ANNOTATIONS INCLUDE VOL. 191

NORTH CAROLINA REPORTS

VOL. 106

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FEBRUARY TERM, 1890.

REPORTED BY
THEODORE F. DAVIDSON

ANNOTATED BY
WALTER CLARK IN 1909
(FURTHER ANNOTATIONS ADDED, 1926)

(3D EDITION, ANNO.)

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CASES REPORTED

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FEBRUARY TERM, 1890

S. C. WEILL, RECEIVER, v. THE FIRST NATIONAL BANK.

Receiver—Mortgage—Discharge and Satisfaction—Novation—Principal and Agent—Payment.

Plaintiff, as receiver of the property of two judgment debtors constituting a firm, brought an action for the value of certain of their personal property, sold by defendant under a mortgage by the terms of which one of the mortgagors was appointed agent to take possession for mortgagee and sell and apply proceeds to the discharge of a debt due to defendant mortgagee. The agent and mortgagor sold the property and deposited proceeds in defendant bank, in the name of their firm, more than sufficient to discharge the mortgage debt: *Held*—

1. That either, or both, such payments were a valid discharge of said mortgage debt.
2. The sale by the agents of goods sufficient to discharge the debts was, in fact, a discharge, there being no change or modification of the contract.
3. If the agents, mortgagors, took and used the money with the consent of the mortgagee, it constituted a new debt, but it was not embraced by the mortgage, and not collectible under it.
4. The new debt could not be a renewal of the mortgage, because it had been discharged.
5. The money received by the agents, mortgagors, was, in legal effect, received by their principal, the mortgagee.
6. A receiver may bring an action without special leave of the court.

(2) THIS was a civil action, tried before *Bynum, J.*, at the Fall Term, 1890, of NEW HANOVER Superior Court.

In proceedings supplementary to the execution, on 24 January, 1888, the plaintiff was appointed receiver, and he brought this action on 4 April, 1888, to recover the value of certain personal property of the judgment debtor, which the defendant claimed, by virtue of a deed of mortgage, executed on 16 April, 1879, to it by the judgment debtors mentioned, to wit: D. A. Smith and T. C. Craft, trading as D. A. Smith & Co., which deed purported to convey to the defendant a stock of "furniture, goods, wares and merchandise," specified by schedule, to secure three promissory notes borrowed money, aggregating $3,000, coming due, respectively, at sixty, ninety and one hundred and twenty days. This mortgage was proven and registered on 17 April, 1879. The following is so much thereof as need be reported:

"To have and to hold the said furniture and merchandise to said party of the second part, them and their successors: *Provided, nevertheless,* and this deed of conveyance is made upon the following conditions, stipulations and agreements, to wit: That the said furniture and merchandise hereby conveyed, or intended to be conveyed, shall be, and is, from the date of these presents, delivered unto the possession of the said party of the second part, and that Thomas C. Craft, of said city of Wilmington, is hereby appointed the agent of the said parties of the second part to receive and retain such possession for the said parties of the second part, and is authorized and empowered as such agent only, to sell and dispose of the said furniture and merchandise from time to time, and appropriate the proceeds of said sale to the

(3) payment of said three notes, or any other notes that may be given in renewal or substitution of the same, with the interest thereon, and the said agent shall, at least once in every month, so long as he shall continue to act as agent aforesaid, render a full, fair and complete account in writing of all sales of said furniture and merchandise by him sold, whether for ready money or upon a credit, and deliver to the said party of the second part all such proceeds; and it is further understood and agreed that said agent shall keep, in books for that purpose, a complete and accurate account of all sales by him made as aforesaid, which books of all kinds, in any way relating to the conduct of such sales, shall be at all times open to the inspection and examination of the party of the second part, or any agent or attorney it may designate for that purpose; and in like manner, the said party of the second part, by its agents and attorneys, may examine at all times the said furniture and goods, and for that purpose may enter into the said stores at any time. And it is further expressly understood and agreed between the parties hereto

that the said party of the second part may at any time, when it shall be so minded, remove the said agent hereby appointed, and nominate and constitute some other agent or agents," etc., etc.

The defendant denied most of the material allegations of the complaint.

The parties waived a trial by jury and the court found the facts; the part of the findings of fact necessary to be reported are as follows:

"First. That on 16 April, 1879, D. A. Smith & Co., composed of D. A. Smith and T. C. Craft, were merchants, doing business in the city of Wilmington, N. C. That on the said date they borrowed from the defendant corporation the sum of three thousand dollars, and to secure the payment of the same, executed the mortgage attached (4) to this statement, the same having been registered in the records of New Hanover County, on 17 April, 1879. That on the date of said mortgage, the value of the stock of merchandise owned by the said D. A. Smith & Co. was about six thousand dollars. That previous to the execution of said mortgage, D. A. Smith & Co. had been depositing their funds with the defendant corporation. That from the date of said mortgage up to 24 February, 1881, T. C. Craft, agent of the said defendant corporation, continued to deposit with the defendant the funds arising from the sales of the goods and merchandise of D. A. Smith & Co., in the name of D. A. Smith & Co., just as they had been doing before, and to draw checks on the bank in the name of D. A. Smith & Co., the said money paid on said checks being used in carrying on the business of D. A. Smith & Co., as had been done by them previous to the date of the mortgage; that the checks were filled out by the said Craft and signed by Smith for D. A. Smith & Co.; that the said firm bought goods in the name of D. A. Smith & Co., and sold them as such; that the said firm of D. A. Smith & Co. was solvent on the day of the execution of the mortgage; that the three thousand dollars was borrowed from the defendant corporation by D. A. Smith & Co. to enable them to pay some debts due by them, and to enable them to buy more goods.

"Second. That said Craft, from the date of said mortgage up to 24 February, 1881, paid none of the principal of said debt, but did pay some interest.

"Third. That on 24 February, 1881. the defendant corporation required the said Craft to make his deposits in the name of T. C. Craft, agent, and so continued to some time in February, 1883, when the said Craft retired from the said firm; that from said 24 February, 1881, until February, 1883, when said Craft retired, none of the deposits made with the defendant corporation were applied on the mortgage (5) debt, but the deposits were used by Smith & Co. in running the business of D. A. Smith & Co., with the consent of the bank; that when

Craft left the firm of D. A. Smith & Co., in 1883, the firm was doing a good business, and in good condition.

"Fourth. That when Craft left, in February, 1883, J. I. Macks was appointed agent of the defendant, and continued to act as such until the closing out of the business of D. A. Smith & Co., in October, 1885.

"Seventh. That from the date of said mortgage, made by D. A. Smith & Co. to the defendant corporation, on 16 April, 1879, to 24 February, 1881, there was deposited with the said defendant by T. C. Craft, as agent for the bank in the name of D. A. Smith & Co., $33,270.42.

"That the said T. C. Craft, from 24 February, 1881, to ..... day of February, 1883, deposited, as agent, $58,080.15; that from the said ..... day of February, 1883, to 7 October, 1885, J. I. Macks deposited, as agent, the sum of $1,500; that none of the above sums were applied to the payment of the mortgage debt, except the sum of $1,500, deposited by the said Macks, but all was used by D. A. Smith & Co. and D. A. Smith in running their business. From February, 1883, to October, 1885, enough was collected to have paid the mortgage debt, if it had been so used.

"That the principal deposits made with the defendant, in the name of D. A. Smith & Co. and T. C. Craft, agent, arose from sale of the merchandise of D. A. Smith & Co., but there was included in said deposits all the moneys of D. A. Smith & Co. from all sources.

"Ninth. That at the time of the execution of the said mortgage there was an outstanding judgment against the said D. A. Smith for $150, which was paid about October, 1879; that about two years subsequent to the said mortgage several judgments were taken against said Smith,

(6) which were also compromised and paid about a year afterwards; that in December, 1881, a judgment was obtained against Smith, Craft and one King for ninety dollars, which is not yet paid.

"Tenth. It is admitted that at the time of the execution of said mortgage there was no actual intent, on the part of either the said bank or said D. A. Smith & Co., in executing the same, to hinder, delay or defraud any of the creditors of D. A. Smith & Co.

"Eleventh. It is admitted that the value of the property taken and sold by the bank, under its said mortgage, was $972.20, and the value of that portion of said stock of goods of said Smith which was sold, as aforesaid, under execution in favor of the bank by the sheriff was $363.38."

The court gave judgment as follows:

"This action having been brought to trial by the court, a trial by jury having been waived and the court, by consent of the parties, having found the facts, the court doth adjudge and decree, on the facts

as found, that the plaintiff do recover of the defendant the sum of nine hundred and seventy-two dollars and twenty cents ($972.20), being the value of the goods contained in the mortgage, and his costs of suit, to be taxed by the clerk of the court."

After the facts were found by the court, the defendant moved to dismiss the action, upon the ground that the receiver had no leave to sue, and could not maintain the action without such leave of the court.

Motion overruled, and defendant excepted, and appealed.

J. D. Bellamy for plaintiff.
Junius Davis for defendant.

MERRIMON, C. J. In our judgment, the debt of the mortgagors, in favor of the defendant and secured to it by the mortgage mentioned, was discharged several years before this action began, and hence the claim of the defendant to the property in controversy is unfounded. This appears from the purpose of the mortgage, its terms, the stipulation contained therein, the facts found by the court, and (7) the legal effect of the whole taken together.

The purpose was to secure the payment of the three notes specified. To that end, the property was delivered to the possession of the defendant, and its particularly designated agent was "to receive and retain such possession" for it, and he was "authorized and empowered as such agent only to sell and dispose of the said furniture and merchandise from time to time, and appropriate the proceeds of said sales to the payment of said three notes, or any other notes that may be given in renewal or substitution of the same, with the interest thereon." The property was thus to be sold and the proceeds of sale to be applied at once—not at some indefinite time in the future—to the payment of the notes. It was not made necessary after such sales to obtain the assent, or consent, of the mortgagors to such appropriation; such consent had already been given by the express terms of the agreement. The agent received the money, proceeds of such sales, not to hold the same for the mortgagors or to await something to be done by them, but solely for the defendant, and in payment of so much of the mortgage debt as it was sufficient to discharge, whether proper credits were entered or not. The money so received, the contract at once appropriated it, certainly in the absence of modification of that contract. There was no agreement in terms, or appearing by implication, in the mortgage deed, that the mortgagors might use the proceeds of such sales from time to time, and indefinitely; nor, so far as appears, was there any oral agreement to that effect, if such agreement could at all modify or change

the material provisions of the mortgage deed. The debts once discharged could not be revived as a mortgage debt secured by that mortgage.

