the testimony of the witness. He admitted that he diagnosed the case and prescribed for the patient, and compounded and supplied the remedy for compensation. He moreover acknowledged that he had done and was then doing the same thing for numerous other patients; that he claimed and announced to the public generally his ability to diagnose diseases and compound and furnish remedies for their cure. Yet he qualified his statement by alleging that he did these things, not as a doctor, but to advertise his medicine, and charged for the medicine, and not for examinations and advice. He confessed that he had never been examined by the board of medical examiners, and held no certificate from them, and had no right to practice medicine in the state.

The only instruction requested by the Commonwealth, and granted, was that—

"If the defendant \* \* \* within twelve months prior to July 30, 1917, in the city of Roanoke, announced in any way to the public that he was ready to examine human beings physically, to diagnose their ailments, and furnish for compensation a remedy which would relieve the same, or did within said period engage in the business of examining human beings physically, diagnosing their ailments and furnishing medicine which he claimed would relieve them, and receive pay for the same, then he is guilty as charged, and the jury should so find, fixing his punishment at a fine of not less than \$50 nor more than \$500, and in addition thereto may impose \* \* \* confinement in jail for not more than six months."

This instruction is practically in the language of the statute, and the verdict of the jury is fully sustained by the evidence.

[1] The law does not recognize the mental reservations of the accused, by which he bunglingly attempted to escape the consequences of his flagrant and habitual violations of the law. The object of the statute is to protect the public against just such impostors.

[2] A number of exceptions were taken by the accused during the progress of the trial to rulings of the court, chiefly in denying prayers for instructions in his behalf; but they do not call for special notice, since the case plainly comes within the settled rule that, where the appellate court can see from the entire record that no other verdict could rightly have been found under correct instructions, or that the accused could not have been prejudiced by the rulings of the trial court, it will not reverse the judgment and set aside the verdict. *Burks' Pl. & Pr.* § 267, and cases cited in *Standard Red Cedar Chest Co. v. Monroe*, 125 Va. —, 99 S. E. 589.

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

Affirmed.

BURKS, J., absent.

(126 Va. 15)

### JOHNSON v. JOHNSON.

(Supreme Court of Appeals of Virginia. Sept. 17, 1919.)

#### 1. DIVORCE $\S$ 133(1)—EVIDENCE OF DESERTION.

In a husband's suit for divorce, evidence held to prove the charge of desertion against the wife.

#### 2. DIVORCE $\S$ 129(16)—EVIDENCE OF ADULTERY.

In a husband's suit for divorce, evidence held insufficient to prove the charge of adultery against the wife.

Appeal from Circuit Court, Russell County.

Suit for divorce by Aaron S. Johnson against his wife. From an adverse decree, the wife appeals; both parties assigning error. Affirmed.

W. W. Bird and A. G. Lively, both of Lebanon, G. B. Johnson, of Honaker, and C. C. Burns, of Lebanon, for appellant.

Finney & Wilson, of Lebanon, for appellee.

PRENTIS, J. Aaron S. Johnson instituted his suit for divorce, alleging that his wife had willfully abandoned him, and that she had been guilty of adultery. Her answer denies all of the allegations of the bill, charges him with having willfully abandoned her, and with cruelty, and prays that her answer may be treated as a cross-bill, and for a divorce from bed and board.

The decree of the trial court acquits the wife of the charges of adultery, but is in favor of the husband for divorce from bed and board upon the ground of desertion. From this decree she appealed, and both parties assign error.

There is much testimony, disclosing conflict and disagreement which could have been avoided if each had been generous to the faults of the other, and which has resulted disastrously for both. The wife in her answer and evidence charges her husband with lack of appreciation, coldness, oppression, penuriousness, cruelty for many years, and recently with accusing her of having committed adultery culminating in his desertion. She produces no witness, however, in support of these more serious charges, and her case depends upon her own testimony. The only witnesses she introduces are two, by whom she undertakes to discredit the testimony of Noah Maxfield by showing that because of the construction of the house he could not have seen her or P. H. Smith, the man with whom she was charged with having committed adultery, as they came down a stairway from the upper floor of the store building. The evidence is insufficient for the purpose for which it was introduced, because its whole basis is that the witness Maxfield stood immovably fixed in a particular place in the store, whereas his evidence cannot fairly be construed. Then she introduced one Fielding Combs, who testified in substance that after the suit was instituted the husband told him that he could not prove anything against his wife—evidently alluding to the charge of adultery—and then Peter R. Smith, who sold her his interest in the business, for the purpose of showing that the husband did not participate in the negotiations, whereas he testified that he did so participate; and Bertha Nash, who testified to grossly offensive remarks made by the husband to his wife in the presence of his children after the suit was instituted, and that after the separation he said that he did not intend to return to her. This, with the exception of the testimony of P. H. Smith and her own, constitutes the entire evidence upon which she relies. On the other hand, the husband introduces 24 of his friends and neighbors, who were also her neighbors, for she had been born and reared in the same community and had lived her entire married life there. These witnesses testify as to various phases of the controversy, and their testimony all tends to sustain the husband's allegations. The wife has a father, mother, sister, and brother, and although it appears from the husband's testimony that he had discussed their troubles with her relatives, that her mother and brother had talked to her on the subject, that her father sent a friend to her to talk to her, and from her testimony that her father has himself cautioned her to be careful in her conduct, none of these relatives are introduced to support her upon any point.

These incidents precede the controversy: The wife purchased a one-half interest in a stock of goods in a country store, within about one-half mile of her home. The other

half was retained by the vendor, who was the father of P. H. Smith. Young Smith was to stay in the store, in his father's interest, and as a salesman. He was also to board with her, and she was to have general supervision of and to give such time to the business as seemed to her necessary. The vendor, however, required security, and hence her husband indorsed her notes for the unpaid purchase money. Shortly after that her husband voluntarily gave her \$300 to put in the business, which prospered, and she gave more and more time to it. Certain occurrences aroused the husband's jealousy of Smith. The first one was when he unexpectedly returned to the store, and he thought that she appeared to be unaccountably excited and confused. That night he called her attention to the circumstances and asked her for an explanation. She gave a perfectly natural explanation of the situation, and requested him to go to the store to examine Smith and to make certain other investigations for confirmation of her statement. This he declined to do, but apparently in perfect good faith accepted her statements as true. From time to time, as he thought, and as others also thought, she indicated a greater pleasure in Smith's society than in his own, and he proposed to buy the other half interest in the store for himself. This proposition she refused to entertain, the reason alleged being that she knew that he was anxious to get possession of her interest and to control the business. Afterwards, however, with her husband's assistance, he indorsing her notes and giving the security which the vendor required, she bought this other half interest and became the sole owner of the store. It is apparent that in this the husband was trying to break up her growing intimacy with Smith which so disturbed him. His disquietude and disapproval were justified because, while the evidence fails to sustain his charge of adultery, it is perfectly manifest that many in the neighborhood suspected that there were improper relations between Smith and his wife. They were frequently alone at the store, sometimes after dark. As time went on, she spent more and more time there with him and less at the home which her husband had provided for her. So widespread was this suspicion and so common the talk, that two little boys testified that because of what they had heard they cautiously entered the store on one occasion for the purpose of spying on them. Her father sent a friend of the family to talk to him on the subject, and this friend testifies that, when he attempted to do so, the husband exhibited great distress and refused to discuss the matter. Notwithstanding this situation so likely to arouse suspicion and to excite gossip, and in spite of her husband's jealousy of which she knew, she kept Smith in the store three months after she became sole owner. After he left there she conducted a correspondence

with him—not an improper correspondence, as is apparent from the letters introduced, which relate only to the unfinished business of the old firm. During this correspondence, however, no one but she and Smith knew the subject thereof. He came to see her two or three times thereafter, and he also from time to time ordered articles of clothing from her.

Smith's reputation in the community had suffered because a young unmarried woman had accused him of being the father of her child, and there is evidence tending to show that Mrs. Johnson's attitude towards him was due to her benevolent wish to practice what she professed and to prove to those whom she thought too censorious that, "While a man may be down, he is never out." She testified that until after Smith left the immediate neighborhood she had never heard of this gossip which reflected upon her, but, if she had not, her husband and her neighbors had, and she had been told a year before that time by her husband of his dissatisfaction. She certainly knew of this neighborhood gossip after Smith left, and yet she continued her intercourse with him in such a way as to excite further comment.

Her husband testified that she became colder to him as her apparent fondness for Smith increased, and that she finally denied him access to her bed and his marital rights in the spring of 1915. The evidence shows that in the following July, two nights before Smith left their home, the husband commenced sleeping at his mother's, which is within half a mile of their residence and within 100 yards of the store, though he continued to take some of his meals at his home to cultivate his farm, and to see his children. On the two nights before Smith left, he stayed at his home until all had retired. He continued to sleep at his mother's until some time in December, when he returned to his home to sleep. He was then again denied access to his wife's bed, and sent to a separate room upstairs, and she was at that time preparing to move with their three children to the store. They quarreled and differed over this, but she went against his will, claiming that she could not attend to the store business during the winter months and at the same time properly look after her little children unless she did make this move. It is substantially proved by three or four witnesses who helped her to move that one of her motives, as expressed by her, was to rid herself of her husband. He followed her to the store, evidently persisting in his desire for a reconciliation. Her account of this is that she agreed to such reconciliation only upon condition that he would stop charging her with adultery with Smith, and that as he continued to make that charge she refused to

become reconciled. At any rate, she still refused to renew her marital relations with him, required him to stay in a separate room, and after three months he moved to his mother's house about 100 yards away.

[1] Whatever the husband's shortcomings, it is abundantly shown that he always desired and repeatedly sought reconciliation. He gave her money and he indorsed her notes, whereby she was enabled to acquire and to prosecute her business during the very period in which she is charging him with the grossest sort of cruelty, penuriousness, and indifference to her rights and feelings. She complains of his failure to supply herself and his children with clothing, and yet, upon the few occasions when he sought to do so, his efforts are ridiculed by her. That she suffered for nothing in this respect is perfectly apparent from the fact that he had accounts with the local merchants from whom she could obtain goods on his credit, and that she had saved some money before her marriage which she still has; that she always had her separate purse; and that in her domestic economies, especially in the raising of chickens, she had \$300 of her own in bank at the time she bought an interest in the store; and he says that she told him that she preferred to buy her clothes and the children's. That he supplied her and their children with a home furnished properly, judged by the neighborhood standard, and with food, and that until Smith appeared upon the scene, so far as their intimate friends could perceive, they lived as happily as married people usually do, is apparent from the evidence. It is also manifest that upon the question as to which of the two has willfully abandoned or deserted the other, their friends and neighbors, as indicated by their evidence, and her own relations, as shown by their silence, have adjudged her to be most at fault. The trial judge could not have found otherwise from the testimony.

[2] Upon the charge of adultery her husband has failed. While if her heart had rested upon him, she could not have been as indifferent to his happiness as is shown in this record, the evidence is insufficient to prove this charge, and the trial court rightly acquitted her thereof.

The case has peculiar features, in that, notwithstanding all the evidence of desertion, the parties now live within a stone's throw of each other. Their duty to their children and to society requires that they should ignore the antipathies engendered by this litigation and become reconciled.

Affirmed.

KELLY, J., absent.

(126 Va. 10)

**HUNDLEY v. REYNOLDS et al.**(Supreme Court of Appeals of Virginia.  
Sept. 17, 1919.)**1. FRAUD  $\S$ 58(1) — EVIDENCE; CLEAR AND CONVINCING.**

Fraud must be shown by clear and convincing proof, and grave suspicion is not enough to sustain finding of fraud.

**2. VENDOR AND PURCHASER  $\S$ 341(3)—FRAUD; NOT SHOWN BY EVIDENCE.**

In an action by purchasers for compensation for deficiency in acreage, evidence held insufficient to show fraud on the part of defendant.

Appeal from Circuit Court, Floyd County.

Bill by one Reynolds and others against one Hundley. Decree for complainants, and respondent appeals. Reversed.

Jno. P. Lee, of Rocky Mount, and Samuel A. Anderson, of Richmond, for appellant.

Sowder & Howard, of Floyd, for appellees.

**BURKS, J.** The appellees filed their bill in equity against the appellant, alleging that they had purchased of the appellant a tract of land represented as containing 120 acres, but which in fact contained only 100 acres, and praying compensation for the deficiency at the rate paid per acre, with interest from the date of purchase. The bill alleges that the sale was by the acre, and that the discrepancy occurred by reason of fraud or mistake on the part of the appellant. The appellant answered, denying that he had ever represented the tract as containing 120 acres, and, on the contrary, alleging that the land was conveyed by metes and bounds, that he had sold it to the appellees as 100 acres at \$16.50 per acre, that they well knew the quantity of land purchased by them and the price to be paid therefor, and that the mistake in the deed to the appellees, in stating that the boundary contained 120 acres, was the mistake of the scrivener of the deed, but did them no harm, as they well knew the quantity of land in the boundary, and that it had been sold to them by the appellant as and for 100 acres. Respondent prayed that, if need be, his answer be treated as a cross-bill, and his deed to appellees be reformed, so as to declare that the boundary conveyed contained only 100 acres. The appellees answered the cross-bill, denying its material allegations. Depositions were taken, and, upon the hearing, a decree was rendered, granting the complainants (the appellees here) the relief prayed. From that decree this appeal was taken.

[1] It is conceded by the parties that this is a proper case for equity jurisdiction, and the controversy is entirely upon the merits as developed by the evidence. If not conceded,

it is clearly established by the evidence that the appellant at all times well knew that the tract of land contained only 100 acres, so that the case is not one of mutual mistake. The case resolves itself, therefore, into the question of whether or not the appellant perpetrated a fraud on the appellees. The evidence is of the most conflicting and contradictory nature, composed very largely of oral testimony given by ignorant and illiterate witnesses of verbal admissions made by the respective parties 5 or 6 years before they testified, and of contradictions of one witness by another as to statements made by them. It could serve no useful purpose to review the testimony in detail. It must suffice to say that even grave suspicion is not enough to sustain a charge of fraud, and if fraud has been committed in the case in judgment, it has not been shown by that clear and convincing proof necessary to establish it.

[2] The appellant had acquired this tract of land by exchange with H. L. Keaton, and in the deed of exchange the land conveyed to Keaton is described as "containing some 120 acres, more or less," and the land received by Hundley is described as two "tracts or parcels of land adjoining each other and containing in the aggregate 100 acres," and the metes and bounds are given. By agreement of all parties, J. W. Walton, a justice of the peace of the neighborhood, was engaged to write the deed from the appellant to the appellees, and, in order to enable him to describe the land to be conveyed, he was furnished with the deed of exchange aforesaid, which not only gave the metes and bounds, but also stated the quantity of land in the boundary. He copied the metes and bounds accurately, but mistated the quantity. No explanation is given by any witness of how this mistake was made, but it is suggested that the eye of the scrivener fell on the figures "120" in the deed of exchange, and that he inserted them, without reading the deed carefully, supposing that they represented the quantity in the tract to be conveyed. This suggestion seems probable, as he does not appear to have been a very careful draftsman. He failed to retain a lien in the deed for the deferred payments of purchase money, as had been agreed upon by the parties, and mentioned the retention of the lien in one of the bonds for the deferred payments, and failed to mention it in the other two. He states in his testimony that he does not recollect that he had any instructions as to how to write the deed. When the deed was delivered by the appellant to one of the grantees, he also delivered to him the deed under which appellant derived his title, which plainly stated that the tract contained 100 acres. None of the witnesses who were present at the time the deed was prepared say that the appellant said that the tract contained 120 acres, or that he gave

any direction to the scrivener to so state in the deed. T. H. Reynolds, one of the grantees, was present, but makes no such claim. Appellant and his wife and Peter Claytor, who were present, state that appellant instructed the scrivener to make the deed like the old deed under which appellant claimed title. Appellees paid taxes on the land for 6 or 7 years thereafter, assessed as on 100 acres, before this suit was brought. There was also much parol testimony tending to sustain his claim. On the other hand, there was much parol testimony tending strongly to sustain the contention of the appellees that the tract was represented as containing 120 acres, and explaining why the tax tickets did not furnish evidence that the tract contained only 100 acres. In addition to this, the deed stated that there were 120 acres, and 17 months after the deed was made the appellees, at the instance of the appellant, executed an instrument under seal by which they gave the appellant a vendor's lien for the balance of his purchase money, in which the land is again described as containing 120 acres, which deed the appellant admits was read to him. But appellant explains this by saying that he only felt concerned about the security for his purchase money, and hence paid no attention to the reading of other parts of the deed. As already stated, the parol testimony is of such character as to be entitled to but little, if any, weight; but, whether we weigh it or not, the evidence, taken as a whole, is not sufficient to establish fraud on the part of the appellant, and for that reason the decree of the circuit court must be reversed.

Reversed.

(126 Va. 49)

NICHOLS et al. v. NICHOLS et al.

(Supreme Court of Appeals of Virginia. Sept. 17, 1919.)

WILLS  $\Leftrightarrow$  635—OPENING VESTED INTEREST TO LET IN AFTER-BORN CHILDREN.

Where testatrix gave a fund to trustees for the period of 10 years for the use of her grandchildren, share and share alike, and any after-born grandchildren to come into distribution, with directions that at the expiration of the 10 years the trust estate should be divided between grandchildren then living, the issue of any dead to take the share of the parents, the principal of the trust fund vested beneficially on the testatrix's death in the grandchildren then born, subject to open and let in after-born grandchildren, but they were not entitled to share in the income distributed.

Appeal from Corporation Court of Roanoke.

Suit between one Nichols, as trustee, and others, and one Nichols and others, for con-

struction of the will of Mrs. S. E. Nichols, deceased. From the decree, the trustee and others appeal. Reversed.

Hoge & Darnall, of Roanoke, for appellants.  
H. M. Fox, of Roanoke, for appellees.

WHITTLE, P. This appeal is from a decree of the corporation court of the city of Roanoke construing the third clause of the will of Mrs. S. E. Nichols, deceased. So much of the clause as is necessary to be stated is as follows:

"All the rest and residue of my estate consisting mainly of bonds, stocks and such investments, I give and bequeath in trust to my said sons, Geo. S. Nichols and J. R. Nichols, \* \* \* to be held, controlled, invested and reinvested from time to time as may be necessary or judicious and proper, for the period of ten years, for the use and benefit of my respective grandchildren, share and share alike, and any after-born grandchild or grandchildren to come into the distribution. The net income of said trust fund during said period of ten years shall be paid to my respective grandchildren. \* \* \* At the expiration of said ten years then the principal of said trust estate shall be divided between my grandchildren then living, and if any shall have married and died leaving issue, said issue is to take the parent's share. \* \* \* My intention is that my grandchildren, including those after-born, shall share in the income of my estate during life to the expiration of said ten years after my death, but that upon dying before that period, unmarried and without lawful issue, then the share or shares of any one or more dying shall remain a part of said trust estate for division among those living and entitled as hereinbefore directed.

"And I give authority to my said trustees, or the one acting, if they or he shall deem it judicious, to pay to any adult grandchild before the expiration of said ten years, the then share of such grandchild in the principal fund, provided that as a condition to such payment of any grandchild, he or she shall execute a proper bond with good surety to account for and pay back of the amount received, its pro rata share of what may thereafter come due to any after-born grandchild. And upon the expiration of said ten years and at the regular division of said principal trust fund, like bond and surety for such refunding shall be required from or on behalf of the respective legatees or distributees unless my said trustees, or the one acting, shall deem it wholly unnecessary."

The ten years period referred to in the third clause of testatrix's will expired on February 10, 1917, since which date another grandchild of testatrix, Ralph St. George Nichols, has been born. The principal of the trust fund is still undistributed, and the sole question for our determination is whether under the terms of the third clause of the will this after-born grandchild is entitled to share in the trust fund.

This appeal is from a decree of the trial court resolving that question adversely to the after-born grandchild.

Read in its entirety, we find no ambiguity or obscurity in the third clause of the will. There seems no escape from the conclusion that the objects of testatrix's bounty with respect to the trust fund were her grandchildren, both born and after-born, as a class. To hold otherwise we should be forced to ignore the repeated declarations of testatrix that any after-born grandchild or grandchildren were "to come into the distribution" with those in esse, "share and share alike"; and the provision authorizing the trustee to pay to any adult grandchild, before the expiration of the ten-year period, his or her share of the principal trust fund, upon the execution of "bond with good surety to account for and pay back of the amount received its pro rata share of what may thereafter come due to any after-born grandchild"; and the provision as to refunding bonds upon the regular division of the principal trust fund after the expiration of the ten years period. The established rule is that, even where the testator's intention is ambiguous or obscure, that construction should be adopted that will dispose of the property in a just, natural, and reasonable manner, such as will bring about an equal distribution among the beneficiaries when that is the manifest purpose. And a fortiori must that principle obtain where the intention is unambiguous and clear.

In *Woodruff v. Pleasants*, 81 Va. 37, testator gave certain property in trust to his grandchildren by three of his sons, "now born or hereafter born, to be divided equally between them, my sons acting as trustees, each for his own family, \* \* \* and dividing out to each child, as he or she may come of age or marry, his due share of said estate. \* \* \* Held: \* \* \* The property vested beneficially, on testator's death, in the grandchildren then born, subject to open and let in after-born grandchildren." See, also, *Buford v. North Roanoke Land & Imp. Co.*, 90 Va. 418, 18 S. E. 914; *Bayly v. Curlette*, 117 Va. 253, 259, 84 S. E. 642.

We think this will falls in the class that, where the intention of the testator is clearly expressed and his meaning plain, there is no occasion to resort to rules of construction. The will in such case speaks for itself.

We are furthermore of opinion that the infant appellant, Ralph St. George Nichols, is not entitled to share in the net income of the estate paid out to living grandchildren or their parents or guardians during the ten-year period. The will in terms limits the net income of the trust fund during that period to grandchildren living at that time and not to those who might be born afterwards.

Our conclusion is to reverse the decree of the trial court and remand the case for further proceedings to be had therein not in conflict with the views expressed in this opinion.

Reversed.

## LITTON v. WOLIVER.

(126 Va. 32)

(Supreme Court of Appeals of Virginia. Sept. 17, 1919.)

1. SEDUCTION  $\S$ 16 — DECLARATION; "DEBAUCH."

A declaration alleging that defendant debauched and carnally knew the daughter of plaintiff is an allegation that defendant seduced the woman; the word "debauch" meaning to corrupt with lewdness or to seduce.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Debauch.]

2. SEDUCTION  $\S$ 8, 20—DAMAGES; WOUNDED FEELINGS.

Notwithstanding the provisions of Code 1904,  $\S$  2896, dispensing with the need of proof of actual loss of services in case of an action by a parent for the seduction of a daughter who was a member of his family, the parent cannot recover damages for wounded feelings and affections because of defendant's mere sexual intercourse with the daughter, where there was no actual seduction; this being true, though the loss of services is at common law the basis of the action.

3. APPEAL AND ERROR  $\S$ 1066—PREJUDICIAL ERROR; INSTRUCTIONS IN SEDUCTION CASE.

Where there was evidence by defendant tending to show that, while he had sexual intercourse with plaintiff's daughter, there was no seduction, the giving of an instruction allowing the recovery of damages for wounded feelings and affections, without any proof of actual seduction, was prejudicial error.

Error to Circuit Court, Lee County.

Action by one Litton against one Woliver. There was a judgment for plaintiff, and defendant brings error. Reversed, and new trial granted.

This is an action by a father, the defendant in error, who was plaintiff in the trial court, against the plaintiff in error, who was defendant in the trial court, to recover \$10,000 damages for the alleged seduction by the latter of the daughter of the plaintiff and for certain expenses of nursing, etc., alleged in the declaration. The parties will be hereinafter referred to in accordance with their positions in the court below.

The declaration is in the usual form, alleging seduction at common law, being practically copied from the form given for such a declaration in 1 Barton's Law Pr. pp. 401, 402. There was a trial by jury, and a verdict in favor of the plaintiff for \$2,500 damages, upon which the judgment was entered which is under review.

There is ample evidence in the record to sustain the verdict of the jury in finding the existence of sexual intercourse of the defendant with the daughter; that it resulted in the birth of a child; that, although the daughter was over 21 years of age, she was still a

member of the family of the plaintiff, so that the relation of master and servant existed between the plaintiff and the daughter; and to sustain a verdict of the jury for such actual damages as the plaintiff may have suffered in the premises from loss of the services of the daughter and to reimburse the plaintiff certain incidental expenses alleged in the declaration. But the evidence is conflicting on the question of whether the sexual intercourse was accomplished by means of a promise of marriage, as the testimony for plaintiff tended to show was true, or whether such intercourse took place without seduction—that is to say, without the aid of any promise of marriage or other artifice, but was consented to by the daughter in gratification of her sexual passion merely, as the testimony for the defendant tended to show was the case.

In this state of conflict of the testimony, the trial court, over the objection of the defendant, gave the following instructions:

**First for the Plaintiff, No. 1.**

"The court instructs the jury if they believe, from a preponderance of the evidence in this case, that the defendant had carnal intercourse with the plaintiff's daughter, Polly Woliver, and at the time of such intercourse the relation of master and servant existed between plaintiff and his said daughter, you will find for the plaintiff, and assess his damages at such amount as you believe he had sustained under the evidence, so that the same does not exceed \$10,000.

"And the court instructs the jury that, if they find for the plaintiff in this case, they may, in estimating the injury the plaintiff has sustained, take into consideration the wounded feelings and affections of the plaintiff, the wrongs done to him in his domestic and social relations, the stain and dishonor he sustained, and the grief, affliction, and mental anguish, if any, suffered in consequence of the acts complained of, and give damage accordingly."

**Second for Plaintiff, No. 2.**

"The court instructs the jury, if they find for the plaintiff in this case, you may, in addition to finding the actual damages sustained by the plaintiff, also find punitive or exemplary damages; that is to say, the jury need not be limited to the mere compensation for the actual damages sustained by the plaintiff, but you may award such further damages as you may think right, in view of all the facts and circumstances proved at the trial, as a punishment to the defendant and as a wholesome and salutary example to others to deter them from offending in like manner, and if you believe from a preponderance of the evidence that said carnal intercourse with the plaintiff's daughter was accomplished by means of a prior promise of marriage, you may take this fact into consideration as an aggravation of such damages, and in fixing such damages the jury may take into consideration the financial worth and ability of the defendant."

J. C. Noel and Pennington & Pennington, all of Pennington Gap, for plaintiff in error.

B. H. Sewell and Davidson & Robnett, all of Jonesville, for defendant in error.

SIMS, J. (after stating the facts as above). The single question we need to pass upon, among those raised by the assignments of error, is the following:

[1] 1. Was the trial court in error in instructing the jury that the plaintiff was entitled to recover, because of mere sexual intercourse of the defendant with his daughter, not accomplished by seduction under the promise of marriage or by other artifice, damages for wounded feelings and affections, etc., and punitive or exemplary damages, as set forth in the instructions above copied, in addition to compensatory damages for loss of the services of the daughter and for the expenditures alleged in the declaration?

This question must be answered in the affirmative. The declaration is in proper form for a declaration alleging seduction at common law. 1 Barton's Law Pr. pp. 401, 402; 4 Robinson's Pr. pp. 625, 626; 2 Greenl. on Ev. (14th Ed.) § 571; Fry v. Leslie, 87 Va. 269, 12 S. E. 671. The allegation in the declaration that the defendant "debauched and carnally knew" the daughter is an allegation, not merely of sexual intercourse, but of such intercourse accomplished by seduction—that is, by aid of enticement through "arts, promises, or deception." State v. Whalen, 98 Iowa, 662, 68 N. W. 554. That is to say, "to debauch" means to seduce and violate a woman. Koenig v. Nott, 2 Hilt. (N. Y.) 323, 329. Or, as defined in the Century Dictionary, "debauch" means "to corrupt with lewdness; bring to be guilty of unchastity, deprave, seduce, as to debauch a woman." But the instructions in question fall short of the allegation of the declaration on the subject under consideration. They allow recovery of punitive damages and damages for wounded feelings and affections, etc., as injuries resulting from the mere sexual intercourse with the daughter, taking place without any seduction.

[2] It is true that loss of services is at common law the basis of the action for seduction, and a plaintiff is entitled to maintain such an action and recover for loss of services, and for incidental expenses incurred by him, resulting from the mere act of sexual intercourse of the defendant with the daughter. 35 Cyc. 1304; 25 Am. & Eng. Ency. Law (2d Ed.) p. 191. The statute in Virginia (section 2896 of the Code), dispensing with the need of proof of actual loss of services has not changed that rule. Lee v. Hodges, 54 Va. (13 Grat.) 726. But, as said in the work last cited (25 Am. & Eng. Ency. Law), at page 218:

"It is, however, well settled that in cases where sexual intercourse has taken place without seduction—that is, without the aid of flattery and artifice—no recovery can be had by the father beyond compensation for the loss of services and reimbursement of incidental expenses."

See, also, to same effect, 35 Cyc. p. 1326.

The only authority cited for the plaintiff which in the holding sustains his contention that other than compensatory damages may be recovered in a case of mere sexual intercourse—that is, of such intercourse not accomplished by seduction—is that of *Barbour v. Stephenson* (U. S. C. C., Dist. of Ky.) 32 Fed. 66. The report of that case gives only the charge of the trial judge. There is frequent reference in the charge to the case being one of "seduction," to the "person seduced," "the wrongful act of seducing her," "such an injury," etc. The only issue in the case seems to have been over the identity of the person who seduced the daughter, and not over the question of whether the intercourse was accomplished by seduction. It is true, however, that in the course of the charge language is used to the effect that seduction was not necessary to sustain a recovery of damages because of the "wounded feelings" of the plaintiff, but no authority is cited to sustain that proposition, and, as we have seen above, the case is in direct conflict with the holding of all the other authorities on the subject which have been called to our attention; and in our view such case is on this point unsound in principle and we cannot give it our approval.

The case of *Lipe v. Eisenlerd*, 32 N. Y. 229, cited for plaintiff, was one of seduction so far as the report shows, and what is said in the case as reported assumes it to have been such a case, referring to the "seduction," etc.; and there was no issue in the case involving the question we have under consideration, nor was there any deliverance of the court, even as dictum, on the subject. The same is true of the cases of *Lee v. Hodges*, 54 Va. (13 Grat.) 726, *White v. Campbell*, 54 Va. (13 Grat.) 573, *Clem v. Holmes*, 74 Va. (33 Grat.) 722, 36 Am. Rep. 793, and *Fry v. Leslie*, 87 Va. 269, 12 S. E. 671, which are cited for the plaintiff.

[3] Since there was testimony for the defendant in the case before us which, if credited by the jury, was sufficient to have shown that he was not guilty of the seduction charged in the declaration all consideration of which evidence was taken from the jury by the instructions in question, the giving of such instructions constitutes reversible error.

Therefore the case must be reversed, and a new trial granted to the defendant, to be had not in conflict with the views expressed in this opinion.

Reversed.

## LUFTY v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Sept. 17, 1919.)

### 1. INDICTMENT AND INFORMATION $\S$ 110(6)—FOR ATTEMPTED RAPE; FOLLOWING STATUTORY LANGUAGE.

An indictment, alleging that defendant with force and arms upon a female child under the age of 15 feloniously did make an assault, and did feloniously attempt to carnally know and abuse, is sufficient to charge the offense of attempt to rape; conforming substantially and almost literally with Code 1904, § 3680, denouncing the crime of rape, and section 3888, prescribing the punishment for attempted crimes.

### 2. CRIMINAL LAW $\S$ 594(1) — CONTINUANCE; ABSENCE OF WITNESS.

In prosecution for an attempt to rape, where defendant, in accordance with Code 1904, § 4016, was tried at the term at which the indictment was found, the denial of a continuance because of the absence of a witness who was too unwell to appear, and who it was stated was familiar with defendant's high character and knew the character of prosecutrix and her mother, *held* not error; it appearing that the witness' testimony would be only cumulative as to defendant's high character and standing, and it not appearing that the witness, if permitted, would testify that the character of the prosecutrix and her mother was bad.

### 3. CRIMINAL LAW $\S$ 765, 834(5)—GOOD CHARACTER; INSTRUCTIONS.

The refusal of requested instruction that the character of the accused when proven is a fact to be considered, and if the jury have any doubt as to the guilt of accused, evidence of his good character should "resolve" that doubt in his favor, was proper; the court correctly substituting an instruction charging that the character of accused is a fact to be considered, and if the jury have any reasonable doubt as to guilt they should acquit, the requested instruction practically taking the case from the jury, by use of the word "resolve."

### 4. CRIMINAL LAW $\S$ 829(4)—INSTRUCTIONS; REPETITION.

In a prosecution for attempt to rape, an instruction *held* not erroneous as failing to ignore the defense, which was not guilty; the instructions given at defendant's instance fully covering his theory.

### 5. RAPE $\S$ 59(19)—INSTRUCTIONS; IGNORING ELEMENTS OF CRIME.

In prosecution for attempt to rape, an instruction that, if the female was under 15, if defendant attempted by force to have intercourse with her, and, if he did any overt act toward carrying out that purpose, he would be guilty of attempted rape, *held* not objectionable as failing to recognize the essentials of an attempt to commit a crime, which are the intent and an ineffectual act towards its commission.

Error to Corporation Court of Roanoke.

M. Lufty was convicted of an attempt to commit rape, and he brings error. Affirmed.



Hairston & Hairston, of Roanoke, for plaintiff in error.

Jno. R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Morton L. Wallerstein, of Richmond, for the Commonwealth.

KELLY, J. Lufty was indicted for an attempt to commit rape. He was tried and convicted of an assault, and sentenced to six months in prison and the payment of a fine of \$200. There are four assignments of error.

[1] 1. The indictment charges that—

The defendant "with force and arms in and upon one Ethel Garrison, she being then and there a female child under the age of 15 years, to wit, of the age of 10 years, feloniously did make an assault, and her, the said Ethel Garrison, then and there did feloniously attempt to carnally know and abuse."

The defendant demurred to the indictment and moved to quash the same "on the grounds that it insufficiently stated the crime of attempted rape." The court overruled the demurrer and motion to quash, and its action in doing so, though excepted to, was plainly right. That the defendant himself fully understood the charge against him is manifest from the very words in which he assailed it. The indictment conforms substantially, and almost literally, with the language of sections 3680 and 3888 of the Code, the former defining the crime of rape, and the latter prescribing punishment for attempted crimes.

In *Cunningham v. Commonwealth*, 88 Va. 37, 13 S. E. 309, the charge was that—

The accused, "with force and arms, in and upon one Martha Hartsock, violently and feloniously made an assault, and her, the said Martha Hartsock, feloniously did attempt to ravish and carnally know."

The indictment was held good, and the opinion of the court in that case conclusively meets and answers the objection to the indictment in the present case. And we may add, that the word "ravish" appeared in the indictment in the *Cunningham Case*, and omitted therefrom in the instant case, was not necessary to either.

In *Christian's Case*, 23 Grat. (64 Va.) 954, cited by counsel for the accused, and conceded in the brief for the commonwealth to have held that the word "ravish" must appear in an indictment for rape, it is true that the opinion delivered by Judge Anderson did announce that proposition, but a majority of the court, while concurring in the reversal of the sentence on other grounds, were of opinion that the indictment was good. Of course, the word "ravish" is not necessary in a case like this where the prosecutrix is under the age of consent.

[2] 2. The defendant was tried at the same term of court at which he was indicted. Up-

on calling his case he moved for a continuance, because of the absence of a witness, Mrs. Ayers, who had been duly summoned, but was unable to appear because too unwell, as shown by the certificate of her family physician. The motion was overruled, and the defendant excepted. So far as the record shows, the facts which this witness was expected to prove were:

"That she lived in the same block where the offense was alleged to have been committed and knew the defendant well; had been in his store frequently where the crime was said to have been committed, and knew that he was a young man of high character and standing; and that she also knew the character of the girl and her mother, who made this charge."

Section 4016 of the Code provides that the person indicted for felony shall be tried at the same term at which the indictment is found, unless good cause be shown to the contrary. Whether good cause is shown upon a motion for a continuance is a question which rests largely in the discretion of the trial court; and, while the exercise of such discretion is reviewable, the judgment of the trial court in that respect will not be reversed unless plainly erroneous; and to warrant a continuance for the absence of a witness, the evidence of such witness must be more than merely cumulative. *C. & O. Ry. Co. v. Newton*, 117 Va. 260, 263, 85 S. E. 461, and cases cited.

In this case the defendant introduced ten witnesses, who testified to his good character. Seven of these were mothers living in the immediate vicinity of the alleged crime, who testified that they and their young daughters had frequently made purchases in the defendant's store, and always found him polite and well behaved. No attack was made by the commonwealth upon these witnesses, and no effort to rebut their evidence. The testimony of Mrs. Ayers, therefore, could have been only cumulative as to the defendant's character. As to the character of the girl and her mother, it does not appear whether Mrs. Ayers, if permitted to testify at all on the subject, would have said that their character was bad, nor even that she knew anything about their reputation for truth and veracity. The character of the girl and her mother was not in issue except as witnesses.

We find no error, therefore, in the refusal of the court to continue the case.

[3] 3. The defendant asked for four instructions, all of which were given as asked, except No. 2, which was as follows:

"The court instructs the jury that the character of the accused when proven in a case, whether good or bad, is a fact to be considered by them, and if the jury from the evidence have any doubt as to the guilt of the accused, then the evidence of his good character should resolve that doubt in his favor, and you should acquit him."

The court refused to give this instruction, and substituted the following:

"The court instructs the jury that the character of the accused when proven in a case, whether good or bad, is a fact to be considered by them, and if the jury from the evidence have any reasonable doubt as to the guilt of the accused, you should acquit him."

The defendant cites Phillips on Instructions, § 995, par. 3, asserting that instruction No. 2, as requested, "is copied almost verbatim" from that authority. The instruction found in the section of Phillips on Instructions here cited is taken from Wadley's Case, 98 Va. 810, 35 S. E. 452, and is in the following language:

"The court instructs the jury that the burden of proof is on the commonwealth to prove, beyond a reasonable doubt, every essential ingredient necessary to constitute the offense charged in the indictment, and if the jury from the evidence have any doubt as to the guilt of the accused, then evidence of his good reputation may be allowed to resolve the doubt in his favor."

It is manifest, not only from the language of the instruction last quoted, and cited by the defendant in support of his original instruction No. 2, but also as an independent proposition, that there was no error in the court's refusal of No. 2 as asked, and its action in giving the same as modified in the manner above shown. A "reasonable doubt" always entitles a defendant in a criminal prosecution to an acquittal, and it is proper in a case where there is "any doubt" as to his guilt to tell the jury that evidence of his good reputation "is a fact to be considered by them," or "may be allowed to resolve the doubt in his favor"; but it is not proper to practically take the case from the jury by instructing them that upon such evidence "they should resolve the doubt in his favor and should acquit him." The instruction as given in this case was substantially the same as the one approved in Wadley's Case, and in Phillips on Instructions, cited supra.

[4] 4. The court gave the following instruction on behalf of the commonwealth:

"The court instructs the jury that if you believe from the evidence beyond a reasonable doubt that Ethel Garrison is under 15 years of age, and if you further believe from the evidence beyond reasonable doubt that the accused, Moses Lufty, attempted by force to have intercourse with her, and that he did any overt act toward carrying out that purpose, such as taking hold of her, or throwing her down, then he would be guilty of attempted rape as charged in the indictment in this case."

