

small streams flowing down the face of the mountain between Auburn and Pine creek. It probably took out of the creek as much as 300 inches of water. Between 1866 and 1868 the Pine creek end was filled up and destroyed by a land slide, and the ditch was not used again to take water out of the creek until 1877.

This was a clear case of abandonment within the Oregon statute, which substantially provides that, when a ditch is abandoned, and thereafter for one year the claimant shall cease to exercise acts of ownership over the same, he shall be deemed to have lost all claim thereto. Comp. 1887, p. 1639, § 3833; Act Oct. 29, 1870, § 1.

Pine creek was not in a mining district, and the farmers at the base of the mountain down which it flowed were accustomed to take water out of the same for agricultural and domestic purposes, by cutting ditches therefor, without filing any notice thereof with the county clerk, for record or otherwise.

On the whole, I conclude that Strother Ison is entitled to take by his ditch, as an appropriator, the first 300 inches of the waters that flow through Pine creek, for the irrigation of the N. W.  $\frac{1}{4}$  of section 28 aforesaid, and that, as owner of said quarter section, he is absolutely entitled to the use of the waters of said creek thereon as a riparian proprietor, in preference to any appropriation thereof; and that Luther B. Ison and O. P. Ison are entitled to take by their ditch, as appropriators, the next 600 inches of said waters for the irrigation of their lands aforesaid; and said O. P. Ison is absolutely entitled to the use of the waters of said creek on the S.  $\frac{1}{4}$  of the S.  $\frac{1}{4}$  of section 21 aforesaid, as a riparian proprietor, in preference to any appropriation thereof; and Luther B. Ison is in like manner entitled to the use of the waters of said creek on the N. E.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of said section. The defendant is enjoined as prayed for in the bill.

---

#### CHAMBERLAIN v. MENSING.

(Circuit Court, D. South Carolina. August 3, 1891.)

##### SUMMONS AND COMPLAINT—VARIANCE—NOTICE.

Under the United States circuit court rule 5, which provides that in South Carolina, in all actions other than for the recovery of money, the summons shall contain a notice to the effect that, on failure of defendant to answer within a certain time, the plaintiff will apply to the court for the relief demanded in the complaint, a summons in an action for the recovery of land is insufficient which contains a notice that, on default of answer, the plaintiff will "take judgment against you for relief demanded in the complaint."

At Law.

*Mitchell & Smith*, for plaintiff.

*Northrop & Memminger*, for defendant.

SIMONTON, J. The summons with complaint has been served in this case. The complaint discloses an action for the recovery of land. The

defendant now moves "to set aside the complaint for irregularity, in that it does not conform to the summons." This is directed to the notice, which is in these words: "If you fail to answer this complaint within the time aforesaid, the plaintiff will take judgment against you for the relief demanded in the complaint." Under the practice prevailing in South Carolina when our rules were adopted, there were two modes of obtaining advantage of a defendant's default in not answering. In one class of cases, actions on contract for the recovery of money only, the plaintiff could take judgment; that is to say, no application to the court was necessary. His judgment was at hand, and he took it without more. In all other cases he was required to ask of the court the relief he sought, and the court gave it or refused it at discretion. The Code then existing, and our rule 5, adopted in conformity with it, imperatively required the plaintiff to insert in his summons a notice. If the action was one arising on contract for the recovery of money only, the notice was to the effect that he would take judgment for the sum specified therein, if the defendant failed to answer within a time specified. In all other actions the notice required was to the effect that, if defendant failed to answer the complaint within such period, plaintiff would apply to the court for the relief demanded in the complaint. Under the first class the judgment was final, and that was the end of it. Under the latter the defendant could still come in and contend in mitigation of damages, and object to the jurisdiction over the subject-matter of the suit. The insertion of this notice having been imperatively required, its omission necessarily is fatal. In 1882 the Code of Civil Procedure in South Carolina was changed. The practice of taking judgment was abolished, the first subdivision above quoted was repealed, and in every case relief must be sought at the hands of the court. The notice to be inserted in the summons was changed accordingly. It is unnecessary to follow defendant's attorney in his discussion of the effect of this change of practice upon our rule 5. Whether it amends the rule *proprio vigore*, or whether this will depend upon the action of this court, yet to be taken, it will not affect this case. The plaintiff had adopted in his summons a form of notice, conforming not literally, but in substance, to the notice required in actions upon contract for the recovery of money only. It is not synonymous with the notice required for all other actions, as he says that he will take judgment, and does not say that he will apply to the court for relief. It looks narrow and technical. But it is a familiar rule that when a statute prescribes a form it must be followed. So, also, with a rule of court. The summons and complaint in this case do not conform, and whenever this occurs the complaint is irregular. *Boington v. Lapham*, 14 How. Pr. 362. In *Allen v. Allen*, Id. 248, the plaintiff was allowed, under circumstances in a measure similar to these, to amend the summons. But, as the summons is the very first step in a cause, there seems to be nothing to amend by. The plaintiff has leave to discontinue, and begin afresh, if he be so advised, paying the costs of clerk and marshal. There are as yet no attorney's costs.

RUSSELL *v.* RICHMOND & D. R. Co.*(Circuit Court, D. South Carolina. August 14, 1891.)*

## 1. MASTER AND SERVANT—COUPLING CARS—USE OF STICKS—CONTRACT—WAIVING CLAIMS FOR INJURIES.

Where a railroad company by rule forbids its brakemen going between freight-cars to couple them, and provides that coupling must be done by means of a stick, the company is not liable for the death of a brakeman who, in consideration of employment by the company, signed a written recognition of such rule, waiving all liability of the company to him for any results of disobedience thereof, when it appears that he understood what he was signing, that the company had provided coupling-sticks for the train, and that the death was the result of disobedience of the rule.

## 2. SAME.

The paper signed by the brakeman was not a contract by the company exempting itself from liability for its own negligence.

## 3. SAME—AUTHORITY OF CONDUCTORS.

Railroad freight conductors do not so far represent the company as to be authorized to rescind rules made by the company for the guidance of its brakemen in coupling cars.

At Law. Action by Mary A. Russell, administratrix, against the Richmond & Danville Railroad Company, for damage caused by death of her intestate.

Plaintiff's intestate, a brakeman on the railroad of defendant, was crushed to death between the cars on 12th February, 1890. He was brakeman on a freight train which had stopped at Westminster, in this state, and was on the siding, awaiting a passenger train. The train had been divided so as not to obstruct a crossing, and a car at the inner end of the division was loaded with lumber, with pieces projecting over this end of the car. When the passenger train passed, and the freight train was to be reunited, the intestate went to couple the cars. He went in between the two divisions without a stick, and, the locomotive backing down the front end of the train, he was caught and killed instantly. The testimony of plaintiff tended to show that the coupling gear was defective, and the mode of loading the car with lumber improper and dangerous, and that after the accident there was some neglect of the body. For the defense there was given in evidence the following paper, signed by the intestate on 24th January, 1890:

"RICHMOND AND DANVILLE RAILROAD COMPANY, A. & C. DIVISION.

"ATLANTA, GA., Jan. 24th, 1890.

"I fully understand that the rules of the Richmond & Danville R. R. Company positively prohibit brakemen from coupling or uncoupling cars, except with a stick, and that brakemen or others must not go between cars, under any circumstances, for the purpose of coupling or uncoupling, or for adjusting pins, etc., when an engine is attached to such cars or train; and, in consideration of being employed by said company, I hereby agree to be bound by said rule, and waive all or any liability of said company to me for any results of disobedience or infraction thereof.

"Witness: Z. V. RAINEY.

his  
PAT X RUSSELL.  
mark.