If the mortgagors took and used the money, the proceeds of such sales, after the agent so received the same, in discharge of the mort-
(8) gage debt, with the assent of the defendant, they became indebted to it on a new account, but such new indebtedness was not embraced by the mortgage. The new debt could not be treated as a "renewal" of the mortgage debt, because that debt had been discharged. The contract embodied in the mortgage deed plainly did not contemplate that the mortgagors should use the proceeds of the sales of the goods as they did do. On the contrary, there was a studied purpose to prevent them from controlling the property or using the money. It was expressly and carefully provided that the defendant's agent should have its possession of the property—that he should sell it and receive the money for the purpose of paying the notes, and no other.

This case is much like *Mingus v. Wright,* 3 Dev., 78, in which this Court said: "Upon the second point, the defendant offered to show that the principal debtor in the two notes had placed property in the hands of the plaintiff as trustee to sell and raise money and pay the two notes, and furthermore, that he had sold the property and raised from the sales money sufficient to discharge them. We are unable to see upon what grounds this evidence could be legally rejected. The plaintiff being the holder of the notes, and at the same time trustee to sell property placed in his hands expressly to discharge the notes, it does seem to us that when he did sell and receive the money, it was immediately a payment of the notes." *Strayhorn v. Webb,* 2 Jones, 199; *Williams v. Whiting,* 92 N. C., 683.

The counsel for the appellee cited *Conkling v. Shelly,* 28 N. Y., 360, which is much and strongly in point here. In that case, the Court said: "But the Supreme Court reversed the judgment and ordered a new trial in this case, on the ground that the sales made and the proceeds received by the mortgagors, under such an arrangement between
(9) them and the mortgagees, should have been applied in payment and satisfaction of the mortgage, whether the money was actually paid over to the mortgagee or not. In this, I think they were right. Such an agreement made the mortgagors agents of the mortgagees. Their possession and their sales were, in effect, those of mortgagees. It was as if the latter had taken possession and placed a third person in charge to sell and account to them. They could not have escaped from crediting on their indebtedness the proceeds of the sales made by such an agent, because he had fraudulently or dishonestly misapplied or employed the

money. . . . It is not a question between the mortgagees and mortgagors, who, of course, could not take advantage of their own wrong, and who remain liable to the plaintiffs for the money received and misapplied by them. But the question here is between the mortgagees and the creditors, who have obtained a lien or an interest in the mortgaged property after the satisfaction of the mortgage. The mortgagees have made the mortgagors their agents, and their dealings with the property under the agreement constituting them such must be considered as the acts of agents, and not of mortgagors, and will affect their principals accordingly. The moneys received by them from sales were, in legal effect, received by the mortgagees," etc. *Chester v. Stephens,* 3 Denio, 33; *Braghman v. Done,* 69 N. Y., 69; *Hunt v. Nevers,* 15 Pick., 500.

It clearly appears, from the facts found by the Court, that the agent of the defendant sold the mortgage property and received the money therefor, greatly more than sufficient to pay the mortgage debt, and thus, as we have seen, it was, in legal effect, discharged. The defendant must be treated as having received the money, through its agent.

No reason was assigned, on the argument, why the plaintiff may not maintain this action as receiver, without special leave of the Court to sue, nor can we see any. The Court made an order in the proceedings supplementary to the execution, appointing the plaintiff receiver, "to take charge and custody of all property, choses in action and things of value of said defendants, with all the rights, powers and privileges of a receiver under the law." The Code, secs. 494, 497; (10) *Coates v. Wilkes,* 92 N. C., 376.

While the Court may exercise very great control over the receiver, and may direct, in appropriate cases, that he shall or shall not do particular things, yet, ordinarily, when he is invested with full power as a receiver, he will have authority to bring appropriate necessary actions without special leave or direction of the Court.

Affirmed.

A. D. MISENHEIMER ET AL. v. SOPHIA L. BOST ET AL.

Will—Construction—Life-estate.

Where a testator left an estate, real and personal, to his wife and children during her widowhood, and if she married she was to draw only a child's part, and have one hundred acres of land; and in case of her death and the death of her children, one thousand dollars was to go to his sister,

and one thousand dollars each to two religious societies: *Held*, that his widow having married again, and his children being all dead, she was only entitled to a life estate in the land, and that she was not entitled to the surplus proceeds of his real estate, left after paying his debts, without giving bond for its repayment at her death; and that the testator's sister and the religious societies were each entitled to one thousand dollars at the death of the widow.

THIS was a civil action, tried before *Shipp, J.*, at the January Term, 1889, of CABARRUS Superior Court.

It appears that Martin A. Blackwelder died in the county of Cabarrus some time prior to 1874, leaving a last will and testament,
(11) which was duly proven, and his widow, who has since intermarried with the male plaintiff, qualified as executrix thereof. The following is a copy of so much of this will as needs to be reported here:

"I will and bequeath to my beloved wife Leah L. and all my children all of my property, both real and personal, to have and to hold as long as she keeps my name; if she, my wife, marries, then, in that event, she only draws a child's part.

"I will and bequeath to my wife one hundred acres of land if she marries, to have and to hold her lifetime, and at her death then it is to go to my children, and that this hundred acres of land be laid off by three freeholders, her choice, and that they commence on the long line between my brother, H. A. Blackwelder, and myself, about two or three hundred yards south of the sweet-gum corner at the mouth of the Martin Walter branch, and that it be laid so that it includes my house and mill and cotton gin.

"It is my will that my executor collect in all of the money that is owing me, and pay all of my just debts, and if there is not enough, then my executor sell the house and lot in the town of Concord and pay the remainder of my debts.

"It is my will, if my wife and all my children die, then, in that event, that my sister Sophia L. Bost, now the wife of George Bost, and her heirs, first receive one thousand dollars of my estate.

"It is my will that if my wife and children die, as before stated, that one thousand dollars go to St. James Church, in Concord, N. C., and that thousand to be put on interest, and the interest to be taken to pay the minister of said church yearly.

"It is my will, if my wife and children die, that one thousand go to the N. C. Synod of the Lutheran Church of No. Ca., and it be on interest as before stated.

"I hereby appoint my wife Leah as executor of my estate in full, and that Dr. J. E. McEachern assist her, if his health admits of
(12) it, if not, R. W. Allison."

It also appears that said testator left, as legatees and devisees of said will, two minor children, Maggie S. Blackwelder and Bettie Blackwelder, the latter of whom was born about three months after the death of testator, and the plaintiff Leah L., his widow, who has since intermarried with the plaintiff A. D. Misenheimer.

That the personal estate of said testator was insufficient to pay his debts, and on account of a defective title to the real estate described in said will as the house and lot in the town of Concord, very little was realized therefrom, etc.

That after a final settlement of the estate of said testator, made and filed on 1 June, 1883, a surplus of the proceeds arising from said sale of land, to wit, the sum of two hundred and thirty-three 71/100 dollars, was retained by Jas. C. Gibson, the clerk of said Superior Court, who refused to pay over the same absolutely to the plaintiffs.

That on the ..... day of ....., 1874, the said Bettie Blackwelder died intestate and without issue, leaving as her only heir at law her sister, the said Maggie S. Blackwelder, and that on the ..... day of ....., 1884, the said Maggie S. Blackwelder also died intestate and without issue, or brother, or sister, or issue of such, leaving, as her only heir at law, her mother, the plaintiff, Leah L. Misenheimer.

That, as plaintiffs are informed and believe, the said Leah L. Misenheimer is entitled to a fee-simple estate in all the lands hereinbefore described, and has a right to the absolute use of the funds arising from the sale thereof, to wit, the sum of two hundred and thirty-three 71/100 dollars, now in the possession of the clerk of this court.

A jury trial was waived, and the court, having found the material facts, gave judgment as follows:

"The court doth further declare its opinion to be, that under said will of said M. A. Blackwelder, upon the facts admitted in the pleadings and found above by the court, that, at the death of Leah L. Misenheimer, the defendant, Sophia L. Bost, will be entitled to receive one thousand dollars from the estate of M. A. Blackwelder; that (13) St. James Church, in Concord, N. C., and the N. C. Synod of the Lutheran Church of N. C., are each entitled to be paid one thousand dollars out of the estate of the said M. A. Blackwelder, if the estate amounts to that sum."

From this judgment the plaintiffs appealed to this Court, assigning as error as follows:

1. That his Honor erred in holding that the plaintiff, Leah L. Misenheimer, is not entitled to the money in the hands of the clerk of the Superior Court of Cabarrus County, without giving a bond for its repayment, at her death, to Sophia L. Bost.

2. That his Honor erred in not holding that the plaintiff, Leah L. was entitled to said money as heir at law of Maggie S. Blackwelder, her deceased child, and that the same should be paid to her absolutely.

3. That his Honor erred in not holding that, under the will of M. A. Blackwelder, the said Maggie S. Blackwelder and Bettie Blackwelder took an estate in fee in all the lands of which the testator died seized, and that such estate was indefeasible after the death of said testator.

4. That his Honor erred in not holding that, upon the death of Maggie S. Blackwelder, there was a merger of the life-estate which the plaintiff, Leah L., took directly under said will, and the absolute estate which said Maggie S. Blackwelder had in the lands of said testator.

5. That His honor erred in declaring that, at the death of Leah L. Misenheimer, the defendant, Sophia L. Bost, will be entitled to receive one thousand dollars from the estate of M. A. Blackwelder, and that St. James Church, in Concord, N. C., and the N. C. Synod of the Lutheran Church of N. C., are each entitled to be paid one thousand dollars out of the estate of said M. A. Blackwelder.

(14) *H. W. Harris, A. Burwell and P. D. Walker for plaintiffs.*
W. J. Montgomery for defendants.