It is claimed that this instruction ignored the defendant's view of the case. His view simply was that he was not guilty, and the

instruction expressly recognized that view by imposing upon the commonwealth the burden of proving beyond a reasonable doubt that he did the things which were recited in the instruction, and the doing of which plainly rendered him guilty of attempted rape. The instructions given at his own instance were without conflict with that of the commonwealth, and fully covered and guarded the defendant's theory. The issue was merely that of his guilt or innocence.

[5] The further objection, that the instruction given for the commonwealth failed to recognize the two essential elements of an attempt to commit a crime—(1) the intent, and (2) some ineffectual act done towards its commission—is answered by the language of the instruction itself. Both elements are clearly embodied therein.

5. The last assignment of error is based upon the refusal of the court to set aside the verdict as contrary to the law and the evidence. It is earnestly insisted that the testimony of the prosecutrix, corroborated by that of her 8 year old girl companion, is incredible and unbelievable. It may be conceded that the story as told by them appears improbable. Upon a careful examination of all of the evidence, however, we are of opinion that the case is one in which we cannot interfere with the verdict of the jury.

We find no error in the judgment complained of, and the same must be affirmed.

Affirmed.

BURKS, J., absent.

(126 Va. 54)

NICKELS' ADM'R v. HORSLEY et al.

(Supreme Court of Appeals of Virginia. Sept. 17, 1919.)

1. EXECUTORS AND ADMINISTRATORS ⇐35(19)  
—REVOCATION OF APPOINTMENT NOT REVIEWABLE UNLESS PLAINLY WRONG.

An appellate court will not review an order granting a motion under Code 1904, § 2687, for the revocation of the appointment of an administrator, except where manifest injustice has been done, or where it is plain that proper case has not been made for the exercise of the discretionary power of removal.

2. EXECUTORS AND ADMINISTRATORS ⇐35(2)—  
REMOVAL FOR ADVERSE INTEREST.

Where a surviving partner, who was appointed administrator of his deceased copartner, failed to return any inventory within the time required by statute, and it appeared from his conduct that he was hostile and adversely interested to the distributees, his appointment was properly revoked.

**3. PARTNERSHIP** **↔258(2)—DEATH OF PARTNER; ADMINISTRATOR'S RIGHT OF ACTION AGAINST SURVIVOR.**

Unless there be exceptional circumstances, the administrator of a deceased partner is the only one entitled to sue to recover from surviving partners any balance due the estate of the deceased partner.

Error to Circuit Court, Scott County.

Motion by one Horsley and others for the revocation of the appointment of J. C. Parrish, as administrator of J. C. Nickels, deceased. From an order granting the motion, the administrator brings error. Affirmed.

S. H. Bond, of Gate City, and Will H. Nickels, of Bristol, for plaintiff in error.

W. S. Cox, of Gate City, for defendants in error.

PRENTIS, J. This is a motion under section 2687 of the Code for the revocation and annulment of the powers of J. C. Parrish as administrator of J. C. Nickels, deceased, made by the surviving husband and children of Margaret Horsley, who was the daughter of the decedent. The trial court sustained the motion, and the plaintiff in error is here complaining of the order revoking and annulling his appointment.

[1] The rule which controls this court in such cases is stated in *Reynolds v. Zink*, 27 Gr. (68 Va.) 31. The statute vests the court, under the order of which the fiduciary derives his authority, with the right and duty to revoke and annul his power whenever from any cause it is proper, and this is said:

"There must, of necessity, be vested in that court a very large discretion; and while it is a legal discretion, to be exercised in a proper case, an appellate court ought not to interfere, except in a case where manifest injustice has been done, or where it is plain that a proper case has not been made for the exercise of the powers which the Legislature has specially conferred upon that court, from which the fiduciary derives his authority." *Snavely v. Harkrader*, 29 Gr. (70 Va.) 128.

[2, 3] It is clear that the discretion of the trial court was properly exercised. The record shows that the administrator was appointed with the concurrence of his wife who is a daughter of the decedent, and of the other distributees who together are entitled to three-fourths of the estate. The other one-fourth belongs to the defendants in error. The administrator is the surviving partner of the decedent. He failed to return any inventory or appraisal within four months of the date of his qualification as required by the statute. The partnership appears to have been engaged in farming and stock-raising. He sold a large portion of the assets as surviving partner, in which he claims a one-half

interest after payment of certain debts. The total net balance arising from the sale of these copartnership assets is shown to be \$16,471.04. Of this amount the administrator claims one-half, or \$8,235.52, by virtue of his interest in the partnership, and he charges against a like amount representing his deceased partner's interests in the partnership assets the sum of \$7,006.62, leaving for the estate of his deceased partner, as representing his interest in these assets, only the sum of \$1,228.90. This large debit against his deceased partner is nowhere explained. Then there are two sums, one of \$385.74 and one of \$385.64, paid apparently on different dates to his wife, Nannie E. Parrish, out of the estate of the deceased, whether on account of her distributive share therein, or in settlement of a debt or debts, does not appear, and the accounts as shown by the record need much explanation. On the date of the sale of the partnership property, which he appears to have sold both as administrator and as surviving partner, he had others bidding on his account, and, when his son made a bid, he complained to him and told him that the previous bid was made in his (the administrator's) interest.

Nannie E. Parrish, his wife, and others instituted a partition suit for a division of the real estate belonging to the decedent, in which it is alleged that in some of the land her husband has a one-half interest, although the legal title is in the name of her father, the decedent, and he, the administrator, in his own right filed an answer to that bill, signed by two of counsel who also represented the complainants, admitting the allegation that he owned the interest in the land as stated in the bill, averring that it had been paid for with partnership funds, and that the reason the deed was taken in the name of the deceased instead of in the partnership name was because he was a notary public and desired to save the expense of having another notary take the acknowledgment.

There are other matters shown by the record which make it difficult to separate the individual from the copartnership property, and it is clear that there are conflicting interests between the administrator, claiming in his own right as surviving partner of the decedent, and the heirs at law and distributees claiming under the decedent. In this state of affairs there should be an administrator who should thoroughly investigate the partnership affairs, ascertain just the nature of the partnership and the true state of the accounts, so as to make the proper distribution of the assets as between the surviving partner and the distributees of the estate of the decedent.

In 2 Schouler on Wills, etc. (5th Ed.) § 1104, p. 1016, this is said:

"One may be considered unsuitable for the appointment who holds already some other trust whose interests decidedly conflict with those of the estate in question. Or who is largely indebted to the estate, especially if the amount due has not been ascertained. Or who was partner of the deceased at the time of his death. Or who is hostile to another of the next of kin. Or who is otherwise so adversely interested to heirs, creditors, or other kindred, as to prejudice the due settlement of the estate, if it be placed under his charge. For the administrator should be interested in settling the estate, not unfaithfully or partially, but faithfully, for the welfare of all concerned."

In *Cornell v. Gallaher*, 16 Cal. 367 (construing a statute), *Heward v. Slagle*, 52 Ill. 336, and *Estate of Brown*, 11 Phila. 127, it is determined that a surviving partner of an intestate ought not to be appointed administrator of his deceased partner's estate.

Where there are antagonistic interests, and the probability that the administrator will be called on to conduct litigation between himself individually and himself as administrator of the decedent, it is clear that he should not be appointed; and, if these antagonisms develop after the appointment, he should be removed. It is upon this principle that it has been decided that the surviving partner of an intestate ought not to be appointed his administrator. 11 R. C. L. p. 50. It may well be doubted whether a surviving partner should ever be appointed administrator of his deceased copartner, but certainly in this instance, where sharp conflicts as to their respective rights have arisen, he should be removed, for the surviving partner, while having full control over the partnership assets, is the debtor of his deceased copartner for any balance due to his estate and unless there be exceptional circumstances the administrator only can sue for such balance. *Tennant v. Dunlop*, 97 Va. 234, 33 S. E. 620; *Conrad v. Fuller*, 98 Va. 16, 34 S. E. 893; *Reager's Adm'r v. Chappelle*, 104 Va. 14, 51 S. E. 170.

The order appealed from is plainly right. Affirmed.

(126 Va. 39)

### LOYD CORPORATION v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Sept. 17, 1919.)

#### TAXATION @406—ASSESSMENT OF OMITTED PROPERTY.

Where a corporation disclosed to the commissioner of revenue all of its assets and gave the commissioner information from which he could have determined the value of the assets, held that, though the commissioner undervalued the assets, consisting largely of corporate stocks, and such valuation was not changed for several

subsequent years, the corporation, in view of Code 1904, § 491, was entitled to the benefit of section 508, as amended by Acts 1916, c. 491, and was not liable as for omitted taxes because of the undervaluation.

Error to Circuit Court, Washington County.

Motion by the Loyd Corporation against the Commonwealth to be relieved against an assessment for omitted taxes alleged to be erroneous. The court relieved the Corporation of taxes for the year 1910, but refused to relieve it for the other years, and the Corporation brings error, and the Commonwealth assigns cross-errors. Reversed.

F. S. Kirkpatrick, of Lynchburg, and J. Irby Hurt, of Abingdon, for plaintiff in error. Jno. R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and F. Briggs Richardson, of Richmond, for the Commonwealth.

BURKS, J. The Loyd Corporation made a motion before the circuit court of Washington county to be relieved from an assessment of omitted taxes for the years 1910 to 1914, both inclusive, which it alleged to be erroneous. The court relieved it of the taxes for the year 1910, but refused to relieve it for the other years. To this action of the court the corporation excepted, and its action is brought under review by this writ of error.

The Loyd Corporation was chartered in 1910, with its chief office at Abingdon, in Washington county. Its assets consisted wholly of choses in action which had belonged to the estate of William H. Loyd, deceased, which had been previously listed for taxation in the city of Lynchburg, where Loyd resided at the time of his death. The company had been chartered as a holding company to keep together the estate of the decedent. The assets turned into the company consisted of stock in the banks of Lynchburg, stock of the Western Union Telegraph Company, stocks in sundry coal companies, and bonds and notes of private persons for money loaned them. These coal stocks were very closely held, and it could hardly be said that they had a market value, but in the organization of the company they were listed at prices much in excess of any sales that had been made thereof.

In January, 1910, S. M. Loyd, the president of the company, went to Abingdon, and interviewed the commissioner of the revenue with reference to furnishing him a list of the assets of the company for taxation. This interview lasted over two hours, and Loyd furnished the commissioner a complete itemized list of all the stocks, bonds, and other property liable to taxation, and answered every question put to him by the commissioner. This list, however, did not affix any values to the several stocks listed, though

it named the several companies in which stock was held, and correctly stated the number of shares held in each. There is no controversy here over the value placed upon any of the property except the coal stocks. The bonds and notes above mentioned were listed at their face value. The commissioner was informed by Mr. Loyd that Mr. Snead, the commissioner in the city of Lynchburg, could give the proper amounts at which the bank stock should be assessed, and this information was obtained from Mr. Snead, and the bank stock was listed accordingly. Loyd informed the commissioner that he did not know the value of the Western Union stock, but thought it was selling for about 70. He said, however, that the stock was listed on the New York Stock Exchange, and he could ascertain its value from almost any daily paper. The commissioner listed this stock at 50. There is a conflict of testimony as to what took place with reference to the valuation of the coal stocks, but the preponderance of the testimony is that Loyd told the commissioner that Mr. Snead, the commissioner in Lynchburg, had assessed some of these stocks at over \$200 per share. The commissioner listed one group of them at \$50 per share, another at \$75 per share, and two others at \$100 per share, and asked Loyd if these values were satisfactory, and he replied that they were. The par value of these stocks was \$100 per share, and the actual values of most of them not less than \$250 per share. The stock of the Western Union Telegraph Company was worth at least \$70 per share, but was listed by the commissioner at \$50 per share. Tangible personal property of other persons was listed at about three-fourths of its value. For the years subsequent to 1910 no further conferences were held with the commissioner, but each year the Loyd Corporation furnished the commissioner written lists of the number of shares of stock held by it in these same coal companies, annexing the same values to each that the commissioner had annexed to them in 1910. It does not appear that there was any change in such values during the years mentioned. Subsequently the examiner of records for the district listed these stocks for omitted taxes for the years 1910 to 1914, both inclusive, and in this list he valued the Western Union stock at \$71.50 per share, and increased the assessment on 19 shares of coal stock from \$50 per share to \$75 per share, and 80 shares from \$100 a share to \$200 a share, and 50 shares from \$100 a share to \$250 a share, and 100 shares from \$75 a share to \$250 a share. These were the changes made for the year 1910. In the subsequent years the lot of 100 shares had been listed by the corporation at par. It is not claimed that the valuations of the examiner are excessive.

It is not claimed by the commonwealth that the Loyd Corporation has concealed any

of its assets, or that it has failed to furnish a complete itemized list thereof. The entire controversy arises over the valuation of the four groups of coal stocks. The commonwealth contends that it was as much the duty of the corporation to give the value of these stocks as it was to give the names of the companies and the number of shares held in each, and that, having failed to state the fair cash value thereof, the corporation has not made a "full disclosure" of its assets, and hence is not entitled to the benefit of section 508 of the Code, as amended by act of March 22, 1916 (Acts 1916, p. 826). The president of the corporation told the commissioner that he did not know the value of the stocks, as they were not quoted on any market and were closely held, and, as already stated, the preponderance of the testimony is that he told the commissioner that some of them had been assessed by the commissioner in Lynchburg at over \$200 a share. We think it also sufficiently appears that the commissioner knew that these stocks formerly belonged to a citizen of Lynchburg, and had been there listed by a commissioner of the revenue who stood very high in the estimation of the taxing officers of the state.

While it is the duty of the citizen to return a list of his personal property and the value thereof, it is made the duty of the commissioner by section 491 of the Code (1904) to call upon him for such list, and if he neglects or refuses to give it, the commissioner is given ample power and authority by that section to obtain the needed information from other sources. The commissioner could readily have gotten the value of the Western Union stock, as he admits, from the newspapers circulating in his home town, and, according to the preponderance of the testimony, he was furnished with information from which he could have readily ascertained the fair value of the coal stocks for the purpose of assessment. He did not consult either. The circuit court exonerated the corporation for the year 1910, but refused exoneration for the other years. If the corporation was entitled to exoneration for 1910, we do not perceive any good reason why it was not also entitled to exoneration for the other years. There was no change in the value of the stock, according to the testimony, between 1910 and 1914, and if it was correctly valued in 1910 it was correctly valued for the other years. In the absence of any evidence to the contrary, the officers of the corporation had the right to assume that the commissioner would place the same value on the stock in the subsequent years that he placed on them in 1910, and the valuations submitted by the corporation became the valuations of the commissioner when accepted by him and placed on the tax list. He was not bound by the valuations submitted by the corporation, and if not satisfied with them he should have placed a proper valua-

tion thereon. As said in *Union Tanning Co. v. Commonwealth*, 123 Va. 610, 96 S. E. 780, commissioners of the revenue "act and are required by statute, indeed, to act upon their own knowledge, or upon any means of information they may have, that is, upon their own opinion based upon such information as they may have; and although it is their duty to receive and they should not arbitrarily disregard the lists of the returns and statements of property owners, they are not bound thereby."

The commonwealth makes no charge of fraud against either the commissioner or the officers of the corporation, but only that these coal stocks were assessed at "less than the law required." At the first interview the president of the corporation had not asked or suggested a low assessment, but only that his company be treated as other citizens. The commissioner was pleased that the corporation had selected Abingdon as its home office, and readily agreed that such treatment should be accorded. All other personal property in the district, except loans of money, was assessed at much less than its actual cash value, and the commissioner, without adequate investigation and inquiry, assessed the stocks at far below their cash value. The president of the corporation naturally acceded to his valuations and said they were acceptable. The taxes at these valuations were regularly paid from year to year, and it only remains to inquire whether, under these circumstances, there has been that "full disclosure" which entitled the corporation to the benefit of the provisions of section 508 of the Code (1904) as amended.

Section 508 of the Code (1904), as amended by the act of 1916 (Acts 1916, p. 826), is as follows:

"If the commissioner of the revenue \* \* \* ascertain that any person, or any real or personal property, or income, or salary, or license tax has not been assessed for taxation for any year by the state, county, district, city or town, or that the same has been assessed at less than the law required, for any year, \* \* \* it shall be the duty of the commissioner of the revenue \* \* \* to list the same, and assess persons, property (real, personal and mixed) and levies at the rate prescribed for that year, adding thereto interest at the rate of six per centum per annum. Provided however. \* \* \*

"7. In the case of omitted taxes whenever the taxpayer has made full disclosure of his taxable property (real estate, tangible or intangible personal property, money and income), and in cases of tangible and intangible personal property, money and income, as enumerated on his returns the items thereof, and there has been an assessment made in good faith by the tax officer, although made under misapprehension of the law, such assessment as to the valuation of such property shall be final; but in cases in which there has not been a full disclosure and enumeration of his tangible and intangible personal property, income and money, whether intentional or otherwise, such assessment shall not be considered final, but in contested cases

the burden shall be upon the taxpayer to show that he has made a full disclosure."

The first part of this section down to the proviso is substantially the same as it was before amendment, so far as it affects the question here at issue. But it is manifest that the Legislature intended to make very substantial changes in the law in the interest of the taxpayer. It is a matter of common knowledge that personal property of all kinds had for years been assessed at less than its actual cash value, and it was the purpose of the Legislature to make the question of the values returned by the commissioner final in cases within the purview of proviso 7 above quoted. The substance of that proviso is that in case of omitted taxes, wherever the taxpayer has made a full disclosure of his taxable property, and the items thereof, and there has been assessment in good faith by the tax officer, although made under a misapprehension of law, such assessment as to the valuation of such property shall be final. In the case at bar it is admitted that the corporation did furnish the commissioner a complete list of all of its property "and the items thereof," but it is claimed that the statute is inapplicable because the list did not give the actual cash value of each item. If the list furnished had given the actual cash value of the stocks, there would have been nothing to correct, and to hold that the statute was only applicable to that class of cases would be to render the statute wholly nugatory in that respect. It is true that the first part of the section, which was the old law, does provide that, if the commissioner or examiner of records shall ascertain that any property "has been assessed at less than the law required for any year," it shall be his duty to list the same at the rate prescribed for that year, adding interest at 6 per cent., and there may be cases falling within these terms and not within the terms of proviso 7 (a question not now decided), but if there is conflict between the two, then the proviso must prevail, as the later expression of the legislative intent. We are of the opinion, however, that the *Lloyd Corporation* made a full disclosure of all of its taxable property, and of the items thereof, for the years 1910 to 1914, both inclusive, within the meaning of the statute, that the assessment thereof was made in good faith, and that therefore the valuation thereof by the commissioner is final, and cannot now be disturbed.

In *Union Tanning Company v. Commonwealth*, supra, omitted taxes from 1908 to 1915 were assessed, and it appeared that no return of any kind was made for the year 1908, and that for the years 1909 to 1915, inclusive, the returns—

"did not enumerate the items of bark or hides composing its intangible property listed on such returns, but gave only what was listed as the

aggregate fair cash values thereof for the respective years. \* \* \* The only information on the subject given by the company to the commissioner of the revenue to whom such returns were made and who made such assessments was 'the amount and value of the bark and hides' aforesaid, read from the books of the company."

It was there said that—

"This evidence is obscure as to whether the number of hides or pounds of bark were read to the commissioners of the revenue from the books of the company, or just what 'amount' or what 'value' was so read. We do not think that such character of proof is sufficient to show that there was 'a full disclosure' of such bark and hides to the commissioners of the revenue."

The facts of that case are radically different from these in the case at bar.

The commonwealth assigns as cross-error the action of the circuit court in exonerating the plaintiff in error from the payment of omitted taxes for the year 1910. For the reason hereinbefore stated, we are of opinion that the circuit court committed no error in this respect, but that it did err in failing to exonerate the corporation also from such taxes for the years 1911 to 1914, inclusive, and that for this error its judgment must be reversed.

Reversed.

(126 Va. 715)

MARTIN et al. v. COMMONWEALTH (two cases).

(Supreme Court of Appeals of Virginia. Sept. 17, 1919.)

1. COURTS ⇨97(5) — DECISION OF FEDERAL SUPREME COURT BINDING ON STATE COURT.

Decisions of the Supreme Court of the United States upon all questions involving interstate commerce are conclusive upon the state courts.

2. CRIMINAL LAW ⇨560—DEGREE OF PROOF.  
Suspicion of guilt cannot be substituted for proof.

3. CRIMINAL LAW ⇨308 — PRESUMPTION OF INNOCENCE.

All men will be presumed to be innocent until their guilt has been established beyond a reasonable doubt.

4. INTOXICATING LIQUORS ⇨138—TRANSPORTATION OF LIQUORS THROUGH STATE NOT VIOLATION OF PROHIBITION LAW.

Employees on an interstate train passing through the state were passengers, and could not be convicted under the State Prohibition Law by proof that more than one quart of liquor was found in their possession, in the absence of evidence that they intended to dispose of the same while in the state; such employees being protected by the Commerce Clause of the federal Constitution, and the Reed Amendment (U. S. Comp. St. 1918, § 8739a)

to the Webb-Kenyon Act March 1, 1913 (U. S. Comp. St. § 8739), not prohibiting the transportation of liquor through a state.

5. INTOXICATING LIQUORS ⇨138—TRANSPORTATION THROUGH STATE NOT PROHIBITED.

Acts 1916, c. 146, does not prohibit the transportation of liquor through the state, nor a passenger passing through the state from having liquor in his possession while on the train of an interstate carrier passing through the state.

6. INTOXICATING LIQUORS ⇨224—BURDEN OF PROOF; POSSESSION OF LIQUOR.

An employé on a train of an interstate carrier passing through the state did not have the burden, under Acts 1916, c. 146, to prove that he was on an interstate journey through the state; although ardent spirits in excess of one quart were found in his possession, the evidence for the state showing that the liquor was found upon the train itself.

Sims, J., dissenting.

Error to Corporation Court of Roanoke.

Martin and White were convicted for violation of the Prohibition Law, and bring error. Reversed.

Hoge & Darnall and Hairston & Hairston, all of Roanoke, for plaintiffs in error.

Jno. R. Saunders, Atty. Gen., and J. D. Hank, Jr., Asst. Atty. Gen., for the Commonwealth.

PRENTIS, J. The accused were jointly indicted, tried, convicted, and sentenced for violation of the prohibition law (Acts 1916, p. 215). The indictment was comprehensive, as is authorized under the Virginia statute, and charged them with the possession and transportation of intoxicating liquor in violation of the state law.

There is no conflict in the testimony, and the facts shown are that the accused were both employes on a dining car, part of an interstate train, running from New York City to Memphis, Tenn.; that while this train stopped for a few minutes in the city of Roanoke, Va., the police officers boarded the train, arrested the accused while they were in the discharge of their duties upon said dining car, before either had left the train or indicated any purpose to do so; and that they were going through the state of Virginia on that train in the performance of their duties. Upon a search of the car and of certain parts of it to which the accused had access, a quantity of liquor in excess of the amount then allowed by the Virginia statute was found in their possession.

[1] A mere statement of these facts seems sufficient to show, under the decisions of the Supreme Court of the United States, the final arbiter upon all questions involving interstate commerce, that these convictions cannot be sustained.

It is claimed for the commonwealth that while the general rule is that no state law can operate upon the subjects of interstate commerce, various acts of Congress have been adopted which remove the inhibition as to intoxicating liquors transported in interstate commerce, and authorize the enforcement of penalties imposed by state laws for illegal traffic in such liquor.

The first of these statutes, generally spoken of as the Wilson act, was passed following the decision in *Lelsy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128, in which the court held that ardent spirits being recognized by the usages of the commercial world as property, and subjects of exchange, barter, and traffic, therefore no state could burden interstate commerce in that commodity, and that, whether prohibited by state law or not, the right of transportation of intoxicating liquors from one state to another, included the right of the consignee to sell such imported liquor in violation of state law in unbroken packages at the place where the transportation ended, and that it was only after the transportation was completed and the liquor was mingled with and became a part of the general property of the state that state regulations with reference thereto could be enforced.

The Wilson Act of August 8, 1890 (26 Stat. L. 313, ch. 728; Comp. Stat. § 8738) subjected intoxicating liquors transported in interstate commerce to the exercise of the police power of the state, just as if it had been produced in such state, and whether introduced therein in original packages or otherwise. This act was construed in *Wilkerson v. Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572, and in *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088. The practical effect of this statute, as construed, was to allow persons to continue to receive intoxicating liquors from other states, notwithstanding the inhibitions of state laws, but prohibited the sale of such liquors, although in the original packages, contrary to such state laws.

Then, in further aid of the prohibition laws of the states, the Webb-Kenyon Act of March 1, 1913, was passed. 37 Stat. L. 699, ch. 90; Comp. St. § 8739. This act prohibits the transportation of intoxicating liquors from one state into any other state, either in original packages or otherwise, in violation of any such law of such state. This statute was reviewed and construed by the Supreme Court of the United States in *Adams Express Co. v. Kentucky*, 238 U. S. 190, 35 Sup. Ct. 824, 59 L. Ed. 1267, L. R. A. 1916C, 273, Ann. Cas. 1915D, 1167, and in *James Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U. S. 311, 37 Sup. Ct. 180, 61 L. Ed. 326, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845. Mr. Chief Justice White, in the last-named case, said that this act was intended simply to extend that which was done by the Wilson act—"that

is to say its purpose was to prevent the immunity characteristic of all interstate commerce from being used to permit the receipt of liquor through such commerce in states, contrary to their laws, and thus, in effect, afford a means by subterfuge and indirection to set such laws at naught." These acts provide that state laws should operate upon intoxicating liquors introduced into a state in violation of the state law, but it was still no violation of state and federal law to transport such liquors through a state in interstate commerce.

Then what was known as the Reed Amendment (39 Stat. L. 1069, c. 162; Comp. St. 1918, § 8739a) was adopted March 3, 1917, which imposes a penalty for ordering, purchasing or causing the transportation of intoxicating liquors in interstate commerce (except for scientific, sacramental, medicinal or mechanical purposes) into any state or territory which prohibits the manufacture or sale therein of intoxicating liquor, for beverage purposes. This later act has been construed by the Supreme Court of the United States in two recent cases, *United States v. Dan Hill*, 248 U. S. 420, 39 Sup. Ct. 143, 63 L. Ed. 337, where it is decided that although the laws of the state of West Virginia expressly authorize the transportation and use of a limited quantity of liquor for beverage purposes, the transportation of any quantity of liquor into West Virginia in violation of Reed Amendment is punishable under that act; and in the case of *United States v. Gudger*, 249 U. S. 373, 39 Sup. Ct. 323, 63 L. Ed. 653, where it is decided that the Reed Amendment, while it prohibits transportation of intoxicating liquor in interstate commerce "into" any state or territory, the laws of which prohibit the manufacture and sale of intoxicating liquors for beverage purposes, does not prohibit the movement through such a state as a mere incident to the transportation into another state, whether such transportation be by personal carriage or by common carrier. In that case the conceded facts were that the accused was a passenger on a railroad train from Baltimore, Md., to Asheville, N. C., and that while the train was temporarily stopped at the station at Lynchburg, Va. he was arrested, his baggage examined, and it was found that he had in his possession seven quarts or more of whisky; that he had no intention of leaving the train at Lynchburg or any other point in Virginia; and that his sole intention was to carry the liquor with him into the state of North Carolina, to be there used as a beverage. The charge in the indictment that the accused caused to be transported liquor to Lynchburg, in the state of Virginia, had no other foundation than the fact that he was arrested while the train was stopped at the railroad station at Lynchburg, Va., and while he was en route to Asheville, in the state of North Carolina. Upon this



state of facts, the Supreme Court of the United States determined that the judgment of the trial court quashing the indictment was clearly right, because of opinion that there is no ground for holding that the prohibition of the statute against transporting liquor in interstate commerce into any state or territory the laws of which state or territory prohibit the manufacture, etc., includes the movement in interstate commerce through such a state to another. This is said by way of conclusion:

"No elucidation of the text is needed to aid cogency to this plain meaning, which would, however, be reinforced by the context if there were need to resort to it, since the context makes clear that the word 'into,' as used in the statute, refers to the state of destination, and not to the means by which that end is reached—the movement through one state as a mere incident of transportation to the state into which it is shipped. The suggestion made in argument that, although the personal carriage of liquor through one state as a means of carrying it beyond into another state violates the statute, it does not necessarily follow that transportation by common carrier through a state for like purpose would be such violation, because of the more facile opportunity in the one case than in the other for violating the law of the state through which the liquor is carried, is without merit. In last analysis it but invites, not a construction of the statute as enacted, but an enactment by construction of a new and different statute."

What the Congress has done then is to withdraw the protection of commerce clause of the Constitution from intoxicating liquors which are transported in violation of the laws of the state into such state. None of these acts, however, contain any suggestion that a state law can operate upon intoxicating liquor as the subject of interstate commerce while being transported through such state. The purpose of the Congress is avowed and apparent, and that is to prevent the citizens of one state, under the cover of interstate commerce, from violating the prohibition laws of another state by the introduction of intoxicating liquors therein. There is no suggestion anywhere, either in these statutes or decisions, that state can lawfully prohibit the transportation of intoxicating liquor through such state. The Legislature of Virginia, in enacting the prohibition law, fully recognized this accepted doctrine, and has never claimed the right to prohibit such transportation through the state. The Virginia act by express language and clear implication prohibits the introduction of the liquor into the state, but does not prohibit its transportation through the state in interstate commerce.

[2-5] Under the facts of this case then, unless suspicion is to be substituted for proof, and the rule that all men are presumed to be innocent until their guilt has been established beyond a reasonable doubt is to be ab-

rogated, it is clear that the commonwealth has failed to establish the guilt of the accused. As employes on an interstate train passing through the state, they were passengers, and there is no indication in the evidence of any use or distribution of the liquor in the state of Virginia. It is not contended that the state laws could operate upon liquor in the possession of a common carrier while being transported through the state, and under the facts of this case these defendants are equally protected by the commerce clause of the Constitution. Under the decision in *United States v. Gudger*, supra, we are of opinion that the question is not an open one, for the state statute prohibiting the introduction of intoxicating liquor into the state in violation of its laws should receive the same construction as the like prohibition in language of similar import contained in the Reed Amendment. At the time this alleged offense was committed, it was not a violation of either federal or state law to transport intoxicating liquor through the state of Virginia in interstate commerce.

[6] It is contended that, inasmuch as ardent spirits in excess of one quart were found in the possession of each of the accused, the burden was upon them to prove that they were on an interstate journey, and *Lucchesi v. Commonwealth*, 122 Va. 872, 94 S. E. 925, is cited to sustain this contention. A sufficient reply to this is that in the *Lucchesi* Case the commonwealth proved that the accused had left the train in Richmond, where he resided, and was found in possession of a quantity of liquor in excess of that allowed by law. His defense was that he was on his way to his room, and that he intended to leave Richmond on an early train, and thus to continue his journey to North Carolina. The commonwealth, in that case, having established a prima facie case, it was properly said that the burden was upon the accused to prove his defense. In this case, however, the commonwealth had not proved a prima facie case; indeed, in our view of the evidence, it had proved facts from which but one fair inference could be drawn, and that is that the defendants were upon an interstate journey, carrying the liquor with them and had violated no statute of Virginia.

Other questions are discussed in the briefs, but as they have been decided and sufficiently discussed in previous opinions of this court, we think it unnecessary to prolong this opinion by repeating what has been recently said in *Pine & Scott v. Commonwealth*, 121 Va. 812, 93 S. E. 652; *Pettus v. Commonwealth*, 123 Va. 800, 96 S. E. 161; *Sickel v. Commonwealth*, 124 Va. —, 97 S. E. 783; *Burton v. Commonwealth*, 122 Va. 847, 94 S. E. 923. Reversed.

SIMS, J. (dissenting). The majority opinion deals with the case as if it were one merely of interstate transportation of liquor. It

is upon this point that I am constrained to dissent.

The liquor was found and seized under search warrants regularly issued and executed in accordance with the prohibition act, hereinafter more particularly referred to. And the vital fact proved in the case by the commonwealth is that liquor in excess of the quantity allowed by law to be transported within the state was found in the possession of the accused within the state in a place other than the home of the accused. The liquor consisted of 15 pints of whisky belonging to the accused, Martin, and 3 quarts 2 pints and 1 pint bottle two-thirds full belonging to the accused, White, and was found in the city of Roanoke on the "Memphis Special" train, in the dining car thereof, in places therein occupied by the accused respectively. The first-named liquor was in a grip, upon a pantry shelf, covered by a coat belonging to Martin, who first denied that there was any whisky on the car, but who after such liquor was found admitted that it was his. The other liquor was in a locker occupied by White on a high shelf in the pantry near the top of the car, and White admitted after the liquor was found that this liquor was his. Further, \$49 was found upon the person of Martin, all consisting of one dollar bills, except three two dollar bills; and \$145 was found on the person of White, consisting of denominations of probably one twenty-dollar bill and of ten, five, and one dollar bills, but mostly one dollar bills.

Section 28 of the prohibition act of the state (Acts 1916, at page 232), so far as material, provides as follows:

"Whenever ardent spirits shall be seized in any room \* \* \* car or other place, searched under the provisions of this act, the finding of such ardent spirits \* \* \* in any such place, shall be prima facie evidence of the unlawful selling, keeping and storing for sale, gift, or use, by the person or persons occupying such premises, \* \* \* and the \* \* \* person in charge of the premises where such ardent spirits are found, \* \* \* shall be tried on the charge of selling, and keeping and storing for sale unlawfully, such ardent spirits, under the indictment and form prescribed in section seven of this act. \* \* \*

Section 65 of the same act, so far as material, provides as follows:

"The possession by any person of any ardent spirits, at any place other than his home, except as provided in this act, \* \* \* shall, in any proceeding or prosecution under this act, be prima facie evidence that such person possesses such distilled liquors \* \* \* for the purpose of sale. \* \* \*

It will be observed that section 28 above quoted goes beyond section 65, also above quoted, in its effect, and makes the finding of the liquor in such a place as it was found in the case in judgment not merely prima facie evidence of the purpose of sale of it, but such evidence of the factum itself of

the "unlawful selling, keeping and storing for sale, gift or use by the person or persons occupying such premises" of such ardent spirits.

The indictment in the case in judgment is under section 28 and not section 65 aforesaid, and is in the form prescribed by section 28, and charged the accused with the said offenses mentioned in said section 28.

The verdict of the jury found both of the accused guilty as charged in the indictment.

In view of the facts above mentioned, which were proved by the commonwealth, there can be no doubt that there was ample evidence to sustain the verdict of the jury in finding as they did, in effect, that the accused were guilty of the "unlawful selling, keeping and storing for sale, gift or use" of ardent spirits on said train in the city aforesaid and within the state of Virginia, contrary to the provisions of said statute; even if the accused had testified that they had the liquor with them for the sole purpose of the interstate transportation of it, or had offered or there had been other evidence in the cause tending to rebut the prima facie case to the contrary made against them by the evidence for the commonwealth as aforesaid. As a matter of fact, however, neither of the accused testified in explanation of their possession of the liquor aforesaid; and there was no evidence in the case, or offered, even tending to show that the accused were not guilty of the "unlawful selling, keeping and storing for sale, gift or use" of the liquor as aforesaid, except the sole circumstance that the accused were themselves on an interstate journey. Now manifestly the fact that the accused were themselves on an interstate journey was not in itself conclusive of the fact that the liquor was on such a journey. It may or it may not have been. That was a question of fact for the jury upon all the evidence in the case when such evidence was weighed as prescribed by said statute. It was for the jury to say whether the prima facie case made by the evidence for the commonwealth, as aforesaid, was rebutted by the mere fact that the accused were themselves on an interstate journey under the circumstances disclosed by the evidence. And under the statutory rule applicable to the evidence, as it must be regarded in this court after verdict, it is plain, as it seems to me, that the verdict aforesaid cannot be disturbed by us.

Of course, if there were no provision of statute, such as that aforesaid, giving to the finding of the liquor, as aforesaid, the effect of the prima facie evidence aforesaid, the case would be different. But that statute is a police regulation, and applies to all ardent spirits in excess of the quantity allowed by law to be carried with them by travelers, when seized and found within the state, as in the case in judgment. And the fact that one found in possession of the liquor so seized

is himself on an interstate journey is manifestly immaterial, if the liquor itself is not on such a journey. If the liquor is being sold, or kept or stored for sale, gift, or use within the state, as the traveler passes through it, the interstate character of the journey of the traveler cannot be rightly held to exempt him from punishment for violation of the statute of the state prohibiting such sale, keeping, and storing for sale, gift, or use. Hence the statute aforesaid applies the prima facie presumption aforesaid to the finding of the ardent spirits within the state under the circumstances aforesaid, regardless of the nature of the journey of the person or persons in whose possession it may be found; and in such case, under the statute, the liquor is prima facie not on an interstate journey—the case is not prima facie one of interstate transportation of liquor—although the person found in possession of it may himself be an interstate traveler.

And but slight reflection makes it apparent that a different holding, such as that of the majority opinion, must result in nullifying the statute aforesaid to the extent of rendering its provision as to prima facie evidence aforesaid inapplicable to all violators of the law who may adopt the device of doing so as interstate travelers. All that such an one need do is to become an interstate traveler, and he will thereby become exempt from the rule of evidence aforesaid to which all intrastate travelers are amenable; and he may sell, keep, and store for sale, gift, or use ardent spirits as he passes through the state, and be exempt from punishment, unless the commonwealth should chance to be able to produce evidence of an actual unlawful sale, gift, or use thereof. By such construction of the law interstate travelers are put in a class by themselves, exempting them from the operation of a very important and vital provision of the state statute—so vital, indeed, that, as experience has shown, the statute will be rendered practically nugatory as to such travelers. I cannot give my assent to such a construction of the law. I am of opinion that under our system of government interstate travelers are as much subject and amenable to all the police statutes of a state as are intrastate travelers and citizens of the state; and there is no decision of any of our courts, state or federal, to the contrary, of which I am aware, nor can be in accordance with true legal principles.

In the case of *United States v. Gudger*, 249 U. S. 373, 39 Sup. Ct. 323, 63 L. Ed. 653, cited in the majority opinion as controlling the case in judgment, the fact affirmatively appeared on the trial that that was a case merely of interstate transportation of liquor—a case where the “sole intention” (of the accused) “was to carry the liquor with him” from without, thence, through the state of

Virginia, into another state, “to be there used as a beverage.” That was the fact conclusively appearing against the commonwealth in that case. If such had been the fact in the case in judgment, the *Gudger* Case would have been controlling of it, but not otherwise. And, as we have seen, such fact did not conclusively appear in the case in judgment. It was in issue before the jury, and was found against the accused upon ample evidence to sustain the verdict.

I am therefore of opinion that there was no error in the refusal of the trial court to set aside the verdict, and on this point I am constrained to dissent from the majority opinion.

(126 Va. 141)

WASHINGTON-VIRGINIA RY. CO. v.  
DEAHL.

(Supreme Court of Appeals of Virginia.  
Sept. 17, 1919.)

1. EVIDENCE §244(15)—ADMISSIONS BY CARRIER'S CLAIM AGENT.

Where a passenger on an electric railway car which collided with a truck claimed that she was injured as the result of the collision, testimony that the claim agent of the railway company who investigated the passenger's claim and the circumstances surrounding the accident told the passenger that the controller was broken, and that was the reason the motorman could not stop the car, is admissible, despite the rule against hearsay; the declaration being within the scope of the claim agent's authority.