MERRIMON, C. J., after stating the case: It seems to us very clear that the testator, in disposing of his property to his wife and children, did not have in view at all, or expect, the death of each and all of them before that of himself, nor did he intend that the property bequeathed and devised to his children should vest absolutely in them immediately upon his death, if they survived him. It is very improbable that he thought that his wife and all his children—several persons—might die before himself, and, therefore, he provided for such contingency. Besides, that he did not, appears strongly in that he appointed his wife executrix of his will, thus indicating his expectation that she would survive him; and further, in that he directs that at the death of his wife the land devised to her for her life should go to his children; and further, in that he devised to his wife a certain quantity of land, in the contingency that she should, after his death, marry a second time; and further, in that he bequeathed and devised all of his property, both real and personal, to his wife and children as long as she continued to be his widow. He scarcely thought of the contingency of the death of his wife before his own and that of all his children and that they all might die before him. We think, therefore, that the provisions of the will have reference to the time of the death of the testator and contingencies mentioned that might happen after that time.

By the clause of his will first above set forth, the testator puts his widow and all of his children on an equal footing, as to his property, both real and personal, as long as the widow should remain his widow. In case she married a second time, she became entitled to have a child's part of the personalty absolutely, and a life-estate for her own life in one hundred acres of land designated. In that case, she ceased (15) to have an interest in common with her children in the property— her part of the property was to be set apart to her, and, this done, she held and owned it by a separate and distinct title under the will, while the children continued to own the balance thereof in common.

Thus the testator made a clear disposition of his property, both real and personal. He seems to have thought, in making his will, perhaps without careful consideration, mainly of his wife and children, and making provision for them particularly, without reference to children they might thereafter have, and of disposing of the property after the death of all of them. But be that as it may, in subsequent parts of his will be disposed of his property by limiting it to other persons after the death of his wife and all of his children. He provides, with particularity, that if his wife and all his children die, "then, and in that event," etc. He certainly knew that his wife and children would all die at some time. There was no reason of law that prevented him from making such disposition of his property. He might exclude the children of his children, directly or indirectly, if he saw fit to do so, and he might limit the property, or parts of it, or the proceeds, or part thereof, of the sale of it, as he did do, upon the happening of the event specified.

It appears that there was no personalty, or not sufficient to pay the debts of the testator. Then, under the will and upon the material facts as they appear, when the first child of the testator died, her share of, and interest in, the property of the children, including the remainder in the land devised to the mother, descended to the sole surviving sister as heir at law; and when the latter died, the property descended to the mother, the *feme* plaintiff; and when she shall die, it will descend to her heirs at law, charged with the payment of the several legacies of the will, in their order. If the property shall be more than sufficient to pay the legacies, the surplus will go to the heir at law or dev- (16) isee of the mother, the *feme* plaintiff.

Affirmed.

THE DURHAM AND NORTHERN RAILROAD COMPANY v. THE RICHMOND AND DANVILLE RAILROAD COMPANY ET AL.

Eminent Domain—Corporations—Condemnation of Land—Jurisdiction—Railroads—Statutes.

1. The charter of a railroad company provided that it might condemn land by a proceeding commenced before a court of record having common-law jurisdiction: *Held*, that the clerk of a Superior Court has jurisdiction of such proceeding.
2. The petitioner in a proceeding to condemn land must allege that it has "surveyed the line or route of its proposed road, and made a map or survey thereof, by which such route or line is designated, and that it has located its said road according to such survey, and filed certificates of such localities, signed by a majority of its directors, in the clerk's office," etc., as required by The Code, sec. 1952; otherwise, the proceeding will be dismissed.
3. The provisions of the general railroad act, The Code, ch. 49, are applicable to the Durham and Northern Railroad Company, notwithstanding its charter prescribes that it shall have the power to condemn land under the "same rules and regulations as are prescribed for the North Carolina Railroad Company."

MOTION TO DISMISS a proceeding for the condemnation of land, begun by plaintiff before the clerk of DURHAM Superior Court, and carried, by appeal, to the court in term time, heard before *Graves, J.*, at October Term, 1889, of DURHAM Superior Court.

The plaintiff's petition was as follows:

(17) The petition of the Durham and Northern Railway Company represents:

"1. That the petitioner is a corporation duly created and existing under and by virtue of the laws of the State of North Carolina.

"2. That the Richmond and Danville Railroad Company is a corporation duly created and existing under and by virtue of the laws of the State of Virginia.

"3. That the North Carolina Railroad Company is a corporation duly created and existing under and by virtue of the laws of the State of North Carolina.

"4. That the North Carolina Railroad Company, many years ago, and before the incorporation of the town of Durham, acquired for its use a right of way through what is now known as the town of Durham, of a width of 100 feet on each side of its main track, and that it constructed its said road over the center of said right of way.

"5. That the town of Durham has been duly incorporated by act of the General Assembly of North Carolina.

"6. That shortly after the said town was incorporated, and more than twenty years ago, by proceedings duly and lawfully had, a portion of the said right of way, upon which Peabody street is now located, was duly condemned and laid off as a street or public highway, and that for over twenty years the said street, as located upon said right of way, has been openly, adversely and continuously used, occupied and possessed by the said town of Durham and the citizens thereof as a street and public highway.

"7. That the said portion of its right of way was dedicated by the said North Carolina Railroad Company to the public, for use as one of the streets of the town of Durham.

"7½. That for many years before the said street was thus condemned and dedicated, it had been used and treated for all purposes as a public highway, having been previously condemned and dedi- (18) cated to and accepted by the public for this use.

"8. That on 6 April, 1889, the town of Durham, by its commissioners, at a meeting duly held, adopted the following resolutions, to wit:

"*Resolved,* That the Durham and Northern Railway Company be permitted, and they are hereby expressly authorized by the town of Durham, to use Peabody street for the purpose of extending their track from a point just west of the electric-light house, where their present right of way stops, to a point on said street opposite the eastern end of the factory building of W. Duke, Sons & Co., and that they be permitted to grade said street for said purpose: *Provided,* that said railway company put said street in as good order as it now is; *And, provided further,* that they put all street crossings, now existing or hereafter to be made, in good order, so that vehicles can conveniently and safely cross; *And also provided,* that they shall so construct their track, where the same may pass in front of any storehouse, that wagons can get access to said stores.

"*Resolved,* That whenever, on said street, the said railroad company shall take up any pavement, they shall replace the same in as good order as the said pavement now is.

"*Resolved,* That the said railway company only be allowed to lay one track over the street hereby granted to them for the purpose of extending their track.

"*Resolved,* That the road shall be run up said street as follows: It shall run up the south side of Peabody street from their present terminus to a point nearly opposite the western end of the Hotel Claiborn, where Corcoran street crosses Peabody street, where it shall cross to the northern side of Peabody street, and continue along the northern side of Peabody street, as near the northern edge thereof as possible

(19) and as is safe for the buildings on the north side of Peabody street, to the western limit of the portion of said street on which the railway company is authorized to lay its track by the resolution.

"*Resolved,* That the permission hereby given shall in no way interfere with, or be taken as repealing, any franchise heretofore granted to the Durham Street Railway Company.

"9. That the petitioner, requiring the said right of way as necessary for the exercise of its franchise and the performance of its duties, and for the great convenience of the public, has, in pursuance and by authority of the said permission and authority, constructed its railroad and laid its track upon a strip of land twenty feet wide, except where embankments shall be required, where the width shall be sufficient for an embankment on which to accommodate a single track, in which case the width is not to exceed thirty feet, beginning just opposite and at the southeastern corner of the factory building of W. Duke, Sons & Co., and designated "A" on the map; thence easterly along Peabody street and bounded on the north parallel with one hundred feet from the center line of the North Carolina Railroad, and on the south by a line two feet south from and parallel with the track of the Durham and Northern Railway, as shown on the map, to the point where said track begins to curve near Corcoran street; thence diagonally with said curve across Corcoran street, as shown on the map to be 20 feet wide; thence along and upon the southern side of Peabody street to the point where said track leaves said street, to be 20 feet wide; thence from the point where the track of said petitioner's road leaves Peabody street, as shown on said map, of the width of 30 feet, beyond the eastern edge of Cleveland (formerly Roxboro) street, where the old right of way of the petitioner stopped, as shown on said map, said strip being so located with reference to said old right of way as to allow the track laid thereon to be extended on this strip, as shown by said map; that a plat of the said right of way, and of the said track, will be filed with this pe-

(20) tition. (This amendment was made by leave of court, 18 May, 1889. D. C. Mangum, C. S. C.)

"10. That, as petitioner is advised and believes, the said Richmond and Danville Railroad Company is, by virtue of its lease of the railroad property and franchise of the North Carolina Railroad Company, entitled merely to an easement in the said right of way required and occupied by petitioner, subject to the superior easement which the town of Durham has acquired therein; and that neither the North Carolina Railroad Company nor the Richmond and Danville Railroad Company have any right to lay a track upon said street without the leave of the town of Durham.

"11. That the said right of way has never, in any manner, been used by the North Carolina Railroad Company or Richmond and Danville Railroad Company, and that it is not necessary to either of said companies for the exercise of their franchise or the discharge of their duties.

"12. That the North Carolina Railroad Company owns amply sufficient right of way, exclusive of the said strip of land, for all of its present or future purposes.

"13. That the said strip of land required by the petitioner passes through the heart of the town of Durham, and near its business center, being located within a block of the principal stores and warehouses of Durham, and that the track of petitioner constructed upon this right of way, and that affording an accessible competing line, will be of the greatest convenience to the citizens of said town, and that it is of the greatest importance to your petitioner that its road should be extended to and near the said business houses and tobacco factories, and especially to the Duke factory building, where an immense amount of freight will be delivered.

"14. That this is the only practicable route for petitioner's road to reach the said factories and warehouses and business center, and that it may be constructed without injuring or interrupting the business of either of defendant companies, without interference with the exercise of their franchises, and, at the same time, with great (21) usefulness, convenience and benefit to the public.

"15. That the defendant corporations have an easement only in this right of way for the purpose of operating their railroads, subject to the superior easement of the town of Durham, as above stated, and that, for this reason, petitioner cannot acquire from the defendants, or either of them, the said right of way by purchase.

"16. That the defendants are unwilling to sell to petitioner any interest they may have in the said land.

"17. That neither of said defendants is entitled to more than nominal damages for the right of way which petitioner has taken, if entitled to any damages at all.

"18. That the petitioner, by its charter, has full power and authority to acquire land for the purpose of constructing its road, and for side-tracks and turn-outs, etc., for the operation of the same, and to have land condemned by the order and judgment of any court of record.

"Wherefore, the petitioner demands judgment," etc.

The defendants moved to dismiss the proceedings upon the ground that, upon the face of the petition, the clerk did not have jurisdiction of the proceeding.

The court below dismissed the proceeding, and the plaintiff appealed.

In this Court the defendants moved to dismiss for the additional reason that the petition did not state facts sufficient to constitute a cause of action.

J. B. Batchelor, John Devereux, Jr., W. W. Fuller and J. W. Hinsdale for plaintiff.

D. Schenck, F. H. Busbee, W. A. Guthrie and John W. Graham for defendants.

SHEPHERD, J. The defendants moved, in the court below, to dismiss the petition, on the ground that the clerk did not have jurisdiction
(22) of the proceedings. By the charter of the petitioner (Acts 1887, ch. 140, sec. 6) it is allowed to condemn land under "the same terms and rules" as are prescribed for the condemnation of lands by the North Carolina Railroad Company, and one of the provisions of the charter of the said company is that such a proceeding shall be commenced before a court of record, having common-law jurisdiction. The motion is based upon the erroneous assumption that the clerk, as clerk (leaving out of view his probate functions), has a separate and independent jurisdiction. The jurisdiction is all in the Superior Court, and the only distinction is between acts which can be performed by the clerk in vacation, acting as and for the court, and acts which can only be done by the judge, either in vacation at Chambers or in term time. *Brittain v. Mull,* 91 N. C., 498; *Strayhorn v. Blalock,* 92 N. C., 292; *Jones v. Desern,* 94 N. C., 32; *Click v. Railroad,* 98 N. C., 390. In the last named case the proceeding was under the charter of the Western North Carolina Railroad Company, which contains the same provision in respect to condemnation proceedings as the one under consideration. The Court said: "In this case the application to the court was made in term time, and the court had authority to make, and properly made, as far as appears, the order appointing the commissioners, and thus obtain jurisdiction. It would not have been otherwise, as to the jurisdiction, if the proceeding had been begun in vacation, because the jurisdiction in any case was that of the court, not that of the clerk; the latter would, in that case, simply have represented and acted for the court." These authorities are decisive against the defendant, as to the motion to dismiss for want of jurisdiction.

In this Court the defendant moved to dismiss for the further reason that the petition does not state facts sufficient to constitute a cause of action. It is contended that the petitioner having already constructed its road to one of its termini, the town of Durham, its power to
(23) condemn land in that locality is exhausted. This involves a very

serious question, and one which we do not feel warranted in determining upon the face of the petition. It is true that the resolutions of the town of Durham (which are embodied in the complaint), in describing the alleged easement granted by the said town to the petitioner, speak of "the electric-light house (as the point) where the present right of way stops," and a similar expression occurs in the ninth section of the petition; but this language was used apparently for the purpose of description merely, and we cannot attach to it the important legal effects which follow direct and solemn admissions in pleadings. We will not, therefore, consider this phase of the case, but will assume, for the purpose of the discussion, that the power to condemn has not been exhausted, and that the petitioner has the right to condemn the land in question.

This introduces us to the other ground assigned by the defendant, that the petitioner does not allege that it has "surveyed the line or route of its proposed road, made a map or survey thereof by which such route or line is designated, and that they have located their said road according to such survey, and filed certificates of such localities, signed by a majority of the directors of the company, in the clerk's office, and given notice," etc. The Code, sec. 1952.

These conditions must be complied with before any company can construct any part of its road, and The Code, sec. 1944, requires that their performance shall be alleged in the petition in all proceedings to condemn land. This legislation was taken from the general railroad law of New York, where, as with us, experience had shown the necessity of more particular and uniform regulations upon the subject. Before the enactment of these laws, railroads were entitled, under the ordinary provisions of their charters, to locate their roads between the termini, according to their discretion, and this discretion could not be controlled by the courts except in cases where it was abused. (24) The remedy was usually by injunction, and this often occasioned much vexatious litigation and delay, both to the railroad company and the landowner. Besides, much needless injury to property might be inflicted, undue advantages taken, and even the peace of the State disturbed, before this remedy could be obtained. It was, therefore, deemed necessary to require the filing of maps, etc., as above provided, so that the landowner might know what particular land was intended to be appropriated, in order that, if he felt aggrieved, he could apply to the court within fifteen days after written notice of such location, and have his grievances passed upon. The Code, secs. 1944 and 1952. "A fair construction of these laws" (says the Supreme Court of New York, *In re New York and Boston R. R. Co.,* 62 Barb., 85) "requires a chrono-

logical fulfillment of these provisions." "By doing this," continues the Court, "the company, in the first instance, has the right to arbitrarily locate the route, but the statute then gives the right to the property owner to secure a change of that location, if he can show cause for changing it to the satisfaction of the three persons to be appointed by the court to determine the question. This right of the property owner may be material and valuable, in view of the manner in which the railroad may cut his property and affect the highways and other objects in the neighborhood. At any rate, it is a right given to him by the statute, and it is not for a corporation, nor for the court, to deprive him of it." The purpose of these laws is also stated in Mills on Eminent Domain, 62: "In order to obviate complaints of abuse of discretion, the Legislature of New York passed an act requiring the filing of a map of the proposed road, and that parties aggrieved may apply for the appointment of commissioners to have the road altered. . . . The remedy cannot be applied to force the roads from the land of one owner upon another, nor can the continuity of the route be
(25) broken." In *Norton v. Wall Kill Valley Railroad,* 61 Barb., 76, *Learned, J.,* says: "It is suggested that if commissioners were appointed in such cases great delay might ensue. But the statute gives power to the company to limit the time within which this application can be made. All they have to do is to notify the property holders. After such notice, the persons aggrieved have but a limited and short time within which to make the application. There need be no delay. And whenever there is reasonable ground of complaint as to the route—a route established merely by the will of the company—I think that the person feeling aggrieved should have a fair hearing before persons competent to settle the question."

The foregoing references are made for the purpose of showing the true spirit and purpose of these laws, and that the performance of the preliminaries required is indispensably necessary before proceedings to condemn can be instituted. It is said that, although the petition in this case fails to allege the performance of these conditions, the omission is not fatal, and that it is but a defective statement of a good cause of action. We do not concur in this view. The exercise of the power of eminent domain is in derogation of common right, and all laws conferring such power must be strictly construed. By the very terms of the law under consideration, these allegations *must* be made in the petition, and we think that they are as much jurisdictional in their character as is the fact that the landowner and the railroad company have failed to agree. "If the petition does not state the facts required by the statute to be stated, an objection in that regard can be raised

preliminarily in effect by way of demurrer, and should be disposed of before proceeding upon the merits. If such objection is well taken, the proceeding is dismissed, unless a proper cause for amendment is shown." *West Shore and Buffalo Railroad Co.,* 64 How. Prac., 216; Fieri Special Pro., 523. So far from any amendment being suggested in the particulars mentioned, the counsel were candid enough to (26) admit that maps of the route, etc., had not in fact been filed.

It only remains, then, for us to consider whether the above mentioned provisions of the general railroad act (The Code, ch. 49), are applicable to the petitioner. The petitioner was incorporated under chapter 140, Acts 1887. Its charter provides, as we have said, that it should have the power to condemn land under the "same rules and terms as are prescribed for the North Carolina Railroad Company." The charter of the latter company does not make the filing of a map of the route and the giving of notice, etc., a prerequisite to the institution of proceedings to condemn, and it is insisted that our case is governed by the provisions of this charter, and not by those of the general railroad act. It is also urged that the Legislature has no power to change the charter of the North Carolina Railroad Company in the particulars mentioned, and that if it has attempted to do so, such legislation would be unconstitutional, because it would impair vested rights. It is well settled that a mere change in the *remedy* does not fall within the inhibitory provisions of the Constitution. Cooley Cons. Lim., 287; *Railroad v. Kenner,* 14 Am. & Eng. Railroad Cases, 30; *Hinton v. Hinton,* Phil., 415; *Railroad v. McDonald,* 12 Heisk., 54; *New Jersey v. Weldon,* 23 Am. & Eng. Railroad Cases, 134. But this question does not arise here, as the point is not whether the general act applies to the charter of the North Carolina Railroad Company, but whether it is applicable to the charter of the petitioner. This latter charter was granted in 1887 (chapter 49, Acts 1887), and must be construed with reference to existing laws. In 1883 (see section 701 of The Code), it was provided that "this chapter (on corporations) and the chapter on railroads and telegraphs, so far as the same are applicable to railroad corporations, shall govern and control, anything in the special act of Assembly to the contrary notwithstanding, unless in the act of the General Assembly creating the corporation, the section or sections of (27) this chapter and the chapter entitled 'Railroads and Telegraph Companies,' shall be specially referred to by number, and, as such, specially repealed." This provision very plainly shows that it was the intention of the Legislature that the general railroad act should apply, and that its important provisions should not be repealed, either by implication or by hasty legislation. It is but an affirmance of the princi-

ple that the repeal by implication of a general law by a private statute is not favored. 7 Myers' Fed. Dec., sec. 2975. But the statute goes a step further, and prescribes a rule of construction under which the private act, even if it be inconsistent with the provisions of the general law, shall not repeal them "unless they are specially referred to by number, and, as such, specially repealed."

It is unnecessary to determine in this action whether this section of The Code applies to charters in existence prior to 1883; but it is, we think, too plain for argument that it does govern and control all charters granted *after* its enactment.

The reference in the petitioner's charter to the charter of the North Carolina Railroad Company can have no greater effect than if the "terms and rules" referred to had been expressly set forth in the act of incorporation, and these, as we have seen, must give way to the general law. It may be further remarked that there is no real conflict, in any material particular, between the two remedies. The general law only superadds certain requirements as to which the private act is silent. They may well be construed *in pari materia.*

Holding, as we do, that the general law applies, and that, under this law, the petitioner has failed to set forth in his petition such facts as constitute a cause of action, we must conclude that his Honor committed no error when he allowed the motion of the defendant and dismissed the proceeding.