2. APPEAL AND ERROR §236(2)—OBJECTIONS IN LOWER COURT; VARIANCE WAIVED.

In an action by a passenger injured when an electric railway car collided with a motor-truck, where the declaration alleged that the company ran its train negligently without having the same under proper control, and without a timely application of the brakes, defendant cannot complain of the admission over objection of evidence that the controller was broken, and that that was the reason the motorman could not stop the car, for the court might readily have required the amendment to the declaration and no continuance was requested on the ground of surprise.

3. EVIDENCE §123(11)—DECLARATIONS AS RES GESTÆ.

In an action by a passenger for injuries received when the electric railway car on which she was riding collided with a motor truck, testimony by other passengers, that immediately after the collision the motorman stated to the driver of the truck that this was the third time the driver had tried to pass in front of the car and that he had gotten him, held admissible as part of the *res gestæ*.

4. DAMAGES §171—ADMISSIBILITY OF EVIDENCE OF PLAINTIFF'S POVERTY.

In an action for personal injuries received by a plaintiff hurt when the electric car on which she was riding collided with a motor

truck, testimony as to poverty of plaintiff is not admissible for any purpose, and cannot be received even to show her mental suffering due to her alleged physical inability to make a living and her lack of funds.

**5. TRIAL  $\S$  79—OBJECTIONS TO EVIDENCE; WAIVER BY FAILURE TO REPEAT.**

Where, in action for injuries to passenger, defendant strenuously objected to admission of testimony as to poverty of plaintiff, defendant did not waive the objection because he permitted plaintiff to allude on cross-examination to her poverty without at the moment objecting to the allusions.

**6. APPEAL AND ERROR  $\S$  1053(2)—HARMLESS ERROR; CURE OF ERROR BY INSTRUCTION.**

Error in the admission of improper evidence may be cured by a proper instruction to disregard it.

**7. APPEAL AND ERROR  $\S$  1053(4)—HARMLESS ERROR; CURE OF ERROR BY INSTRUCTION.**

In an action by a passenger for injuries, where testimony as to her poverty was improperly admitted, *held*, that the error was not cured by an instruction that the jury could not allow the passenger more damages than would compensate her for the injuries actually received, and that if her present condition was due in part to hysteria or previous trouble they should take into consideration the existence of such diseases.

**8. APPEAL AND ERROR  $\S$  1050(1)—ADMISSION OF EVIDENCE PREJUDICIAL ERROR WHERE VERDICT EXCESSIVE.**

In a passenger's action for injuries, admission of testimony as to her poverty was prejudicial error, where it was contended that she underwent mental suffering because of her physical inability to earn her living, coupled with her poverty, and defendant attacked the verdict of \$5,000 as excessive.

Error to Circuit Court, Alexandria County.

Action by Miss Anna E. Deahl against the Washington-Virginia Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Moore, Keith, McCandlish & Hall and Jno. S. Barbour, all of Fairfax, for plaintiff in error.

Henry I. Quinn, of Washington, D. C., and Leo P. Harlow and J. K. M. Norton, both of Alexandria, for defendant in error.

**KELLY, J.** An electric railway car, owned and operated by the Washington-Virginia Railway Company collided with a motortruck owned and operated by the Washington Brick & Terra Cotta Company at a point where a private road leading from the latter company's brick plant crosses the tracks of the railway company. Miss Anna E. Deahl was a passenger on the electric car and claimed that as a result of the collision she sustained physical injuries for which she brought an action against both compa-

nies. There was a verdict and judgment in her favor against the railway company for the sum of \$5,000, and to that judgment this writ of error was awarded.

[1] 1. The plaintiff as a witness in her own behalf was permitted, over the objection of the railway company, to make the following statement:

"After I got home from that accident the claim agent, Mr. Travers, came and he said the controller broke on the car and that was why the motorman could not stop the car."

The chief objection urged against this statement as evidence is that it violates the rule against hearsay. The soundness of this objection depends upon the relationship which the declarant bore to the defendant, and the capacity in which he was acting at the time he made the statement. He was not present when the accident occurred and only knew of the circumstances attending it by information obtained from others. If he was not acting in a representative capacity and within the scope of his agency, then his statement was pure hearsay and not admissible. If, however, the statement related to a matter within the sphere of his authority, and was made in the course of an investigation or negotiation concerning that matter, then, regardless of how he derived his knowledge, he spoke as and for his principal, and his statement was admissible.

It appears that Travers was the claim agent of the defendant company and had called on Miss Deahl to see her in regard to the accident itself and the manner in which she was hurt. The evidence does not show just what his duties were, but the general scope and purpose of a railway claim agent's business are matters of common knowledge. There can be no doubt that he called to see Miss Deahl in connection with an investigation of the accident and a determination of the company's attitude and probable liability as to any claim she might make. It is true that he had nothing to do with the operation of the car, and was not in any way a participant in the occurrence; but the investigation and settlement of the plaintiff's claim against the company for personal injuries necessarily involved the acquisition on his part of accurate information and knowledge as to the cause of the action. Such information and knowledge were peculiarly essential to his branch of the company's business, and his declarations made in regard thereto in the course of his negotiations with the plaintiff fall easily and plainly within the rule permitting proof of declarations made by agents within the realm of their agency, and during the transaction of business in which they are employed. *Lynchburg Telephone Co. v. Booker*, 103 Va. 594, 604, 50 S. E. 148, and cases cited.

[2] It is further urged that the statement

in question ought not to have been admitted because there was no allegation of negligence in the declaration sufficiently broad to embrace a defective condition of the controller. The charge of negligence in the declaration is that—

The company "did not use due and proper care that the plaintiff should be safely and securely carried by the said train on the said journey, but wholly neglected to do so and ran its said train carelessly and negligently across and over the said roadway and without having the said train under proper control \* \* \* and without a timely application of the brakes."

It may be rather remote to say that proof of the fact that the controller broke tends to prove these allegations as to proper control of the car and timely application of the brakes, but we do not think the objection here relied upon ought to be seriously regarded in this court. The objection was made in the court below, and it would perhaps have been more regular if the court had required the plaintiff to amend the declaration. If this had been done, however, the motorman who had charge of the car and who was alleged to have made the statement was present, and it would have been proper to proceed at once with the trial. No continuance was asked for on the ground of surprise.

[3] 2. The court permitted, over the objection of the railway company, the following testimony:

(a) By the witness Joshua Hardy that he was at the scene of the accident immediately after the collision and heard the railway company's motorman, just after getting out of his car, say to the driver of the truck:

"This is the third time you have run across me like this, and I have got you this morning."

(b) By Hugh Lion that he was on the running board of the truck when the collision occurred, and heard the above-mentioned declaration made just as the motorman stepped from the car.

(c) And by the witness Cornelius Lion, the driver of the truck and the man to whom the motorman was speaking, that the declaration was made under the circumstances described by the following extract from his testimony:

"Q. Did you see the motorman when he got off his car?

"A. Yes, sir. I was standing right there at the time. I got down and was standing there when he jumped out. I was out there first though, and he walked up to me and asked me—

"Q. (Interposing.) Did he walk straight from the motor when he got out?

"A. Yes, sir.

"Q. He walked straight from the motor when he got out?

"A. Yes, sir. I was the first one he spoke to.

"Q. What did he say?

"A. He asked me why did I cross, and I asked him why did not he blow, and I told

him that I did not see him, and he said he did blow and I contradicted him, and he said that was the third time I had tried that and that time he got me."

None of the witnesses undertook to measure in seconds or minutes how much time elapsed between the collision and the conversation; but we think it perfectly clear that the interval was very brief, and that the conversation not only followed almost immediately upon the collision, but that it stood in immediate causal relation thereto. It followed under the immediate spur of the main fact, and bears no evidence of reflection or deliberation on the part of the actors. It appears to have been a spontaneous, undesigned, and illustrative incident and part of the litigated act. These are the tests of admissibility under the *res gestæ* rule. The rule itself is incapable of any precise definition. Its application to a particular case depends upon the circumstances of that case, and necessarily rests at last in every instance upon the discretion and judgment of the trial court. Such discretion and judgment, of course, may be the subject of review; but in doubtful cases there ought to be and is a presumption in favor of the action of the court below.

It is not always easy to apply the rule correctly, because not always easy to say whether the statement or declaration in question is merely a recital of a past occurrence or is a verbal act forming a part of the occurrence itself. We have deemed sufficient in the present case to state generally the essential characteristics of the rule above, and to concur in the holding of the trial court that the evidence under consideration was properly admitted.

A case which perhaps goes as far as any Virginia case has gone in excluding declarations of this character is *Blue Ridge Light Co. v. Price*, 108 Va. 352, 62 S. E. 938, wherein this court held that the statements of a motorman made just after the accident to the plaintiff, Miss Price, were not admissible. There was very little discussion of the *res gestæ* rule in that case, the opinion being directed mainly to the proposition that the motorman could not bind the defendant company on the score of agency. We have no difficulty in reaching the same conclusion in this case under the agency rule, and so far as the *res gestæ* doctrine is involved we are of opinion that the case in judgment is fairly distinguishable in its facts and circumstances from the case cited. Miss Price, who seems to have been knocked down by a car which she was attempting to board, had gotten up after the accident and had gone into the car, and at least an appreciable time had elapsed between the accident and the conversation which was excluded. Moreover, the statement of the motorman in that case was dissimilar in its character and in

its general setting from the excited declarations of the motorman in the case at bar.

Another case cited for the defendant is *Vicksburg & Meridian R. Co. v. O'Brien*, 119 U. S. 99, 7 Sup. Ct. 118, 30 L. Ed. 299. The opinion in that case, by Mr. Justice Harlan, shows that the statement of the engineer which was held inadmissible was made from 10 to 30 minutes after the accident; and even in that case four members of the court—Chief Justice Waite, and Justice Miller, Field, and Blatchford—were of opinion that the engineer's statement ought to have been admitted as part of the *res gestæ*.

The general nature of the *res gestæ* rule is so well understood, and has been illustrated by so many adjudicated cases, that we do not feel warranted in prolonging the discussion of this branch of the case. The pertinent authorities are comprehensively collected under the title "*Res Gestæ*" in 11 Mich. Dig. 907, 931, and in the later volumes of that work, 14, 15, 16, and 17, under the same title.

We do not overlook the contention made by counsel for the railway company that the testimony of a witness named Downham, who was a fellow passenger with plaintiff, shows that a considerable interval of time elapsed between the collision and the declaration of the motorman to the truck driver. We do not think the testimony of the witness can be given the effect claimed for it in this connection. He is not very definite as to the time, but clearly shows that the conversation he heard was just after the accident had happened. Moreover, this witness was not permitted, because of his inability to fix the time definitely, to testify as to the conversation, and we must be governed as to the admissibility of the declaration by what the witnesses who did testify thereto said as to the time and circumstances.

For the reasons stated, we find no error in the admission of the evidence complained of in the first and second assignments.

[4] 3. Miss Hofman, a trained nurse, testifying on behalf of the plaintiff, was asked the following questions and gave the following answers over the objection of the defendant company:

"Q. Have you any knowledge of Miss Deahl's financial condition?

"A. I certainly have.

"Q. What is it?

"A. During the winter she did not have anything but what she got from me, the room rent, and when I was in I always boarded with them, and that was all she had, except once in a while her brother would give her a little something."

This testimony was clearly illegal, and should have been excluded. There was no claim of punitive or exemplary damages involved in this case, and the general rule supported by the great weight of authority is that compensatory damages are not affected

by the financial standing of either party to the action, and that it is error to admit evidence on that subject. *Watson on Damages for Personal Injuries*, § 620; *Sutherland on Damages* (3d Ed.) § 1254; 8 Am. & Eng. Enc. L. (2d Ed.) p. 640; 13 Cyc. p. 197; 17 Corpus Juris, § 181, p. 827, and cases cited note 68; *Penn. Co. v. Roy*, 102 U. S. 457, 26 L. Ed. 141; *C. & O. Ry. Co. v. Ghee*, 110 Va. 527, 533, 66 S. E. 826.

In the case of *C. & O. Ry. Co. v. Ghee*, supra, evidence was admitted by the trial court on behalf of the plaintiff to the effect that the deceased, for whose death damages were sought, owned ten acres of land at the time of his death and did not have any other property or estate; and the admission of this evidence was one of the errors for which the judgment in that case was reversed. Judge Cardwell, delivering the opinion of the court, said:

"We are of opinion that this evidence was irrelative and improper, and should have been excluded, since it was not material to any issue in the case. Such evidence was calculated to excite the sympathy of the jury, or as stated by some of the courts, to stimulate their sympathy, and this sympathy [was] well calculated to influence the jury not only as to the quantum of damages they should allow, but in the determination of the question whether the case upon the evidence was for the plaintiff or for the defendant. The principle that such evidence is presumed to have wrongfully affected the verdict seems to be settled by the decisions of this court."

It is contended on behalf of the defendant in error that in this case the foregoing evidence was admissible at least for the purpose of enabling the jury to fix a proper sum for the mental suffering of Miss Deahl due to the contemplation of the financial distress which would necessarily come upon her by reason of her lack of funds and her alleged physical inability thereafter to make a living. No such distinction as this is recognized by the law in Virginia or elsewhere so far as we know, but, even if there were such distinction, there was nothing at all in this case to limit the jury's consideration of the evidence in question to that particular purpose.

[5] It is further contended that, if the evidence was improperly admitted, the error was harmless because subsequently and during the course of her cross-examination by counsel for the brick company, Miss Deahl stated, without objection on the part of the railway company, that she had no support herself, that she had been supporting her mother for 20 years, and that she was worrying about these things. The argument here is that the former error of the court in admitting the evidence as to Miss Deahl's financial condition was waived and rendered harmless by the subsequent admission without objection of other testimony to the same

effect. The general rule here invoked is well settled, but in order to be applicable there must be some reasonable and just foundation for holding that there was in fact a waiver. An application of the rule in this case would be a distortion of its purpose and a sacrifice of the principle upon which it rests. The record shows that the testimony as to Miss Deahl's financial condition was made the subject of a serious objection which was thoroughly argued before the trial court and deliberately passed upon and overruled. There was everything to charge the trial judge and the opposing counsel with knowledge of the fact that the railway company was earnestly relying upon this objection, and had no idea of waiving the same. It is true that counsel for the railway company did not at the moment object to the allusions of the witness to the support of herself and mother; but during the very cross-examination by counsel for the brick company in which she made these allusions, and after some of them had been made, counsel did again specifically remind the court of his objection and motion to exclude all references to the plaintiff's financial condition. And at a still later stage, when Mrs. Elizabeth Deahl, the plaintiff's mother, was on the stand, the court, while properly ruling out all references which had been made to Mrs. Deahl's dependence upon and support by the plaintiff, reaffirmed its ruling in admitting the evidence as to the poverty of the plaintiff herself.

Under these circumstances, we think it clear that the objection to the evidence in question was not waived.

In the case of *Virginia Ry. & P. Co. v. Davidson*, 119 Va. 313, 321, 89 S. E. 229, 230, a similar question of practice arose, and we said:

"We do not think the objection was waived. The bill of exceptions which sets forth the testimony of the witness Walton, on this point, shows that at the very first offer of the plaintiff to prove the motorman's general reputation the defendant specifically and earnestly objected on the ground that such evidence 'was immaterial and irrelevant, and that the defendant was only responsible to the plaintiff for the act of the motorman at the time of the accident complained of, and that any general reputation he may have for either carelessness or carefulness was not properly admissible. The court heard argument of counsel upon the question and then admitted the evidence. In this state of the record we have no hesitancy in holding that the subsequent cross-examination of the other witnesses on this subject, without formally repeating the objection, and the introduction of rebuttal evidence of the defendant, did not waive the previous objection, and that the motion to exclude was a timely and proper method of further saving the point.

"Objection to the erroneous admission of evidence is not waived by introducing rebutting evidence, although it be of the same kind, or by cross-examination in relation to the objection-

able matter. \* \* \* Where an objection to evidence is distinctly made and overruled, it need not be repeated to the same class of evidence to save the objection, although the question is asked of another witness.' 38 Cyc. 1398, 1399, and many authorities there cited."

[8, 7] It is further argued that the objection to this testimony was rendered harmless by instruction J given at the request of the defendant railway company, as follows:

"The court instructs the jury that, even if they should find for the plaintiff, they cannot under the law allow her more damages than they believe from the evidence would actually compensate her for the injuries actually sustained as the direct result of the accident, and the burden is on the plaintiff to prove her damages by a fair preponderance of the evidence with a reasonable certainty, and if they believe that her present condition is due, in part, to nervousness, hysteria, or any trouble with internal organs, which originated prior to August 10, 1916, they must take into consideration the previous existence of such diseases and troubles and not assess any damages therefor."

This instruction was not sufficiently specific as a direction to disregard the illegal evidence which had been admitted, if, indeed, it even remotely had such evidence in view. The rule is well settled that the error in the admission of improper evidence may be cured by a proper instruction to disregard it. *Southern Ry. Co. v. Simmons*, 105 Va. 651, 661, 55 S. E. 459; *Taylor v. Commonwealth*, 122 Va. 886, 894, 94 S. E. 795. But as appears from the authorities just cited, the withdrawal of the illegal evidence from the jury must be in direct and explicit terms. It can hardly be said that the instruction above quoted could have led the jury to suppose that the evidence in question was being thereby withdrawn. Especially is this true in view of the fact that plaintiff's instruction No. 4 told the jury that they might take into consideration "her station in life," and twice mentioned her "mental suffering" as proper elements upon which to base a recovery; the latter element according to plaintiff's theory, being necessarily aggravated by her lack of means.

[8] But it is said that the verdict of \$5,000 was not excessive, and that the error under consideration was therefore harmless. It is true that we are not asked to set aside the verdict on the specific ground that the damages allowed were excessive, and it is also true that, if the case had gone to the jury without the evidence in question and their verdict had been for the same amount, we would not be able to interfere with it on account of its size; but the fact remains that a motion was made in the lower court for a new trial on the express ground that the verdict was excessive, and very grievous complaint is made in this court of the size of the recovery. The position taken before us is

stated thus in the petition upon which this writ of error was awarded:

"Your petitioner contends that the damages awarded in this case are out of all proportion to the extent of the injuries sustained, and that in fixing the amount of damages the jury was largely influenced by this line of testimony as to the financial condition of the parties."

It is apparent, therefore, that the real question is whether the size of the verdict may not have been materially augmented by improper testimony. The authorities cited above establish the rule that evidence of the character here complained of is presumed to have wrongfully affected the verdict. That it may have done so in this case seems rather more than a probability, and, at any rate, its admission compelled the defendant to submit to the result of a trial had in violation of a settled rule of evidence which it invoked and had the right to have enforced. The admissibility of the evidence was so earnestly insisted upon both in this court and in the court below that there is little reason to suppose that the able and ingenious counsel for the plaintiff failed to make effective use of it before the jury.

For the error in admitting the testimony with reference to Miss Deahl's financial condition, the case must be reversed and remanded for a new trial, and this fact makes it unnecessary to deal with the remaining assignments of error. They involve questions that are not likely to arise at the next trial, except the motion to set aside the verdict on the ground that the evidence was not sufficient to support it, and as to this it would not be proper, under our practice, for us to express any opinion at this time.

Reversed.

(126 Va. 1)

#### HENRY'S EX'X v. PAYNE.

(Supreme Court of Appeals of Virginia. Sept. 17, 1919.)

#### 1. CHATTEL MORTGAGES ⇨139—LIEN; NOTICE OF MORTGAGEE OF CLAIM OF THIRD PERSON.

Mortgagee in a chattel mortgage given to secure prior indebtedness, even though considered a deed of trust, acquired no lien where he had prior notice that grantor had previously executed a bill of sale to another.

#### 2. FRAUDULENT CONVEYANCES ⇨219—GENERAL CREDITORS; SALES WITHOUT DELIVERY.

Code 1904, § 2465, providing that every bill of sale of goods and chattels, when the possession is allowed to remain with the grantor, shall be void as to subsequent purchasers for valuable consideration without notice until duly admitted to record, a creditor without a lien stands on no higher footing than his debtor, and cannot successfully invoke the benefit of the statute.

#### 3. FRAUDULENT CONVEYANCES ⇨154(1)—RETENTION OF POSSESSION; FAILURE TO RECORD BILL OF SALE.

One to whom a bill of sale of property was executed was not estopped to claim the property by reason of having failed to record the same as provided by Code 1904, § 2465, although he left the property in the hands of the prior owner and a third person extended credit to such former owner by reason of his possession and claim of ownership, there being no claim of purchaser's fraud or knowledge that third person was extending credit on faith of prior owner's continuing ownership.

#### 4. FRAUDULENT CONVEYANCES ⇨154(1)—RETENTION OF POSSESSION; FAILURE TO RECORD BILL OF SALE.

In view of Code 1904, § 2465, a landlord may acquire a lien by distress warrant, or by execution levied on property in the hands of his tenant, even after learning that the tenant has given a bill of sale therefor, and can defeat the rights of the true owner of the property, if such lien is acquired before the bill of sale is recorded.

#### Appeal from Corporation Court of Roanoke.

Suit between one Payne and the executrix of R. R. Henry. From an adverse decree; the latter appeals. Reversed.

The controversy in this suit in equity between the appellee, Payne, claiming the right to have sale of certain personal property, consisting of a certain law library, under a writing which is in effect an equitable chattel mortgage, executed by Randolph Henry, at a time when he was in possession of the library, conveying same to secure the payment of a certain note of the latter given to cover certain accrued and past-due office rent, owing by him to appellee, and the appellant, who claims that her testator, R. R. Henry, was the owner of the library by purchase from said Randolph Henry, as evidenced by a bill of sale which was unrecorded at the time of the execution of said chattel mortgage, appellant claiming, however, that appellee had actual notice of such ownership of R. R. Henry prior to the execution of the chattel mortgage.

There is no question of fraud in the case. The facts are undisputed that R. R. Henry was the bona fide purchaser for value of the library of Randolph Henry, as evidenced by said bill of sale, some 4½ years prior to the execution by the latter of the chattel mortgage and several years prior to the beginning of the renting by latter of a certain law office of the appellee, from which the indebtedness aforesaid secured by the chattel mortgage arose. The library was left by the said vendee in the possession of the vendor thereof, the said Randolph Henry, and the latter, on renting a law office of appellee (first of one room, later of two rooms),



moved the library therein. There is some question raised in the examination of appellee on cross-examination by Randolph Henry, acting as attorney in the case, as to just what representations the latter made to appellee as to the ownership of the library at the time the law office rental contract was entered into. The appellee, however, testifies positively that such debtor told him, at the time of said renting and before the debt for rent aforesaid was incurred and also subsequently along during the tenancy, which continued for somewhat over a year, that the library "was his library," that he owned it, and that it was on the faith of this representation that appellee rented the premises aforesaid to said debtor and allowed him to continue to occupy the premises and incur said indebtedness. Randolph Henry on the same day and again about three months later gave his depositions in the cause, in which he nowhere contradicts the said testimony of the appellee. Hence the testimony of the latter on this subject must be taken to be true.

However it is admitted by the appellee in his testimony that on the same day of and prior to the execution of said chattel mortgage by Randolph Henry, the latter said to appellee:

"I am going to give you a deed of trust on this library and furniture; the library belongs to my father; but he will have no objection to my giving a deed of trust on it."

The record shows that that was the first intimation that appellee had that the library belonged to R. R. Henry, the father of said debtor, and that it did not belong to the debtor.

The debtor, having given the chattel mortgage aforesaid, vacated the premises aforesaid, moving the library into another building in the same city, but within the jurisdiction of the same court, which is the court below.

The fact that the chattel mortgage was given by the son never came to the knowledge of the father, nor was his consent thereto ever asked or given. In explanation of this, the record shows that the said debtor did not see his father subsequently to the giving of said chattel mortgage until about two months thereafter, when the father was in the said city at federal court, but was busy, and the debtor had no opportunity to talk to him then, as the debtor testifies. The father lived some distance away in another part of the state, and went home from said court sick, and this illness lingered, gradually getting worse, until he died in October, 1915, some six months after the chattel mortgage aforesaid was given. The son and debtor, during the last-named period, saw the father only once, which was in his home in August, when the father was not ex-

pected to live, was unconscious most of the time, and was almost speechless during his lucid intervals, so that, as the son testifies, it was impossible to discuss any business matter with him. The son never saw the father alive after that.

There is no evidence in the record that the father, the owner of the library, at any time knew that the son and debtor aforesaid was representing to the appellee or to any one else that the library was his (the son's) property, or that the latter was obtaining credit of the appellee on the faith of such ownership.

Notwithstanding the prior notice given appellee as aforesaid of the true ownership of the library, the appellee accepted the chattel mortgage aforesaid, and promptly recorded it.

Appellee did not sue out and have levied on the library any distress warrant for said rent indebtedness, nor did he have any execution levied thereon.

Appellee did later obtain a judgment against said debtor for the amount of said indebtedness, with interest and costs of the action, but meanwhile the bill of sale aforesaid had been duly recorded in the lifetime of the said R. R. Henry, namely, on August 13, 1915, about two months prior to the death of the latter, it being taken from among the papers of R. R. Henry by the appellant and sent to said debtor for recordation, and it would therefore have taken precedence of any lien that could have been thereafter acquired by appellant by having execution issued upon said judgment and levied upon the library.

The appellee, prior to the recordation of said bill of sale, seems to have relied wholly upon the representation of the debtor made just before the execution of the chattel mortgage as aforesaid, and the hope thus engendered that the father would have no objection to the "deed of trust" on the library. Upon the death of the father, without having consented to the mortgage being given, that hope failed. But it was then too late for appellee to obtain a lien for his debt by distress warrant for rent, or by obtaining judgment and levy of execution ahead of the bill of sale aforesaid, which had been recorded as aforesaid. Hence appellee was compelled to depend and rest his case, and does rest his case in this suit upon his rights as a purchaser under the chattel mortgage.

By the decree under review the court below held that the lien and claim of the appellee upon the library and furniture is superior to the claim of appellant.

There is no controversy in the cause as to the correctness of such decree as to the furniture, which was the property of the debtor, Randolph Henry. The sole controversy is over the library, which was not the

property of the latter, but of appellant's testator as aforesaid.

Randolph Henry and Thos. M. Darnall, both of Roanoke, for appellant.

J. H. Stuart and C. R. Williams, both of Roanoke, for appellee.

SIMS, J. (after stating the facts as above). The material facts of the case are set forth in the statement preceding this opinion. It is one of grave hardship upon the appellee, as we feel compelled to decide it; but we may not allow our feeling that it is a hard case lead us to disregard well established rules of law.

[1] 1. Appellee does not controvert that, in so far as his claim of lien is concerned, his position is the same as that of any creditor the payment of whose debt is secured by a deed of trust, namely, that of a purchaser from the grantor of such a deed of trust. Appellee takes the position that the chattel mortgage under which he claims a lien on the library is in truth a deed of trust, and by his pleading he seeks to have it enforced as a deed of trust. Appellee, therefore, being a purchaser from the grantor of said chattel mortgage, could not and did not acquire any lien on the library by virtue of such mortgage, because, as appears from the statement of facts preceding this opinion, he took the mortgage with prior notice that the library did not belong to his grantor, but to another, namely, the grantor's father, appellant's testator.

[2] 2. Appellee relies upon section 2465 of the Code as rendering the bill of sale held by appellant's testator void as against the appellee, a creditor of Randolph Henry, the grantor in such bill of sale. So far as material such section provides as follows:

"Every \* \* \* bill of sale \* \* \* of goods and chattels when the possession is allowed to remain with the grantor \* \* \* shall be void as to subsequent purchasers for valuable consideration without notice, and creditors, until and except from the time that it is duly admitted to record. \* \* \*"

But the appellee, as we have seen, was not such a purchaser, and the creditors who are entitled to the benefit of this statute are lien creditors only. A creditor without a lien stands on no higher footing than his debtor, and cannot successfully invoke the benefit of this statute. *McCandlish v. Keen*, 54 Va. (13 Grat.) 615; *Dulaney v. Willis*, 95 Va. 606, 29 S. E. 324, 64 Am. St. Rep. 815. As we have seen above, appellee acquired no lien on the library by the chattel mortgage aforesaid. It is not claimed that he is a lien creditor in any other right. Therefore section 2465 of the Code has no application to the case.

[3, 4] 3. But appellee contends that—

"The supposed claimant, R. R. Henry, and the defendant, Randolph Henry, will not be per-

mitted by a court to sit down and suppress knowledge of the claim of the said R. R. Henry to the ownership of the property until the defendant, Randolph Henry, had become involved to the extent he did, as shown in this record, in debt to appellee, and then come in and deprive the appellee of his rights to proceed against said property when it is clearly shown in the record of the cause that the credit was given to the defendant, Randolph Henry, on the faith of his absolute ownership of the books and office furniture which was in appellee's, George W. Payne's, building, and the testimony of the defendant, Randolph Henry, shows that his father, R. R. Henry, was here during the time that these books were in the building of the appellee, and that nothing was said or done by either R. R. Henry or Randolph Henry to assert any claim for the benefit of the said R. R. Henry to the said books or to any interest therein, and the said George W. Payne, the appellee, was all along relying upon the said books and furniture as security for his debt, and was carrying the said defendant, Randolph Henry, on the faith of his unconditional and absolute ownership of said property as shown by the record in the case."

This position erroneously assumes that appellee had the right "to proceed against said property" at a time when he had acquired no lien thereon, and ignores the absence of any proof in the record of fraud, or that R. R. Henry had any knowledge at any time that appellant contemplated or was extending or had extended credit to Randolph Henry on the faith of the absolute ownership by the latter of the library. The record therefore fails to make out a case of estoppel against the appellant and in favor of the appellee or to otherwise sustain the position of appellee under consideration.

We can readily see how the possession and apparent ownership of tangible personal property in one, while the actual ownership undisclosed by any matter of record, is in another, may mislead third persons to extend credit to the former to their possible financial loss, especially when the apparent owner represents himself to be the true owner. But this is permitted at common law, for independent of statute a creditor stands in the shoes of his debtor, and can subject no greater rights of property than the debtor in truth has, whatever may be the apparent property rights of the debtor; and whether such status of relative rights shall be allowed to continue to exist must be determined by another department of government than the judiciary. It is solely within the province of the Legislature to act in the premises. So far the Legislature has enacted no statute prohibiting such severance of the real from the apparent ownership of property, where it results from a bona fide sale and purchase for value and no lien creditor of the vendor is affected. And there may be good and sufficient reasons of public policy why the Legislature has not extended the registry statutes so as to protect nonlien as

well as lien creditors in such a situation as that under consideration. And in the instant case, indeed, the law as it exists afforded ample remedy to have given the appellee the relief he now desires, if he had acquired a lien by distress warrant or by execution levied on the library prior to the recording of the bill of sale, instead of relying on the hope that plaintiff's testator would consent to the chattel mortgage and thus make that a valid lien.

For the foregoing reasons we are constrained to reverse the decree under review in so far as it holds the library aforesaid subject to the lien of appellee's debt; the appellant will be decreed to be entitled to the library free of all claim of the appellee, and the cause will be remanded for further proceedings concerning the sale of the furniture. Reversed.

(85 W. Va. 60)

**HOUSEMAN et al. v. TOWN OF ANAWALT et al. (No. 3763.)**

(Supreme Court of Appeals of West Virginia.  
Oct. 28, 1919.)

*(Syllabus by the Court.)*

**1. MUNICIPAL CORPORATIONS §51—WRIT OF ERROR LIES TO REVIEW DISSOLUTION OF CORPORATION.**

This court has jurisdiction by writ of error to review the judgment of a circuit court, proceeding according to section 2 of chapter 47 of the Code of 1918 (Code 1918, § 2383), annulling its charter and dissolving a municipal corporation.

**2. EXCEPTIONS, BILL OF §57—SIGNED AND CERTIFIED, PART OF THE RECORD.**

A bill of exceptions regularly signed by the judge, and certified to the clerk by an order made within thirty days after the adjournment of the term at which the trial was had, becomes a part of the record notwithstanding such order may not have been actually spread upon the order book until after that time.

**3. MUNICIPAL CORPORATIONS §51—REVIEW OF FINDINGS OF CIRCUIT COURT ANNULING CHARTER.**

This court will not in such a case set aside findings of the circuit court made in lieu of a jury, or reverse the judgment thereon annulling the charter and dissolving a municipal corporation, unless such findings are plainly not supported by the evidence or the judgment is not warranted by law.

Error to Circuit Court, McDowell County.

Proceeding by W. H. Houseman and others against the Town of Anawalt and S. T. Spencer and others to forfeit its charter and to dissolve the corporation. Judgment for petitioners, and defendants bring error. Affirmed.

Free & Capehart and Litz & Harman, all of Welch, for plaintiffs in error.

Salé & Tucker, of Welch, for defendants in error.

**MILLER, P.** This is a proceeding begun by petitioners, citizens of this State and inhabitants of the town of Anawalt, against said town and S. T. Spencer and others acting or pretending to act as councilmen during the preceding two years, to forfeit its charter and to dissolve the corporation, pursuant to section 2, chapter 47, of the Code of 1918 (Code 1918, § 2383).

The answer of respondent puts in issue the material facts. Among the grounds alleged for the relief sought, and those which the circuit court found established by the evidence, and upon which it predicated the judgment complained of, were: That the municipality had no bonded indebtedness; had failed for one year to exercise its corporate powers and privileges; and for a like time had failed to keep its roads, streets and alleys in good order and repair.

[1] The jurisdiction of this court to review the judgment of the circuit court annulling the charter and dissolving the corporation is challenged by the petitioners, upon the principles laid down in *In re Town of Union Mines*, 39 W. Va. 179, 19 S. E. 398; *Elder v. Incorporators of Central City*, 40 W. Va. 222, 21 S. E. 738; *Bloxton v. McWhorter*, Judge, 46 W. Va. 32, 32 S. E. 1004; *Summers County Court v. Monroe County*, 43 W. Va. 207, 27 S. E. 307; *McWhorter v. Dorr*, 57 W. Va. 608, 50 S. E. 838, 110 Am. St. Rep. 815; *Morris v. Taylor*, 70 W. Va. 618, 74 S. E. 872. These decisions support the general proposition first affirmed in *In re Town of Union Mines*, that the judgment of the circuit court in the exercise of the legislative and quasi-judicial authority, delegated by said chapter, to incorporate towns and villages was not subject to the appellate jurisdiction of this court.

But the jurisdiction here invoked is not to reverse the judgment of the circuit court granting the charter and incorporating the municipality, but one annulling the charter and dissolving the corporation, quite a different proposition from any affirmed in the decisions cited.

The jurisdiction of the circuit court to annul charters and dissolve municipal corporations was first conferred by chapter 54, Acts of 1907, amending and re-enacting section 2 of chapter 47 of the Code. By that amendment the circuit court was given jurisdiction to hear and determine all matters relating to forfeiture and dissolution of all such charters, upon the petition of one or more of the inhabitants of a municipality or of any ten freeholders of the county in

which such municipality is located. But this calls for the exercise, not of legislative jurisdiction only, but of judicial powers which theretofore could have been initiated only by the State through its attorney general or some other deputed authority to take away vested rights in such charter. *Hornbrook v. Town of Elm Grove*, 40 W. Va. 543, 21 S. E. 851, 28 L. R. A. 416; *South Morgantown v. Morgantown*, 49 W. Va. 729, 40 S. E. 15. The jurisdiction to annul charters and to dissolve corporations conferred by the amended statute involves the ascertainment of the necessary facts and the exercise of judicial powers, not simply the granting of municipal authority, and partakes in every way of strictly judicial functions. As in the case of private corporations, the municipality continues to exist notwithstanding the causes of forfeiture, until the State intervenes and by proper judicial procedure has ascertained and adjudged the causes of forfeiture to exist. *Moore v. Schoppert*, 22 W. Va. 282; *Baltimore & Ohio R. R. Co. v. Supervisors*, 3 W. Va. 319, 324. Of such judgments this court has jurisdiction by writ of error to review them. This is so notwithstanding the legislature may have the right by amendment to take away the charter. Though the jurisdiction here conferred may be to some extent administrative, it involves the exercise of judicial power, reviewable here. *Morris v. Taylor*, supra, 70 W. Va. 626, 627, 74 S. E. 872, and cases cited.

[2] Another objection interposed to our consideration of the case on its merits, is that the bill of exceptions certifying the evidence and the rulings of the court thereon was not certified to the clerk within the time after the adjournment of the court to make it a proper bill of exceptions. This is without merit. The record with the stipulation of counsel shows that the certificate of evidence or bill of exceptions was signed by the trial judge in vacation on September 23, 1918, within thirty days from the adjournment of the court, which occurred on August 24, 1918. And notwithstanding the order certifying the bill of exceptions to the clerk was not actually spread on the order book until October 15, 1918, in term time, it appears on its face, and the endorsement by the judge on the back of the original order shows, that the bill of exceptions was actually signed and the order directed on September 23, 1918. A more formal certificate by the judge is not required. *Wells v. Smith*, 49 W. Va. 78, 38 S. E. 547; *Fink v. Thomas*, 66 W. Va. 487, 66 S. E. 650, 19 Ann. Cas. 571. And we have decided that if the judge actually certifies the bill of exceptions within the limitation prescribed by the statute,

it is not required that it be also entered on the record book within the thirty days prescribed for the certification. *Ketterman v. Dry Fork R. R. Co.*, 48 W. Va. 606, 37 S. E. 683; *Wells v. Smith*, 49 W. Va. 78, 38 S. E. 547.

[3] The only other point submitted for our consideration is that on the merits, the sufficiency of the evidence to support the finding of the court upon which the judgment of annulment and dissolution was predicated. Without going into the details of the evidence, which we have examined with care, it satisfies us that for the past two years no municipal elections were held, and this without justifiable excuse; that some of the members of the council were not eligible, some resigned or refused to serve; and that the mayor and recorder were removed, and others substituted in the most irregular way. If there were any regular meetings of the council, the minutes are incomplete, and kept, if at all, in the most haphazard way. The record shows that after this suit was begun one of the members of the council, not the recorder, secured an outsider to record in the minute book supposed minutes dictated by him. True, he says this was done from notes kept by some one in a tablet, but not identified otherwise, and admittedly not complete. From the minutes, no taxes appear to have been levied for municipal purposes, and none of any consequence collected. The so-called minutes are wanting in any showings of levies of taxes. No delinquent lists are produced, though there is some evidence that a delinquent list was made out by some and returned to the auditor. No one was put in charge of streets and alleys, and during all the two years preceding the suit nothing worthy of mention was done toward keeping up or maintaining the streets and alleys in good repair. There is much evidence that the police force, consisting of one man, was a bootlegger and keeper of a house of ill fame, and was inefficient and unreliable, and that one or more members of the council violated the law in renting business for unlawful purposes, and that there had been no attempt to enforce the law of decency, violated not only by others, but by those assuming official authority. The evidence satisfies us that this semblance of municipal organization and authority was employed simply as a cloak for violators of the law rather than to enforce it and maintain decent and proper municipal government.

In our opinion the findings and conclusions of the circuit court were fully justified and that the judgment below should be affirmed.