Proceeding dismissed.

Cited: S. c., 108 N. C., 304; *Durham v. R. R., ibid.,* 401; *Liverman v. R. R.,* 109 N. C., 55; *R. R. v. Lumber Co.,* 114 N. C., 692; *S. v. Jones,* 139 N. C., 636; *R. R. v. Ferguson,* 169 N. C., 71; *Power Co. v. Power Co.,* 171 N. C., 256.

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(28)

*THE PIONEER MANUFACTURING COMPANY v. THE PHŒNIX ASSURANCE COMPANY OF LONDON.

Contracts of Insurance—Stipulation to Arbitrate—Offer of Arbitration—Denial of Liability—Right of Action—Evidence—Judge's Charge.

1. A provision in a policy of insurance, to the effect any differences arising as to the amount of loss or damage shall be submitted to arbitration at the written request of either party as a condition precedent to the right of action, is not against public policy, and will be upheld by the courts.

*AVERY, J., and CLARK J., did not sit in this case.

2. Where it is in evidence that the adjuster of the insurance company offered the assured a certain sum in settlement of damages, which the assured declined, that constituted "a difference" within the meaning of the policy.

3. Under the provisions of the policy, it was not the duty of the defendant company to tender an agreement to arbitrate to the assured for execution until after a proposition to arbitrate had been acceded to.

4. Where it was in evidence that the defendant company, by its adjuster, wrote a letter to the assured, requesting that the damages "be ascertained by appraisement," and referring to a paper enclosed as "indicating an agreement for that purpose," which enclosed paper was a form of arbitration, signed by the defendant company and naming the arbitrator selected by it, with a blank to be filled with the name of the arbitrator selected by assured, and providing that the award should be "binding and conclusive as to the amount of such loss or damage, but shall not decide the liability of the insurance company": *Held*, that either the letter or the paper-writing constituted such a written request as the policy required, and that it was error for the judge below to charge, in effect, that neither of them, taken separately, constituted such request.

5. If the assured refuses to accede to a proposition to arbitrate in accordance with the terms of the policy, and the insurance company thereafter denies any liability under the policy, no right of action accrues to the assured by reason of such denial.

6. Upon the question as to whether or not there was a denial of liability by the insurance company, the latter is entitled to show all the circumstances under which the alleged denial was made. In such case, evidence is admissible that the assured refused to sign a printed form of submission to arbitration, giving as a reason that it contained a provision that the appraisers should not decide the liability of the company.

7. In such case, the defendant company was entitled to a specific instruction by the court "that if the adjuster of the defendant company did not deny liability until after the plaintiff had refused to sign a submission to arbitration unless the clause providing that the appraisers should not decide the liability of the company should be stricken out, this was no excuse for the plaintiff's refusal to submit to appraisers, and such denial of liability was no waiver of the plaintiff's obligation to submit, upon a written request, to appraisal," and a refusal to give such instruction was error.

8. It is error to embody in one issue two propositions to which the jury may give different responses.

THIS was a civil action, tried before *Avery, J.*, and a jury, at (29) August Term, 1888, of the Superior Court of WAKE County.

The plaintiff's action was based upon a policy of insurance issued by the defendant company, by which it contracted to insure against loss or damage by fire, certain property of the plaintiff described in the complaint. On or about 20 October, 1886, all of said property was destroyed by fire except the engine and two boilers, etc., which, it is alleged, were greatly damaged. The defendant denied its liability on

several grounds, which are illustrated by the issues. Much testimony was introduced. Seventy-six special instructions were requested by the defendant, and a large number of exceptions taken to the rulings of the judge. Only so much of the case will be here stated as is necessary to a proper understanding of the opinion of the Court.

The issues upon which the questions considered upon appeal arose were as follows:

"8. Did a difference arise between plaintiff and defendant as to the extent of damage done by fire to the engine, two boilers, inspirator and connections, not destroyed by fire? Answer: No.

(30) "9. If so, did the defendant request of the plaintiff, in writing, in accordance with the requirements of the policy sued on, that the amount of damage to said articles should be assessed by appraisers, and did plaintiff refuse such request? Answer: No.

"10. Did the defendant company, at the time of making any request or demand for arbitration as to the damage to said articles of property not destroyed by fire, deny its liability to plaintiff under the said policy of insurance? Answer: Yes."

C. M. Hawkins testified as follows: "I had an interview with Mr. Warren and the other adjusters about 29 October, in my office on Fayetteville street. I think that Mr. Churchill, Mr. Dewey and Mr. Warren were present, and I believe that Mr. Cowper was present; it was 29 or 30 October, or 1 or 2 November; I believe it was 2 November now. Mr. Warren came in with the others and handed me a paper, asking me to read and sign it; I thought I had the paper here, but do not find it among the papers that I have here.

"One morning before that I went down to the place where the fire had taken place, with Warren; Warren and myself walked around the engine and two boilers from the outside without examining them. Mr. Warren said: 'We will give you $900 for damages to engine, two boilers, inspirator and connections.' I declined to take the offer. Mr. Warren made the offer on behalf of himself and his agents and adjusters of all the companies interested. I proposed to have competent persons or machinists to examine, and estimate the loss. Warren said that the only way to do that was to restort to arbitration. I told him that I had no objection to arbitration, if he would make it equally binding on me and all parties interested. I do not recollect what he said, but he and Mr. Churchill (and, I think, some other adjusters) left my office immediately after my reply to the remark of Warren about arbitra-

(31) tion. I next saw Warren that afternoon in my office; I think he came in about two or three o'clock, in company with Mr. Churchill, Mr. Dewey and Mr. Pulaski Cowper. Mr. Warren handed

me a paper to read. I said I was willing to sign if it it bound the companies interested as it did my company—the plaintiff company. I told him what my objection to the paper was, and pointed out an objectionable clause. He struck that clause out and substituted another paper, and handed it to me; I said that the second paper was the same, but differently expressed; I said that it was the same old gray mare colored differently; my recollection is that the date was 2 November; it may have been 29 October. Mr. Warren said that if I did not sign that paper that they would not pay me anything. He was speaking for all the companies. I think that Mr. Churchill said to Mr. Warren, 'You act as spokesman for all the companies.' I think that all the agents mentioned were present; I am not sure about young Mr. Walter Hay and Mr. Dewey. Pulaski Cowper was present. Mr. John Whitehead was present at that time. Mr. Warren walked across the floor and said, 'We don't owe you one dollar' (or one cent, perhaps, he said). I turned around and asked if he meant that they did not owe us anything. Mr. Warren said, 'Yes,' and we all then left the office.

"I did not refuse to sign either of those papers, but said that I would sign them if they should be made equally binding on the insurance companies interested as they were on me.

"I wrote . . . a letter to Yarborough House, as stated. There had been previously two or three other propositions submitted."

Plaintiff read, in evidence, a copy of the letter (exhibit D) written just after the adjusters left the office and referred to by the witness.

Mr. Hawkins continued: "The paper, exhibit E, was received by me after my letter, marked D, was written and sent, and I referred in my letter to correspondence, letters and contracts tendered prior to 3 November. There were two papers purporting to be con- (32) tracts tendered to me prior to 3 November.

"I cannot tell how many letters I received from Mr. Warren. I do not recollect that Mr. Warren submitted a printed form to me as contract of arbitration. I cannot identify the pencil memorandum,"

Defendants here read exhibit E.

"I received the letter marked E late in the afternoon. I do not recollect having the paper that came with that letter, nor, if I had, what became of it. My impression is, that the letter was brought by a boy to me.

"I think that the exhibit F, and a pencil memorandum, contained all propositions submitted to me. I recollect no other. My objection to the proposition F was, that the company was not bound, while I was bound. My chief objection to the paper was, that Mr. Warren always wrote, and said in every conversation, that he waived nothing. Mr.

Warren first said, 'I neither admit nor deny liability.' After that, and just before he left the office, he appeared to get angry, and said, 'We do not owe you one dollar' (or one cent, I am not certain which). All of the other appraisers signed an agreement that bound them as well as myself. It was not the stipulation asked for by Mr. Warren."

. . . . . .

"The next interview was in Mr. Hawkins' office, on the morning of 3 November, when, pursuant to the appointment made the day before, we went to Mr. Hawkins' office. Mr. Churchill, Mr. Dewey and myself went together and submitted to Mr. Hawkins a form of agreement to be submitted to appraisers.

"There was a printed paper presented to myself as the special agent of the Phœnix Assurance Company of London, and subscribed by me for that company. I did not take it after it was handed him.
(33) It was signed by Dewey and Churchill, as agents for their respective companies.

"That was the first proposition to arbitrate that was made. I do not know whether the paper was left in the hands of Hawkins, Dewey or Churchill. It was not brought by me out of the office. It is my best recollection that I last saw it in the hands of Mr. Hawkins. I cannot swear that it was left in his hands."

The defendants proposed, at this point, to prove contents of the papers which, they say, are different from exhibit "I," and insist upon their right to do so, because they served (as it admitted) a notice to produce them. The plaintiff produced the papers ("Q") in response to that notice. The court held that there was not sufficient evidence; that the paper referred to by this witness was left in the hands of C. M. Hawkins for plaintiff company to allow proof of the contents. The defendants insisted upon their right because Mr. Hawkins said that he did not recollect that any printed form of arbitration was submitted to him, and that he did not have such paper, and that statement, in their view, makes notice unnecessary.

Upon a further question, made to counsel for plaintiff and to C. M. Hawkins for plaintiff, C. M. Hawkins answers that he has not now in his possession any paper, such as described in the notice.

Hawkins further testified that, according to the best of his recollection, he has never had any printed form in his possession filling the description in the paper marked "P."

After the foregoing testimony was offered, the defendant again proposed to prove the contents of the printed paper referred to by the witness, on the grounds already stated, and the further grounds that it is a collateral matter, and that it is not necessary to produce the paper,

but the contents may be proven without notice to produce or (34) accounting for loss of it. Objection sustained. Exception by defendant.

Defendant then proposed to show that C. M. Hawkins refused to sign the printed form of submission, stating to witness, as a reason, that it contained a provision that the appraisers should not decide the liability of the company.

Objection was sustained, and defendant excepted.