(85 W. Va. 1)

**FERRELL et al. v. DEVERICK et al.**(Supreme Court of Appeals of West Virginia.  
Oct. 21, 1919.)*(Syllabus by the Court.)***1. INFANTS ⇨81—APPOINTMENT OF CLERK OF COURT AS GUARDIAN AD LITEM VALID.**

A decree will not be reversed solely because the court rendering it appointed its clerk guardian ad litem to represent infant defendants in the cause then pending before it

**2. CONSTITUTIONAL LAW ⇨109—No VESTED RIGHTS ON RULES OF EVIDENCE.**

A party to a suit prosecuted under sections 24b.(1)–24b.(12), c. 71, Code (sections 3766–3777, Code 1913), is not deprived of any constitutional right by that provision of section 24b.(7) which authorizes the court to hear evidence in the cause in open court, so long as he is accorded a fair opportunity to present his side of the case and to submit all the facts necessary to a just determination of the controversy. The law recognizes no such thing as a vested right in rules of evidence.

**3. CONSTITUTIONAL LAW ⇨278(7) — DECREE AUTHORIZING LEASE ON LAND SUBJECT TO CONTINGENT REMAINDERS NOT WANTING IN DUE PROCESS OF LAW.**

Where a suit is instituted under the provisions of sections 24b.(1)–24b.(12), c. 71, Code (sections 3766–3777, Code 1913) for the purpose of obtaining a decree authorizing an oil and gas lease on land subject to contingent remainders, and the suit in effect validates a prior lease made by the present life tenant of such land and others, the life tenant is not deprived of property without due process of law, although the final decree gives him fewer and less valuable rights than were his by virtue of the former lease; it appearing that the prior lease accorded him greater rights than he was entitled to, and that the decree gave him as great a return therefrom as he could properly have claimed under the terms of any lease within the power of the lessors to grant.

**4. LIFE ESTATES ⇨12—DECREE AUTHORIZING LEASE NOT VIOLATION OF RIGHTS OF LIFE TENANT.**

Nor was such decree of lease beyond the power of the court to grant, on the ground that it was made without the consent of the life tenant as holder of a vested estate or interest in the land; his consent to the prior lease being sufficient evidence of his willingness and consent to enter into such a lease, and the purpose of the suit being merely to validate such prior lease.

**5. ASSIGNMENTS ⇨90—"ASSIGNS" DEFINED.**

The word "assigns" generally comprehends all those who take either immediately or remotely from or under the assignor, whether by conveyance, devise, descent, or act of law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Assigns.]

**Appeal from Circuit Court, Roane County.**

Suit by T. J. Ferrell, in his own right and as guardian of his minor children, Fannie M. Ferrell, his wife, and others, against C. H. Deverick, such minor children, and others. From two decrees entered in the cause in favor of plaintiff United Fuel Gas Company, defendant C. H. Deverick appeals. Affirmed.

Thos. P. Ryan, of Spencer, for appellant.  
Carl C. Douthitt, of Huntington, and R. G. Altizer, of Charleston, for appellees.

LYNCH, J. C. H. Deverick, believing his interests imperilled thereby, has appealed to this court to review and reverse two decrees entered March 5, 1918, in the chancery cause brought by T. J. Ferrell, in his own right and as guardian of the minor children of himself and his wife, Fannie M. Ferrell, coplaintiff with him and others, against Deverick, the minor children of the Ferrells, and others, codefendants, the chief object of which was the validation or legalization of an oil and gas lease executed by the plaintiffs, Deverick, and others January 1, 1916, to United Fuel Gas Company, covering a tract of 115 acres of land in Roane county. The title to the land leased, so far as now concerned, originated in a deed dated January 3, 1899, by Harrison B. Smith, acting as special commissioner and in his own right, to Fannie M. Ferrell, the wife of Thomas J. Ferrell, and their children, then and now minors, whereby Fannie M. Ferrell acquired a freehold estate for her life in the land, and the children of herself and her husband who should survive her an estate therein in remainder. Mrs. Ferrell and her husband are now living and are the parents of the infant defendants named in the bill in this cause. The language of the granting clause is:

"Doth grant unto the said Fannie M. Ferrell, wife of Thomas J. Ferrell, during the term of her natural life, remainder at death to such children of the said Fannie M. Ferrell by her husband, Thomas J. Ferrell, as may survive her."

The life tenant and her husband, no doubt acting in the utmost good faith, on February 20, 1906, undertook to convey the fee-simple title to the land to A. T. and S. R. Ferrell, neither grantee being a contingent remainderman, but reserved one-third of all oil, gas, and minerals underlying the tract with operating rights and privileges and all rentals and royalties arising from the one-third of all oil, gas, and minerals. The futility of that instrument to accomplish the object contemplated by the grantors, who deemed themselves competent thereby to pass the fee-simple title to the land to the grantees, prompted them, when advised of the lack of power to effect the purpose intended, to institute in the circuit court of Roane county the sum-

mary proceeding authorized by chapter 83 of the Code (sections 3961-3978, Code 1913) to obtain permission to do what they had vainly essayed to do without such permission, with the result that the court empowered the guardian of the contingent remaindermen to execute to the grantees in the unauthorized deed what it was assumed would be a valid conveyance of the fee-simple title to the 115 acres of land, and the guardian did make, execute, and deliver to the grantees a deed, dated September 25, 1912, such as the court granted him permission to make, subject, however, to the reservations contained in the deed of February 20, 1906.

The grantees in these deeds, A. T. Ferrell and S. R. Ferrell, the one by the life tenant and her husband alone, the other by her husband as the father and guardian of their infant children, joined in a deed dated October 1, 1912, purporting to grant to C. H. Deverick, appellant, the fee-simple title to the 115-acre tract, reserving, however, "two-thirds ( $\frac{2}{3}$ ) of the oil, gas, and other minerals, with-in and underlying said tract of land, which is hereby reserved and excepted from the operation of this deed." And on January 1, 1916, A. T. and S. R. Ferrell, C. H. Deverick, Fannie M. Ferrell, the life tenant, and T. J. Ferrell, her husband and the guardian of their children, joined in executing to the United Fuel Gas Company an oil and gas lease covering the 115 acres.

To remove such doubt as may have existed as to the efficacy of this lease to accomplish the end aimed at by the parties thereto, and to obtain a judicial confirmation thereof, so as to render it invulnerable from attack for lack of competency on the part of the lessors, plaintiffs instituted this suit and obtained the decrees now here for review upon appeal.

Of the 16 specific assignments in the petition for the writ, only 11 of which are mentioned in appellant's brief, the points really demanding attention are the sufficiency of the bill, and the right of the court (a) to appoint its clerk guardian ad litem; (b) to allow proof to be taken at the bar of the court and in its hearing, and to read and consider the proof, when so taken, in passing upon the merits of a cause brought and prosecuted, as this is, under the authority of section 24b. (1) et seq. c. 71, Code; (c) to lease land without the consent of an adult interested therein with contingent remaindermen, and thereby annul a lease already executed by him to the proposed lessee. These grounds of error we propose to discuss briefly and dispose of in the order stated; first, however, announcing our purpose not to enter upon a consideration of the merits of the cause, for the purpose of adjudging the extent of the interests of Fannie M. Ferrell, the life tenant, under the deed of January 3, 1899, as affected by the subsequent deeds and lease in which she joined, or of A. T. and S. R.

Ferrell, the grantees of herself and husband in the deed of February 20, 1906, as affected by the subsequent deed and lease in which they also joined, or of C. H. Deverick, grantee of the deed of October 1, 1912, as affected by the lease of January 1, 1916, in which he likewise joined. The rights of these parties these instruments definitely fixed and they have acquiesced in the shares as so established. But we do discover and in another connection later note a concession to Deverick in the lease of January 1, 1916, in excess of the interest allowed him by the decrees complained of—indeed, in excess of the interest to which he is entitled, even in the aspect of the case most favorable to him.

[1] We look in vain for defects in the bill, and counsel for Deverick points to none such as warrant a ruling on the demurrer thereto different from that shown in the decree overruling it. Nor do the decisions cited sustain the proposition stated by him as to the right of a court to appoint its clerk guardian ad litem for an infant who is a defendant in a cause pending therein. They do not question the propriety or legality of such an appointment, except inferentially, and say only that—

"Where an infant is not able to obtain a responsible guardian, or where no one will consent to act for him, and in other proper cases, the court may appoint one of its own officers" (22 Cyc. 652), or, "if none can be found to accept the appointment or appear for the infant, it is the duty of the court to appoint one of its officers, whom they can control, and see that he enters an appearance" (Greenup v. Bacon, 1 T. B. Mon. [Ky.] 108).

In *Fisher v. Lyon*, 34 Hun, 183, the question was not whether the court lawfully could appoint its clerk guardian ad litem, but whether it could dispense with the security required by statute of such guardians. In *Brown v. The Henry Pratt*, 4 Fed. Cas. 334, the decision rested on a rule of court requiring guardians ad litem to give security for costs the same as if personally the parties in interest, the court saying:

"As a general rule guardians ad litem cannot, in admiralty, be excused from giving the ordinary stipulations, and if it be necessary to assign a guardian by the court, the party not being able to produce a responsible person, the court would confer the trust on some standing officer, and then discharge him of the liability for costs."

There appears to us no sound reason, and appellant advances none, and no authority cited or found states any, for reversing a decree solely because the court rendering it appointed its clerk to represent the infant defendants and safeguard their rights and interests in the litigation.

[2] As to the right to permit testimony to be taken at the bar of the court and to consider it in determining the rights of the parties to a cause prosecuted under the sections

of the statute cited, nothing further scarcely need be said than that the statute itself—section 24b.(7), c. 71, Code—amply warrants such procedure. There is no longer any doubt as to the right of the Legislature to prescribe or create rules of evidence to be observed by judicial tribunals, limited only by constitutional guaranties or declaration of a contrary rule upon the same subject. If thereby a party to a litigation is not deprived of a fair opportunity to present his defense, and for that purpose to submit all the facts necessary to a just determination of the controversy, what cause he has for complaint is not evident. 10 R. C. L. 863; 12 C. J. 982. The law recognizes no such thing as a vested right in rules of evidence. As they relate only to the remedy, the Legislature may change them without invading the legal or vested rights of the parties. *State v. King*, 64 W. Va. 546, 593, 63 S. E. 468. Besides, so far as disclosed, Deverick did not object, but presumably was present and acquiesced, and likely participated, in the necessary preliminary inquiry prior to the entry of the decrees of which he now complains, and there is now no suggestion by him or by any other person interested of any prejudice resulting from the action of the court in so hearing the evidence.

[3, 4] Just what foundation there is for the implication underlying the criticism that the decrees reviewed purport to lease the property of appellant without his consent, and thereby to effect the annulment of a lease on the same land theretofore executed by him and others to the same lessee, is not clearly apparent. Complaint is made that the decrees give Deverick fewer and less valuable rights than were his by virtue of the lease of January 1, 1916. Though these decrees may give him less than the prior lease authorized, his return under the latter being the one-third of all moneys therein named or due thereunder, yet the former is not erroneous because of that reduction, for the lease gave him a greater right than he was entitled to, but the decrees give him as much as he could properly have claimed under the terms of any lease within the power of the lessors therein to grant.

An examination of the estates conveyed by the respective deeds and lease shows the correctness of these decrees. By the deed of January 3, 1899, Mrs. Ferrell acquired only a life estate in the tract of 115 acres, giving her no right to any part of the corpus of the estate, but as incidental thereto merely a right to interest on the royalty oil and gas well rentals from such wells as should be authorized and drilled subsequent to the commencement of her life estate. *Wilson v. Youst*, 43 W. Va. 826, 28 S. E. 781, 39 L. R. A. 292; *Ammons v. Ammons*, 50 W. Va. 390, 40 S. E. 490; *Eakin v. Hawkins*, 52 W. Va. 124, 43 S. E. 211. See, also, *Minner v. Minner*, 100 S. E. 509, recently decided, where

the authorities are collected and discussed. Wherefore she could not and did not by her deed of February 20, 1906, pass to her grantees an interest greater than she possessed. Her attempted reservation of one-third of all oil, gas, and other minerals underlying the tract, and all rentals and royalties from that one-third, was more than her rights as life tenant embraced, and therefore more than she was entitled to reserve. As life tenant she could claim only the interest on the proceeds from the royalty oil and gas well rentals; the property being undeveloped and unleased as to those minerals, so far as the record discloses, prior to January 1, 1916, the date of the first lease to United Fuel Gas Company. It is unnecessary to determine whether her attempted reservation of more than was her right is sufficiently broad to admit of construction as a reservation of her right to the interest on the proceeds from the royalty oil and gas well rentals. Assuming the correctness of such construction and the power thus to reserve that interest from the operation of the deed, she has then conveyed to her grantees only a life estate in the surface of the tract, without regard to the underlying minerals; treating them, as they must be, as a part of the corpus thereof. The summary proceeding to sell the contingent interests of the infant remaindermen in aid of the deed of 1906, being instituted under chapter 83 of the Code, and not under section 24b.(1) et seq., c. 71, relating to the sale or lease of land subject to contingent remainders, such as this was, the deed of T. J. Ferrell, guardian of the infant children, to the same grantees gave them no greater right than they possessed by virtue of Mrs. Ferrell's deed of 1906, except that it bestowed upon them the contingent estate in remainder of the infant children, with the exception of one-third of the oil, gas, and other minerals, which was reserved. The interests of A. T. and S. R. Ferrell in the tract then embraced the life estate of Mrs. Ferrell and the contingent estate in remainder, including two-thirds of the oil, gas, and other minerals. This interest their deed of October 1, 1912, conveyed to Deverick, but reserved the two-thirds of the minerals just referred to.

In the lease of January 1, 1916, in which, among others, Mrs. Ferrell, the former life tenant, and C. H. Deverick, the present holder of that estate, joined as lessors, it was stipulated that the latter was to receive "one-third of all moneys herein named or due under the lease." This was more than he as life tenant was entitled to receive, since the corpus of the estate, including the royalty oil and gas well rentals, belonged to the remaindermen, when ascertained according to the terms of the deed of 1899, or, if the condition of that instrument should not be fulfilled, then to the heirs at law, and further because, as we have assumed, Mrs.

Ferrell has reserved her right as life tenant to interest on the proceeds from such royalty and rentals. However, by joining in the lease as lessor, and thus consenting to the disposition therein made to Deverick of one-third of the moneys due under the lease, she has authorized to be included therein her right so reserved in the former deed, thus giving to Deverick the one-third of the interest on the proceeds from the royalty oil and gas well rentals, when and as produced from the land during her lifetime, and not thereafter. On the other hand, if we assume that the attempted reservation in the deed of 1906 cannot be so construed, and that Mrs. Ferrell's right to such interest passed by virtue of the deed to Deverick, the latter, by joining in the lease of 1916, has consented to receive the share therein stipulated.

Under either construction the decrees give him all that he could properly take under the lease. They correctly recognize that the whole of the proceeds from the well or wells drilled on said land and from the royalty oil are the property of such children of Mrs. Ferrell by her husband, Thomas J. Ferrell, as may survive her, or of their assigns, and provide that such proceeds shall be invested and kept at interest during the life of Mrs. Ferrell, and that the interest therefrom shall be paid "to the owners of the life estate aforesaid, or their assigns," specifically giving to Deverick in a preceding sentence a one-third share, thus giving him all that the lease of January 1, 1916, passed and could pass to him.

But Deverick further insists that, in the absence of his consent as holder of a vested estate or interest in the land, the court was without power to decree a sale or lease thereof. Without discussing the effect of the proviso contained in section 24b. (8), c. 71, making such consent unnecessary where the property to be leased is oil, gas, or other volatile or fugitive substance, in danger of being withdrawn or drained away, has not the appellant already expressed his consent and willingness to make such a lease by entering into the prior lease of 1916? It is true he did, as he insists, object to the curtailment by any decree entered in the cause of the rights and interests claimed by him in the leased premises as specified in the lease to the United Fuel Gas Company of January 1, 1916. But what boots it if he did object on that ground alone? He did not express an intention or purpose or desire not to lease the land for oil and gas purposes at all, or to any particular lessee, but merely an unwillingness to accept less than the lease he had already executed saved to him. Had he declined to enter into any contract respecting the oil or gas contained in the land, as was done in *Brown v. Brown*, 83 W. Va. 415, 98 S. E. 428, that case might apply to his relief here. But his willingness to lease the land to the proposed lessee for the production of oil and gas

appears from the fact that he first united as lessor in a contract of that kind, one which this suit was brought to correct and validate, in order to make it legally binding and justly efficacious in the accomplishment of the purposes contemplated by the parties thereto. In other words, he prefers to stand upon the terms of a contract that purports to give him what he cannot lawfully insist upon, and refuses to be bound by a contract between the same parties, touching the same subject-matter, and conceding to him all that he can lawfully exact under the circumstances of this case, and that, too, in a suit, to which he is a party, brought to perfect his title to and interest in the land. In no event, however, could he prevent the execution of a lease directed by the court in such a cause as this is, in so far as concerns the interests of the contingent remaindermen, though perhaps he might prevent operations thereunder.

The death of one of the children of Mrs. Ferrell and her husband and the birth of others during the period of her life estate cannot and does not alter the respective rights and relative interests of the parties thereto in any degree. The provisions of that deed remain unalterable as to the rights of the parties thereto or their assigns until the termination of the life estate. When that occurs as the result of the death of Mrs. Ferrell, the child or children born to her and her husband who survive her, whether one or all of them, or their assigns, take the entire fee in the land in controversy, unless in the meantime it is sold or leased, as here, under the provisions of chapter 71 of the Code, and, if it is, the purchaser will acquire an indefeasible title thereto, and the lessee the right to operate thereon, under the terms of the lease; but the proceeds of the sale or lease are to be substituted for and held intact in lieu of the land during the continuance of the life estate, with this qualification: That the life tenant or her assigns of the whole or any part of such estate, as the case may be, are entitled to the whole or the relative part of the interest on such proceeds during her life.

[5] To the extent the decrees provide for the collection and distribution or disposal of the delay rentals and the proceeds derived from the operation of the leased premises, and the interest thereon, until the termination of the estate for the life of Mrs. Ferrell, they are not subject to criticism. The same thing is true as to the directions given therein respecting the revenues to accrue from the lease after the death of the life tenant, and the provision for the payment thereof to such of her children as may survive her, if then of age, or to their assigns. The word "assigns," as used in the decree, comprehends all those who take either immediately or remotely from or under the assignor, whether by conveyance, devise, descent, or act of law (*Erichsen v. Tapert*, 172 Mich. 457, 138 N. W.



330; *Brown v. Crookston Agricultural Ass'n*, 34 Minn. 545, 547, 26 N. W. 907; *Glenn v. Caldwell*, 74 Miss. 49, 52, 20 South. 152; *Smith v. Baxter*, 62 N. J. Eq. 209, 49 Atl. 1130; 5 C. J. 1310), and therefore includes within its scope such persons as have acquired or may acquire the interests of the infant contingent remaindermen by virtue of proper legal proceedings instituted under statutory authority.

Under this construction the decrees correctly dispose of the case, so far as this appellant is concerned, and will be affirmed.

(85 W. Va. 64)

COVERT et al. v. CHESAPEAKE & O.  
R.Y. CO. (No. 3687.)

(Supreme Court of Appeals of West Virginia.  
Oct. 28, 1919.)

(Syllabus by the Court.)

1. WITNESSES  $\S$ 252—SURVEYOR'S BLUEPRINT ADMISSIBLE FOR EXPLANATION OF HIS TESTIMONY.

A map or blueprint made by a surveyor, though not evidence independently of his testimony, is properly admitted in connection therewith for illustration and explanation of his evidence.

2. EVIDENCE  $\S$ 474(11)—OPINIONS OF NON-EXPERTS AS TO DAMAGES TO RIPARIAN OWNER.

The opinions of non-expert witnesses acquainted with the facts and with opportunity and occasion to observe the action of flood waters in a stream, that damages done thereby to the property of a riparian owner were the result of the obstruction placed by defendant in the channel of such stream, is competent and admissible in evidence on the trial of an action for such damages.

3. WATERS AND WATER COURSES  $\S$ 178(2)—RECOVERY FOR OCCASIONAL DAMAGE TO LANDS OF RIPARIAN OWNERS.

Where a railroad company or other person by temporary or permanent structures or fills built in a stream obstructs the channel and thereby diverts the regular flow of the waters therein resulting in occasional damages to the lands of a riparian owner, such damages in contemplation of law are impermanent, continuous and temporary, as distinguished from permanent damages, and recovery therefor is limited to the damages as from time to time they occur.

4. WATERS AND WATER COURSES  $\S$ 179(3)—TEMPORARY DAMAGES BY OBSTRUCTION OF STREAM.

In the trial of an action for such impermanent damages it is error to admit evidence of prospective or future damages liable to be sustained by such riparian owner.

5. WATERS AND WATER COURSES  $\S$ 179(5)—INSTRUCTION AS TO LIMITATION OF RECOVERY FOR TEMPORARY DAMAGES.

An instruction to the jury in such an action, on the subject of damages, which does not limit recovery to such impermanent or temporary damages as have accrued, constitutes reversible error.

Error to Circuit Court, Boone County.

Action by C. R. Covert and others against the Chesapeake & Ohio Railway Company. Verdict and judgment for plaintiffs, and defendant brings error. Judgment reversed, verdict set aside, and defendant awarded a new trial.

Fitzpatrick, Campbell, Brown & Davis and C. W. Strickling, all of Huntington, for plaintiff in error.

L. Fulton, of Madison, for defendants in error.

MILLER, P. Plaintiffs sued defendant for damages to their six houses and four lots (sub-divided) in Laurel City addition to the town of Clothier, located on the east bank of Spruce Fork of Little Coal River, in Boone County, and obtained a verdict and judgment for one thousand dollars, of which the defendant complains.

The declaration, in one count, we think good, and the demurrer thereto was properly overruled. The gravamen of the action is that plaintiffs, before or during the progress of the work doing the injury, constructed six houses on said lots; that the defendant owned and operated on the west bank of said river the Spruce Fork Branch of its railway; and that beginning in the early spring of 1915, it filled in with stone and earth a large part of the main channel on the west side of the river opposite their lots located on the east bank; whereby the said river during freshets therein was turned out of its regular channel and thrown over against the east bank, whereby plaintiffs' lots were washed by the waters and caused to fall in and do them the damages for which redress is sought at the hands of the railway company. Their theory was that the fill on the west bank crowded the main channel, forced the waters back and over into the secondary channel opposite their lots, thereby depriving them of the right to have the waters flow in their natural course undisturbed, unless compensated in damages by the defendant company for the injuries sustained thereby.

[1] The first complaint is that the court over defendant's objection admitted improper evidence. A part of this evidence consisted of a map or blueprint made by one of the surveyors, not claimed by him to be entirely accurate, but used and referred to by him to illustrate and apply his evidence to the conditions on the ground, and admitted in

evidence for that purpose. Of course the map itself was not evidence independently of the testimony of the witness, but it was properly admitted in connection therewith to illustrate and make his testimony clear to the jury. For such purpose it was admissible, and there was no error. *State v. Harr*, 38 W. Va. 58, 17 S. E. 794; *Poling v. Ohio River Railroad Co.*, 38 W. Va. 645, 18 S. E. 782, 24 L. R. A. 215; *King v. Jordan*, 46 W. Va. 106, 32 S. E. 1022.

[2] Another point on the admission of evidence is that certain of plaintiffs' non-expert witnesses were permitted to give in evidence their opinions that the alleged damages to plaintiffs' property were the result of the fill made by defendant in the river. We do not think there is any substantial merit in this point. The witnesses so examined were residents of the village or neighborhood and acquainted with the conditions before and after the fill was made, and their opinions based thereon were competent to go in evidence to the jury for what they were worth. This rule is well established by our decisions. *Walker v. Strosnider*, 67 W. Va. 39, 67 S. E. 1087, 21 Ann. Cas. 1; *Kunst v. Grafton*, 67 W. Va. 20, 67 S. E. 74, 26 L. R. A. (N. S.) 1201; *Cline v. N. & W. Railway Co.*, 69 W. Va. 436, 438, 71 S. E. 705.

[3, 4] Another point involving, it is claimed, more serious consequences, is that plaintiffs were permitted over defendant's objection to prove by a number of witnesses as the basis of recovery the market value of their property immediately before and the value thereof after the fill and the resulting injury up to the time of the institution of this suit, but not including any probable damages or injury from subsequent actions of the river. The theory upon which plaintiffs proceeded at the trial and on which the case was submitted to the jury was that the damages were not permanent but impermanent or continuous and recurrent, and that they were properly limited in their recovery to damages accrued up to the time of the bringing of the suit, and on this theory the railway company as well as the trial court seems to have concurred.

The law laid down by prior decisions of this court is that where a railroad company or other person by structures built in a stream, whether permanent or temporary, changes the current of the stream and causes it from time to time as freshets come to wash away the land of a riparian owner and do him injury, such injury is not of a permanent nature in law, but intermittent, recurrent and continuous, so that damages once for all cannot be recovered. *Eells v. Chesapeake & Ohio Railway Co.*, 49 W. Va. 63, 38 S. E. 479, 87 Am. St. Rep. 787; *Pickens v. Coal River Boom & Timber Co.*, 51 W. Va. 445, 41 S. E. 400, 90 Am. St. Rep. 819; *Id.*, 66 W. Va. 10, 65 S. E. 865, 24 L. R. A. (N. S.) 354; *McHenry v. City of Parkersburg*, 66 W.

Va. 533, 66 S. E. 750, 29 L. R. A. (N. S.) 860. In the second of the *Pickens* Cases cited Judge Brannon re-examined the questions with reference to our prior decisions and cases cited from other states, and reaffirmed the proposition as to the character of such damages and the doctrine of the prior decisions. The test according to these authorities is whether the whole injury results from the original tortious act or from the wrongful continuance of the state of facts produced by those acts. As Judge Brannon says (66 W. Va. 17, 65 S. E. 868, 24 L. R. A. [N. S.] 354):

"We do not test the matter only by the permanent or impermanent character of the structure, but by the damage. Does it all occur at once or come occasionally or as time goes on?"

We agree with counsel on both sides of the case that the facts proven call for the application of the rule relating to impermanent or continuous and recurrent damages. But the point of error urged by counsel for defendant is that conceding the character of the damages, the court admitted evidence of permanent damages. The evidence of plaintiff C. R. Covert and of a number of his other witnesses on this subject was that prior to the filling in of the river by defendant, the value of the entire property, consisting of the four lots and six houses, was \$5,500.00 to \$6,000.00. Following which the question put to each of these witnesses, substantially was: "Leaving out of consideration the question of future damages to the property from washings, what would you consider the fair market value of the property as it existed on September 20, 1916, the date of the institution of the suit?" The answers generally were, about \$3,500.00, the difference, \$2,000.00, being the estimated damages. We see nothing particularly wrong with this evidence, if in their estimate the witnesses limited themselves to the elements properly entering into such impermanent damages, such as loss of rental value, the value of the land actually taken or washed away, interference with egress and ingress to the property, or other physical damage thereto, if any. There was some evidence of loss of rental value, but none except as may have been covered by the evidence relating to the value of the property before and after the building of the work as to the value of the land washed away. There was some evidence of interference with egress and ingress to the rear ends of the lots. The character of the questions propounded to these witnesses was very like the questions allowed in *Cline v. N. & W. Railway Co.*, supra, relied on by plaintiffs in this case. In the case here, however, the plaintiffs and some of their own witnesses were permitted to depart from these elements of damages and to introduce elements of permanent damages. For example, plaintiff C. R. Covert testified that

he would not want to make investments in the property under present conditions, that he did not consider the property safe on account of the fill, and that he would not want to put his money in something that was not safe, showing that he had in mind permanent and future damages. Another witness seems to have taken into consideration the fact that plaintiffs did not own the lots above theirs where any work would have to be done to protect their lots. Besides, an instruction to the jury to be hereafter disposed of shows that the case as submitted to the jury did not properly limit them to temporary damages, as did the instructions in the Cline Case.

Counsel for defendant rely on the rule in *McHenry v. City of Parkersburg*, supra, and *Pickens v. Coal River Boom & Timber Co.*, 68 W. Va. 10, 65 S. E. 865, 24 L. R. A. (N. S.) 354. In the *McHenry* Case it was held to be reversible error in a case of impermanent or recurring damages to admit evidence of the difference between the value of the property before it was subjected to the injury and its value afterwards. But in that case the witnesses were not called upon, as here and in the *Cline* Case, to exclude prospective or future damages.

[5] The next point of error involves the instructions to the jury, given and refused. Defendant's instruction number 1, a peremptory instruction to find for the defendant, was properly refused. It was probably based on the theory that the fill did not cause the damages. But on this point the evidence was conflicting, and the fact was one for the jury. Instructions numbers 2, 4½ and B., on the theory of want of negligence in the construction of the work by the defendant, were properly refused. Plaintiff did not allege or rely on, or attempt to prove negligent construction of the work, but the damaging of their property for public use without just compensation by defendant. Defendant's instruction Z would have limited plaintiffs in their recovery simply to loss of rental value of the property. This is not the law. Certainly if entitled to recover anything, they would be entitled to damages for land actually taken and sustained by physical invasion of their property up to the time of the suit.

Of plaintiffs' instruction number 1, based on the theory of a diversion of the waters from their natural course by the defendant and causing the cutting away of a portion of their lots, it tells the jury if they so find, they should also find for the plaintiffs. This instruction is good as far as it goes, although it does not limit them in the amount of damages or define the rule of measurement to govern them in their findings.

Instruction number 2 is plainly bad in so far as it told the jury that the measure of damages was the difference between the market value of the property immediately before

the first washing of the property after the fill was built, as given in evidence, and its market value on September 20, 1916. It did not exclude prospective or future damages, and as there was some evidence of permanent and future damages admitted, the instruction based thereon was calculated to mislead the jury into an improper finding. Such an instruction is condemned by the *McHenry* Case. In the *Cline* Case the instruction given was properly confined to damages accrued to the date of the suit and excluded prospective or future damages.

It is argued that the verdict was excessive, but as there is to be a new trial, it is not proper to consider that question.

Our conclusion is to reverse the judgment, set aside the verdict, and award the defendant a new trial.

(85 W. Va. 37)

CURTIS et al. v. CURTIS et al. (No. 3720.)

(Supreme Court of Appeals of West Virginia.  
Oct. 28, 1919.)

*(Syllabus by the Court.)*

1. WITNESSES ⇐140(7), 146—HEIR INCOMPETENT TO TESTIFY AS TO MENTAL CAPACITY OF GRANTOR.

One who would inherit an interest in land, in case a deed, which is attacked upon the ground of lack of capacity of the grantor, is set aside, is incompetent to testify as to the mental capacity of the grantor in such deed, and this disqualification extends to the wife or husband of such person.

2. WITNESSES ⇐176(1) — WHERE GRANTEE TESTIFIES TO COMPETENCY OF GRANTOR ADVERSE PARTIES CAN TESTIFY.

Where, however, the grantee in such deed testifies as to the mental capacity of the grantor therein, those seeking to overthrow the same become competent witnesses upon that question under the exception contained in section 23 of chapter 130 (sec. 4879) of the Code of 1913.

3. DEEDS ⇐211(4)—PRIMA FACIE PROOF OF UNDUE INFLUENCE.

Proof that the grantor in a deed was feeble, both in body and mind, reposed great confidence and trust in her son, the grantee therein, who acted as her agent under a power of attorney giving him full authority to manage, dispose of, and convey her estate, that he procured his attorney to prepare the deed conveying all of the grantor's estate to him for an insubstantial consideration to the exclusion of another son and a daughter, who were left entirely unprovided for, and which deed was executed while the grantor was living with the grantee in his home, without any independent advice being obtained by the grantor or any opportunity for obtaining such advice, establishes prima facie the charge of undue influence by the son; and, where such prima facie case is not overthrown by clear evidence that the grantor was of sound mind

and acted independently and upon her own judgment in executing such deed, the same will be set aside.

Appeal from Circuit Court, Upshur County.

Suit by Clinton A. Curtis and Mollie E. McNemar against I. R. Curtis and others, to cancel a deed. Decree for plaintiffs, and the named defendant appeals. Affirmed and remanded to take the accounts prayed for in the bill.

C. N. Pew and H. Roy Waugh, both of Buckhannon, for appellant.

Young & McWhorter, of Buckhannon, for appellees.

RITZ, J. The plaintiffs, Clinton A. Curtis and Mollie E. McNemar, and the defendant I. R. Curtis are children of Katherine E. Smith, who was twice married, her first husband being Isom Curtis, the father of the plaintiffs and the above-named defendant. After the marriage of Mrs. Smith to her last husband she resided with him on a farm in Upshur county until the spring of 1912, when their house was destroyed by fire. They then for something like a year lived with various of the children of Mr. Smith by his first wife. Early in the year 1913 they acquired a house in the town of Buckhannon, in what is known as the Liggett addition, which was conveyed to Mrs. Smith, although paid for by her husband, in consideration that she release her contingent right of dower in some other lands owned by him. The Smiths continued to reside at this place until the death of the husband in the latter part of July, 1915. At that time it is conceded by all parties that Mrs. Smith was in a very feeble physical condition, and it is contended by the plaintiffs that her mental faculties were very much impaired, if not entirely destroyed. After the funeral of Mr. Smith, and on the same day, the plaintiffs say that at the instance of their brother I. R. Curtis they entered into an arrangement for taking care of their mother. According to their contention it was agreed among them that her mental and physical condition was such that she was not able to take care of herself or of her property, and they agreed that she should live with that one of her children that she might select, and that such one should receive reasonable compensation for caring for her out of her property, and at her death what remained should be divided equally among them. She was allowed to remain at her home for a few days after her husband's death in charge of Mr. and Mrs. Queen, who were employed for the purpose of caring for her. She was then removed to the home of her daughter Mrs. McNemar in Lewis county, where she remained until about the 25th of September, 1915. At that time she was tak-

en back to Buckhannon and placed in the home of Mr. and Mrs. Queen, where she remained until about the 3d of October, when she was taken to the home of I. R. Curtis, also in the town of Buckhannon, where she remained until her death on the 19th of December, 1915. On the 30th day of July, 1915, the defendant I. R. Curtis procured from his mother a power of attorney, authorizing him to transact her business, sue for, and recover any moneys that might be due her from any one, collect the same, to compound or compromise for the same and give discharges therefor, make settlement of her interest in the estate of her late husband Phillip Smith, and also of her interest in the estate of her deceased father, Randolph Jackson, to sign any bond, deed, obligation, contract or other paper, to indorse promissory notes and renew the same from time to time, to draw any money she might have out of any banks, to sell or lease any part or parts of her real estate, and to make all necessary deeds of conveyance, with all necessary covenants of warranty and assurances of title, and sign, seal, and acknowledge the same, and to do all other acts and things in relation to all or any part of her affairs that she might do herself. This power of attorney he had recorded in the office of the clerk of the county court of Upshur county. On the 17th day of November, 1915, a deed was executed by Mrs. Smith, conveying to I. R. Curtis all of her real estate, consisting of her house and lot in the town of Buckhannon, and her interest in her father's farm in Lewis county. This deed was also placed upon the record on the same day that it was executed and acknowledged, but the plaintiffs say that they had no actual knowledge of it until after the death of their mother in December. Shortly after their mother's death they instituted this suit for the purpose of setting aside and canceling said deed, upon the ground that it was in violation of the agreement had between the plaintiffs and the defendant I. R. Curtis in regard to taking care of their mother, and the division of the property, and upon the further ground that she was without capacity to make such deed at the time she made the same, and that it was procured from her by undue and fraudulent influence. Much evidence was taken upon the question of the capacity of the grantor to make this deed, and to show the relationship of the various parties to the transaction. The circuit court entered a decree canceling the deed, holding that Mrs. Smith did not have capacity to execute the same, and that it was procured from her by the undue influence of the grantee. From this decree this appeal is prosecuted.

[1, 2] In support of the allegations of their bill that their mother did not have capacity to make the deed sought to be overthrown, both of the plaintiffs, as well as their respec-

tive spouses, testify as to the mental capacity of Mrs. Smith. There was no objection made to their testimony in this regard at the time it was introduced, nor was it objected to for this reason at any time in the lower court, but it is now for the first time suggested that they were not competent to testify as to the mental capacity of the grantor in that deed, for the reason that it would be in effect testifying to personal communications with the deceased grantor. It is well settled in this jurisdiction that the one claiming under a deceased person cannot, in a suit affecting his estate, give his opinion as to the mental capacity of such deceased person, as such opinion must be based upon communications had with the deceased. Impressions or conclusions reached by the witness as to the sanity or insanity of a deceased party must be arrived at from observations of the conduct of, or from communications had with, such deceased person, and in either event they fall within the inhibition of the statute. *Trowbridge v. Stone*, 42 W. Va. 454, 26 S. E. 363; *Freeman v. Freeman*, 71 W. Va. 303, 76 S. E. 657. And it is likewise true that where a witness is disqualified to testify as to such personal communications, his spouse is under like disability. *Freeman v. Freeman*, supra; *Kilgore v. Hanley*, 27 W. Va. 451.

But the plaintiffs say that, while these witnesses were not competent to testify at the time their evidence was taken, they became competent before any objection was made thereto, or before their evidence was ever read by the chancellor, because the defendant and his wife, who were under the same disability, testified as to the mental condition of Mrs. Smith. It is quite true that the defendant and his wife both testify at length as to the mental capacity of the grantor in the deed, and give their opinions in regard thereto. It is insisted that this was testifying in regard to the same communications or transactions to which the testimony of the plaintiffs was directed. It may be said that the observations of the grantor by the witnesses extend practically over the same period of time, they were of the same general character, and the opinions formed are conclusions reached from the same communications or transactions with the deceased party, and if one of the parties testifies in regard to such communications or transactions, under the exception contained in section 23 of chapter 130 (sec. 4879) of the Code, the other interested party is authorized to give his version of the transactions or communications. This was the conclusion reached by this court in the case of *Wooldridge v. Wooldridge*, 69 W. Va. 554, 558, 72 S. E. 654, Ann. Cas. 1913B, 653. Our conclusion, therefore, is that, while the plaintiffs and their spouses were not competent witnesses at the time their testimony was taken, still by the action of the defendant in introduc-

ing himself and his wife to testify in regard to the mental condition of his mother he made this evidence competent, and he cannot now complain that it was considered by the chancellor in reaching his conclusion.

[3] As before stated, much evidence is taken by the parties to this suit to establish the mental condition of the grantor in the deed. A number of the children of Phillip Smith, the second husband of Mrs. Smith, were introduced. They had had long acquaintance with Mrs. Smith, and were nearly of the same age, Phillip Smith being many years older than his wife; it appearing that he was past the age of 90 years when he died, while his wife was only about 68. These children testify that they had known Mrs. Smith for many, many years; that in the year 1912, when the house in which the Smiths lived was destroyed by fire, Mrs. Smith suffered from a severe shock of some kind, which seemed to very seriously depress her; that her physical and mental condition continued to grow worse from that day until the day of her death. They testify that during the last illness of their father they were at the house of the Smiths frequently, some of them almost constantly for quite awhile; that Mrs. Smith was at that time in a very deplorable physical and mental condition; that she did not appreciate the gravity of her husband's illness, and did not understand that he had died. It is insisted that these witnesses were biased and prejudiced against the defendant I. R. Curtis, and that little credence should be given to their testimony. After a careful perusal of the record we cannot see any justification for this conclusion. They certainly had the means of knowledge, and we see nothing in the record to indicate that their testimony was fabricated because of ill feeling toward the defendant. They had frequent communications with Mrs. Smith after her husband's death, up until the time she died, and they are all of the opinion that for a considerable time before her death her mental condition was such that she did not know what she was doing. Other witnesses are introduced who also testify in the same way. Mr. and Mrs. Queen, who were at the house of Mr. and Mrs. Smith before Mr. Smith's death, and who nursed both of them during that time, and stayed there with Mrs. Smith for a short time after the funeral of Mr. Smith, and at whose house Mrs. Smith stayed after her return from her daughter's in Lewis county in the fall of 1915, testify as to her condition during the time they were at the Smith residence with her and during the time she was at their house in the fall of 1915. They testify that she was incapable of understanding what she was doing during that time. They say that at the time the power of attorney was executed she did not realize what she had done, and that after her son had procured her signature to

this paper she inquired of them at frequent intervals what it was that she had executed. They say that while she was at their house she thought she was at her own residence, and called attention to the fact that some trees that were formerly in her yard were not there now; that she frequently did not recognize her close friends and associates of long standing. It is also testified by witnesses that on some occasions she did not recognize her own children. Two physicians testify on behalf of the plaintiffs, one who attended Mrs. Smith while she was at her daughter's in Lewis county, and the other who attended her for some time at Buckhannon. The first of these only saw her on two or three occasions, but he attended her professionally at those times, and says that he found her suffering from paralysis, that she was mentally incapacitated, and that there was in his judgment no possibility of her improving, but that he was reasonably certain that she would continue to grow worse until her death. The other physician saw her on many more occasions, and his conclusion was about the same. However, two physicians testify on behalf of the defendant, and their opportunities were equally as good as those of the physicians above mentioned. One of these only saw her, however, on one occasion, and that was on the very day she executed the deed. He says that he was present for about 30 minutes, and went there for the purpose of making an examination; that she answered his questions intelligently, and he saw nothing to indicate that there was anything wrong with her mind; that in his judgment she was suffering from locomotor ataxia, which disease does not necessarily affect the mind. The other physician who testified for the defendant had attended Mrs. Smith from a short time before her husband's death until her death, with the exception of the time that she was in Lewis county at her daughter's. He testifies that he saw her on many occasions during that time, and that he believes she was suffering from locomotor ataxia, which does not necessarily affect the mind until shortly before death, and that he did not believe that Mrs. Smith's mind was seriously affected until three or four days before she died, although he admits that during all of the time she was weak, both in body and mind. Other witnesses testify that they had seen Mrs. Smith both before and after her husband's death, on various occasions; that she always knew them, conversed with them intelligently, and seemed to clearly understand what she was doing.

That her mind was affected there is no doubt. Whether it was affected to the extent that the disposition she made of her property under the circumstances thereof was not in fact her own act is the question we have here. The defendant I. R. Curtis was intrusted by her with the full manage-

ment of all of her property by the power of attorney before referred to. This conferred upon him large powers, even to the extent of selling and conveying any of her estate. It shows that she had the utmost confidence in him. In fact it may be said that it is strong evidence that he exercised a controlling influence with her even at that time. It is also worthy of remark that at the time he procured this power of attorney he said nothing about it to either his brother or sister, and they had no knowledge of it until after their mother's death. He contends, of course, that he believed his mother was entirely capable of conducting her own affairs, and that he only took this power of attorney from her for the reason that she was physically weak and unable to get around to look after her business, but why did he incorporate in it authority to sell and convey her real estate if she was entirely competent for the purpose of making a deed? It would have required no physical exertion upon her part to have done this. Then, too, he lived many miles away in another part of the state, and if his mother's convenience was his only motive, this would have been better served by conferring the power upon his brother who lived in the same town with the mother. There is another significant fact in connection with this power of attorney, and that is this recital in it: "I am doing this because I am physically unable to look after these matters, but yet of sound mind." Both of the plaintiffs and the wife of Clinton A. Curtis all testify that on the day of Phillip Smith's funeral they and the defendant I. R. Curtis agreed among themselves that Mrs. Smith was mentally incapable of transacting her business; that this was I. R. Curtis' own suggestion, and that they assented to it because it was a fact. They introduced two letters written by the defendant I. R. Curtis on the 31st of August, 1915, one to his sister, and the other to his brother. In the letter to his sister he insists on their getting together and agreeing on how his mother shall be taken care of, and insists that his sister be compensated for her care and attention to her, and also states that anything that is left of the mother's estate after they have provided for her they will divide equally among themselves. He also makes the suggestion in this letter that there is no necessity of worrying their mother about it, for she in all her suffering cannot have a clear conception of what she wants, but that he is sure she will want all of her children to share equally. Substantially the same statements are made in the letter written on the same day to his brother. These letters, it is urged, are inconsistent with the statement that he believed his mother's mental condition was sound, and that she was competent to take care of her affairs. Pursuant to these letters he did come to the home of his sister in Lewis county where his mother was

then staying, and removed her to Buckhannon. He claims that he did this because his mother desired it, she complaining that her daughter's children disturbed her. The defendant then kept her at his house in Buckhannon until she died in December. It appears that on the 15th of November he had the deed prepared which is sought to be set aside in this case. He says that he did it at the repeated solicitations of his mother. It conveys all of her property to him, in consideration that he support and maintain her during her life. It was reasonably certain that she could live but a short time. This is shown clearly by the medical testimony, and while he says that he was reluctant to have his mother execute this deed, it does not appear that he ever suggested that she consult with her other children in regard to it, or in fact with any one else, nor is there any evidence that she ever did consult with any one else in regard to it. At the time the deed was acknowledged it was not read over to her, the defendant making the statement that he had read it to her the day before, and she knew what was in it. The officer who took the acknowledgment and the witness who was present and witnessed her mark say that she assented to this statement, and when she was asked if she acknowledged the deed expressed herself in the affirmative, and that this was all that passed at the time of the execution of the paper. It is rather significant that on this very day, not only the doctor who had been attending her, but another doctor who had never seen her before, and who was never called to attend her afterward, called to examine her just a short time after she executed the deed. While the defendant placed this deed on record on the same day that it was procured, he never said a word to his brother about it, although they lived right in the same town, and saw each other practically every day, nor did he ever mention the matter to his sister. Mrs. Smith, it cannot be doubted, reposed the utmost confidence in her son, the defendant. She was feeble, not only in body, but in mind. He acted as her agent. Under the power of attorney which she had given him he was her other self, and we do not hesitate to say that a deed executed by her, conveying to him all of her estate, practically without consideration, without any advice or consultation from any one else, is *prima facie* evidence of undue influence in the procurement of it. *Sperry v. Johnson*, 80 W. Va. 142, 92 S. E. 574; *Turner v. Hinchman*, 72 W. Va. 384, 79 S. E. 18; *Samuel v. Marshall*, 3 Leigh (Va.) 567; *Hartman v. Strickler*, 82 Va. 225; *Whitelaw v. Sims*, 90 Va. 588, 19 S. E. 113; *Leonard v. Burtie*, 226 Ill. 422, 80 N. E. 992; *In re Hess's Will*, 48 Minn. 504, 51 N. W. 614, 31 Am. St. Rep. 665, and note at page 670, etc.; *Underhill on Wills*, § 137. This *prima facie*

case is not overcome by the other evidence. In fact we are of opinion that it is strengthened thereby. There are many cases in this jurisdiction in which wills and deeds have been attacked for want of capacity upon the part of the grantors therein. One case furnishes very little light in the determination of another. The relationship of the parties and the conditions which surround them are always different, and the motives which actuate men in the transaction of business are so influenced by these peculiar conditions and circumstances that the decision in one case furnishes little assistance in the determination of another. In this case the learned judge of the trial court has found that Mrs. Smith did not have mental capacity to make this deed, and that the same was procured by undue influence. His findings were based upon a careful review of all the evidence, and we will not reverse the same unless convinced that they are not supported by the showing made. We cannot say that in this case.

Our conclusion, therefore, is to affirm the decree complained of, and remand the cause for the purpose of taking the accounts prayed for in the bill.

(85 W. Va. 46)

**BROWNING v. BROWNING et al.**  
(No. 8533.)

(Supreme Court of Appeals of West Virginia.  
Oct. 28, 1919.)

(Syllabus by the Court.)

**1. LIMITATION OF ACTIONS §130(2)—APPLICATION OF STATUTE AUTHORIZING NEW ACTION AFTER DISMISSAL.**

The statute (section 19, c. 104, Code [sec. 4432]) which saves to a plaintiff the right to bring a new action on the same cause within one year after the dismissal, for any cause which could not be pleaded as a bar thereto, of a prior action brought in time, "notwithstanding the expiration of the time within which a new action or suit must otherwise have been brought," applies only to those causes of action which, under the general statute of limitation applicable thereto, would otherwise be barred before the new action is commenced, and lengthens rather than shortens the period of limitation prescribed by the general statute. If there is no such bar, or if there is one whose limitation has not yet run against the cause of action, the section has no application, and nothing except laches or the running of such limitation will prevent the institution and maintenance of a second suit.

**2. EQUITY §71(1)—LACHES IN ENFORCEMENT OF RIGHT OF ACTION.**

Whether laches does or does not operate to defeat enforcement of a right asserted is not always to be determined merely by a consideration of the time that has elapsed since the accrual of the right to sue.

**3. EQUITY §71(1)—POSTPONEMENT OF ASSERTION OF CLAIM NOT DEFEATING EQUITABLE RELIEF.**

Unless accompanied by circumstances affording a reasonable basis for presuming an intention on the part of the plaintiff to abandon the claim asserted in the suit, or such as render the transaction out of which the claim arose obscure, or render difficult, if not impossible, the production of evidence to defeat the claim and thereby prevent injustice, the mere postponement of the assertion thereof does not ordinarily warrant refusal of relief in equity.

**4. EQUITY §83—EXCUSABLE LACHES IN ENFORCEMENT OF CLAIM.**

Where in the meantime defendant or those claiming under him have recognized or acknowledged directly or impliedly the existence of the right asserted by plaintiff, such recognition generally excuses the delay of the plaintiff in suing to enforce such right.

**5. PLEADING §214(1)—DEMURRER AS AN ADMISION.**

A demurrer admits to be true the material facts set up in a pleading and all reasonable inferences or necessary presumptions fairly attributable to such facts.

**6. PLEADING §48—SUFFICIENCY ON DEMURRER.**

A pleading is sufficient upon demurrer if it informs defendant of the nature of the demand made upon him, and states such facts as will enable the court to say that, if they are proved as alleged and in the light of all reasonable inferences fairly attributable thereto, they establish a good cause of action.

**Appeal from Circuit Court, Logan County.**

Suit by Jesse V. Browning against Minerva Browning and others. Demurrer to bill sustained, and suit dismissed, without reservation, plaintiff's bill of review for error apparent on the face of the record dismissed on defendant's demurrer, and plaintiff appeals. Reversed, demurrers overruled, and cause remanded.

J. B. Wilkinson and Butts & Minter, all of Logan, for appellant.

LYNCH, J. By three successive, but vain, efforts made in 1912 and in June and November of 1918, plaintiff endeavored to obtain a decree declaring a deed made by him to his brother, David T. Browning, for 50 acres of land in Logan county, to be a mortgage to secure the payment of \$600 to the grantee, rather than a grant to him of the land in fee simple absolute, as on its face it purports to be. The deed, the acknowledgment, and recordation thereof bear date as of August 7, 1903; the consideration expressed therein being "one dollar and other considerations" in hand paid, the receipt of which is acknowledged. Some time during the early part of October, 1912, it appears from the allegations of the bill demurred to, plaintiff tendered

defendant \$600 and the interest that had accrued thereon in the meantime, and demanded a reconveyance of the land "pursuant to the agreement and understanding" had between them in 1903, but the grantee declined to accept the money tendered and to execute the reconveyance demanded. Thereupon ensued the first suit, which on November 4, 1912, plaintiff voluntarily dismissed, reserving in the dismissal order the right to institute and prosecute another suit based upon the same cause and for the same relief. This dismissal, according to the allegations of the bill, was due to the intercession of the father of the grantor and grantee, with the expectation of effecting a compromise and amicable settlement of the matters in controversy between them, but which they failed to consummate. Plaintiff then brought this suit at July rules, 1918, and to the bill then filed defendant demurred, and the court sustained the demurrer and dismissed the suit without reservation. Later in the same year plaintiff filed a bill of review for error apparent upon the face of the record, which terminated likewise upon defendant's demurrer thereto. Hence this appeal.

[1, 2] The only ground assigned as cause of demurrer to the second bill, as appears from the order of dismissal, and the only one assigned in argument by counsel, is "that at the institution of this suit more than one year had expired since the dismissal of a former suit on the same cause of action between the same parties"—this upon the supposition that section 19, c. 104, Code (section 4432), is decisive of the question here involved. The applicability of this section to a suit brought to impress upon a deed absolute on its face the character of a mortgage and to decree accordingly does not seem apparent. This is not an unusual, but a common, provision. It appears in many limitation statutes substantially embodied in the same language. It saves to the plaintiff the right to bring an action within one year after the abatement of a prior action brought in time for any of the reasons therein mentioned, or the reversal or arrest of a judgment therein recovered on a ground not preclusive of a new action on the same cause, or a dismissal for want of security for costs or for any other cause which could not be pleaded as a bar to the action, "notwithstanding the expiration of the time within which a new action or suit must otherwise have been brought." The enlarged remedy thereby provided applies in this state as well to suits in equity as to actions at law (*Hevener v. Hannah*, 59 W. Va. 476, 53 S. E. 635); but not so, it seems, in Virginia (*Dawes v. N. Y. P. & N. R. Co.*, 96 Va. 733, 32 S. E. 778). But obviously, as the language quoted above indicates, a statutory bar must exist and the necessity for invoking the exemption therefrom sufficiently ap-



pear before the privilege is available by way of extending the right to sue. If there is no such bar, or if there is one whose limitation had not run against the cause of action, nothing except laches will prevent the institution and maintenance of a second suit, especially where, as here, the order of dismissal reserved to plaintiff the right to renew his suit to obtain the relief sought by him in the first instance, though such reservation may not always be necessary in such case. Section 19 applies only to those causes of action which, under the general statute of limitation applicable thereto, would otherwise be barred before the new action is commenced, and lengthens rather than shortens the period of limitation prescribed therein. There is no statute of limitations in this state applicable to a suit such as this, and hence if plaintiff's right to sue is not barred by laches, but still exists, section 19 did not operate to effect a termination of such right to sue at the end of one year from the decree of dismissal. Instead such right continued and still continues, unless barred by laches.

[3, 4] Whether this equitable doctrine does or does not apply to defeat enforcement of the right asserted is not always to be determined merely by a consideration of the time that has elapsed since the accrual of the right to sue. *Cranmer v. McSwords*, 24 W. Va. 594; *Depue v. Miller*, 65 W. Va. 120, 64 S. E. 740, 23 L. R. A. (N. S.) 775. Unless accompanied by circumstances affording a reasonable basis for presuming an intention on the part of the plaintiff to abandon the claim asserted in the suit, or such as makes the transaction out of which the claim is said to have arisen obscure, or renders it difficult, if not impossible, to produce evidence to defeat the claim and thereby prevent injustice, the mere postponement of the assertion of the claim does not ordinarily warrant refusal of relief in equity. *Tazewell v. Saunders*, 13 Grat. (Va.) 354; *Tidball v. Shenandoah Nat. Bank*, 100 Va. 741, 42 S. E. 867. If no substantial obstruction probably will appear to defeat a fair investigation of the merits of the claim preferred, and a just ascertainment of the rights of the parties with respect thereto, the doctrine of laches does not apply. *Whitlock v. Johnson*, 87 Va. 323, 333, 12 S. E. 614. While it is a sound and salutary rule that he who resorts to a court of equity to enforce his rights must do so within a reasonable time, all things considered, and if he negligently, unreasonably, and unjustifiably delays the prosecution of his demand until there is such a change or alteration in the condition or situation of the parties, as by death or loss of evidence incident thereto, or such as may work injustice to either interested party by reason of insolvency or other untoward circumstances, or where to enforce the claim would operate to the prejudice of purchasers for value without notice, actual or

constructive, the bar does apply (*Smith v. Thompson*, 7 Grat. [Va.] 112, 54 Am. Dec. 126; *Despard v. Despard*, 53 W. Va. 443, 44 S. E. 448), yet the rule is not inflexible.

Such procrastination, continued for seven years, was held in *Pethtel v. McCullough*, 49 W. Va. 520, 39 S. E. 199, to be insufficient to warrant the dismissal of a suit on the ground of lack of due diligence in prosecuting it, where the parties to the transaction still survived; and in some cases the same rule may apply, though one or both parties thereto may be dead. *Alexander v. Byrd*, 85 Va. 690, 8 S. E. 577; *Beverly v. Rhodes*, 86 Va. 415, 10 S. E. 572. And while it is undoubtedly true that equity will refuse to enforce demands that have become stale by reason of the lapse of time, and where the claimant, by his inaction continued during many years, inferentially has abandoned the prosecution of his claim, as held in numerous cases cited in 9 *Michie's Digest*, 99, yet if in the meantime defendant or those claiming under him acknowledged directly or impliedly the existence of the right asserted by plaintiff, such recognition, the authorities say, excuses the delay of the plaintiff in suing in equity to enforce such right. *Griffin v. Macaulay*, 7 Grat. 476, 582; *Applegate v. Wellsburg Banking, etc., Co.*, 68 W. Va. 477, 69 S. E. 901; *Southern Railway Co. v. Gregg*, 101 Va. 308, 43 S. E. 570.

Was there such a recognition of the validity of the claim of the plaintiff as these authorities say excuses the delay now relied on to defeat the relief sought by plaintiff in this suit? David T. Browning, the grantee in the deed, seems to have died sometime in the year 1915 (see Record, p. 28), leaving surviving Minerva Browning, his widow, and Millard F. Carson, Oakley, Dewey, Tweel, and John R. Browning, his children and heirs at law, all of whom are defendants to this suit; the five children last named being infants and represented by Ira P. Hager, guardian ad litem duly appointed by the court.

Though David T. Browning did refuse in 1912 to accept the money tendered him by the plaintiff, and to reconvey the land when such conveyance was demanded by the plaintiff, according to the allegations of the bill, yet it likewise appears from the bill that plaintiff was required to join, or for some reason did join, in the execution of a deed conveying a railroad right of way through the 50 acres to Cole and Crane in February, 1913. This he did inferentially, as we may presume, because of the claim now set up respecting the nature and purpose of the negotiation terminating in the deed of August 7, 1903, between the two brothers. Indeed, plaintiff's joining in the execution of the Cole and Crane deed, 10 years after the deed of 1903, is not and perhaps cannot be explained on any other hypothesis than that he then insisted upon his right to the consideration agreed up-

on by the parties to that transaction. That he did so at that time and for that reason and none other is emphasized by the further fact that the \$600 paid by Cole and Crane for the right of way granted to them was deposited, presumably by and with the advice and consent of all the parties interested, and permitted to remain in the hands of J. Cary Alderson "on account of the contention \* \* \* regarding the ownership of said land and the right to redeem by Jesse V. Browning," the plaintiff in this suit and appellant here.

[5] A demurrer admits to be true the material facts set up in a pleading and all reasonable inferences or necessary presumptions fairly attributable to such facts. *Clark v. West*, 193 N. Y. 349, 86 N. E. 1; *Pollitz v. Wabash R. R. Co.*, 207 N. Y. 113, 128, 100 N. E. 721; *Wills v. Coal Co.*, 52 Or. 70, 96 Pac. 528; *Oregon Home Builders v. Eisman*, 88 Or. 611, 172 Pac. 114; *Goshen Milling Co. v. Bailey*, 186 Ind. 377, 114 N. E. 869; *Klemix v. Jewelry Co.*, 122 Minn. 380, 142 N. W. 871; *Preiss v. Zins*, 122 Minn. 441, 142 N. W. 822; *Klann v. Minn.*, 161 Wis. 517, 154 N. W. 996; 31 Cyc. 336, and cases cited. Besides, the bill explicitly charges and the demurrer admits that the \$600 paid to Alderson was "to be held by him in trust and eventually paid to the party legally adjudicated to be the rightful owner of said lands," and that, although later directed by the court to be paid to Minerva Browning, the widow and administratrix of David T. Browning, said sum and the interest thereon accrued and to accrue is the money of the plaintiff, and to be accounted for to him or credited upon the debt secured by the deed from him to his brother treated as a mortgage, when the amount thereof is ascertained.

[6] As said in *Depue v. Miller*, 65 W. Va. 120, 64 S. E. 740, 23 L. R. A. (N. S.) 775:

"If the right of the plaintiff is clear and not dependent upon oral evidence, and no injury or prejudice to the defendant has resulted from the delay, as by the death of parties, change of conditions, loss of evidence, or the like, the cause of action is not barred by laches, unless the lapse of time and circumstances are such as to raise a presumption of intent, on the part of the plaintiff, to abandon or relinquish the right."

Here the death of the grantee in the deed of 1903 out of which has arisen this controversy operates to some extent alike to the prejudice of both parties. Neither of them can explain the circumstances under which the negotiations leading up to the deed occurred or the purposes which it was intended to

serve, that is, whether it is what it purports to be, a conveyance of the fee-simple title without any inconsistent contemporaneous agreement qualifying its apparent purpose, or a mortgage, as plaintiff contends it is. Death has closed the mouth of one and the statute (section 23, c. 130, Code [sec. 4879]) the mouth of the other, so that neither can speak of the transaction itself or the negotiations between them preliminary thereto. Nor can we say the plaintiff's rights depend wholly or for the most part upon oral testimony. Nothing in the bill shows whether the alleged agreement qualifying the transaction was or was not documentary; and no rule of pleading requires more than is necessary to show a good cause for relief. A pleading is sufficient upon demurrer if it informs defendant of the nature of the demand made upon him and states such facts as will enable the court to say that, if they are proved as alleged and in the light of all reasonable inferences fairly attributable to such facts, they establish a good cause of action. *Snodgrass v. Wolf*, 11 W. Va. 158; *Hortenstein v. Virginia*, etc. Ry. Co., 102 Va. 914, 47 S. E. 996; *Virginia Portland Cement Co. v. Luck*, 103 Va. 427, 49 S. E. 577; *Stonegap Colliery Co. v. Hamilton*, 119 Va. 271, 89 S. E. 305, Ann. Cas. 1917E, 60.

And while David T. Browning and his wife on January 15, 1915, granted to the defendant A. J. Dalton another part, but not all, of the residue of the tract, and they alone joined as grantors therein, the bill alleges and the demurrer admits that Dalton had full knowledge and notice that plaintiff claimed title to the tract subject only to the payment of the debt to his brother. If plaintiff can by proof establish the fact to be as he has alleged, Dalton cannot complain if he loses the benefit of his purchase, for such knowledge effectually disqualifies him to invoke the aid of the rule which seeks to protect a purchaser for value without notice.

The observations respecting laches are to be understood only as made in the light of the allegations of the bills considered upon defendant's demurrers. What the proof may develop, if the cause proceeds to final hearing upon the merits, we cannot of course foresee, and therefore do not pretend to say whether the laches of the plaintiff, if any, is such as precludes the grant to him of the relief he seeks. We are therefore of opinion to reverse the decrees entered in the cause, the first at the October term, 1918, the second on February 4, 1919, of both of which plaintiff complains, overrule the demurrers to the original bill and bill of review, and remand the cause for further proceedings.

(85 W. Va. 82)

**MILLER v. AMERICAN BANK & TRUST CO. et al. (No. 3762.)**(Supreme Court of Appeals of West Virginia.  
Nov. 4, 1919.)*(Syllabus by the Court.)***1. PLEDGES  $\S$ 56(2) — SALE AFTER DEFAULT AND UPON NOTICE.**

The pledgee of mortgage bonds of a private corporation, and of individual negotiable notes pledged by such corporation, to secure a debt owing by it, may sell the same to the highest bidder, after default, upon due notice to the pledgor of the time and place of sale, when authorized so to do by the collateral agreement.

**2. CORPORATIONS  $\S$ 549—RESTRAINING SALE OF MORTGAGE BONDS AND OTHER COLLATERAL BY PLEDGEE.**

An unsecured creditor or stockholder who brings a suit against such corporation, after notice of such sale, praying for the appointment of a receiver to administer its assets and wind up its affairs, on the ground of its insolvency, is not entitled to have the sale of the bonds so pledged enjoined.

Appeal from Circuit Court, Cabell County.

Representative suit for injunction by James I. Miller against the American Bank & Trust Company and another, asking for appointment of a receiver of the Glass Brick Company. Injunction granted, and defendants demurred to the bill, and their motion to dissolve the injunction was sustained, and from such order plaintiff appeals. Affirmed.

J. H. Strickling, of Huntington, for appellant.

John H. Meek, Deegan & Boman, Thomas R. Shepherd, and Warth & McCullough, all of Huntington, for appellees.

**WILLIAMS, J.** The Glass Brick Company, a domestic corporation, having its principal office and place of business at Huntington, W. Va., being largely indebted, issued \$100,000 of bonds secured by deed of trust on its plant, and deposited \$33,800 of said bonds and a note of \$10,000 executed by it to C. B. Lawton and indorsed by him and others, with the American Bank & Trust Company as collateral to secure a debt of \$33,900 which it owed said bank. It also deposited with the Ohio Valley Bank \$16,000 of said mortgage bonds to secure a debt which it owed the bank of \$12,000. These debts becoming due and not being paid, the aforesaid banks published notice in the Huntington Advertiser, a newspaper published in said city of Huntington, that they would sell the collateral so held by them to the highest bidder, the former on the 18th and the latter on the 16th of October, 1918. Thereupon James I. Miller, an unsecured creditor and stockholder of said Glass Brick Company, brought this suit on behalf of himself and

all other stockholders and unsecured creditors who chose to become parties plaintiff thereto and help defray the expenses thereof for the purpose of enjoining said sales and having a receiver appointed to administer the assets of said corporation, alleging its insolvency, and that it was compelled to cease operation because its business was not essential to the prosecution of the war; that it has no capital nor the ability to acquire any, with which to resume operations; that there is no market for its bonds; and that, if the sale is permitted to be made as advertised, it will result in great sacrifice of the company's assets to the injury of all unsecured creditors.

The bill prays for the appointment of a receiver to take charge of the assets of said company and collect the claims and demands due it, and for an injunction prohibiting said sales from being made as advertised. The judge of the circuit court, in vacation, on the 18th of October, 1918, granted the injunction as prayed for. Both of said banks demurred to the bill, and gave notice that on the 31st of October, 1918, they would move the judge of said court in chambers to dissolve the injunction. The motion was heard on the 2d of November, 1918, the parties appearing by their respective attorneys, and the plaintiff by counsel joining in the demurrers and resisting the motion, on consideration whereof the court sustained the motion and dissolved the injunction, and from that order the plaintiff has appealed.

[1, 2] The only question is whether or not the pledgees have a right to sell the bonds pledged to them to secure their respective debts, pending a suit by an unsecured creditor and stockholder brought to wind up the business and administer the assets of the pledgor, an insolvent corporation. Section 58, c. 53, Code 1913 (sec. 2890), and *Waggy v. Jane Lew Lumber Co.*, 69 W. Va. 668, 72 S. E. 778, and *Parr et al. v. Blue Ridge Coal Co.*, 72 W. Va. 174, 77 S. E. 894, are cited as authority for staying the hands of the secured creditors, and requiring them to come into the suit and await its determination. The citations do not sustain the proposition. In the *Waggy* Case an unsecured creditor of the insolvent corporation sought to obtain an advantage over other creditors by procuring a judgment against the debtor after a receiver had been appointed. This, of course, a creditor could not do when the assets of the insolvent debtor were in custodia legis. The principal question decided in the latter case was that, where a suit had been brought to wind up the affairs of an insolvent mining corporation operating under a lease, the court had a right to prevent the lessor from declaring a forfeiture of the lease. This was for the purpose of protecting the property of the insolvent corporation for the bene-

fit of its creditors, who, if the lease had been forfeited, would have received nothing. The lease constituted the chief asset of the mining company, and the right of the lessor to declare a forfeiture was primarily intended as a security for his rents and royalties, and if they were paid or secured he had no right to complain. Equity will generally relieve against a forfeiture.

In the present case the bonds were pledged with the banks before the suit was brought, and the debts for which they were pledged had become due and payable. It is well-settled law that a pledgee has the right to sell the property pledged, without judicial process, upon proper notice to the pledgor, when authorized by the pledgor to do so, even if the pledge consists of commercial paper past due or presently to become due. When authorized to sell such paper, the pledgee is under no obligation to hold and collect rather than sell it and apply the proceeds on his debt. 21 R. C. L. 688. The bill avers that the banks have served notice on the directors of the Glass Brick Company that on the dates above named they will proceed to sell the said collateral securities "under and by virtue of the terms of the collateral notes executed as aforesaid by the said defendant Glass Brick Company to the said banks."

It thus appears that the sale was authorized, and that the pledgees are violating no agreement with the pledgor in proceeding to sell the bonds and notes, and their right to sell, without judicial process, upon proper notice to the pledgor, is too well settled to require discussion. 21 R. C. L. 687; Alex., Loud. & Hamp. R. R. Co. v. Burke et al., 22 Grat. (Va.) 254; and Richardson v. Insurance Co. of Valley of Virginia, 27 Grat. (Va.) 749.

We find no error in the decree, and must affirm it.

LYNCH, J., absent.

(24 Ga. App. 545)

**WILLIAMS v. STATE.** (No. 10935.)

(Court of Appeals of Georgia, Division No. 1.  
Dec. 9, 1919.)

(Syllabus by the Court.)

**1. ADMISSIBILITY OF EVIDENCE.**

The court did not err in admitting the physical evidence as complained of in the special ground of the motion for a new trial. This evidence was a circumstance in the case, and was admissible for what it was worth.

**2. SUFFICIENCY OF EVIDENCE.**

The evidence amply authorized the defendant's conviction, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Brooks County; W. E. Thomas, Judge.

Proceeding between the State and Tom Williams. From the judgment, and the denial of his motion for a new trial, Williams brings error. Affirmed.

Bennet & Harrell, of Quitman, for plaintiff in error.

C. E. Hay, Sol. Gen., of Thomasville, for the State.

**BROYLES, C. J.** Judgment affirmed.

**LUKE and BLOODWORTH, JJ.,** concur.

(24 Ga. App. 545)

**SPENCER v. STATE.** (No. 10933.)

(Court of Appeals of Georgia, Division No. 1.  
Dec. 9, 1919.)

(Syllabus by the Court.)

**DENIAL OF MOTION FOR NEW TRIAL.**

The evidence in this case amply warranted the conviction of the defendant. For no reason assigned was it error to overrule the motion for a new trial.

Error from Superior Court, Terrell County; W. C. Worrill, Judge.

Tobe Spencer was convicted of an offense, his motion for a new trial was denied, and he brings error. Affirmed.

R. R. Jones, of Dawson, for plaintiff in error.

B. T. Castellow, Sol. Gen., of Cuthbert, and R. R. Arnold, of Atlanta, for the State.

**LUKE, J.** Judgment affirmed.

**BROYLES, C. J., and BLOODWORTH, J.,** concur.

(85 W. Va. 70)

**JOHNSTON v. METROPOLITAN LIFE INS. CO.**

(Supreme Court of Appeals of West Virginia.  
Nov. 4, 1919.)

(Syllabus by the Court.)

**1. INSURANCE §448—RECOVERY WHERE BENEFICIARY MURDERED INSURED.**

The beneficiary in a policy of life insurance, who murders the insured, will be denied the right to recover thereon upon grounds of public policy.

**2. INSURANCE §594—ASSIGNMENT BY BENEFICIARY WHO MURDERED INSURED.**

Where the beneficiary in a policy of life insurance murders the insured, and subsequently assigns his interest in the policy to another, such assignee will acquire no better right than his assignor, and will not be entitled to recover upon the policy.

**3. INSURANCE §448—LIABILITY OF INSURER ON MURDER OF INSURED BY BENEFICIARY.**

Where the beneficiary in a life insurance policy murders the insured, the doctrine of public policy will extend no further than to deny-

ing to such beneficiary the right to recover. The liability of the insurance company to pay the fund is not thereby extinguished, and ordinarily a recovery will be allowed upon such policy in the name of the personal representative of the insured for the benefit of his estate.

**4. DESCENT AND DISTRIBUTION ¶51—DEVOLUTION OF PROPERTY ON MURDER OF DECEASED.**

Under our law prohibiting the forfeiture of estates upon conviction of crime, the estate of one who is murdered will pass by devolution to the person designated by law to take the same, notwithstanding such person may have been guilty of murder in taking the life of the one from whom he inherits.

**5. INSURANCE ¶448—RECOVERY BY PERSONAL REPRESENTATIVE ON MURDER OF INSURED BY DISTRIBUTE.**

The personal representative of one who is murdered may not recover the amount of a policy of insurance on his life, where the murder was committed by the party who is the sole distributee of such insured person.

Error to Circuit Court, Cabell County.

Action by James E. Johnston, administrator, etc., against the Metropolitan Life Insurance Company. Judgment in the court of common pleas in favor of defendant, and on writ of error the circuit court reversed, and rendered judgment for plaintiff, and defendant brings error. Reversed, and judgment of court of common pleas affirmed.

Fitzpatrick, Campbell, Brown & Davis, of Huntington, for plaintiff in error.

Daugherty & Riggs, of Huntington, for defendant in error.

**RITZ, J.** The defendant, for the consideration of certain premiums to be regularly paid, issued a policy of insurance by which it agreed to pay to one Frank Pickens the face value of the policy in case he was living at the end of 20 years from the date of issue, or to pay to his beneficiary, Susie Pickens, his wife, an equal sum in case of his death before the expiration of said 20 years. The premiums were regularly paid until the time of Pickens' death. Some years after the issuance of the policy the insured was murdered by his wife, the beneficiary therein. She was convicted of the crime and sentenced to the penitentiary for life. Shortly after the commission of the murder she assigned all of her right under the policy to D. B. Daugherty and H. W. Shields. Pickens left no children surviving him, and owed no debts at the time of his death. The defendant company declined to pay the policy, either to the beneficiary, or to her assignees, or to the administrator of the estate of Pickens, and this suit was brought by the administrator to recover thereon. The court of common pleas rendered a judgment in favor of the defendant, and upon a writ of error to that judgment the circuit court of Cabell county re-

versed the same and rendered judgment for the plaintiff for the amount of the policy, to review which this writ of error is prosecuted.

[1, 2] That Susie Pickens, the beneficiary, has no right to recover upon this policy of insurance can scarcely be doubted. The liability of the company became fixed by the death of the insured, and this was brought about by the felonious act of the beneficiary. It would be monstrous for the courts to lend their aid to any one for the purpose of enriching himself by the commission of murder, and to entertain suit on behalf of the beneficiary to recover upon this policy of insurance would be doing that very thing. It is against the policy of our law to reward one for the commission of crime, and whenever the effect of the enforcement of a right which one would otherwise have would be to give him an advantage by reason of his felonious act, the courts will decline to entertain it. This is well established by the authorities. *New York Mutual Life Insurance Co. v. Armstrong*, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997; *Cooley's Briefs on the Law of Insurance*, 3153; 14 R. C. L. p. 1228, title Insurance, § 409, and authorities there cited. Nor can the assignees of the beneficiary stand on any higher ground than the beneficiary herself. At the time she made the assignment to them she had nothing to transfer. She had voluntarily placed herself in a status which disqualified her to be beneficiary under the policy. Consequently the assignment to Daugherty and Shields was ineffectual to transfer any interest in the fund.

[3] This denial of the right of the beneficiary or her assignees to recover under such circumstances is not, however, based upon lack of liability of the insurer to pay. The policy of insurance is not avoided for such cause by its express terms, and there is no reason why such an exception should be read into it when the interest of other parties is affected. This doctrine of public policy will not be carried by the courts any further than is necessary to prevent resort to them for the purpose of effecting a fraudulent purpose. It is not for the purpose of relieving the insurance company from liability, and if there is any person without fault who has a right to the benefit of the policy the same will be enforced. In other words, there is no condition in the policy avoiding it in case of the murder of the insured, and the liability of the company is just the same where death is the result of murder as where it is produced by any other cause. The only difference is that in case the murderer is the beneficiary named in the policy he is denied recovery, not because the company is not liable, but because he has placed himself in such a position that he cannot invoke the aid of the courts. But does the fact that the beneficiary named in the policy cannot recover discharge

the company from liability in all cases? It is very generally held that where the specific beneficiary named in a policy of life insurance dies the policy of insurance nevertheless remains in force, and recovery may be had thereon by the personal representatives of the insured upon his death for the benefit of his estate. What is the effect when the beneficiary by some act of his puts himself in a position where he cannot invoke the aid of the courts to enforce his claim? He forfeits his right to claim the money to which he would otherwise be entitled. The rule of public policy, as before stated, will not be extended further than is necessary to prevent a felon from reaping benefit from his crime, and it may be said that when by this rule the murderer, who is the beneficiary, is deprived of his right to recover, the doctrine is extended as far as is warranted. This would leave in the hands of the insurer a fund or estate created by the insured. The insurance company is not entitled to it, and the party that the insured desired to have it cannot take it. He forfeited his right to it. What, then, is the result? Naturally it becomes the property of the estate of the insured, very much in the same way as an estate which is left by will to a particular devisee or legatee passes by laws of descents and distributions upon the failure of such legatee, and it has been held that, where a legatee in a will murders the testator, the legacy provided for him in the will will pass to the heirs of the testator under the statutes of descents and distributions. *Riggs v. Palmer*, 115 N. Y. 506, 22 N. E. 188, 5 L. R. A. 340, 12 Am. St. Rep. 819. And it is likewise very uniformly held, and it occurs to us upon sound reason, that where the beneficiary in a policy of life insurance is denied the right of recovery upon grounds of public policy, a trust results in favor of the estate of the insured, and ordinarily the personal representative of the insured can maintain a suit to recover the fund for the benefit of that estate. *Schmidt v. Northern Life Association*, 112 Iowa, 41, 83 N. W. 800, 51 L. R. A. 141, 84 Am. St. Rep. 323; *Cleaver v. Mutual Reserve Fund Life Association*, L. R. 1 Q. B. 1892; *New York Life Ins. Co. v. Davis*, 96 Va. 737, 32 S. E. 475, 44 L. R. A. 305; *Supreme Lodge, Knights and Ladies of Honor, v. Menkhause*, 209 Ill. 277, 70 N. E. 567, 65 L. R. A. 508, 101 Am. St. Rep. 239; *Sharpless v. Ancient Order of United Workmen*, 133 Minn. 35, 159 N. W. 1086, L. R. A. 1917B, 670; *McDonald v. Mutual Life Ins. Co.*, 178 Iowa, 863, 160 N. W. 289; *Equitable Life Assurance Society v. Weightman (Okla.)* 160 Pac. 629, L. R. A. 1917B, 1210.