Witness then continued: "No other printed proposition was tendered except that one discussed, or written ones except those already discussed. We had a conversation about submitting to arbitration with Mr. Hawkins. We stated the terms of the proposition verbally to Mr. Hawkins, when he replied to us to reduce our proposition to writing, and we accordingly did reduce the proposition immediately to writing."

The defendant proposed to show what the witness and other adjusters verbally proposed as the terms of arbitration, and insisted upon their right to show this, as a part of a conversation in relation to which Hawkins testified; that they have a right to show the whole conversation.

The plaintiff objected on the ground that the witness had testified that the proposition was reduced to writing before Hawkins would consider it, and the writing is the highest evidence of what the proposition was, and that defendant cannot, as a part of a conversation, offer testimony incompetent, for this reason. Objection sustained. Exception by defendant.

"The interview was (considered as) interrupted after the printed paper was offered. The adjusters then retired; when they returned, Mr. Cowper came in, representing the Lancashire Company, and the pencil memorandum was then made.

"That paper (pencil memorandum) was made just after Mr. Cowper had asked Mr. Hawkins if he would sign a paper of a particular sort, describing it. Mr. Hawkins said that he would not sign an agreement that had those concluding words in it, the concluding (35) of the pencil memorandum. He added, that it was in substance what the former agreement was that he had refused to sign; that was all he did say then."

The counsel for defendant proposed to ask the witness whether that discussion was before or after the printed form was handed to Mr. Hawkins. Plaintiff objected on the ground that the printed form had been excluded, and the reference to it is made by counsel in order to prove its contents indirectly, and the testimony could not be material for any other purpose. The plaintiff did not object to the conversa-

tion, but to directing the attention of the witness and jury to the printed form. The plaintiff's objection sustained. Exception by defendant.

"The paper marked 'Q' was the paper referred to by Mr. Hawkins in his examination, when he said it was the same old gray mare of another color.

"When Mr. Hawkins said he would not sign an agreement containing the phraseology used in the paper 'Q,' I told him that he had exhausted our efforts to secure an appraisement, except by demand in writing, and that he had driven us to that, but that we could make no written demand until after an effort to agree on the damage had failed, and a difference as to extent of loss had existed. This conversation was in relation to damage to engine, boilers, inspirator and connections. I then said to Mr. Hawkins that Mr. Churchill, Mr. Dewey and I would inspect the property, form the best opinion we could of the maximum extent of damage by fire of those articles, to wit, engine, boilers, inspirator and connections, and inform him, so that if his judgment concurred with ours, we could avoid the necessity of an appraisement. Mr. Churchill, Mr. Dewey and myself did at once go to the ruins, and, relying on Mr. Dewey's judgment, agreed that the damage was seven or eight hundred dollars. This was the afternoon of 3 Novem-
(36) ber—early in the afternoon. We came back and went to Mr. Hawkins' office, and I told him that we had concluded that the damage did not exceed eight hundred dollars to engine, two boilers, inspirator and connections. We asked him if he would agree that such was the extent of the damage to that property. He said that he had made up no judgment of his own, but would go and look, and let us know. He went out, and came back after an absence of perhaps half an hour, more or less, and gave it as his judgment that the engine, boilers, inspirator and connections mentioned had been made worthless by the fire. I thereupon said to him, 'Then you claim $3,000 or $4,000 as the damage?' He answered, 'Yes.' I then said to him, 'You won't accept our $800?' He said, 'No.' I said, 'We will not assent to your figures.' We did not agree. I then said to Mr. Hawkins, 'Now, here is a distinct difference between us.' Hawkins said, 'No, there is no difference.' I replied, 'If $800 is not one sum and $3,000 is not another, with a big difference, then I do not understand figures.' I then remarked that I now could do nothing more nor less than in writing to demand an appraisement of the articles mentioned. I thereupon wrote letter on 3 November, marked exhibit 'E' (read to jury). While I was preparing a paper to submit with this letter, and had begun to prepare it, a part of exhibit 'Q,' Mr. Churchill and Mr. Dewey came into my room, and I, not liking the beginning of exhibit 'Q,' laid it aside. Mr.

Churchill picked it up, and for himself, without any interest on the part of my company, continued it and finished it. I then and there prepared a paper, marked exhibit 'F,' and went to Mr. Hawkins' office with Mr. Churchill and Mr. Dewey, taking with me the papers marked 'E' and 'F.' Mr. Churchill or Mr. Dewey took paper marked 'Q.' I went up to Mr. Hawkins and handed him immediately the papers marked 'E' and 'F,' between three and five o'clock on the evening of 3 November. At the same time exhibit 'Q' was handed (37) to him. I said to Mr. Hawkins that, by the peculiar environments of the defendant company's policy, I could not recede from my former demand, that the form of appraisement should be in exact accord with the terms and conditions of the policy, and that he would find that the paper (exhibit 'F') submitted for his signature, clearly followed the exact phraseology of his policy, and I had intentionally so drawn it, determined to place my company on all of its rights, as he had refused to subscribe to other propositions in writing. I told him to examine his policy and see that the paper 'F' was in exact line with the wording of his policy, or, in substance, that.

"Mr. Hawkins stated that his policy was in his safe. I asked him if he would not get it, and repeated my request. He said that he was feeling very badly and would answer my demand next morning. I told him, if he proposed to refuse, that to compel me to remain another day would extremely embarrass my business, as I had been here three days and had demands on me from other places. He still declined then and there to examine the paper. I told him that I could not wait over and would leave that night. Messrs. Churchill, Dewey and myself then left Hawkins' office. Before we got a square away from his office, I decided to remain. On the morning of the 4th, Hawkins' letter of 3 November was handed to me and other adjusters. The letter was handed to such of the adjusters as were there. Mr. Dewey, Walter Hay, T. T. Hay, Churchill and Hutson Lee (who was another adjuster and arrived that day) and myself were present. I thereupon wrote my letter 4 November, marked exhibit 'K.' I referred in that letter to exhibit 'D,' to which it was an answer. I left that evening. I had no conference with Mr. Hawkins except in the presence of Mr. Churchill and Mr. Dewey. Mr. Cowper was present at one of these interviews. Several times during 3 November, Mr. Hawkins directed questions to (38) me, which forced me (in order to avoid misunderstandings), as I told him at the time, expressly to say that I would not commit my company to either an admission or denial of liability.

"At our last interview Mr. Hawkins said to me, 'Then, I understand you to say you owe me nothing?' I replied, 'No, sir; you misunder-

stand me; I repeat what I have heretofore told you, that I will not commit my company now to an admission or denial of liability.'"

The defendant excepted to the issue submitted by the court—No. 10. The defendant also requested of the court to amend the ninth issue, as settled by the court, by striking out the words "refuse such request," and inserting in lieu thereof the words "fail or refuse to comply with such request," which was refused by the court. The defendant also requested the court to submit to the jury in a separate issue, *whether the plaintiff had failed or refused to comply with such request,* which was refused by the court. To both of these refusals the defendant excepted.

Defendant also excepted to refusal of the court, on the subsequent request to divide issue, now numbered nine, so as to submit separately, requested, whether plaintiff "failed" and whether he "refused," on a proper request, furnished proof, or to insert the word "fail" before the word "refuse," in said issue.

There was much other testimony corroborative and contradictory of the chief witnesses, the material parts of whose evidence has been set out.

The policy of insurance contained the following stipulation and agreement:

EXHIBIT A.

When property is damaged, the assured shall forthwith cause it to be put in order, assorting and arranging the various articles according to their kinds, separating the damaged from the undamaged, and
(39) shall cause an inventory to be made and furnished the company of the whole, naming the quantity, quality and cost of each article. The amount of sound value, and of the loss or damage, shall be determined by agreement between the company and the assured; but if, at any time, differences shall arise as to the amount of loss or damage, or as to any question, matter or thing concerning or arising out of this insurance, each such difference shall, at the written request of either party, be submitted, at an equal expense to each of the parties, to two competent and impartial persons—one to be chosen by each party—and the two so chosen shall select an umpire to act with them in case of their disagreement: *Provided, however,* that none of the persons so chosen shall be interested in the loss as creditors, or otherwise, or related to the assured or sufferers; and the award, in writing, of any two or said persons shall be binding and conclusive as to the amount of such loss or damage, or as to any question, matter or thing so submitted, but shall not decide the liability of this company.

EXHIBIT D.

3 NOVEMBER, 1886.

Messrs. L. R. Warren and others:

GENTLEMEN: Referring to the correspondence between the agents and adjusters of the several insurance companies whose policies I hold for insurance upon the property of the Pioneer Manufacturing Company, I beg to state that I have furnished everything with regard to the loss of the Pioneer Manufacturing Company, occasioned by the fire on 20 October, 1886, which you have required, as far as it was in my power to do, and I have also expressed my willingness to furnish you with any other proof or give you any other information which could be furnished or given. I have also submitted to you the vouchers in support of the company's claim for loss, and I have also proposed that we (40) should take up the said company's claim for loss, and go over it, item by item, to the end that if any item is objected to by you, you may specify the ground of objection in order that the same may be removed or adjusted conformably to the terms and conditions of your respective policies of insurance. I understand you do not accede to the proposition, but, on the contrary, you have declared that you do not recognize or admit the fact that your said companies are liable to one dollar of loss on account of said policies.

It is, therefore, only left to me to request you to furnish your blanks, upon which I may duly make out and forward to you the proof of loss of said Pioneer Manufacturing Company, as required by said several policies of insurance. Yours very truly,

C. M. HAWKINS, *President.*

EXHIBIT E.

RALEIGH, N. C., 3 November, 1886.

Pioneer Manufacturing Company, Colin M. Hawkins, President, Raleigh, N. C.

DEAR SIRS: A difference existing between us as to the extent of the damage by fire (20 October, 1886), to property covered by the second item of our policy, viz.: engine and two boilers, including inspirator and connections, we hereby request that said damage be ascertained by appraisement, in accordance with the terms and conditions of our said policy, and to that end submit herewith, executed by us, a paper indicating an agreement for that purpose, which we beg you will sign, first filling in the name of the party selected by you as appraiser.

Yours very truly,

PHŒNIX ASSURANCE CO. OF LONDON,

L. R. WARREN, *Special Agent.*

(41) EXHIBIT F.