[4] In this case, however, the defendant insists that the personal representative should not be allowed to recover for the reason that such recovery would be for the benefit of the murderess. The insured had no children, and

his widow under the law of descents and distributions is the sole distributee of his personal estate. The fact that the courts will not on grounds of public policy permit her to bring suit to recover this fund does not bar her from taking the estate of her deceased husband. Under our law there is no longer corruption of blood or forfeiture of estates upon conviction of crime, and there is no exception in our statutes of descents and distributions precluding one from inheriting in a case like this. The laws governing the devolution of property are an expression of the public policy of the state contained in its Constitution and legislative acts, and the courts are not justified in attaching to these acts exceptions or limitations which have not been placed thereon by the lawmaking bodies. It therefore follows that if the personal representative of the insured in this case is permitted to recover this fund, the beneficiary will accomplish by indirection that which she could not do directly. That the property of one who has been murdered will devolve upon the murderer where such is the course of distribution provided by law seems to be well settled in most of the American states. *McAllister v. Fair*, 72 Kan. 533, 84 Pac. 112, 3 L. R. A. (N. S.) 726, and note, 115 Am. St. Rep. 233, 7 Ann. Cas. 973; *Shellenberger v. Ransom*, 41 Neb. 631, 59 N. W. 935, 25 L. R. A. 504, and note; *Kuhn v. Kuhn*, 125 Iowa, 449, 101 N. W. 151; *Carpenter's Appeal*, 170 Pa. 203, 32 Atl. 637; 29 L. R. A. 145, 50 Am. St. Rep. 765; *Owens v. Owens*, 100 N. C. 240, 6 S. E. 794; *Ellerson v. Westcott*, 148 N. Y. 149, 42 N. E. 540; *Deem v. Millikin*, 6 Ohio C. C. 357, affirmed on appeal 53 Ohio St. 668, 44 N. E. 1134.

[5] Will the courts then allow themselves to be used for the purpose of bringing into existence an estate which will by operation of law devolve on one who because of his conduct is not entitled to it? The administrator has no interest in the subject-matter. It is agreed here that the insured left no debts, and it follows that every dollar of the fund recovered by the administrator in his representative capacity must go to the murderess. The suit is simply in his name for the benefit of the one who feloniously caused the insured's death. The case of *McDonald v. Mutual Life Ins. Co.*, 178 Iowa, 863, 160 N. W. 289, is very much like this case in its facts. In that case the administrator of the insured brought the suit to recover on the policy of insurance. It appeared that the sole distributees of the insured's estate were her father and mother, and that they had assisted in a criminal operation which produced her death. The court held that the administrator, if such facts were shown, would not be entitled to recover, for it would be for the benefit of those who are by the public policy of the law denied such right. The theory relied upon to defeat recovery is substantially the same as that asserted in

the cases of *Dickinson v. Colliery Co.*, 71 W. Va. 325, 76 S. E. 654, 43 L. R. A. (N. S.) 335, and *Swope v. Coal Co.*, 78 W. Va. 517, 89 S. E. 284, L. R. A. 1917A, 1128. In these cases the basis of recovery was the wrongful employment of plaintiffs' decedents, they being of an age which made their employment in mines a violation of the law. The liability of the defendant was sustained by the court in each case, but recovery was denied to the administrator, not because the defendant was not liable, but for the sole reason that the father, who in each case would have been sole distributee of any recovery, procured the employment of the minor. His act in securing his minor child to be employed in violation of law created a situation which rendered necessary the denial of a recovery, because the party who would receive it had forfeited his right thereto. There was no fault on the part of the one killed, and recovery would have been allowed, but for the fact that the person who would take the fund as sole distributee had united with the defendant in the commission of the wrongful act, and the court denied him the right to take advantage of his own wrong.

The principle invoked here is the same as the principle involved there. In some of the cases we have above cited permitting a recovery by the administrator of the insured, where the beneficiary had caused the death, it was suggested that part of the fund might go to the beneficiary under the law of descents and distributions, but that was held not to defeat recovery. That may be true where only part of the fund goes to the guilty party. It may be that the courts would not allow the innocent to be deprived of the property to which they are entitled for the sole reason that to enforce their rights would also confer a benefit upon a guilty party. However, that question does not arise here, and we express no opinion thereon. We are of opinion, however, that where the guilty party would take the whole of the recovery in case one is allowed, the policy of our law as effectually denies recovery as it would were the suit brought in the name of the guilty party himself.

It follows from what we have said that the judgment of the circuit court will be reversed, and the judgment of the court of common pleas affirmed.

(85 W. Va. 85)

LINDAMOOD v. POTOMAC LIGHT & POWER CO. (No. 3821.)

(Supreme Court of Appeals of West Virginia. Nov. 4, 1919.)

(Syllabus by the Court.)

1. NEW TRIAL §104(2)—NEWLY DISCOVERED CUMULATIVE EVIDENCE.

Evidence adduced by affidavits, on a motion for a new trial, in an action against a corpora-

tion, for damages for wrongful death alleged to have been occasioned by its negligent use of electricity, as having been first discovered after a trial resulting in a verdict for the defendant, and tending to prove the breaking of one of its high voltage wires, as to which no evidence had been adduced on the trial, and resultant contact of such wire with its service wires, at such a place and in such manner as would have caused the high voltage of the broken wire to enter the building in which the decedent came to his death by means of an electric shock, at or about the time of his death, is not cumulative.

2. ELECTRICITY §19(3)—NEW TRIAL §108 (4)—EVIDENCE SUFFICIENT TO PRODUCE DIFFERENT RESULT.

Under the operation of the rule *res ipsa loquitur*, the introduction of such evidence would make the defendant company in such case liable, if the break in the wire was the proximate cause of the injury, in the absence of proof by it of proper construction of the wires at the place of the break and due inspection of its lines, wherefore it is of such character as ought to produce a different result upon a new trial, if its effect should not be avoided in some way.

3. NEW TRIAL §102(5)—DILIGENCE REQUIRED IN SEARCH FOR NEWLY DISCOVERED EVIDENCE.

The duty to exercise reasonable diligence in his search for evidence, before trial, imposed upon a litigant by the law, does not require him to interview witnesses not known by him to possess any knowledge at all respecting his case, nor to have been so situated at any time as to render it likely or probable that they obtained such knowledge. To make it incumbent upon him to interview a person for evidence, he must have some reason to believe or suspect that the person has some knowledge of the transaction, situation, or facts involved in the litigation.

4. NEW TRIAL §90, 150(3)—NEWLY DISCOVERED EVIDENCE OF OMISSION BY WITNESS OF MATERIAL FACT.

Though ordinarily a new trial cannot be had upon the affidavit of a witness showing omission from his testimony of a material fact, by reason of his failure to recollect it while testifying, however important it may be, such an affidavit may be read in aid of those of other witnesses to the same fact, whose knowledge thereof was not discoverable by the exercise of reasonable diligence before the trial, when the omitted subject is new and the matter set forth in the affidavit will be decisive, if found to be true and its force and effect are not avoided in some way.

5. APPEAL AND ERROR §1015(5)—FINDING AS TO NEWLY DISCOVERED EVIDENCE NOT DISTURBED.

The finding of a trial court on an issue of fact as to whether matter relied upon in support of a motion for a new trial is new and after discovered will not be disturbed by the appellate court, when the evidence of lack of prior knowledge thereof is clear and positive and the opposing evidence uncertain, indefinite, and inconclusive.

**6. NEW TRIAL. @102(3)—NECESSITY OF WIDE AND MINUTE INVESTIGATION BEFORE TRIAL.**

Though the injured party is under a duty, before suing for redress, to make a reasonably diligent effort to ascertain by what wrongful act the injury was inflicted, he is not required at all hazards to discover obscure matters or such as cannot be found otherwise than by a wide, thorough and minute investigation, and he may rely upon them in a motion for a new trial, if discovered before entry of judgment.

Error from Circuit Court, Berkeley County.

Action for wrongful death by Cora B. Lindamood against the Potomac Light & Power Company. Verdict for defendant set aside on the ground of newly discovered evidence, and it brings error. Affirmed.

Martin & Seibert, of Martinsburg, for plaintiff in error.

H. H. Emmert and J. O. Henson, both of Martinsburg, for defendant in error.

POFFENBARGER, J. This writ challenges the correctness of an order setting aside a verdict for the defendant in an action predicated on allegations of wrongful death, on the ground of newly discovered evidence.

A statement in detail of the evidence adduced upon the trial and the procedure in the action is unnecessary. Plaintiff's decedent, her husband, was killed in the plant of the Dunn Woolen Company, while there engaged in work as an employe of that company, by an electric current or by a fall occasioned in some unknown way. He was alive but unconscious, when found, and died immediately afterward. There is no living eyewitness to the fatal accident, and the evidence of negligence adduced was largely, if not entirely, circumstantial. The action is against the Potomac Light & Power Company by which electricity for lighting purposes was furnished to the plant in which he was working, not against his employer. Hence the law of master and servant does not govern the rights of the parties. The plaintiff proceeds upon the hypothesis of a defect in the wires or plant of the defendant company, negligently permitted, by reason of which an unusual and undue charge of electricity entered the plant of the Dunn Woolen Company over the service wires, and caused the injury complained of. The theory of the defendant is that, on account of the situation in which the decedent was and defectiveness of the electrical appliances in the room in which he worked, for which it was not in any way responsible, they being no part of its plant or system, the electric current contemplated and furnished for the factory, 110 volts, was sufficient to kill the employe, if he came into contact with it by

his own negligence or through the negligence of his employer, and did either kill him or knock him down in such manner that in his fall he received fatal injury, he having come into contact with it by reason of his own or his employer's negligence.

His surroundings, his hands, the materials he was handling, and no doubt his clothing were all damp, and the electrical appliances used unsafe on account of these conditions. He operated what is known as a drying machine, through which he passed wet wool and shoddy taken from the vats in the dye-house of the factory. It was of steel construction, new and set in concrete, at a point about 18 inches from a partition wall, in a room the floor of which was new concrete not yet thoroughly dry. On it, there were three pulleys, each carrying a 3-inch belt. It had an air door which stood open at an angle of about 45 degrees with the steel edges turned up. Near this door and over one of the pulleys there was a thermometer, and near it a drop electric light on a cord, used for lighting the dark space around the thermometer. The pulleys, bolts, and steel door were unprotected by any guard or safety device. The wiring and sockets were unsuitable and bad for such a place, the wires not having been put in tubes, as experts say they should have been, and the sockets having been brass instead of porcelain. The workman's hands, feet, and clothing and the floor on which he worked were all damp and the air necessarily moist. Between 9:30 and 10 o'clock of the night of February 26, 1917, he was found lying in the narrow space between the machine and the partition, in a puddle of blood. One of the belts was off, the steel door open, and the light unextinguished. In his right temple, there was a wound from which blood was flowing, and which the examining surgeon said went deep into the tissue of the head, although it looked like a superficial injury.

[1] Appreciating and admitting the application, force, and effect of the rule *res ipsa loquitur*, the defendant, after the plaintiff had proved, *prima facie*, death from an electric shock, previous good health of the decedent, and sufficiency of 110 volts to kill, introduced evidence proving, in the absence of contradiction, that its transformer reducing the high voltage, 2,200, to low voltage, 110, was in a safe condition, and bore no evidence of disturbance by an unusual shock and that its wires in the streets in the neighborhood of the Dunn Woolen Company were so arranged and insulated by insulators on the poles and air spaces between the wires as to make them safe. Then it proved the defectiveness and unsuitableness of the wiring and fixtures in the room in which Lindamood was working, and by expert testimony that un-



der such conditions the ordinary voltage was sufficient to kill one coming into contact with it. Proof was introduced also to the effect that none of the wiring or fixtures in the room or building bore any evidence of their having been subjected to the heavy voltage carried by the high tension wires supplying electricity to the service wires through the transformer, and that the secondary or service wires and the wires and fixtures in the building could not carry the high voltage of the primary wires without injury or, in some instances, destruction.

In rebuttal, the plaintiff introduced testimony tending to prove the service wires would carry 1,100 or 2,200 volts for a short time, without any manifestation of its presence until a socket or wire would come in contact with something that would ground the current; that on the night of the accident wires were sparking at the corner of Stephen street and Maple avenue, at about 9:30 o'clock, on account of a limb that had blown over the secondary wires leading into the residence of one Barnard; that on the morning after the accident a woman was knocked down by electric current in a house near the Barnard residence while using an electric iron; that a man helping to remove Lindamood received a severe shock in the back by reason of his coming into contact with the socket at the machine; and that another workman, a few minutes later, got a severe shock from taking the socket in his hand.

The new evidence discovered after the trial, which induced the trial court to set aside the verdict for the defendant, as interpreted by the attorneys for the plaintiff, was that, on the night of Lindamood's injury and death, at about 8 o'clock, in front of the county jail, and not far from the Dunn Woolen Company's building, one of the wires smoked, burned, sputtered, and then broke, at a point about six feet from one of the poles, and fell among the other wires; that the defendant company was immediately notified by telephone; that it sent a man to that place, who tied the long end of the broken wire around a pole; that on the next morning a man came and spliced and repaired the wire; and that after the trial, and nearly a year after the date of the accident, a splice was found in the defendant's primary or high voltage wire, strung above other wires, at a point a few feet south of the pole in front of the county jail.

This interpretation of the affidavits of the witnesses is vigorously assailed in the briefs filed for the defendant. The two Millers, the jailer, and his son do not say the wire broke on the night of the accident, but, fairly read, both affidavits place the date of the occurrence near that night. They say they resided in the jail on that date and

saw the broken wire. M. S. Miller says he is unable to say whether the break occurred on the night of Lindamood's death. His son says he was at a hospital, visiting his wife, when a message was received, calling a physician to attend a man at the Dunn Woolen Mills, who he afterwards learned was Lindamood, but does not say both incidents occurred on the same night. Affiant Hough, a policeman, says he saw the broken wire in front of the jail on the morning after the accident. He testified on the trial, without mention of the broken wire at the jail, but that argues nothing against the plaintiff's interpretation of the affidavits considered as a whole, on the question of identity of the time of the two occurrences.

As to the relation of the broken wire to the service wires and the Dunn Woolen Mills, the joint affidavit of J. O. Henson and H. H. Emmert and that of Shade suffice. Henson and Emmert say the break at the jail was on the lines from the transformer serving the Dunn Woolen Mills, and that they are informed and believe the high voltage wires at that point are above the secondary or service wires coming from the same transformer. Shade says the spliced wire was a primary wire and on the top cross-arm. Hence the secondary wires must have been below it.

[2] If the plaintiff is not precluded from reliance upon this evidence for a new trial by lack of diligence in the discovery thereof, it sustains the grant of a new trial by the court. It is not cumulative, for no evidence at all concerning the break of the wire at the jail was introduced by her. She adduced no evidence of any defect in the defendant's wires that could have caused the injury. The limb across them at another place was a wholly distinct matter, having only slight probative value. If there was such a break at the jail as the witnesses describe in their affidavits, it was a circumstance of such character as would have carried the case to the jury and ought to have called for a verdict for the plaintiff, in the absence of proof of any other circumstance avoiding its legal effect. It would have imposed upon the defendant, under the operation of the rule *res ipsa loquitur* the burden of proving proper construction of its wires at that point and due inspection thereof, if nothing more, by way of precaution against their giving away and causing injury to somebody. *Edmonds v. Traction Co.*, 78 W. Va. 714, 90 S. E. 230; *Snyder v. Wheeling Electric Co.*, 43 W. Va. 661, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922.

[3] On the question of diligence on the part of the plaintiff, the defendant takes two positions, one of which is that the plaintiff was bound to discover this evidence before trial or lose the benefit of it. M. S. Miller,

an officer of the court and an after-discovered witness, was in the courtroom during a part of the trial, and could easily have been interviewed, and his son, the other party who saw the break, was accessible. Hough had been a witness in the case, and testified to the disturbance caused by the limb across the wires near Barnard's residence. In his affidavit filed after the trial he says he had forgotten the broken wire at the jail, when interviewed by the plaintiff's attorneys as to what he knew of electrical disturbances, and did not think of it until his attention was called to it later by one Smith. Omission to interview the Millers is excusable, if the plaintiff had no reason to believe or suspect that they had the knowledge they now disclose. If the location of the break and the presence of the Millers at the time had been known, there would have been reason to suspect their knowledge of the occurrence, and failure to interview them would have been fatal. *Jacobs v. Williamson*, 67 W. Va. 377, 67 S. E. 1113; *Phenix Ins. Co. v. Virginia-Western Power Co.*, 81 W. Va. 298, 84 S. E. 372. But there is no authority holding failure to interview a witness not known to have any knowledge of the subject-matter of the litigation to be fatal to the use of his affidavit disclosing after-discovered evidence. But the affidavits of the Millers leave a link supplied only by that of Hough, who was known to have some knowledge of some of the defendant's wires on the morning after the accident, namely, the time of the break of the wire at the jail. Boyd's affidavit as to it gives only hearsay evidence. Culpability in the matter, if any, rests upon Hough only. Plaintiff and her attorneys swear they diligently sought evidence to sustain their client's case. The attorneys say they interviewed various members of the police force, of whom Hough was one, and Hough swears they interviewed him and would have obtained all of his knowledge but for his failure of recollection. Ordinarily, the forgetfulness of a witness is no ground for a new trial, because he is supposed to have been diligently interviewed and called upon to remember the facts and state them. *Dulgan v. Wyatt*, 3 Blackf. (Ind.) 385; *McQueen v. Stewart*, 7 Ind. 535. But, if it appears that he has been diligently interviewed, and that the matter to which his evidence relates is new and decisive in its import, and other witnesses will testify to it in such manner as to make its existence highly probable, we are of the opinion that his affidavit may be used, and read in aid of the other testimony. The purpose of the requirement of diligence is not defeat or prevention of new trials, and it should be applied in a reasonable and fair way. *Bonyng v. Waterbury*, 12 Hun (N. Y.) 534. Only reasonable diligence is required. *Smith v. McLain*, 11 W. Va. 668,

citing many cases. Manifestly such diligence has been exercised, as regards these witnesses, if the plaintiff had no knowledge of the evidence she now relies upon.

[4] It is insisted, however, that the plaintiff was aware of the knowledge of the Millers and Hough, before the case went to trial. Unfortunately, she started into this litigation under embarrassment. One set of attorneys investigated the case and found the evidence in question, under the impression that she intended to employ them, created by representations of one Smith, a justice of the peace, who professed to have interviewed her respecting her case and the employment of attorneys to represent her. Afterward, she employed other attorneys, to whom this information was not given, and she swears she never employed the attorneys who obtained and held it, and that it was never communicated to her. Her affidavit is very full and definite on this subject, completely excluding any transaction between them and her, direct or indirect, and denying all knowledge of their possession of the evidence. She denies that she ever had any conversation with any member of the firm relative to her suit. One of them says he called upon her to discuss the case, under the impression that his firm was to be retained, but was informed that she had employed no attorney and would not do so until her brother arrived, and that thereupon he left, without discussing the matter further. Another member of the firm represented to one of the attorneys for the defendant that the plaintiff knew of the witnesses whose affidavits had been taken; that she had employed his firm; that M. S. Miller told them of the sputtering wire the day after Lindamood's death; and that he and another member of his firm continued their investigation of the case for about a week, when they were informed that other attorneys had been employed. The attorney filed his affidavit, admitting the representations imputed to him, and saying he had acted under the belief that he had been employed, but had ascertained that he had not been, and denying that he had ever had any conversation with the plaintiff.

[5] The conduct of the parties clearly overcomes the inferences the attorneys for the defendant set up on the admissions made by Boyd. His firm did not appear in the case. This fact effectually negatives the existence of the relation of attorney and client at that time. If it had previously existed, it is morally certain that the attorneys did not disclose to the plaintiff the evidence they had found. If they had, it would undoubtedly have been used in the trial, for it was obviously much more substantial and probative in its import and nature than any that was introduced. Both she and the attorneys representing her in the trial had strong rea-

son for using it, and none for its omission, if it was within their knowledge. Boyd's representation about the plaintiff's knowledge of the witnesses was not very definite. He evidently did not make it upon his personal knowledge, for he says he never conversed with her. She denies that he ever did, and his associates say they never discussed the case with her. Only one of them had seen her, and he denies having done so. All say there was no contract of employment. Hence the trial court was justified in finding lack of a prior relation of attorney and client, which might or might not have imputed to the plaintiff the knowledge possessed by her former attorneys. In point of quality as well as quantity, the preponderance of evidence accords with the court's finding. No reason is perceived why review of this finding as to a question of fact should be governed by a rule different from the one ordinarily applied.

[6] It is urged also that, if she had caused the wires to be inspected, she would have discovered the break or evidence of it, which would have suggested probable knowledge of the fact on the part of Miller and others residing in the neighborhood thereof. Before bringing an action for an injury, the injured party ordinarily and necessarily makes an effort to ascertain by what wrongful act it was inflicted, and is deemed to have known what was obvious or ascertainable by reasonable diligence. But there is no rule of law or practice requiring previous ascertainment of obscure matters, or such as cannot be found otherwise than by a wide, thorough and minute investigation. The plaintiff made an effort to find evidence of noticeable manifestations of defects in the defendant's wires and appliances, and found some, but not the most important one, if she is correct in her representations. That broken wire, if any, was repaired the next morning, before many persons could see it, and while her husband lay dead in her home and she was no doubt overwhelmed with grief and unable to give her attention to matters of the kind involved here. After it was repaired, the wire likely showed only such evidence of the occurrence as was discoverable by close inspection. Moreover, a splice in a wire, without more, might not have aroused inquiry if it had been discovered. The circumstances of this case bear very slight resemblance, if any, to those of *Frymier v. Lorama Railroad Co.*, 78 W. Va. 96, 85 S. E. 26.

Upon these principles and conclusions, the order complained of will be affirmed.

LYNCH, J., absent.

(85 W. Va. 75)

PRICE et al. v. FITZPATRICK et al.  
(No. 3930.)

(Supreme Court of Appeals of West Virginia.  
Nov. 4, 1919.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS §84 — CITY COUNCIL ELECTION CONTEST.

The council of a city, town, or village to which one, whose seat is contested, is elected, is the proper tribunal to try such contest, and not the council in office at the time of the election.

2. MUNICIPAL CORPORATIONS §84 — TRIBUNAL FOR CITY COUNCIL ELECTION CONTEST.

Where by law the duty devolves upon a certain person or tribunal to try and determine a question, and no provision is made for substituting another person or tribunal in case of disqualification of such person or tribunal, by reason of interest, and there is no other mode provided for the trial of such controversy, such interested person or tribunal must of necessity proceed with the trial thereof to the extent, and to the extent only, that there is no other person or tribunal provided for the performance of the duties devolved upon him by law.

3. MUNICIPAL CORPORATIONS §84 — APPEAL TO CIRCUIT COURT OF JUDGMENT ON ELECTION CONTEST.

Where a contest of the right of a member of a city council to hold his seat is heard and determined by the council going out of office at the time his term of office begins, the circuit court on appeal will have no jurisdiction to try such contest de novo upon a writ of certiorari to the judgment rendered by such council. Nothing more can be done than to reverse the judgment of the tribunal acting without jurisdiction, and remand the case to be tried before the tribunal having jurisdiction.

(Additional Syllabus by Editorial Staff.)

4. MUNICIPAL CORPORATIONS §84 — REVIEW ON APPEAL FROM ELECTION CONTEST.

In contest of right of member of city council to hold his seat, the question that the notice did not give the time required by law is one which must be passed upon, first by the tribunal having jurisdiction, and, until that is done, neither the circuit court nor the Supreme Court of Appeals can give judgment thereon.

5. APPEAL AND ERROR §776 — DISMISSAL OF WRIT OF ERROR.

A plaintiff in error has a right at any time to dismiss a writ of error so long as no right of the adverse party will be affected thereby, and also has the right at any time before such motion is made and sustained by the Supreme Court of Appeals to change his mind and withdraw the same.

Error from Circuit Court, Fayette County.

Election contest by S. W. Price and others against J. E. Fitzpatrick, Henry C. Darling.

ton, Thomas Garrett, W. H. Johnson, T. T. Lewis, S. E. Hester, and Arnold Brabbin. Judgment before the town council of Scarbro in favor of contestants, and case removed by contestees by writ of certiorari to the circuit court, wherein the judgment of the council was reversed, and on a trial de novo there was a finding for contestees, Fitzpatrick and Garrett, and for part of the contestants, and from the judgment, contestees, Johnson, Lewis, Hester, and Brabbin, bring error. Reversed and remanded for a trial of the contest before the proper tribunal.

W. R. Bennett and George Love, both of Fayetteville, for plaintiffs in error.

Dillon & Nuckolls, of Fayetteville, for defendants in error.

RITZ, J. At the election held in the town of Scarbro in the month of January, 1919, the following persons were candidates for the municipal offices of said town on the Citizens' Ticket, to wit: For mayor, S. W. Price; for recorder, Henry J. Smith; and for councilmen, V. P. Spradling, C. R. Heerman, L. Douglass, Joseph H. Blake, and Charles S. Thomas. These candidates at that time constituted the common council of said town, their terms expiring with the month of January, 1919, and they being candidates for the respective offices they were then filling. At said election the Citizens' Labor Ticket had candidates for said offices as follows: For mayor, J. E. Fitzpatrick; for recorder, Henry C. Darlington; and for councilmen, Thomas Garrett, W. H. Johnson, T. T. Lewis, S. E. Hester, and Arnold Brabbin. Upon a canvass of the returns of the election, it was found that for the office of mayor Fitzpatrick received a majority of the votes, and for councilmen, Garrett, Johnson, Lewis, Hester, and Brabbin each received a majority of the votes cast, and certificates of election were accordingly issued to them. A contest, however, was at once instituted by their opponents upon the ground, among others, that parties voted for them in said election who were not entitled to vote in said town. Notice of this contest was served upon the contestees on the 28th of January, 1919, to be heard on the 31st of that month, the day before the commencement of the term of office of the new mayor and councilmen. In view of the fact that the council then in office were all contestants, and the council to come into office on the 1st of February were all contestees in said proceeding, the old council determined to create a new and disinterested tribunal for the trial of said contest by each resigning his office and electing a successor to hold the unexpired term, so that on the 31st of January, when the contest came on for trial, there was an entirely new council, selected, however, by the contestants, for the purpose of trying this contest. Objection was

made by the contestees, but all objections were overruled, and a hearing had, and the contestants found to be legally elected, and on the following day they were inducted into office. This proceeding was removed by the contestees by writ of certiorari into the circuit court of Fayette county, where the judgment of the council was reversed, and a trial de novo had therein, which resulted in a finding that Fitzpatrick was elected mayor, that the contestee Garrett was elected as one of the councilmen, and that the contestants Heerman, Douglass, Blake, and Thomas were elected as the other four councilmen, and judgment rendered by said court accordingly, from which judgment the contestees Johnson, Lewis, Hester, and Brabbin prosecute this writ of error.

[1, 2] It is insisted that the circuit court did not have jurisdiction to try the contest upon the writ of certiorari for two reasons: First, that it had never been tried by the tribunal having jurisdiction to try it in the first instance, and that until it had been so tried no jurisdiction could be acquired by the circuit court; and second, that the notice was void because it was not served 10 days before the time fixed for the hearing, as it is insisted the statute requires.

Did the tribunal which tried the contest as the council of the town of Scarbro have any jurisdiction to try the same? In the case of *Trunick v. Town of Northview*, 80 W. Va. 9, 91 S. E. 1081, we held that the council to which a member is elected, whose right to hold the office is contested, is the tribunal to try the contest, and not the council in office at the time of the election. Under this holding, of course, the council which tried the contest here had no jurisdiction to try the same. While it was not made up of the same men who composed the council at the time of the election, it was in fact the same council, the men being selected to fill vacancies caused by the resignation of those then in office, and their terms expired with the terms of those who were in office at the time of the election.

It is, however, insisted that this case is not controlled by the case of *Trunick v. Town of Northview*, for the reason that the right of all of the new council to hold office is contested, and that to allow that body to try the matter would be permitting them to sit in their own case, and that to permit the council who were in office at the time of the election, who were all contestants, would likewise be permitting them to sit in a case in which they were personally interested, so that the only way to get an unbiased and unprejudiced body was for them to resign and appoint their successors for the unexpired term, and allow the contest to be tried by the body thus constituted. We see very little difference in principle in a litigant sitting on his own case, and in selecting, without his adversary having a voice

therein, the judge who is to sit in it. We do not think there was any jurisdiction in anybody to try this contest until the new council came into office on the first day of February. It is undoubtedly true that to permit this council to try this contest would be requiring them to sit and vote upon a matter in which they had a personal interest; there being no provision for substituting another tribunal for the trial of such a contest where the majority of the councilmen are interested therein. Of course, if the seats of less than a majority were contested, then the majority whose seats were uncontested would sit and try the contest, and their right to do so could not be questioned; but where the seats of the whole body are contested, and there is no provision made for substituting any other tribunal for the trial thereof, it would seem that by the law of necessity they would be required to sit and hear and determine the contest, even though the seats held by them were in dispute. If this were not the case, there would be no way to secure a trial of such a contest. The Legislature evidently never contemplated that a situation would arise where the seats of all the members of a town council would be contested, and has made no special provision for the trial of such a contest. It is undoubtedly true that it is against the spirit of our laws for one to act as judge in his own case, and he will not be allowed to do so when he has the slightest pecuniary interest therein, unless there is absolute necessity therefor. *Forest Coal Co. v. Doolittle*, Judge, 54 W. Va. 210, 46 S. E. 238; *Findley v. Smith*, 42 W. Va. 299, 26 S. E. 370. But where there is a contest like this which must be decided, and in which the only tribunal provided by law for its trial and determination is interested, the necessity of the case requires that such tribunal proceed to judgment therein, and such judgment, where the necessity for such action appears, will be as binding as though the parties rendering it were not at all interested in the controversy unless the same is reversed on appeal. It must be understood that this doctrine of necessity can be carried no further than is absolutely necessary. In the case of *Forest Coal Co. v. Doolittle*, Judge, supra, it was held that, because of the interest of the judge in that case, he could not hear the controversy and determine it, but that he might call in a judge from another circuit to hear it, or cause an election of a special judge, as provided by law, for the purpose, notwithstanding his interest, because there was no other way provided by statute for securing a hearing of the cause; and in the case of *Dimes v. Grand Junction Canal*, 3 House of Lords Cases, 759, it was held that the Lord Chancellor, although peculiarly interested in the controversy, might grant an appeal, even though to do so would require passing to some

extent upon the merits of the controversy, because there was no other way provided by law for securing such appeal, but that after such appeal had been granted the Lord Chancellor, because of his interest, could not hear the same, for the reason that, under the law, it might be heard by the Vice Chancellor, who had no interest therein. It will thus be seen that while the courts recognize the necessity of a judge sometimes acting in a case in which he has a personal interest, because there is no other method provided by law to procure a determination thereof, it will be resorted to and permitted only when there is an absolute necessity therefor, and, just as soon as the proceeding reaches that point where some other person or tribunal can take jurisdiction of it under the law, the right of such interested judge or tribunal will cease. In the *Matter of Application of David R. Ryers*, 72 N. Y. 1, 28 Am. Rep. 88; *Butcher v. Kunst*, 65 W. Va. 384, 64 S. E. 967; *Commonwealth v. Ryan*, 5 Mass. 90; *Pearce v. Atwood*, 13 Mass. 324; *Great Charte v. Kennington*, 2 Strange, 1173; *The Mayor of London v. Markwick*, 11 Modern, 164.

[3] It is insisted, however, that inasmuch as this case was tried de novo by the circuit court upon appeal, the fact that it was tried below by a tribunal without jurisdiction will make no difference. The same contention was made in the case of *State ex rel. Porter v. Studebaker*, 80 W. Va. 673, 93 S. E. 755, wherein it was held that the circuit court upon appeal had no jurisdiction to try the matter until it had first been tried by the tribunal having jurisdiction to try the same in the first instance. The only power possessed by the circuit court was to reverse the judgment rendered by the tribunal which acted without jurisdiction, and remand it for a hearing before the tribunal which was authorized by law to try the same in the first instance, and that is the only jurisdiction we possess. It may be that when this case is tried by the tribunal provided by law for the trial thereof neither party will have cause for complaint. At any rate, until the judgment of that tribunal is had upon the matters involved neither this court nor the circuit court has jurisdiction to consider what judgment should properly be rendered between the parties.

[4] It is urged that this court should dismiss this proceeding for the reason that the notice did not give the time required by law. This question is one that must be passed upon first by the tribunal having original jurisdiction, and until that is done neither this court nor the circuit court can give judgment thereon.

[5] A motion is filed on behalf of one of the plaintiffs in error asking to dismiss the writ of error so far as he is concerned, but subsequent to the time he authorized the making of such motion it seems that he

changed his mind and desired to continue the prosecution of this writ. Of course, a plaintiff in error has a right at any time to dismiss his writ of error so long as no right of the adverse party will be affected thereby; but he also has the right at any time before such motion is made and sustained by this court to change his mind and withdraw the same.

As to whether or not two of the plaintiffs in error are qualified to hold the office of councilmen, that question will likewise have to be determined in the first instance by the council to which they were elected, and should any interested party be dissatisfied with the decision of that tribunal thereon the same may be reviewed in the manner provided by law.

It follows from what we have said that the judgment of the circuit court complained of will be reversed, and the cause remanded for a trial of the contest before the proper tribunal.

(85 W. Va. 96)

**OHIO VALLEY BANK v. BERRY et al.**

(Supreme Court of Appeals of West Virginia.  
Nov. 4, 1919.)

*(Syllabus by the Court.)*

**1. APPEAL AND ERROR §966(2)—CONTINUANCE §7, 23, 26(3)—MOTION FOR CONTINUANCE IN DISCRETION OF TRIAL COURT.**

A motion for the continuance of a cause is always addressed to the sound, but not arbitrary, discretion of the court, and when based on the absence of a witness depends on the diligence employed to obtain his presence and the materiality of his evidence, and a judgment denying such motion must plainly appear to be erroneous, to justify a reversal thereof.

**2. CONTINUANCE §45, 46(5)—DILIGENCE IN OBTAINING PRESENCE OF MATERIAL WITNESS NECESSARY.**

There is no presumption of due diligence in such cases, from the mere suing out of summons for an absent witness. Diligence to obtain his presence must be affirmatively shown, as well as the materiality of his evidence if present, and that it will not be merely cumulative of other evidence, must also affirmatively appear.

**3. TRIAL §253(5) — RELIANCE ON FRAUDULENT REPRESENTATIONS NECESSARY FOR RECOVERY.**

An instruction to the jury intended to propound the law of fraud and deceit interposed as a defense to the action on the contract sued on, which omits to submit in connection with the theory of alleged fraudulent representations, the question whether defendants relied thereon and were actually misled to their injury, is erroneous and is properly rejected by the trial court.

**Error to Circuit Court, Cabell County.**

Action by the Ohio Valley Bank against J. E. Berry and others. Judgment for plaintiff, and defendants bring error. Affirmed.

W. W. Smith and S. E. Love, both of Huntington, for plaintiffs in error.

Warth & McCullough, of Huntington, for defendant in error.

MILLER, P. In an action on a note of defendants in favor of plaintiff, dated June 19, 1917, payable ninety days after date, for the sum of twenty-five hundred dollars, given in renewal of a prior note of J. E. Berry, dated January 2, 1917, for three thousand dollars, payable to G. G. Brown, four months after date, and endorsed in blank by Herman Moore, and discounted by plaintiff, the plaintiff on September 17, 1918, obtained the judgment complained of for twenty-six hundred dollars, as found by the jury, with interest and costs.

The point first urged to reverse the judgment is that the court erroneously denied defendants' motion, made in May, 1918, at which time the case was brought to trial, based on the absence of several witnesses, particularly the absence of G. G. Brown, the payee of the original note for three thousand dollars. The record shows a continuance of the case, on defendants' motion, on February 9, 1918, but on what ground does not appear except from the admissions of counsel in their briefs, who say that it was because of the absence of the witness Brown, who, though summoned, did not appear until after the case had been continued, and it had thereby lost its place on the docket for that term and could not be reached for trial.

[1] A motion to continue is always addressed to the sound, not arbitrary, discretion of the court, and when based on the absence of witnesses, depends on the diligence used to secure their presence, and the materiality of their testimony as it may be disclosed by affidavits or other evidence in the case; and to reverse the judgment of the trial court thereon, it must appear to be plainly erroneous. *Doane v. Parsons Pulp & Lumber Company*, 77 W. Va. 545, 87 S. E. 859; *State v. Jones et al.*, 90 S. E. 271.

[2] On the question of diligence it is conceded that a continuance was taken at the previous term because of the absence of Brown. This was sufficient to put the defendants on notice that diligent effort to obtain his presence at the next term was obligatory on them. There is no evidence of any effort on their part to have Brown or any of the other witnesses referred to present, other than the *ex parte* affidavit of Berry that he had had them summoned, but when, nor how long before the trial, does not appear. The affidavit says that the return of the officer shows that Brown, Carr,

Compton and Pool were not found. The process and return are not found in the record. For anything appearing in the record, defendants may have waited until a day or two before the trial before having the summonses issued, and they may have been directed only to the sheriff of Cabell county where the witnesses did not reside, and not in time to be executed before the trial. The witnesses may have resided outside of the State and beyond the process of the court, in which case due diligence required that their depositions should have been taken. Proper diligence is not shown by the record, and we can not see any abuse of the discretion of the trial court. The motion was properly denied on this ground alone. There is no presumption of diligence from the mere suing out of summonses not served; diligence is affirmative matter, to be shown on the motion for a continuance. *Cicerello v. C. & O. Railway Co.*, 65 W. Va. 439, 64 S. E. 621. In the case just cited we held that a summons not served, procured only six days before the trial, did not show diligence under the circumstances of that case and that there was no abuse of the court's discretion in denying the motion for a continuance.

As to the materiality of the evidence of the witnesses, the only plea filed by defendants, except the general issue, was a special plea to the effect that defendants had been induced to execute the note sued on, and the original note of which it was a renewal, by M. J. Ferguson, vice president and active manager of the plaintiff bank, for the purpose of furnishing working capital for the Detroit Improved Backwall Company, the proceeds of which note were to have been paid to said Brown for that purpose, upon the terms that they were to receive five hundred shares of the capital stock of said company, which were to be and were in fact delivered into the hands of said Ferguson as trustee to hold as security for them against loss, but that in truth and fact the proceeds of said note, or a large part thereof, were used to liquidate prior indebtedness of said Brown to said bank, amounting to ten thousand dollars, and were not used to market the product of said company as defendants were led to believe they would be, by said Ferguson, vice president as aforesaid; that said company whose stock said Ferguson represented to be good security, was in fact insolvent, and its stock worthless, and said defendants were induced to execute said note as accommodation makers, by the false representations of said Ferguson, unknown to the defendants at the time of making said original and renewal notes, wherefore the consideration for said note had wholly failed etc.

What defendants expected to prove by said Brown was; first, that Brown was indebted to the plaintiff seventy-five hundred dollars,

and that they, without knowledge of the facts, were induced to execute said note by Brown and Ferguson that Brown might repay a part of his obligations to the bank, by their representation that the proceeds thereof would be used for the purpose of marketing the products of the Detroit Improved Backwall Company; second, that at the time defendants were so induced to execute said note, and said stock was placed in the hands of said Ferguson as trustee, said company had ceased to exist and said stock was worthless, which fact was known to Ferguson but withheld from defendants, and that Brown was compelled by Ferguson to pay sixteen hundred dollars on account of his indebtedness wherefore he was unable to market the product of his company and unable to pay said note as he had agreed.

And defendants expected to prove by the witness Carr that at the time of the execution of their notes Brown was deeply involved financially; that Carr had endorsed for him for money loaned Brown by said bank, which had not been paid, but was long past due, as was known to Ferguson but was unknown to defendants; and that the witness Pool would testify to substantially the same facts.