A difference existing between Pioneer Manufacturing Company and Phœnix Assurance Company of London, as to the extent of the loss by fire on 20 October, 1886, on engine and two boilers, including inspirator and connections, in engine room attached to main building of said Pioneer Manufacturing Company; and said Assurance Company having, in writing, requested that an appraisement of such loss or damage be had in accordance with the terms and conditions of said Insurance Company's policy on said property, it is hereby agreed by and between said parties that B. R. Harding and ....., one of whom is chosen by said Manufacturing Company and the other by said Insurance Company, and neither of whom is interested in said loss as creditors, or otherwise, nor related to assured or sufferers, shall estimate and appraise at the true cash value what such loss or damage by said fire to said property is. The two persons so chosen shall select an umpire to act for them in case of their disagreement, but such person so chosen shall not be one who is interested in the loss, or creditor, or otherwise, nor related to assured or sufferers. The said appraisement shall be at an equal expense to the parties hereto. The award, in writing, of any two of said persons so selected shall be binding and conclusive as to the amount of such loss or damage, but shall not decide the liability of said Insurance Company. Witness the following signature and seals:

PHŒNIX ASSURANCE CO. OF LONDON, [Seal.]
By L. R. WARREN, *Adjuster*. [Seal.]

EXHIBIT I.

It is agreed by and between the Pioneer Manufacturing Company, of the one part, and the insurance companies whose names are hereto subscribed, of the other part, that B. R. Harding and .....,
(42) who are mutually selected by the parties hereto for that purpose only, shall estimate and appraise, at true cash value, the actual damage occasioned by fire on 20 October, 1886, to the engine and two boilers, including inspirator and connections in engine-room attached to main building, the property of said Pioneer Manufacturing Company. The powers of said appraisers are hereby expressly declared to be within the terms and purposes herein expressed, and their award, in writing, within the terms and purposes of this agreement shall be held as fixing the quantum of such damage, and, as such, binding on the parties hereto. This agreement waives no right of said companies, or of assured, under the terms and conditions of their policies, except that

neither party hereto shall deny the award of said appraisers to be the true and actual measure of damage, on a cash basis, to the property hereby submitted for appraisal.

(Signed) J. D. W. CHURCHILL,
For L. & L. G. Ins. Co.
SOUTHERN INS. CO. OF N. O.,
By L. R. Warren, Adjuster.
GERMAN-AMERICAN INS. CO.,
By Geo. W. Dewey, S. A.

EXHIBIT Q.

Shall estimate and say what is the actual damage of fire to, etc., and when, in writing, they shall have said what, in their judgment, such damage is, the sum so found shall be deemed, between the parties hereto, to be the actual damage to said property by such fire, but said appraisers shall have no other power than is herein stated, it being understood that their finding shall in no wise decide that any company hereto is, or is not, liable.

The defendant, among other instructions, asked the court to (43) charge as follows:

"17. That, according to the plaintiff's testimony, a difference arose between the plaintiff and the defendant as to the amount of loss or damage on the engine, boilers, inspirator and connections.

"34. That if Hawkins refused to sign the appraisal paper marked 'F,' on the ground that it did not bind both parties equally, this was not a good ground for such refusal, as that paper, in law, did bind both parties equally, and he ought, upon written request, to have signed it, unless it was duly waived, and his failure to so sign, for this reason, amounted to a refusal to sign.

"40. That if the adjuster of the defendant company did not deny liability until after the plaintiff had refused to sign a submission to arbitration unless the clause providing that the appraisers should not decide the liability of the company, should be stricken out, this was no excuse for the plaintiff's refusal to submit to appraisers, and such denial of liability was no waiver of the plaintiff's obligation to submit, upon a written request, to appraisal.

"53. That if the denial of liability was made by the defendant after the plaintiff had refused to sign the arbitration paper 'F,' or, after being duly requested, the plaintiff refused to enter into an appraisal, such denial of liability was no excuse for the refusal to enter into the appraisement, and the said denial was no waiver of the right to demand the appraisal or arbitration.

"54. That to have the effect of a waiver of appraisal, the denial of liability of the company must precede the refusal to appraisal or arbitration.

"76. That the paper containing the submission to appraisal was in accordance with the terms of the policy, and as to the only point contained in it, the fixing of the value, was equally binding upon
(44) both parties; that this provision of the policy was binding and legal, and the plaintiff was bound, under the policy, to accede to that or a similar appraisal."

The Court, after charging the jury, said that the instructions given were in lieu of those asked.

The instructions given are in part a compliance with said requests by stating the same propositions in different language, and where there is no such compliance, it is intended as a refusal without marking each request as given or refused. Some of said requests are mere recapitulations of the testimony, and so far as they are correct recitals of the evidence are complied with in the recapitulation of the testimony by the court.

Upon the questions arising upon the foregoing prayers for instruction, the court charged:

8. If the defendant's adjuster, Warren, acting on behalf of defendant company, offered to adjust the loss on a basis of valuation of engine, two boilers, inspirator and connections, not destroyed by fire, at either $750, $800 or $900, or any other definite sum, and the plaintiff company, through its president, C. M. Hawkins, refused to accept said offer, and settled on said basis, then a difference did arise, and the jury would so find Yes to the 8th issue. The burden is on the defendant to establish the affirmative of this issue.

9. If, after such difference had arisen, the defendant's adjuster, L. R. Warren, sent to C. M. Hawkins the letter marked Exhibit E, and sent also accompanying said letter a paper marked Exhibit F, or a copy of said paper signed by said Warren, as it purported to be, then the plaintiff did request, in writing, according to the requirement of the policy, that the damage should be assessed by appraisers. If such request was made and refused, the jury would respond to the 9th issue Yes. But if said request in writing marked F, was not delivered to C. M.
(45) Hawkins, and no request was handed to Hawkins other than that marked Exhibit I, which is not signed by Warren as an adjuster of the defendant, then no request in writing was made, and the jury would respond to the 9th issue No.

10. If L. R. Warren, the adjuster of the defendant company, declared to C. M. Hawkins, president of the plaintiff company, in the office of the latter, without qualification, that he would not for his com-

pany, or his company would not, pay one dollar or one cent for loss by reason of the fire, and walked immediately out of the said office, then such declaration was a denial of liability on the part of the defendant, and the jury would respond to the 10th issue Yes. If the said Warren did not make said unqualified declaration, or if said Warren said only that he neither admitted nor denied liability, then there was no denial, and the jury would respond No to the 10th issue.

11. If the said L. R. Warren wrote and caused to be delivered to said C. M. Hawkins the letter put in evidence and marked "K," then the jury will respond Yes to the 11th issue. I believe it is admitted that the letter was sent and received.

13. If the defendant's adjuster (Warren) declared, without qualifications, to said C. M. Hawkins, in the office of the latter, that his company—meaning defendant company, or he, for the defendant company—would not pay one dollar or one cent of loss to plaintiff on account of loss by the fire, and immediately left said office, then such declaration was denial of liability.

There was a verdict for the plaintiff on the issues, whereupon the defendant moved the court for a new trial.

Judgment was rendered in favor of the plaintiff, from which the defendant appealed.

T. C. Fuller, Spier Whitaker and E. C. Smith for plaintiff. (46)
J. W. Hinsdale, C. M. Busbee and F. H. Busbee for defendant.

SHEPHERD, J. The defendant relies upon several defenses, but the only one necessary to be considered in order to dispose of this appeal is founded upon the following clause in the policy of insurance, which is the basis of this action:

"The amount of sound value, and of the loss or damage, shall be determined by agreement between the company and the assured, but if, at any time, differences shall arise as to the amount of loss or damage, . . . every such difference shall, at the written request of either party, be submitted, at an equal expense to each of the parties, to two competent and impartial persons—one to be chosen by each party—and the two so chosen shall select an umpire to act with them in case of their disagreement, . . . and the award, in writing, of any two of said persons shall be binding and conclusive as to the amount of such loss or damage, or as to any question, matter or thing so submitted, but shall not decide the liability of the company. . . . It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery

until after an award shall have been obtained, fixing the amount of the claim in the manner above provided. . . . And it is hereby understood and agreed by and between the Phœnix Assurance Company of London and the assured that this policy is made and accepted with reference to the foregoing terms and conditions."

It is, we think, well settled that such a provision in a contract of insurance is not against public policy, and that it will be upheld by the courts, in so far as it provides for the submission to arbitration
(47) of the amount of loss or damage sustained by the assured.

A policy of insurance, precisely similar to the one under consideration, was declared to be valid by the Supreme Court of New Jersey, in the case of *L. L. & G. Insurance Co. v. Wolff,* 17 Ins. Law Journal, 714; 14 Atlantic R., 561, and this decision is abundantly sustained by the highest authority.

"Agreements for determining only the amount to be recovered by arbitration are valid, and the determination by arbitration of the amount of damages to be recovered, or the time of payment, may lawfully be made a condition precedent." *Scott v. Avery,* 5 Ho. of Lords Cases, 811; 2 Addison Contracts, 294; Morse on Arbitration and Awards, 93; May on Insurance, 493; *Perkins v. U. S. Electric Light Co.,* 16 Fed. Rep., 513; *Gauche v. London & Lancashire Ins. Co.,* 1 Fed. Rep., 347; *Carroll v. G. F. Ins. Co.,* 13 Pac. Rep. (Cal.), 863.

In *Russell v. Pellegrini,* 38 E. L. & E., 101, Lord Campbell said: "When a cause of action has arisen, the courts cannot be ousted of their jurisdiction," but added that "parties may come to an agreement that there shall be no cause of action until their differences have been referred to arbitration."

"Both sides admit that it is not unlawful for parties to agree to impose a condition precedent, with respect to the mode of settling the amount of damage, or the time of paying it, or any matters of that kind, which do not go to the root of the action. On the other hand, it is conceded that any agreement which is to prevent the suffering party from coming into a court of law—or, in other words, which ousts the courts of their jurisdiction—cannot be supported." *Edwards v. The Aberayron Mutual Ship Ins. Co.* (limited), 1 Q. B. Div., 593 (1875).