Respecting the witness Brown, we think it more than doubtful that he would have admitted fraud and deceit on his part in obtaining defendants' indorsements, and conspiracy with Ferguson to obtain said notes. It is most unlikely that he would have confessed a crime of that kind. As to the amount of his indebtedness to the bank, it was proven by Ferguson that Brown owed the bank at that time seventy-five hundred dollars. Nor do we think it likely that Brown would have added to his offense by swearing that his company had ceased to exist and that its stock was worthless. Besides, defendants appear to have known that the company had no plant and was depending selling additional stock to obtain money to get goods manufactured and to put its inventions on the market, and also to pay a note from Brown and wife for fifty-five hundred dollars in favor of them, which if paid carried a profit to them of twenty-five hundred dollars for obtaining for him the three thousand dollars on the original of the note sued on. Ferguson swore on the trial that no part of the proceeds of said notes or of either of them went to pay any indebtedness of Brown to the bank, and that the bank still holds his notes unpaid. There must have been other employees of the bank who could have been summoned to prove the facts.

Defendants were examined as witnesses in their own behalf, and Ferguson was examined, and they had opportunity on cross-examination to call for the books of the bank but did not do so. In so far as Brown or either of the other witnesses would have corroborated them, their evidence would

have been cumulative, and their absence, so far as such evidence is concerned, is not good ground for a continuance.

[3] Another point of error relied on to reverse, is that the court rejected defendants' two instructions to the jury. Number one purported to propound to the jury the law of fraud and deceit, applicable to the evidence in the case, and by which defendants represented they were induced to sign the notes involved in the transaction, was defective in omitting to submit to the jury, in connection with the question of the alleged fraudulent representations, the question of the defendants' reliance thereon, and whether they were actually misled thereby to their injury. 3 Brickwood's Sackett on Instructions, p. 2345, § 3645; 3 Thomp. on Trials (2d Ed.) p. 1385, § 1947; 10 Stand. Enc. Proc. pp. 63, 64, and note; 20 Cyc. 129; Staker v. Reese, 82 W. Va. 764, 97 S. E. 641, point 4 of the syllabus.

And what we have said in criticism of instruction number one may be said of instruction number two; it may be said of both that the false representations assumed must not alone have been "calculated" to mislead, as the instructions submit; they must in fact have been relied on and actually misled the defendants. We find no error in the refusal of defendants' instructions.

It is next argued as an additional ground for reversal that the verdict was contrary to the law and the evidence. Assuming the law to be as affirmed by defendants, and for which they cite many decisions, the fact of misrepresentations and of fraud and deceit were denied. Ferguson, a witness for the plaintiff, flatly contradicted the alleged misrepresentations on his part, and we think the note for fifty-five hundred dollars and the contract between Brown and defendants, of January 1, 1917, tend to corroborate his evidence rather than defendants on the theory of fraud and deceit, set out in the plea and in their testimony, as well as some other matters testified to by them. But whether so or not, the facts in controversy were submitted to the jury and must be regarded as having been found against the defendants' contentions. And this includes the theory of defendants that Ferguson, representing the plaintiff bank, and in the interest of the bank, and by false representations, procured them to endorse or make their note for one purpose, in order to get the money to apply to the indebtedness of Brown to the bank. The fact that any of the money was so applied, is denied, and not proven by defendants. Indeed Ferguson swears positively that the defendants made their contract with Brown without his previous knowledge, or any advice by him, as to the solvency or honesty of either Brown or his company. The jury heard the testimony of both sides

and found for plaintiff, and we can not say their findings are against the evidence.

The judgment must therefore be affirmed.

(178 N. C. 722)

### STATE v. LITTLE. (No. 401.)

(Supreme Court of North Carolina. Nov. 12, 1919.)

#### HOMICIDE ~~§~~244(3), 250—DEFENSES REDUCING CRIME TO SECOND DEGREE MURDER OR MANSLAUGHTER.

Where defendant undertook to reduce the killing to second degree murder, or to manslaughter, he was only required to satisfy the jury of the truth of the facts upon which he relied, and an instruction upon defendant's having a reasonable apprehension that he must kill deceased in order to save himself required defendant to satisfy the jury of such facts beyond a reasonable doubt was erroneous.

Appeal from Superior Court, Anson County; Shaw, Judge.

Doll Little was convicted of murder in the first degree, and he appeals. New trial granted.

McLendon & Covington and B. V. Henry, all of Wadesboro, and A. M. Stack, of Monroe, for appellant.

Jas. S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

BROWN, J. The prisoner was convicted of the murder of one Will R. Honeycutt on the 19th of September, 1918, and the record of the trial presents 16 exceptions; 1 to the refusal to admit testimony, 10 to the judge's refusal to charge as requested, and 5 to his charge as given. We will consider only 2.

The homicide occurred at a cotton gin at Morven in Anson county. The evidence tended to prove that the prisoner and the deceased had an altercation about priority in getting under the sheds and to the gin with their wagons. There is no evidence that the deceased was armed. All the evidence proved that the defendant drew a pistol and shot the deceased, and that the deceased was struck four times and died from the wounds. There was much evidence introduced which it is unnecessary to set out.

The prisoner requested the court to charge the jury that there was no evidence of murder in the first degree. We cannot sustain this exception, but will not discuss the evidence, as it might prejudice the prisoner on another trial.

In the charge to which the defendant excepted, the court told the jury, among other things:

"In passing upon the question, you can put yourselves in the position of the defendant and see whether or not he reasonably apprehended



it was necessary to shoot in order to save his own life or himself from great bodily harm, and if he has satisfied you from all the evidence, beyond a reasonable doubt, if he has satisfied you that he did not provoke the difficulty and did not enter into it willingly, and after getting into it that he used no more force than was reasonably necessary, the court instructs you that if you find these to be the circumstances under which he killed him, it would be justifiable homicide, and it would be your duty to return a verdict of not guilty."

This instruction was erroneous, and well calculated to injure the prisoner. The burden of proof is always upon the state to satisfy the jury beyond a reasonable doubt in order to convict of a criminal offense. But where the defendant undertakes to reduce the killing to murder in the second degree or to manslaughter, he is only required to satisfy the jury of the truth of the facts upon which he relies. This is elementary now in this state. In the brief of the learned Assistant Attorney General, he admits that the expression, "beyond a reasonable doubt," is plainly error, but contends it is a mere slip of the tongue, and that it was corrected in the charge.

We fail to see that it was immediately corrected and so explained to the jury. It is a very important rule of evidence, as there is quite a difference between satisfying the jury of the truth of a fact and of convincing it beyond a reasonable doubt.

We think the prisoner is entitled to a new trial.

New trial.

(178 N. C. 435)

GORDON v. PINTSCH GAS CO. (No. 411.)

(Supreme Court of North Carolina. Nov. 12, 1919.)

1. JUDGMENT ¶17(9)—DENIAL OF VACATION OF DEFAULT FOR NEGLIGENCE.

Where service was duly made on defendant's agent, although it was not properly named, held that where defendant upon its own part failed to give the matter that amount of attention which a man of ordinary prudence usually gives to his important business, it is not entitled to set aside a default judgment for excusable neglect.

2. APPEAL AND ERROR ¶958—DISCRETION AS TO AMENDMENTS NOT REVIEWABLE.

Discretion of court as to amendments vested in trial court by Revisal, § 507, will not be disturbed on appeal, except in case of palpable abuse.

3. PARTIES ¶95(5)—POWER OF COURT TO ALLOW AMENDMENT OF NAME OF DEFENDANT.

On motion, several years after default, to correct by substituting "Compressing" for "Gas" in the corporate name of defendant, the latter being its generally known name, held, allowance of amendment was within the discretion of the court.

4. CORPORATIONS ¶48—EFFECT OF MISNOMER.

Misnomer is immaterial, if the identity of the corporation intended is apparent.

Walker and Allen, JJ., dissenting.

Appeal from Superior Court, Richmond County; Lane, Judge.

Action by J. R. Gordon against the Pintsch Gas Company. After default judgment was rendered, plaintiff moved to correct the pleadings, process, and judgment by inserting the word "Compressing" in the name of the defendant instead of the word "Gas." From a judgment correcting the record, the defendant appeals. Affirmed.

This action was instituted against the Pintsch Gas Company in 1913 to recover damages for sewage emptying on the lot of the plaintiff in the town of Hamlet, N. C. Judgment by default, and inquiry was taken at December term, 1913, for want of an answer. At March term, 1918, the inquiry was instituted, and the jury found in response to the issue submitted, "What damages, if anything, is the plaintiff entitled to recover of the defendant in this action?" "\$2,975," and thereupon judgment was entered for that sum.

On June 26, 1919, the counsel for the plaintiff gave notice of a motion in due form that at the next term of the superior court of Richmond to be held on Monday July 14, 1919, motion would be made in said court that the court should "amend process, pleading and judgment in the case of J. R. Gordon against the Pintsch Gas Company so as to read and to be J. R. Gordon v. Pintsch Compressing Co., said cause having been tried and judgment rendered at March term, 1918, of the superior court of Richmond." This notice was served on the superintendent and manager of the defendant Pintsch Compressing Company on July 2, 1919, and affidavits were filed by the plaintiff and others. The plaintiff introduced the record of the judgment by default and inquiry at December term, 1913, and of the verdict and judgment, final at March term, 1918.

The affidavit of M. R. Sharpe was filed that in 1912 and 1913 he was manager and superintendent of the defendant's plant at Hamlet, N. C., and that the summons in this case of J. R. Gordon against the Pintsch Gas Company was served upon him, and he immediately sent the copy left with him by the sheriff to the general office of the defendant, who employed resident counsel to represent them; that there was no other plant in Richmond county in the business of manufacturing gas and its allied products in 1912 and 1913; and that the summons was served on him the latter year.

A. B. McDonald filed an affidavit that the plant of the defendant at Hamlet was built about 1897; that the "defendant was always known by the name of, and as, Pintsch Gas

Company; that it was recognized and known at all times by such name; that the first time that this affiant ever knew, or even heard, that the defendant was named Pintsch Compressing Company was after judgment final had been recovered against it in this action"; that M. R. Sharpe was superintendent and manager of the defendant at Hamlet during the years 1912 and 1913 and for many years prior thereto; and that it was the only person or corporation in said county known by the name of either Pintsch Compressing Company or Pintsch Gas Company; and that he has been many years deputy sheriff of Richmond county, and at all times the defendant has been known, recognized, and acting as the Pintsch Gas Company.

The plaintiff, J. R. Gordon, in his affidavit reiterated the above statement of fact, and added that, after the death of the original counsel employed by the defendant in this action the defendant employed another resident counsel to represent it, and that M. R. Sharpe its superintendent knew that said action had been brought, and was intended to be brought, against the company which he represented; that it had no other name posted at the entrance of its plant or elsewhere, as its true name, as required by law, and that it was recognized as the Pintsch Gas Company, and paid bills and accounts charged against it in such name; that it was the only plant doing such business in said county or owning or operating a line of sewage upon the land of the defendant, and it never made any contention that it "was not sued in the right name" until the statute of limitations had run against the plaintiff's cause of action, although it knew it was the real party sued, and knew of each and every proceeding and move made in said trial thereof, and it has not been misled in any particular herein, being at all times fully informed as to the real and true contention of the plaintiff. The affidavits filed by the defendant's general superintendent (in New York) did not deny any of the above statements, but rested its contention upon the ground that after the summons in the action of the plaintiff against the Pintsch Gas Company was sent to it by the local superintendent, Sharpe, it employed counsel to look after the matter, Maj. John D. Shaw and after his death the company retained Mr. John P. Cameron, and added that his recollection was that a second summons had been served in the same action in the name of the "Pintsch Gas & Compressing Company," and that the matter had been left to counsel, and after the death of the second counsel the defendant employed Mr. Bynum, through whom it is resisting this motion.

The motion was continued from time to time by consent of parties till September term, 1919, at which term the court rendered judgment—

"correcting the pleadings, process, and judgment in such matter by inserting the word 'Com-

pressing' in the name of the defendant Pintsch Gas Company instead of the word 'Gas,' and thereby correcting the same to speak the true defendant, Pintsch Compressing Company, who were in court under process issued, and were represented from the time of the institution of said action until final judgment was signed and until the present time, and it further appearing to the court that said motion, notice, and other processes were made, served, and properly executed," it was decreed that the motion should be granted, and that "said process, pleadings, issues, and judgments be, and the same and each thereof is, amended by inserting the word 'Compressing' instead of the word 'Gas,' making the name of defendant read 'Pintsch Compressing Company,' instead of 'Pintsch Gas Company.'"

From this judgment, the defendant appealed.

Fred W. Bynum, of Rockingham, for appellant.

Lorenzo Medlin, of Rockingham, for appellee.

CLARK, C. J. [1] The defendant upon its own showing failed "to give the matter that amount of attention which a man of ordinary prudence usually gives to his important business," and therefore would not be entitled to set aside the judgment for excusable neglect even if such motion had not been barred by the lapse of more than a year. *Sluder v. Rollins*, 78 N. C. 271; *Roberts v. Allman*, 106 N. C. 394, 11 S. E. 424, and citations thereto in *Anno. Ed.*

[2, 3] The case stands, therefore, upon the power of the court, in its discretion, to allow the amendment asked for. *Revisal*, § 507, provides that—

The "judge or court may, before and after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party; or by correcting a mistake in the name of a party, or a mistake in any other respect," etc.

The language of the statute itself shows that this is a discretionary power, and it has always been held that the granting or refusal of amendments in the cases named is not reviewable by appeal except in cases of palpable abuse. See citations to *Pell's Revisal*, § 507. Also *Sheldon v. Kivett*, 110 N. C. 411, 14 S. E. 970 and cases there cited.

The evidence in this case fully warranted the findings of fact in the judgment and the grant of the leave to amend. There is no question upon the affidavits on both sides that the Pintsch Compressing Company was the party charged with committing the tort sued on; that the general manager of the Compressing Company was served with summons; that he sent it to the general office in New York, which employed counsel, and at his death employed another counsel, and later, on the death of the latter counsel, employ-

ed another; that the company sued was known generally by the name mentioned in the summons, which is held sufficient, even as to defendants in an indictment, subject to plea in abatement in which the defendant must give its true name. The general manager in New York in his affidavit states that his recollection is that a second summons was served, giving the name of defendant as the Pintsch Compressing & Gas Company. There is no indication that the defendant suffered any prejudice by reason of the misnomer, and it has waived any objection by not giving its true name by plea in abatement.

[4] A misnomer does not vitiate, provided the identity of the corporation or person with that intended by the parties is apparent, whether it is in a deed (*Asheville Division v. Aston*, 92 N. C. 584), or in a judgment or, in a criminal proceeding (*McCrea v. Starr*, 5 N. C. 252).

The judgment by default and inquiry in December, 1913, and the judgment final in March 1918, upon the verdict of the jury were both taken regularly, "according to the course and procedure of the courts." There is no question that this appellant had the fullest knowledge that the action was against itself and that it had the amplest opportunity to defend.

The amendment rested in the discretion of the court.

Affirmed.

WALKER, J. (dissenting). There was no serious denial by the defendant of the right to have the record amended by inserting the correct name of defendant for the incorrect one; that is, the Compress Company for the Gas Company, two names radically different in pronunciation, and not coming under the rule of idem sonans. The power of amendment was not the real point raised by the defendant, but his right to answer, if the power was exercised and the amendment made. My opinion is that he should have been granted that right. If the plaintiff could enforce his judgment, the amendment was not necessary, and the fact that it was made shows that plaintiff and the court considered it necessary in order to enforce the judgment. It was therefore a material amendment, and not merely formal. The plaintiff was asking for a favor from the court, and when he received it, it does not come with good grace from him to question defendant's right to be heard. But I do not regard it as a mere favor the defendant is asking of the court, but a right to which he is entitled. In *Atwood v. Landis*, 22 Minn. 558, the court went beyond the position I now take, and held the judgment in a similar case to be void, the process not having been served on the party by his right name. It is not necessary that we should go so far, as defendant only asks leave to answer. The facts of that case were precisely like those in this record, as the man upon

whom the summons was served was the one who owed the debt. *Farnham v. Hildrich*, 32 Barb. (N. Y.) 277, is directly in point. It was decided as follows:

(1) "The judgment and execution must describe the party whose property is sought to be taken, and it is not enough that the right man is made to pay a debt."

(2) "The sheriff can only execute the process against the person or property of the individual named."

(3) "Where a defendant, sued by a wrong name, fails to appear in the action, he does not waive his right to object to the misnomer, after judgment and execution"—citing many authorities.

This decision was approved in the Minnesota case, which we cited above. See, also, *Cole v. Hindson*, 101 English Rep. (Reprint) 528 (S. C. 6 Term Rep. 234). All these cases decide beyond any doubt that if plaintiff is permitted to amend, the defendant should be allowed to answer or demur as if there had been no judgment.

But aside from authority upon this question, it would seem to be fair and just that defendant should be allowed to answer to the merits. If plaintiff's amendment is necessary in order that he may enforce the judgment, it is substantial, and no reason in that view can be discovered why defendant should not be entitled to plead or answer in the case; the judgment being set aside for that purpose. The defendant was not by the law called upon to answer a defective complaint filed under defective process, nor was it required to come into a suit, appear and plead, when it had not been properly summoned to do so. When process was served upon the Compress Company, even if the same was defective, it had the right to retain counsel to investigate and protect its interests, and this cannot be used to its prejudice. A person would be very imprudent and unwise to pursue any other course. It did not appear, because it was not required to do so, and waive its rights in favor of the plaintiff. If one is served with process by one name, he is not bound to answer if that is not his true name, but is quite different. He is not bound to correct the plaintiff's or the sheriff's mistake. It appears, or at least was stated in the argument, that the lot in question was not worth over \$700, and the plaintiff offered to sell it for \$800, and yet the damages were assessed at four times that much, or \$2,975. This is a large recovery in any case, but especially so, and also a very unjust one, when the defendant has properly had no day in court. A plaintiff must not only intend to sue the one whom he alleges to be liable to him, but he must actually do so, and a suit against the Gas Company is not a suit against the Compress Company. *Hassell v. Daniels, etc., Steamboat Co.*, 163 N. C. 296, 84 S. E. 363.

The judgment by default and inquiry was

rendered at December term, 1913, and the inquiry was not executed until March term, 1918. In the meantime, the two attorneys who represented the defendant successively in Richmond county for many years have died.

ALLEN, J., concurs in this dissenting opinion.

(178 N. C. 658)

JOHNSON v. COVINGTON et al. (No. 415.)

(Supreme Court of North Carolina. Nov. 12, 1919.)

**1. APPEAL AND ERROR ¶627(2)—TRANSCRIPT: REFUSAL OF CERTIFICATE OF MOTION TO DISMISS.**

Where the transcript of appeal was not docketed in the time required, and the appellee prepared the certificate required by court rule 17 (81 S. E. ix) for motion to dismiss, and forwarded it to clerk of trial court, with a request that he sign the same, the clerk had no right to decline to sign and return the certificate because plaintiff's counsel had two weeks previously paid him \$20 on account for the making out of a transcript and requested that he prepare the same.

**2. APPEAL AND ERROR ¶628(2)—TRANSCRIPT OF RECORD; LACHES IN BRINGING UP.**

Appellant was in laches for putting off his application for the transcript of record until just before the time when it should have been sent up for hearing at the fall term, though the appeal was taken in the previous March, and he was further in laches that, when the clerk delayed in making out the transcript, he did not take steps to have it made out himself and certified by the clerk, and if there was any valid excuse the appellant should have filed his application for certiorari, and, being guilty of laches, the motion to dismiss under court rule 17 (81 S. E. ix) must be granted.

Appeal from Superior Court, Richmond County.

Action by Edith Johnson against L. S. Covington and others. On motion of the defendants, the plaintiff was nonsuited at the close of the evidence, and she appeals. On motion to dismiss appeal. Motion allowed.

This is a motion by the defendants to docket and dismiss the appeal of the plaintiff under rule 17 of this court (81 S. E. ix).

McIntyre, Lawrence & Proctor, of Lumberton, for appellees.

PER CURIAM. This case was tried at March term, 1919, of Richmond. On motion of the defendant, the plaintiff was nonsuited at the close of the evidence, and appealed. The case on appeal was agreed and filed in the office of the clerk of the superior court of Richmond some months ago.

[1] The transcript on appeal, not having been docketed here in the time required at this term, the appellee prepared the certificate required by rule 17 (81 S. E. ix) for this motion, and forwarded the same to the clerk of Richmond with request to sign the same. The clerk of Richmond telephoned the defendant's counsel, who reside in Robeson, that the plaintiff's counsel had two weeks previously come to his office and paid him \$20 on account for making out the transcript, and requested him to prepare the same, and declined to sign and return the certificate.

This action of the clerk was entirely without authority, and the appellee was entitled to said certificate upon application and payment of the costs of the certificate. It was for this court, and not for the clerk below, to decide upon the rights of the parties as to the motion to dismiss. If this were not true, it would be in the power of a clerk below to control the course of appeals to this court.

[2] It would seem that the appellant was in laches for putting off his application for the transcript of the record until just before the time when it should have been sent up, though the appeal was taken in March last, and he was further in laches that, when the clerk delayed in making out the transcript, he did not take steps to have it made out himself and certified to by the clerk. If there was any valid excuse, the appellant should have filed his application for a certiorari, in apt time, in this court, or have answered the motion to dismiss under rule 17 by showing cause.

The rights of the appellee cannot be thus denied, and the motion to dismiss under rule 17 must be granted.

Motion allowed.

(178 N. C. 659)

WATT v. SHAPLEIGH HARDWARE CO. (No. 443.)

(Supreme Court of North Carolina. Nov. 19, 1919.)

**APPEAL AND ERROR ¶999(1)—REVIEW; QUESTION OF FACT NOT REVIEWABLE.**

Where the only question involved in an appeal of a civil action is one of fact on which the jury were properly instructed, no error is shown.

Appeal from Superior Court, Mecklenburg County; Adams, Judge.

Action by W. W. Watt against the Shapleigh Hardware Company. Judgment for plaintiff, defendant's motion to set aside the verdict overruled, and defendant appeals. No error.

Civil action tried upon these issues:

(1) Is the defendant indebted to the plaintiff? "Yes."

If so, in what amount? Answer: "\$2,943.66."

(2) Has the defendant tendered to the plaintiff any payment upon plaintiff's alleged indebtedness? If so, what is the amount of the tender and the date thereof? Answer: "Yea, \$1,493.61, on 26th day of August, 1918."

From the judgment rendered, the defendant appealed.

A. B. Justice, of Raeford, for appellant.

E. R. Preston and Clarkson, Tallafarro, & Clarkson, all of Charlotte, for appellee.

**PER CURIAM.** Upon an examination of the record in this case, the court is of opinion that the only question involved is one of fact which has been determined by the jury in favor of the plaintiff under a clear charge free from error.

No error.

(178 N. C. 442)

In re SKINNER'S ESTATE. (No. 251.)

(Supreme Court of North Carolina. Nov. 12, 1919.)

**DESCENT AND DISTRIBUTION**  $\Leftrightarrow$  35—**PERSONAL PROPERTY; CLAIMANTS OF THE HALF BLOOD.**

Under statute of distribution, claimants of the half blood are entitled to share equally with claimants of the whole blood in the distribution of personal property.

Appeal from Superior Court, Wake County; Allen, Judge.

In the matter of the estate of Charles W. Skinner. Controversy without action between Mrs. Sarah S. Snow, and Eliza Skinner McGehee and others. Judgment for the former, and the latter except and appeal. Affirmed.

The controversy is to determine the rights of respective claimants of the whole and half blood to participate in the personal estate of Charles Worth Skinner, deceased intestate, and now in the hands of Joseph B. Cheshire, Jr., administrator.

There was judgment in favor of Mrs. Snow. The claimant of the half blood and the claimants of the whole blood excepted and appealed.

L. P. McGehee, of Chapel Hill, for appellants.

E. W. Ewbank, of Hendersonville, for appellee.

**HOKE, J.** In the case agreed, the family connection and blood relationship of the parties to this proceeding are given as follows:

"I. Thomas E. Skinner, formerly of Raleigh, N. C., married, first, Ann Eliza Halsey, of which marriage there were children, as follows:

"(a) Sarah Halsey Skinner, who intermar-

ried with Samuel Snow, and who is a party to this proceeding, said Samuel Snow being dead; and

"(b) Thomas Skinner who died without issue, and whose wife is now dead. There was no other issue from this marriage.

"II. The said Thomas E. Skinner married, second, Ann Stuard Ludlow, of which marriage there were children, who survived infancy as follows:

"(a) Eliza Mary Skinner, who intermarried with George B. McGehee, and who is a party to this proceeding, the said George B. McGehee being now dead.

"(b) J. Ludlow Skinner, who intermarried with Octavia Winder. The said J. Ludlow Skinner is now dead, leaving issue John Cox Winder Skinner only, who is a party to this controversy.

"(c) Charles Worth Skinner, who is now dead, and his duly qualified administrator, Joseph B. Cheshire, Jr., is party to this controversy. Said Charles Worth Skinner never married.

"No other children of this marriage survived infancy."

It further appeared that the estate consisting of personal property to the amount of \$44,000, less some valid payments made by the administrator, devolved upon Charles Worth Skinner, the intestate under a settlement of his grandfather John R. Ludlow, by which the property was given to the mother, Ann Stuard Skinner-Ludlow, for life, and then to her children, etc.

It seems to have been definitely settled in the English courts, at least as early as 1690, that there is no distinction in the rights of claimants of the half and the whole blood to share in the distribution of personal property. *Crook v. Watt*, 2 Vernon, 124. This decision, rendered on February 11, 1690, was affirmed in the House of Lords at or near the beginning of the Easter Term following and does not seem to have been afterwards questioned as the correct construction of the statute applicable to the subject. 2 Ventris, 317, 23 English Reprints, 689. The same position has prevailed with great uniformity in the American courts, unless affected by some change in the different state statutes on the subject. *Prescott v. Carr*, 29 N. H. 453, reported also in 61 Am. Dec. 652; *Anderson v. Bell*, 140 Ind. 375, 39 N. E. 735, reported in 29 L. R. A. 541; *McKinney v. Mellon*, 8 Del. (3 Houst.) 277; *Deadrick et al. v. Armour*, 29 Tenn. (10 Humph.) 588; *Ector v. Grant*, 112 Ga. 557, 37 S. E. 984, 53 L. R. A. 723. The authoritative textbooks, so far as examined, are in accord with the decisions. 2 Blacks. 515; 2 Kent, 428; *Williams on Personal Property*, p. 362; 9 R. C. L. 32, 33; 27 Am. & Eng. Enc. (2d. Ed.) 315.

In the citation to *Williams*, supra, it is said:

"In tracing the degrees of kindred in the distribution of the intestate's personal estate,

no preference is given to males over females; nor to the paternal over the maternal line; nor to the whole over the half blood," etc. "The degrees of kindred are reckoned according to the civil law."

In 9 R. C. L., supra, it is said:

"The rule is nearly uniform that brother and sister of the half blood are included in the statutory provision for descent to brother and sister, unless a contrary intention appears, and the phrase 'of the blood' is held to include half blood, and the term 'next of kin' is construed to include the half blood, especially where the degrees of kinship are reckoned according to the civil law, by which they are equally next of kin."


The precise question as to personal property does not seem to have been presented in this state, but our statute of distribution in the terms appertaining to the question is the same or substantially similar to the English law which had been construed as above stated. It contains throughout nothing which affects any change in reference to this especial subject, and on authority we must approve the ruling of his honor in awarding her proportionate and equal share to the claimant of the half blood.

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

(178 N. C. 441)

KORNEGAY et al. v. PRICE. (No. 224.)

(Supreme Court of North Carolina. Nov. 12, 1919.)

HUSBAND AND WIFE  16—POSSESSION BY HUSBAND ON VOID DEED FROM WIFE NOT ADVERSE.

Where a deed from the wife to the husband was void for noncompliance with Revisal 1905, § 2107, requiring the approval of the probating officer, etc., the husband could not hold under it as color of title adversely to the wife during coverture.

Appeal from Superior Court, Duplin County; Gulon, Judge.

Action by Hezekiah Kornegay and another against Eden Price. Judgment for defendant, and plaintiffs appeal. Judgment reversed, and new trial granted.

Civil action tried upon these issues:

(1) Is the plaintiff the owner of the lands described in the complaint?

Answer: Yes, second tract only.

(2) Does defendant wrongfully withhold the same from the plaintiff?

Answer: Yes, as to second tract.

Judgment for defendant, and plaintiffs appealed.

John A. Gavin, Jr., of Kenansville, for appellants.

Stevens & Beasley, of Kenansville, for appellee.

BROWN, J. It is admitted that Margaret Price was the owner in fee of the land in controversy, and that the plaintiff is her only heir at law. Margaret Price was the wife of the defendant, Eden Price. They were married prior to the 15th day of May, 1897, and lived together as man and wife until the 18th day of July, 1916, when Margaret Price died. No children were born of said marriage. On the 15th day of May, 1897, Margaret Price executed to her husband, the defendant, a deed which was void under Revisal 2107. The defendant claimed that this deed was color of title and that he had had adverse possession against his wife of the 44½-acre tract for a period sufficient to ripen the color into a good title. The court directed the jury that the plaintiff was not entitled to recover the 44½-acre tract of land; that, if the evidence is to be believed, he acquired title by color of the deed from his wife and by adverse possession against her.

We think the learned judge erred in holding that the husband can acquire the wife's land by adverse possession under color of title. It is admitted that the deed of Margaret Price to the defendant is void because not probated in accordance with the statute and that it did not pass the title.

It seems to be well settled that, owing to the unity of husband and wife, adverse possession cannot exist between them so long as the coverture continues. But where the marital relations have been terminated by divorce or abandonment, it seems that one may acquire title from the other by adverse possession. I. A. & E. Ency. p. 820, § 11. In *First National Bank v. Guerra*, 61 Cal. 109, it is held that a wife cannot claim adversely to her husband or those claiming under him so long as he remains the head of the family. It is held further in *Hendricks v. Kasson*, 53 Mich. 575, 19 N. W. 192, that the husband cannot hold, adversely to his wife, premises belonging to her. Joint possession by husband and wife held under the wife's claim of title inures to her benefit. *Templeton v. Twitty*, 88 Tenn. 593, 14 S. W. 435. In *Vandevoort v. Gould*, 36 N. Y. 639, it is held that the possession of premises by husband belonging to his wife can in no sense be deemed adverse. In the note to A. & E. Ency., supra, a large number of cases is cited sustaining the text. See, also, *Union Oil Co. v. Stewart*, 158 Cal. 149, 110 Pac. 313, Ann. Cas. 1912A, 570 and notes.

The possession of the husband of land conveyed to him by the wife under a void deed becomes adverse only after her death and against her heirs. *Berkowitz v. Brown*, 3

Misc. Rep. 1, 23 N. Y. Supp. 792. There are authorities which hold that the possession of the husband does not become adverse against the wife's heirs until a demand is made for possession. See, also, R. C. L. 755, § 83, where it is said:

"It is well settled that neither a husband nor a wife can acquire title by adverse possession as against the other of land of which they are in the joint possession."

The judgment of the superior court is reversed.

New trial.

(178 N. C. 470)

**GORDON v. STEHLI SILKS CORPORATION.** (No. 389.)

(Supreme Court of North Carolina. Nov. 19, 1919.)

**1. MASTER AND SERVANT §234(1) — UNPROTECTED MACHINERY; INJURY TO SERVANT FROM.**

A spinning machine operative, not warned of the uncovered cogwheel of a motor, which caught her dress when she passed it on her way out, *held* not negligent in using the aisle in which the motor was placed.

**2. MASTER AND SERVANT §121(5) — UNPROTECTED MACHINERY; NEGLIGENCE OF MASTER.**

An uncovered cogwheel is a danger, and it is negligence to leave it uncovered, even temporarily, without notice to operatives passing it on their way from work.

Appeal from Superior Court, Guilford County; Lane, Judge.

Action by Ida B. Gordon against the Stehli Silks Corporation. Verdict and judgment for plaintiff, and defendant appeals. No error.

This action is to recover damages for personal injuries caused by the negligence of the defendant, who had taken the hood off of a certain cogwheel in the factory where the plaintiff worked, leaving it exposed so that the plaintiff had her dress caught in the cogs sustaining injuries. Verdict and judgment for plaintiff. Defendant appealed.

Justice & Broadhurst and King & Kimball, all of Greensboro, for appellant.

John A. Barringer, of Greensboro, for appellee.

CLARK, C. J. The plaintiff had been working in the defendant's factory for some five years, and it was her duty to go from one machine to the other and take out the bad bobbins. There were 16 spinning frames all set in rows parallel to each other, but separated by aisles. There were little motors in the aisles at the end of each spinning frame, around which the plaintiff went to get the defective work and bring it to the redrawing

machine. The motors were geared to the spinning machines, the gearing being covered. The cover which fitted over the gearing of this particular motor had been taken off for repairs, and the cogs were left unprotected. When the plaintiff started to supper at 11:30 at night, she went down the aisle to ask another girl to go with her, as was her custom. The wind, through an open window, blew her dress as she was passing this unprotected cogwheel, and her dress was caught in the cogs and pulled off of her, and she was drawn down so that the calf of her left leg was caught and seriously injured by the cogs. She testified that she did not know that the cover was off the motor.

[1] Taking the evidence, as we must, in the light most favorable to the plaintiff, the motion to nonsuit was properly refused. It was the duty of the defendant to furnish a safe place for the plaintiff to work, and it was negligence to leave the cogwheel unprotected. It was not negligence barring recovery by the plaintiff for her to go the way she did, unless she had been warned of the uncovered cogwheel. The court properly refused the prayer to charge the jury that she could not recover because she might have avoided going near that particular motor with the open cogwheel.

[2] An uncovered cogwheel is a danger, and it was negligence to leave it uncovered, even if temporarily, without notice. The jury under proper instructions have found that this negligence was the proximate cause of the injuries sustained by the plaintiff. *Hardy v. Lumber Co.*, 160 N. C. 113, 75 S. E. 855, 42 L. R. A. (N. S.) 759, and citations to that case in *Anno. Ed.*

No error.

(178 N. C. 724)

**STATE v. CAIN et al.** (No. 346.)

(Supreme Court of North Carolina. Nov. 12, 1919.)

**1. HOMICIDE §30(2) — PRINCIPALS; FIRST DEGREE MURDER.**

If defendants formed a common design and purpose to go to the house of deceased and assault him with guns and pistols or to inflict any bodily harm upon him or the inmates of his house, and in pursuance of such common design and purpose came to door of deceased's house, and some one of the party shot him and killed him, and this was done after it had been premeditated and deliberated upon by them, and they did it with malice, they would all be guilty of murder in the first degree.

**2. CRIMINAL LAW §1172(7)—APPEAL; OMISSION IN INSTRUCTION FAVORABLE TO DEFENDANT.**

That the words, "You will specify, of course, which one," were omitted before the word, "because," in instruction, "If you find

any of the defendants guilty of murder in the first degree, you will specify of course which one. If you find any one of the defendants guilty of murder in the second degree, because only one defendant could be guilty of murder in the second degree"—if error, was error in favor of defendants.

**3. HOMICIDE §307(4) — INSTRUCTIONS; EXCLUDING CONSIDERATION OF MANSLAUGHTER AND SECOND DEGREE MURDER.**

In view of evidence of threats and preparation of weapons and concerted attack simultaneously made with firearms late at night by defendants firing simultaneously, the judge properly instructed that there was no evidence of manslaughter, and might have gone further and instructed that there was no evidence of murder in the second degree; there being only one question in the case, the identity of the parties.

**4. HOMICIDE §232 — CIRCUMSTANTIAL EVIDENCE; PREMEDITATION.**

Premeditation and deliberation, like any other fact, may be shown by circumstances, and in determining whether there was premeditation and deliberation the jury may consider the entire absence of provocation and all the circumstances under which the homicide is committed.

**5. HOMICIDE §9 — EVIDENCE; MURDER IN THE FIRST DEGREE.**

If the circumstances show a formed design to take the life of deceased, the crime is murder in the first degree.

Appeal from Superior Court, Surry County; Lane, Judge.

Joe Cain, Joe Bowles, and Gardner Cain were convicted of murder in the first degree, and they appeal. No error.

Folger, Jackson & Folger, of Mount Airy, and J. C. Biggs, of Raleigh, for appellants.

The Attorney General and Assistant Attorney General, for the State.

CLARK, C. J. There was evidence of motive that the prisoners were operating an illicit still in the vicinity of Riley Easter's home, and that the deceased and his son, James Easter, knew of it, and that the prisoners accused Riley Easter and his son of giving information which caused the still to be captured and destroyed; that they made threats and sent him a message that if it was not replaced there would be trouble, and there was evidence that Walter Cain, son of Joe Cain, went to the Easters and gave him notice that the other defendants were enraged at his having had the still taken, and unless put back by Sunday night they would do some injury or violence to him. There was evidence that the still was not returned by Sunday night, and that on the next night Riley Easter was slain. There was also evidence that one Andy Martin was induced by

John Hicks, one of the defendants, to go to Easter and warn him to put the still back. There was much other evidence to the same purport, and that on the Monday night in question Joe Bowles, Joe Cain, Gardner Cain, and John Hicks were seen and identified by the inmates of Riley Easter's house and also by Riley Easter himself; that they knew these men, having lived in that community for some months, seeing them frequently; that these men had come to Riley Easter's house often and spent much time there; that on this Monday night Mrs. Easter and her daughter were out of doors, it being a moonlight night, the moon well up, and about 10 or 11 o'clock at night, as they testified, these four men came up near the house; one of them testified that she knew Joe Cain's voice; Mrs. Easter and her daughter, Mrs. White, ran to the house, and as they got in the door they exclaimed that these four men were out there, calling them by name; the son, Jimmie Easter, was in the house, and Riley Easter went to the door, thinking it was revenue officers, and said, "Hello," and invited whoever it was to "come in"; that there was then the simultaneous report of four guns, and a bullet struck Riley Easter, entering his body and subsequently causing his death; that at that time it was so bright that Riley Easter was able to recognize the men out there; that the firing became rapid, from four guns, and Mrs. Easter testified that she saw flashes coming from four weapons of some kind in the hands of these four men; that she was able to recognize the three defendants who were convicted and Walter Cain; that a number of shots were fired into the room or side of the house, some going into the room or side of the house, and that these men then made a rush for the door; that James Easter then got his pistol and fired two shots; that the inmates closed the door to keep the assailants out, but the door failed to close fully, leaving a sufficient opening to see out; that these men were pushing against the door, and Mrs. Easter saw Joe Cain appearing through it, seeing him plainly; that one of her daughters from another door had also seen these men and recognized them, and other inmates of the house say they saw these men and identified them. One of the women said, "You have killed pap and my baby." Then these men got off the steps at the door and went away. There were a large number of shots fired, as appeared by the bullet holes on the door facing and door as testified to by officers and other persons. A shotgun and pistol were found next day at Walter Cain's, and there was also evidence that Gardner Cain owned a repeating rifle and a pistol, and that Joe Cain also had guns and pistols. These weapons which were found at their houses, or known to have been owned



by them and found in their vicinity, were put in evidence.

Riley Easter stated to Dr. Hollingsworth when he first came in that he was going to die. Though the doctor told him he was not, Riley Easter repeated the statement that he was going to die and said that these men, naming the defendants and Walter Cain, had killed him. He said they were all shooting. The judge found as a fact that Riley Easter made these statements under an impending sense of death, and admitted them as dying declarations, with proper instructions. Riley Easter died 10 a. m. after the night he was shot.

There were exceptions to the admission of evidence and to some two alleged errors in reciting the contention of the parties, but they do not require discussion. The evidence shows that Riley Easter, notwithstanding the remark of the doctor that he would not die, repeated that he would, and subsequently made his declaration that these prisoners had shot him in the manner above detailed. The doctor testified that he thought then Riley would die. The two alleged errors in the recital of the evidence by the judge are very slight, and he told the jury that they must take their own recollection of the testimony.

[1] The two exceptions chiefly relied upon are the following statements in the charge:

"Now, if the jury shall find from the evidence in this case, beyond a reasonable doubt, that these defendants, Joe Cain, Gardner Cain, Joe Bowles, Walter Cain, and John Hicks, formed a common design and a common purpose to go to the house of Riley Easter and assault him with guns and pistols, or to inflict any bodily harm upon him or the inmates of his house, and if you further find beyond a reasonable doubt that, in pursuance of this common design and purpose, entered into and agreed to by all of them, that they were there, and that when Riley Easter came to the door some one of them fired a shot into his body from a weapon and killed him, and that this was done in pursuance of the common design entered into by all of them, and death was caused to him in that way, after it had been premeditated and deliberated upon by them, and they did it with malice, then all would be guilty of murder in the first degree."

There was evidence of the motive and of the threats of these prisoners that they came up about 11 o'clock at night armed with deadly weapons, and all four of them firing simultaneously at Easter and into the house, and evidence by the inmates identifying the prisoners. In this instruction there was no error.

When the officers sought to arrest the three defendants who were convicted and went to Joe Cain's house, his wife said he was not at home; but he was found in the loft in which there was no floor and to which there was no access by ladder or steps. The officers found Gardner about 300 yards from his house

in the woods lying between two logs with his pistol tucked under some leaves near his head. Joe Bowles was found covered up in bed with all his clothes on. A shotgun and his clothes were found in a tree not far from Gardner Cain's house. Walter Cain and John Hicks, who alone of the prisoners went upon the stand, testified that they were not present at the shooting, and were acquitted. Walter Cain testified, however, that he was at the Easters' Sunday morning and told them that they had better take that thing back to keep down trouble, for his father (Joe Cain) and Gardner Cain were mad about it, and that he had seen a shotgun at Gardner's house like the one that was found near there.

John Hicks also testified that he told Andy Martin that he thought the Easters were going to get into trouble, and to tell them to take the still back.

The court charged the jury explicitly:

"By premeditation and deliberation is meant the forming of a design, a purpose weighing it in the mind, thinking it over, deliberating upon it, turning it over in the mind, as it were."

[2] There was no exception to this nor to the definition of "malice" or any other part of the charge as to these prisoners except the following:

"If you find any of the defendants guilty of murder in the second degree, because only one defendant could be guilty of murder in the second degree."

This assignment of error is defective because it is a mere paragraph taken out of a longer sentence, but, taking the whole sentence to make it intelligible, it reads as follows:

"If you find the defendants guilty of murder in the first degree, then your verdict will be guilty of murder in the first degree; if you find any of the defendants guilty of murder in the first degree, you will specify, of course, which one; if you find any one of the defendants guilty of murder in the second degree because only one defendant could be guilty of murder in the second degree."

It is apparent that there was a typographical error in omitting before the word "because" in the last paragraph, "You will specify, of course, which one." Otherwise, the sentence excepted to is insensible. If error, this was error in favor of the prisoners.

The only other exception to the charge is to the following:

"The state contends, therefore, that you should find from the evidence, beyond a reasonable doubt, that he (Walter Cain) was a party to the common purpose and design entered into by all of them that they do injury or death to Easter."

Walter Cain was acquitted. Neither of the defendants except Walter Cain and John

Hicks went upon the stand, both of whom were acquitted.

[3] The judge properly instructed the jury that there was no evidence of manslaughter. He might have gone further and told them that there was no evidence of murder in the second degree, for upon this evidence of a concerted attack simultaneously made with firearms, late at night upon Riley Easter and the house by the prisoners firing simultaneously, and approaching in a body, taken in connection with the threats and the preparation of weapons, if believed, there could only be one question—the identity of the parties. But the judge left to the jury the question as to whether the killing was murder in the second degree, but charged that if it “was by premeditation and deliberation and malice, done in pursuance of a common design entered into, common enterprise entered into by all of them, after it had been premeditated and deliberated upon by them, and they did it with malice, then they would be guilty of murder in the first degree.”

[4, 5] The evidence against the prisoners was fuller and more complete than above set out, but sufficient is recited to point the exceptions taken. The law is thus clearly stated in a recent case by Brown, J., *State v. Walker*, 173 N. C. 782, 92 S. E. 328:

“Premeditation and deliberation, like any other fact, may be shown by circumstances, and in determining as to whether there was such premeditation and deliberation the jury may consider the entire absence of provocation and all the circumstances under which the homicide is committed. *State v. Roberson*, 150 N. C. 837 [64 S. E. 182]; *Carr on Homicide*, § 72. If the circumstances show a formed design to take the life of the deceased, the crime is murder in the first degree. This subject is so fully discussed in the many cases in our reports that it is useless to pursue the matter further.”

The facts were carefully stated to the jury and the law laid down according to the precedents. It would be difficult to find any set of facts which, if believed by the jury, would more completely constitute malice, premeditation, and deliberation than those testified to in this case, and which the jury found to be true under the charge of the court.

In the oral argument here, counsel for the prisoners presented objections to the charge which are not set out in the exceptions taken on the trial or in the assignments of error. In a matter of this importance it may be that, if exceptions of importance were omitted by oversight, the court would by amendment allow the assignment of error to be en-

tered here; but we have examined the alleged errors and find no merit in them.

After the fullest consideration of the evidence and the charge and the argument of counsel, we find in the conduct of the trial nothing prejudicial to the rights of the prisoners.

No error.

ALLEN, J. (concurring in result). I think there are several errors in the charge as it appears in the record, but they are not excepted to, presumably because the charge was not transcribed correctly by the stenographer, and as there is no error in the exceptions taken, and it appears to me that the prisoners began firing simultaneously when the deceased appeared at the door of his house and could have had but one intent, and that was a common purpose to kill, I agree to the judgment of the court. As I read the record, the question in controversy was one of identity, and that has been decided against the prisoners under instructions which are free from criticism on the controverted issue. I do not wish to animadvert on the judges of the superior court, knowing as I do the many duties they have to perform; but they owe it to themselves and to the public to scrutinize the records we are called on to review.

In this case the judge is placed in the attitude of charging that the burden was on the defendants to show matters in mitigation beyond a reasonable doubt, when he doubtless charged “not beyond a reasonable doubt, but to the satisfaction of the jury.” This was not excepted to.

In another case at this term, one of the most learned judges on the superior court bench appears to have held that the vendor of personal property has a vendor's lien for the purchase money which deprived the vendor of his personal property exemption as against the purchase money, because he signed a judgment hastily for the accommodation of parties not knowing the question was raised.

Much of the difficulty about records arises from the extension of the statutory time for making up the case on appeal; and, while I would not favor withdrawing from counsel the right to extend the time by consent, I am of opinion a rule ought to be adopted that there shall be no further extension of the time entered upon the record without the written approval of the judge, before whom the action is tried, as in this way he may have the opportunity of settling the case before he has left the district or has overlooked many of the incidents of the trial.

(178 N. C. 424)

McLEAN, Com'r, et al. v. CALDWELL.  
(No. 302.)

(Supreme Court of North Carolina. Nov. 12, 1919.)

**1. REMAINDERS ⇐16—SALE UNDER ORDER OF COURT; REINVESTMENT.**

Under Revisal 1905, § 1590, court may order sold for reinvestment land devised for life with remainder in fee to life tenant's oldest daughter, if any, and, if no daughter, then to the oldest son, or should he die without issue then to another in fee simple, where the land was in best business district and too valuable to be used for residence purposes, and there was only one small dwelling on the land and no appreciable revenue therefrom, and tenant and contingent remaindermen were without funds to pay taxes or improve the property, or to pay inheritance taxes assessed, and the best interest of all concerned would be subserved by a sale for reinvestment.

**2. REMAINDERS ⇐16—SALE UNDER ORDER OF COURT; PRIVATE NEGOTIATION.**

A sale of land for reinvestment may be effected by private negotiation, under Revisal 1905, § 1590, subject to the approval of the court, when it is properly made to appear that the best interest of all the parties so requires.

**3. REMAINDERS ⇐16—SALE UNDER ORDER OF COURT; DISPOSITION OF PURCHASE PRICE MONEY.**

A purchaser of land sold for reinvestment under Revisal 1905, § 1590, is not charged with duty of looking after the proper disposition of the purchase money, but when he has paid his bid into court or to the parties authorized to receive it by the court's decree, he is acquitted of further obligation concerning it.

**4. REMAINDERS ⇐16—SALE UNDER ORDER OF COURT; PROVISION IN DECREE FOR SAFETY OF FUND.**

The proper care and safety of the fund, where land is sold for reinvestment under Revisal 1905, § 1590, can be provided for in the final decree of the court.

Appeal from Superior Court, Robeson County; Calvert, Judge.

Controversy without action by J. Dickson McLean, Commissioner, and others against S. F. Caldwell. Judgment for plaintiffs, and defendant appeals. Affirmed.

The controversy is to determine the right to enforce collection of a bid for real estate, sold for reinvestment under section 1590 of Revisal. There was judgment that the title offered was a good one, and that the defendant, the purchaser at judicial sale, comply with his bid. Defendant excepted and appealed.

McIntyre, Lawrence & Proctor, of Lumberton, for appellant.

McLean, Varner, McLean & Stacy, of Lumberton, for appellees.

HOKE, J. The facts pertinent to the inquiry, and showing the action of the superior court thereon, are very satisfactorily stated in the appellant's brief filed in the cause, and are as follows:

"Fannie Peterson, owner in fee simple of a lot in the business portion of Lumberton, died leaving a will wherein she devised said lot to Eugene Bond for life, with remainder in fee to his oldest daughter, if any, or if no daughter, then to his oldest son, or should he die without issue then to Allen Bond in fee simple. In said will she also directed her executors to purchase another lot, adjoining the lot then owned by her, the title to which lot, when so purchased, to be held for the same persons and subject to the same conditions and limitations as set forth in the will with respect to the lot owned by her at her death. Pursuant to such direction, her executor acquired title of said lot, and the two lots together, embracing one acre of land which is the subject of this action.

"Eugene Bond, the life tenant, is living and above the age of 25, but is unmarried. The contingent remaindermen, Victor Bond and Allen Bond, are living, above the age of 21, but are unmarried.

"In 1917, Eugene Bond, the life tenant, instituted an action in the superior court of Robeson county to have said land sold for reinvestment under section 1590 of the Revisal. Victor Bond, Allen Bond, R. S. Bond, executor of Fannie Peterson, and the unborn children of Eugene Bond, Victor Bond, and Allen Bond were defendants in this action, and summons was duly served upon them. Upon application the judge appointed a guardian ad litem to represent the unborn children of the life tenant and devisees and all contingent remaindermen. A verified complaint was filed, alleging that the land was in the business district of Lumberton, and too valuable to be used for residence purposes; that there was only one small dwelling on the land, and there was no appreciable revenue therefrom; that the life tenant and living contingent remaindermen were without funds to pay taxes or improve the property, or to pay inheritance taxes assessed, and that the best interest of all concerned would be subserved by a sale for reinvestment. The guardian ad litem filed answer, admitting the allegations of the complaint. At December term, 1917, Judge Bond entered a decree of sale, appointing J. Dickson McLean as commissioner, and authorizing him to secure private bids and submit same to the court. Thereafter S. F. Caldwell, defendant in this action, addressed a written bid to the commissioner, offering him \$25,000 for a 'good, perfect, and indefeasible title in fee simple' to said lands. The commissioner filed report, recommending the acceptance of this bid, whereupon at September term, 1919, his honor, Judge Calvert, signed a decree, authorizing acceptance of the bid and directing the commissioner to execute a deed conveying

said land to the purchaser in fee simple upon payment of the purchase money, the decree further providing that the proceeds of sale should be deposited in bank at interest until such time as a decree for reinvestment of the proceeds of sale could be entered. The commissioner thereupon tendered a deed in the usual form of a commissioner's deed to said Caldwell, who declined to accept same or pay the purchase money, for that he was advised by counsel that there was doubt as to the power of the court to decree a sale of said lands, and for that there was doubt as to whether, upon the face of the record of said proceedings, the deed of the commissioner would convey a good, perfect, and indefeasible title in fee simple to said lands.

"This action was thereupon instituted by the commissioner and the living devisees and executor of Fannie Peterson against said S. F. Caldwell, for the purpose of requiring said Caldwell to comply with his bid, receive the deed from the commissioner, and pay the purchase money. There being no dispute whatever as to the facts, the cause was submitted to the court below upon a case of agreed facts. The court being of opinion that upon the face of the record the court had the power to decree a sale of said lands, and being of opinion that the deed of the commissioner would pass a good, perfect, and indefeasible title in fee simple to the purchaser, judgment was entered, requiring defendant to comply with his bid and pay the purchase money, to which judgment defendant excepted and appealed."

[1-4] In several recent cases before us, the questions presented were fully and directly considered, and the decisions are in full support of his honor's ruling in the premises. *Dawson v. Wood*, 177 N. C. 159, 98 S. E. 459; *Pendleton v. Williams*, 175 N. C. 248, 95 S. E. 500; *Thompson v. Rospigliosi*, 182 N. C. 145, 77 S. E. 113. From a perusal of these cases and the authorities cited therein, it will clearly appear: (1) That on the facts presented the court had full power to order a sale for reinvestment under the statute. (2) That the same can be effected by private negotiation, subject to the approval of the court, when it is properly made to appear that the best interest of all the parties so requires. This was the course pursued and directly approved in *Dawson's Case*, supra. (3) That ordinarily and on the facts of this record the purchaser is not charged with duty of looking after the proper disposition of the purchase money, but when he has paid his bid into court or to the parties authorized to receive it by the court's decree, he is "quit of further obligation concerning it" (*Dawson v. Wood*, supra; *Pendleton v. Williams*, supra); and as said further in the *Dawson Case*, the proper care and safety of the fund can be provided for in the final decree.

It may be well to call attention to two recent statutes in reference to the care and proper investment of funds arising by reason

of these sales for reinvestment. Laws 1919, c. 17; Laws 1919, c. 259.

On the record, the judgment of the superior court is affirmed.

Affirmed.

(178 N. C. 447)

SHANNONHOUSE et al. v. FLEETWOOD.  
(No. 34.)

(Supreme Court of North Carolina. Nov. 19, 1919.)

EXECUTORS AND ADMINISTRATORS — 138(1)—  
SALE WITH WIDOW'S APPROVAL.

Where the will authorized sale of unremunerative property in the discretion of executor, subject to a provision requiring him to secure consent of the widow, he had power to sell unprofitable land and reinvest proceeds, where she in writing consented thereto.

Appeal from Superior Court, Perquimans County; Bond, Judge.

Submission of controversy without action by W. T. Shannonhouse, executor, and others, against J. Fleetwood. Judgment for defendant, and plaintiffs appeal. Reversed.

Controversy without action submitted to Bond, J., in the superior court of Perquimans county, August, 1919. The plaintiffs contracted to sell to the defendant a certain tract of land at a certain price. The defendant is willing to take the land and pay the money, but avers that the title is not good. The court held that the title was not good and adjudged that the defendant be not required to pay the purchase money. Plaintiffs appealed.

William T. Shannonhouse, of Norfolk, Va., for appellants.

Charles Whedbee, of Hertford, for appellee.

**BROWN, J.** The title to the land depends upon the construction of the will of H. T. Shannonhouse, deceased. It is admitted that if the executor, William T. Shannonhouse, acting in connection with the wife of the testator, has power to sell the land under the terms of the will, then the proffered title is good and the defendant may justly be required to pay the purchase money. The will contains the following provisions:

"I hereby appoint my brother, Wm. T. Shannonhouse, to be and act as my sole executor, and that he shall furnish good and sufficient bond.

"I hereby impose upon my executor, as part of his duties hereunder, that in all matters he shall consult and secure the consent in writing of my wife, Annie H. Shannonhouse, regard-

ing all matters of purchase, or sale and reinvestments.

"I hereby desire and will to my wife, Annie H. Shannonhouse, all of my life insurance, to be paid her immediately upon settlement of same with the Insurance Companies, said sum to belong to her in full and in fee.

"No. 2.

"I will and devise to my wife, Annie H. Shannonhouse, during her lifetime all of my properties of all and every kind.

"I hereby appoint and authorize my brother, Wm. T. Shannonhouse, to act as manager, and have full power of handling all property for my wife, Annie H. Shannonhouse, subject to paragraph three on sheet No. 1.

"It is my will and desire that any property that I may own at the time of my death, and any of same should be found to be not profitable or remunerative, that same shall, in the discretion of my brother, Wm. T. Shannonhouse, subject to paragraph three of sheet No. 1, be sold, and the proceeds of same reinvested in good and substantial stocks, bonds or real estate.

"I will and devise that all revenue from my property of all kinds (No. 3 sheet) be paid to my wife, Annie H. Shannonhouse."

It is stated in the case that in the opinion of W. T. Shannonhouse, executor, concurred in by Annie H. Shannonhouse, by her consent in writing, the said farms are not profitable or remunerative, and it would be for the best interest of all that a sale be made of all the farms and proceeds reinvested in good substantial stocks, bonds, or real estate.

We are of opinion that, under the will, the power of sale is conferred upon the executor subject to the approval of the widow. A certain discretion is vested in the executor subject to such approval to determine whether or not any of the property of the testator proves to be unprofitable and unremunerative. In such case, the executor is charged with the duty of selling the same and reinvesting the proceeds in "good and substantial stocks, bonds or real estate." The power of the executor is restricted, always, throughout the entire will, by requiring him to have the approval of the widow. She seems to be the first object of the testator's care and is given practically all the revenues of the estate. It is declared by the executor and the widow that the farms are not profitable or remunerative, and that it would be for the best interest of all concerned that a sale be made of all the farms and the proceeds reinvested according to the terms of the will.

We think this provision of the will speaks for itself and is couched in plain and simple terms. It is not unreasonable. On the contrary, it may be a wise provision, by which the income of the widow may be increased.

We are of opinion that the proffered title is good, and that the defendant should be required to accept the deed and pay the purchase money.

Reversed.

(178 N. C. 429)

MORRISON & HILD v. MARKS. (No. 392.)

(Supreme Court of North Carolina. Nov. 12, 1919.)

1. TRIAL  $\S$ 140(1)—CREDIBILITY OF EVIDENCE JURY QUESTION.

Credibility of evidence was for jury.

2. SALES  $\S$ 418(1)—NOMINAL DAMAGES; ACTION FOR NONDELIVERY.

In buyer's action for seller's refusal to deliver, where there was evidence to establish a sales contract and a breach thereof by seller, buyer was entitled to recover at least nominal damages.

3. DAMAGES  $\S$ 40(2)—PROFITS; LOSS FROM BREACH OF CONTRACT.

Profits cannot be recovered as damages unless such damages are such as may fairly be supposed to have been contemplated by parties when making contract and might naturally be expected to follow its violation, and are certain both in their nature and in respect to the cause from which they proceed.

4. DAMAGES  $\S$ 176—LOSS OF PROFITS; MATTERS TO BE CONSIDERED.

In ascertaining what profits may be recovered as damages within the rule that such damages may be recovered when within contemplation of parties and certain, it is proper to consider relation of parties, subject-matter of contract, the business of the party, the knowledge of the defendant, and other relative circumstances.

Appeal from Superior Court, Guilford County; Lane, Judge.

Action by Morrison & Hild against A. H. Marks. Judgment of nonsuit, and plaintiff excepts and appeals. Reversed.

This is an action to recover damages for breach of contract. At the conclusion of the evidence, his honor entered judgment of nonsuit, and the plaintiff excepted and appealed.

John A. Barringer, of Greensboro, for appellant.

King & Kimball, of Greensboro, for appellee.

ALLEN, J. The plaintiff alleges that on January 10, 1917, the defendant contracted to sell him three cars of gum lumber for \$12 per thousand and to deliver the same on the cars at Chapel Hill, and that the defendant failed to perform said contract to his damage \$360.

These allegations are denied by the defendant.

The plaintiff introduced evidence tending to prove that he was in the lumber business; that M. S. Satterfield was in his employment; that he sent Satterfield out to buy lumber, and he returned and delivered to him memorandum of contract for three cars of gum lumber to be delivered at Chapel Hill for \$12 per thousand, signed by the defendant.

Satterfield testified that he went to the home of the defendant and saw him, and said, among other things:

"I bought the three cars of gum. That is a copy of the contract that he signed."

There was also evidence as to the minimum and maximum number of feet in a car of lumber and that the defendant had failed and refused to deliver any of the lumber.

[1, 2] The credibility of this evidence was for the jury, and, if believed, it establishes a valid contract and a breach by the defendant, which would entitle the plaintiff to recover at least nominal damages. *Hassard-Short v. Hardison*, 114 N. C. 486, 19 S. E. 728.

[3] The measure of damages is not now before us, but it is well to note that profits cannot be recovered as damages except subject to two conditions:

"The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed." *Wilkinson v. Dunbar*, 149 N. C. 23, 62 S. E. 750.

[4] In ascertaining what damages come within the rule, it is proper to consider the relation of the parties, the subject-matter of the contract, the business of the parties, the knowledge of the defendant, and other relevant circumstances. *Johnson v. R. R.*, 140 N. C. 557, 53 S. E. 362.

Reversed.

(178 N. C. 481)

BILYEU v. BECK. (No. 412.)

(Supreme Court of North Carolina. Nov. 19, 1919.)

PARENT AND CHILD §13(1)—PARENT'S LIABILITY; NEGLIGENT DRIVING OF AUTOMOBILE BY CHILD.

The liability of a defendant, mother, for personal injuries caused by the negligent driving of an automobile by her daughter, past 21 years of age, depends, not upon ownership of the machine, but upon agency express or implied; and, in the absence of evidence that the daughter was on any mission or performing any service for defendant, a nonsuit was proper.

Appeal from Superior Court, Moore County; Shaw, Judge.

Action by Joseph Bilyeu against Mrs. Florence Beck. From a judgment of nonsuit, plaintiff appeals. Affirmed.

This is an action to recover damages for personal injury, alleged to have been caused by the negligence of the defendant.

The plaintiff was riding a bicycle along a public road on the 23d of March and was injured by being run over by an automobile, driven by the daughter of the defendant, who was over 21 years of age and an experienced driver.

The plaintiff examined the defendant before the trial under section 864 et seq. of the Revisal, and this examination was introduced in evidence on the trial to prove that the defendant was the owner of the car.

The defendant was not in the car at the time of the injury, and there is no evidence that the car was being used on any business or mission of the defendant.

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

Hoyle & Hoyle, of Sanford, and G. H. Humber and L. B. Clegg, both of Carthage, for appellant.

U. L. Spence, of Carthage, for appellee.

ALLEN, J. The evidence of the negligence of the daughter, who was driving the automobile, is not satisfactory; but conceding that it was sufficient to be submitted to the jury, and also that there is evidence that the defendant was the owner of the automobile, these facts alone would not establish the liability of the defendant for the injuries which the plaintiff has sustained.

This was expressly decided in *Linville v. Nissen*, 162 N. C. 99, 77 S. E. 1098, where it is said:

"The owner of an automobile is not liable for personal injuries caused by it, merely because of his ownership."

And again:

"Even if the son had been the servant of his father in driving the machine, the father would not be liable for his negligence unless his son was at the time acting in the scope of his employment and in regard to his master's business."

The responsibility of the parent for the negligence of the child of mature years and of experience as a driver is not dependent on the ownership of the machine, but upon the principles of agency, express or implied, and in this case there is no evidence that the daughter was on any mission or performing any service for the defendant, her mother.

The two cases on which the plaintiff chiefly relies, *Williams v. May*, 173 N. C. 78, 91 S. E. 604, and *Wilson v. Polk*, 175 N. C. 490, 95 S. E. 849, are easily distinguishable.

In the first it was in evidence that the father bought a car for the use of his family, and employed one Orendorff to teach his minor child to run it, and while in this employment the plaintiff was injured, and in the second there was evidence that the owner was in the car at the time of the injury and that it was going on a mission to her farm for her.

In our opinion, the motion for judgment of nonsuit was properly sustained.

Affirmed.

(118 S. C. 84)

**JOWERS v. DYSARD CONST. CO.**  
(No. 10289.)

(Supreme Court of South Carolina. Nov. 11, 1919.)

**1. DISMISSAL AND NONSUIT** ¶47—**NONSUIT AS TO ITEMS OF ACCOUNT OR SEPARATE ELEMENTS OF DAMAGES.**

A nonsuit cannot be granted as to items of an account or separate elements of damages, but the remedy is by a request to charge that the objectionable items and elements of damage are not recoverable.

**2. CONTRACTS** ¶322(2) — **EVIDENCE; PERFORMANCE.**

In an action by subcontractor against the contractor to recover for work done in constructing manholes and flush tanks in a sewer system for a city, where plaintiff had testified that his work was satisfactory to the city and its inspectors, evidence by the city engineer, as to whether plaintiff's work was satisfactory, was improperly excluded.

**3. DAMAGES** ¶124(4)—**BREACH OF CONTRACT; ELEMENTS.**

Where plaintiff subcontractor had performed part of the work under a contract for the construction of manholes and flush tanks in sewer system in subservience to defendant's contract with the city, the value of plaintiff's services in the performance of the contract was an item to be considered in the cost of performance.

**4. EVIDENCE** ¶318(4)—**HEARSAY; REPORT OF CITY INSPECTOR INADMISSIBLE.**

In a subcontractor's action against a contractor to recover for the construction of certain manholes and flush tanks in sewer system, where plaintiff had testified that his work was satisfactory to the city, a report of a city inspector was properly excluded as hearsay.

Hydrick, Watts, and Gage, JJ., dissenting in part.

Appeal from Common Pleas Circuit Court, of Richland County; R. W. Memminger, Judge.

Action by J. M. Jowers against the Dysard Construction Company. Judgment for plaintiff, and defendant appeals. Reversed, and new trial ordered.

Nettles & Tobias, and J. Fraser Lyon, all of Columbia, for appellant.

W. N. Graydon, of Columbia, for respondent.

**FRASER, J.** The respondent in his argument on appeal makes the following statement of the facts:

"J. M. Jowers made a contract with the Dysard Construction Company to build certain manholes and flush tanks in the city of Columbia. Dysard Construction Company had a contract with the city of Columbia to build these things and hired Jowers to do certain parts of the work. The contract was in writing and specifically stated the price of the manholes and flush tanks as so much per foot. The testimony showed there were 84 manholes and 173 flush tanks to be built.

"Jowers commenced work on the contract and bought a mule, and wagon, cement, brick, and other material, and built four manholes and eleven tanks, when the defendant drove him off of the work and refused to allow him to finish the contract. The plaintiff then commenced this action, and demanded judgment for the sum of \$1,674 damages for breach of the contract and \$96.91 for work already done.

"He expressly sought damages for the profits he alleged he would have made on the work, basing his estimate on the amount he had made on the work already done.

"The answer of defendant was a general denial and an allegation that plaintiff had voluntarily abandoned the work and that it had paid him for the work already done."

The judgment was for the plaintiff, and the defendant appealed upon eight exceptions.

[1] I. The first three exceptions complain of error in refusing a nonsuit as to separate items of the account. These exceptions cannot be sustained, as there is no provision for a nonsuit as to items of an account, or separate elements of damages. The remedy is a request to charge that the objectionable items and elements of damage are not recoverable.

[2] II. The next objection is that the witness T. K. Legare was not allowed to answer the question, "Was Jowers' work satisfactory to your inspectors and yourself?"

The witness was the city engineer. The plaintiff, when on the stand, said:

"I knew the work would be under the city engineer, and that his inspector would check me up and report to the city. I knew the work would have to come up to city specifications. My work was satisfactory to the city and its inspectors."

The contract of the plaintiff and defendant was a subcontract, made in subservience to the contract between the defendant and the city. The testimony of the city engineer was competent. The fourth exception is sustained.

III. The appellant complains of error in the exclusion of a report of city inspector,

J. W. Burdell. The report was excluded on the ground that the city was not a party to the action. The plaintiff had testified that his work was satisfactory to the city inspectors. We have seen that the city contract was in question and the testimony was competent to disprove his statement.

[3] IV. His honor, the presiding judge, charged the jury that the value of the contract was the difference in the cost to the plaintiff of performing the unfinished part of the contract and the price which the defendant had agreed to pay to the plaintiff to perform it. The appellant asked his honor to charge the jury that the value of the plaintiff's service in the performance of the contract was an item to be considered in the cost of performance. This his honor refused to do, and in this he was in error. This is a contract for construction and not a contract for personal service.

The last two exceptions complain of matters that are incident to the trial complained of, and, as a new trial must be ordered, these exceptions need not be considered.

The judgment is reversed and a new trial ordered.

GARY, C. J., concurs.

HYDRICK, WATTS, and GAGE, JJ.  
[4] We concur, except as to the disposition of the third point considered. We think the report of Burdell was properly excluded, because it was hearsay.

(113 S. C. 22)

COLE v. JEFFERSON STANDARD LIFE  
INS. CO. (No. 10284.)

(Supreme Court of South Carolina. Oct. 21,  
1919.)

INSURANCE §152(3), 360(3)—DISTRIBUTION  
OF PROFITS TO PREVENT FORFEITURE; POLICY.

In an action on a life insurance policy issued March 1, 1911, where it appeared insured died May 24, 1918, and premium due March 1, 1918, was not paid, exclusion of evidence as to the amount of profits earned by the policy at the end of 5 years, on the ground that the policy provided for a distribution of profits only at the end of 20 years, was improper, the Insurance Commission having, before the policy was issued, forbidden a distribution period of more than 5 years; for, whatever the expressed language of the policy might be, the law would read it to provide for a 5-year and not 20-year distribution period.

Appeal from Common Pleas Circuit Court of Anderson County; George E. Prince, Judge.

Action by Mollie E. Cole, administratrix of the estate of William H. Cole, against the Jefferson Standard Life Insurance Company. Judgment for defendant on a directed ver-

dict, and plaintiff appeals. Reversed, and new trial ordered.

K. P. Smith and A. H. Dagnall, both of Anderson, for appellant.

Brooks, Sapp & Kelly, of Greensboro, N. C., and Lee & Moise, of Sumter, for respondent.

FRASER, J. This is an action on a policy of insurance on the life of William H. Cole, issued by the Greensborough Life Insurance Company on March 1, 1911, and assumed by the Jefferson Standard Life Insurance Company on September 20, 1912.

William H. Cole died on May 24, 1918. The deceased had borrowed on his policy the sum of \$309. The premium due on March 1, 1918, of \$91.92 was not paid. The policy provided for a distribution of the profits only at the end of 20 years. The plaintiff offered to prove the profits at the end of 5 years. The evidence was excluded by the court.

The failure of evidence to prove that there was sufficient funds in the hands of the company was, of course, manifest, and the presiding judge directed a verdict for the defendant. From the judgment entered upon this verdict, the plaintiff appealed.

Before this policy was issued, the Insurance Commission of South Carolina had issued an order forbidding a distribution period of more than 5 years. This policy violated that order making its distribution period 20 years, instead of 5 years.

On the trial of the cause, the plaintiff offered to prove the amount of profits earned by this policy. The defendant objected on the ground that the policy provided for a distribution period at the end of 20 years and that no profits could be claimed before the end of 20 years. This objection was sustained, and from this ruling the plaintiff appealed.

1. This ground of appeal must be sustained.

The insurance commissioner required as a condition precedent to the issuance of a license, that no policies should be issued with a longer distribution period than 5 years. To this the Greensborough Life Insurance Company promised compliance and accepted its license. The state is a party, and a controlling party, to all contracts. Whatever the expressed language of the policy may be, the law reads that contract to provide for a 5-year and not a 20-year distribution period. The testimony was competent, and its exclusion was error.

II. There was evidence from which waiver might be inferred, and that question should have been submitted to the jury.

The judgment is reversed, and a new trial ordered.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.



(112 S. C. 39)

GILL v. WALKER et al. (No. 10286.)

(Supreme Court of South Carolina. Nov. 11, 1919.)

1. HABEAS CORPUS  $\S$ 99(3) — CUSTODY OF CHILD; BEST INTERESTS AS DETERMINING ELEMENT.

While the legal and moral claims of claimants to custody of a child may not be ignored in disposing of such custody, the paramount consideration of the court is the welfare of the child, and as a general rule it should be placed where its best interests will be subserved.

2. HABEAS CORPUS  $\S$ 85(1) — CUSTODY OF CHILD; EVIDENCE.

In habeas corpus by the sister of an infant against its grandparents to determine the right of custody, evidence held to sustain a finding that the custody was properly awarded petitioner.

Fraser, J., dissenting.

Appeal from Common Pleas Circuit Court of Chester County; R. W. Memminger, Judge.

Habeas corpus by Bessie Gill against Neely Walker and others, to determine the right to custody of Mattie Ree Meeks, an infant. Judgment for petitioner, and defendants appeal. Affirmed.

Marion & Marion and Gaston & Hamilton, all of Chester, for appellants.

Hemphill & Hemphill and S. E. McFadden, all of Chester, for respondent.

**HYDRICK, J.** This is a proceeding in habeas corpus to determine who is entitled to the custody of Mattie Ree Meeks, the infant daughter of Mattie Meeks, deceased, who was the daughter of Neely and Mattie Walker, and the sister of Bessie Gill. After hearing the evidence, the circuit court awarded the custody of the child to Bessie Gill.

In 1911, Mattie, the deceased, married Sam Meeks, and they lived in the house with her parents, until she died, in 1915, leaving two children, Seretha and Mattie, the subject of this controversy, who was only five days old when her mother died. About two months after the death of its mother the child was turned over to Bessie Gill, who kept it until October, 1918, when it was taken from her and delivered to its grandparents, under an order of the probate court, appointing them guardians of its person and property.

The evidence is conflicting as to the agreement under which Bessie took the child. That introduced by her tends strongly to show that her mother, Mattie Walker, asked her to take it, because it was sickly and puny and required more care and attention than she could give it on account of her advanced age, physical infirmities, and the other cares and duties incumbent upon her, especially the care and attention which she was obliged to bestow upon the older child,

Seretha, and for these reasons, after obtaining the consent of her husband, she agreed to take it and raise it as one of her own—she has five of her own—and did so until it was taken from her; that she has become very much attached to it, having taught it to call her mother, and has bestowed upon it the utmost care and attention, without which it would have died; that it was carried to her house by Sam, who expressed his consent that she should have it and his delight that it had found so good a home.

On the other hand, the testimony on the part of the grandparents tends to show that the arrangement with Bessie was intended to be only temporary, and that they compensated her, at least in part, for her care and attention to the baby.

[1] While the legal and moral rights of the claimants to the custody of a child may not be ignored, in disposing of its custody the paramount consideration of the court is the welfare of the child, and as a general rule it should be placed where its best interests will be subserved.

[2] Without going into a detailed consideration of the evidence, which would serve no useful purpose, but giving due weight to everything that has been pressed upon our attention for and against the contentions of the respective parties, we are of the opinion that the decision of the circuit court was right, and it will be affirmed, with this reservation: That the grandparents and sister of the child must have reasonable opportunity to visit it and have it visit and be with them on proper occasions and at reasonable intervals. The parties live in the same community, very near to each other, and the litigation does not seem to have disturbed the paternal and filial relations between them, and there is no reason why they should not be able to agree amongst themselves about the matter, but if they cannot they may apply to the court for its directions.

Judgment affirmed.

GARY, C. J., and WATTS and GAGE, JJ., concur.

**FRASER, J.** I dissent. First. The record shows that the appellants applied to the probate court for an appointment as guardians of the infant in dispute; that there was an order that the petitioner show cause why the appointment should not be made permanent. This rule seems to have been ignored. This the petitioner had no right to do. If authority for this is deemed necessary, it will be found in *Ruling Case Law*, vol. 7, p. 1087, where it is said:

"It is a familiar principle that, when a court of competent jurisdiction acquires jurisdiction of the subject-matter of a case, its authority continues, subject duly to the appellate authority, until the matter is finally and completely

disposed of, and no court of co-ordinate authority is at liberty to interfere with its action. This is applicable both to civil cases and to criminal prosecutions."

In *Ex parte Townes*, 97 S. C. 56, 81 S. E. 278, it was held that it is the duty of a citizen to heed the mandate of a court even where the court was without jurisdiction of the person of the defendant. I do not think the petitioner had the right to ignore the mandate of the probate court, or that this court should entertain these proceedings.

Second. I do not think a court should determine so important a question as the permanent guardian of an infant on habeas corpus proceedings. In these proceedings the evidence is by affidavit, and in this very case the petitioner in her argument feels the handicap, and asks this court to make allowances for it. The courts are slow to fix any permanent rights on affidavits. How much more careful should they be in fixing the physical, intellectual, and moral environment of a child at its most impressionable period.

Unquestionably habeas corpus is a proceeding at law. The appointment of a guardian is the highest prerogative of the court of chancery, and the shorthand proceeding at law should not be allowed to oust the jurisdiction of chancery.

In *Ex parte Richards*, 2 Brev. 376, it was said that by legislative act the courts of common pleas, then a court of law only, was given concurrent jurisdiction of appointment of guardians with courts of equity.

Third. On the merits. Much has been said in this case about the hardship of depriving the parties to this proceeding of the custody of the child. That has nothing to do with this case. The respondent seeks by this proceeding to have the presence of this child in her house. She, however, is not in supreme control of her home. Her husband, William Gill, is the head of that household, not only in law but in fact. There is testimony against William Gill as to drunkenness, violence of disposition, and general crookedness. This court should not find against him on either charge from this record, nor by any number of affidavits. There is no word of testimony to show that the environment at the home of the grandparents would endanger

the person or morals of the infant. The infant may go to one of two places; one is safe, the other at least doubtful. In this condition of affairs, I do not think this court should hesitate for a minute to send the child to the safe place. The proof is not conclusive, but it may be that William Gill does get drunk on liquor, not allowed by law, and is a man of violence and in his rage, drunk or sober, does beat his wife and pursue her with a shotgun, when in his tantrums. If these things are true and the court has been warned of them, then William Gill's house is not a safe place for that child. Mattie Ree Meeks is not the child of William Gill, nor is she blood kin to him. William Gill may be all he ought to be. There is evidence that he is not, and evidence enough to warn me not to take the risk.

There is evidence that William Gill has said that he would relinquish all claim to the child for \$300. That may not be true either. Unless I can know that it is not true, I cannot consent to commit the child to what is really his custody.

Fourth. To my mind there is another objection to the appointment of the petitioner that is insuperable. Mattie Ree Meeks has no brother and only one sister, and this sister is to remain with her grandparents. In my judgment the appointment of the petitioner as guardian separates these two sisters. I do not take the view that the separation will be only nominal. The appellants, it appears, did not take a deed to Mattie, because they thought it treated their granddaughter as a chattel. If this is an index to their characters, then they will not feel at liberty to visit at the house of a son-in-law whom they and their affidavits have denounced as dangerous and unworthy, because they must be, to the head of the house, unwelcome guests. I fully concur in the finding that from what appeared in court there is no antagonism between the appellants and the respondents. There is ill feeling in the case on the part of William, and I think the separation of these two children will be even more complete than if they lived farther apart.

In my view the appointment of the petitioner is manifest error.

For these reasons I dissent.













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