"I take the law as settled by the highest authority—the House of Lords—to be this: There are two cases where such a plea as the present is successful—first, where the action can only be brought for the
(48) sum named by the arbitrator; secondly, where it is agreed that no action shall be brought till there has been an arbitration, or that arbitration shall be a condition precedent to the right of action." *Dawson v. Fitzgerald,* 1 Exchequer Div., 260 (1876).

"Since the case of *Scott v. Avery,* in the House of Lords, the contention that such a clause is bad, as an attempt to oust the courts of jurisdiction, may be passed by."

See, also, Porter's Laws of Insurance, 210, and *Casser v. Sun Fire Office* (Supreme Court Minn., 1890), Insurance L. J.

The contention of the defendant company is, that a difference arose as to the amount of damage to the engine, boilers, etc., that the defendant made a written request of the plaintiff that the said difference should be submitted to, and determined by, arbitrators, and in accordance with the terms of the policy, and that the plaintiff, without legal excuse, refused to comply with said request.

The submission to arbitration upon the written request of the defendant, being clearly a condition precedent to the right of action, we are now to determine whether the defendant company has placed itself in such a position as to defeat the present action by reason of the non-performance of the said condition by the plaintiff.

1. As a first step in the establishment of this defense, it was incumbent on the defendant to show that a difference, in respect to the particulars mentioned, had arisen, and, in order to determine this question, the eighth issue was submitted to the jury.

The defendant requested his Honor to charge the jury that, according to the plaintiff's own testimony, through its president, Hawkins, such a difference had arisen between the parties.

The court declined to give this instruction, and the jury found the said issue in the negative.

Hawkins testified that L. R. Warren, the adjuster of the defendant company, offered him nine hundred dollars in settlement (49) of the damages to the above mentioned property, and that he, Hawkins, declined to accept the said offer. This surely constituted a "difference," within the meaning of the word as used in the policy, and the subsequent negotiations as to arbitration must have been based entirely upon the assumption that such a difference existed.

We are, therefore, of the opinion that his Honor erred in declining to give the instruction prayed for, and we presume that he only permitted the finding of the jury to stand, upon the ground that it became immaterial in view of the verdict upon the succeeding issue.

2. This, the ninth issue, involves the second branch of the inquiry, and is in the following words:

"If so (that is, if there was a difference), did the defendant request the plaintiff, in writing, in accordance with the requirement of the policy sued on, that the amount of damage to said articles should be assessed by appraisers, and did the plaintiff refuse such request?"

The defendant tendered two issues, which divided the proposition contained in that which was submitted by the court. These issues were refused, and the defendant excepted to such refusal, and also to the issue actually submitted. This exception finds direct support in *Emry v. R. R.*, 102 N. C., 209, where it is said that "it is misleading to embody in one issue two propositions, as to which the jury might give different responses, and, on exception taken in apt time, a new trial will, in such cases, be granted."

We prefer, however, to base our decision upon grounds which more closely affect the merits of the defense, and we will, therefore, inquire whether there was error in the instruction of the court upon the said issue.

Hawkins testified that he received the letter (Exhibit "E") from Warren, the adjuster of the defendant company, on 3 November, and that before he had written his letter (Exhibit "D"), which was dated
(50) on the same day, Mr. Warren had handed him Exhibit "F," which, he admits, was a proposition tendered to him by the said Warren. Mr. Hawkins further says: "I think that the Exhibit 'F' and a pencil memorandum contained all the propositions submitted to me. . . . My objection to the proposition 'F' was that the company was not bound, while I was bound."

Now, proposition "F" was a paper drawn in strict conformity to the provisions of the policy, and it provided that the award should be "binding and conclusive as to the amount of such loss or damage, but shall not decide the liability of said insurance company." Not only was it executed by the defendant company, but it contained the name of the arbitrator selected by it, and was complete in every respect, save its execution by the plaintiff company and the insertion of the name of the arbitrator to be selected by it. The policy does not require any particular form of written request, and we can conceive of no stronger one than this paper which the plaintiff admitted was submitted to him.

Again, the plaintiff admitted that he received letter "E." This was a formal request for an arbitration or appraisement, and it referred to "a paper indicating an agreement for that purpose," and executed by the defendant, which the plaintiff was requested to sign. Hawkins does not deny that he received the enclosure; but if he did not receive it, the letter was none the less a written request to arbitrate according to "terms and conditions" of the policy. If the paper enclosed was not drawn in accordance with such terms and conditions, it was the duty of the plaintiff to have made it known, so that a proper agreement could have been prepared. Besides, it was not the duty of the defendant to tender the agreement until after the proposition had been acceded to, and it will be further observed that the letter did not request a submission to arbitra-

tion according to the terms of the policy as interpreted by the enclosed paper, but that the submission to arbitration was to be (51) in accordance with the terms of the policy, and the paper was submitted only as "indicating an agreement" to effectuate that purpose.

The court charged the jury upon the said issue as follows:

"9. If, after such difference had arisen, the defendant's adjuster, L. R. Warren, sent to C. M. Hawkins the letter marked Exhibit 'E,' and sent also accompanying said letter a paper marked Exhibit 'F,' or a copy of said paper signed by said Warren, as it purported to be, then the plaintiff did request in writing, according to the requirement of the policy, that the damage should be assessed by appraisers. If such request was made and refused, the jury would respond to the 9th issue Yes. But if said request in writing, marked 'F,' was not delivered to C. M. Hawkins, and no request was handed to Hawkins other than that marked Exhibit 'I,' which is not signed by Warren as an adjuster of the defendant, then no request in writing was made, and the jury would respond to the 9th issue No."

This instruction is to the effect that neither Exhibit "E" nor "F," taken separately, would constitute such a written request as is required by the policy, whereas we have seen that either paper would be sufficient.

This error is not cured in the latter part of the instruction, which speaks of the delivery to plaintiff of the "request in writing, marked "F." If such paper was, in the opinion of his Honor, a request in writing, he should have instructed the jury, as substantially requested, that the plaintiff's president, Mr. Hawkins, expressly admitted that the said paper was submitted to him, and that he had failed to agree to it. Again, if his Honor considered the paper 'F' a written request, he should have so stated, and put it affirmatively, as well as negatively, to the jury; but we very much doubt that, even had he done so, the prejudicial effect of the first part of the instruction would have been removed.

3. We will now consider the exception relating to the tenth issue, which is as follows: "Did the defendant company, at the (52) time of making any request or demand for arbitration as to the damage to said articles of property not destroyed by fire, deny its liability to plaintiff under the said policy of insurance?"

Hawkins testified that at an interview in his office (Messrs. Churchill, Dewey and Cowper being present), Warren handed him a paper to read; that he told Warren that he was willing to sign it if it bound the insurance companies as it did the plaintiff company, and that he pointed out an objectionable clause; that Warren struck out that clause and substituted another paper and handed it to him; that he, Hawkins, said that it was "the same old gray mare colored differently"; that Warren said that if he, Hawkins, did not sign that paper they would pay him nothing.

"He was speaking (says Hawkins) for all the companies. I think Mr. Churchill said to Mr. Warren, 'You act as spokesman for all the companies.' I think that all of the agents were present; I am not sure about young Mr. Walter Hay and Mr. Dewey. Pulaski Cowper was present. Mr. John Whitehead was present at that time. Mr. Warren walked across the floor and said, 'We don't owe you one dollar' (or one cent, perhaps, he said). I turned around and asked if he meant that they did not owe us anything. Mr. Warren said, 'Yes,' and we all then left the office."

The plaintiff also introduced upon this point John J. Whitehead, who testified as follows: "I am employed by the Gas Light Company, of which Mr. Hawkins is president. I was in Mr. Hawkins' office about 1 November, 1886, and saw Mr. Warren and Mr. Churchill, and, I think, Mr. Dewey was there. They submitted a paper to Mr. Hawkins to sign. He said that it bound him, but did not bind the companies. Then Mr. Warren sat down and wrote with a pencil and handed what he wrote to Mr. Hawkins. Mr. Hawkins said, in substance, that it amounted
(53) to the same thing as the other. Mr. Warren got up off the stool and said to Mr. Hawkins, 'Then, Mr. Hawkins, I don't owe you one cent.' Mr. Hawkins turned to him and said, 'Do I take that as a denial of liability?' Mr. Warren said, 'Mr. Hawkins, I wish you to understand that we do not admit one cent of liability.' I don't recollect anything more, except that in a very short time they left."

The foregoing testimony was relied upon to establish the alleged denial of liability by the defendant, and it is plain that the latter was entitled to show all of the circumstances under which the alleged denial was made. Hawkins admits that two propositions to arbitrate were made at the said interview. Now, if these propositions were in accordance with the terms of the policy, and the plaintiff refused to accede to them, the very terms of the contract forbade a recovery, and Warren would have been justified in making the imputed denial.

It was in evidence that Warren presented a printed form of an agreement to submit to arbitration, executed by the defendant and the other companies (which, according to Hawkins' testimony, may have been Exhibit "F," or a similar paper), and the defendant proposed to show its contents by oral testimony, having given notice to the plaintiff to produce it. Passing by the ruling of the court that the contents could not be thus proven for any purpose, which ruling is, to say the least, doubtful, it is very plain to us that the defendant had a right to show by the witness Warren that Hawkins "refused to sign the printed form of submission, stating to witness as a reason that it contained a provision that the appraisers should not decide the liability of the company." His

Honor excluded this testimony, which expressly stated the ground of refusal, and in this we think there was serious error, although there was other testimony from which the same facts might probably have been inferred. It will be noted that Hawkins admits that the paper was a proposition in the form of an agreement to arbitrate, and (54) it was unnecessary to have shown its contents, so far as the question of denial of liability was concerned, if the refusal to accept was based upon the reason alleged to have been assigned by him. The whole conversation, therefore, should have been submitted to the jury for the purpose of showing why the alleged denial was made.

Apart from this, however, the material contents of the papers were proved, without objection, in another way. Mr. Hawkins speaks of a substituted paper ("the same old gray mare," etc.) being submitted to him. Warren testified that the paper marked "Q" was the one so described by Hawkins. This paper was in evidence, and its terms are in perfect conformity to the provisions of the policy. If, then, as Mr. Hawkins says, these terms were the same as those in the other paper, which Warren states was executed by him and the agents of the other companies, we have in evidence the very clause which Hawkins objected to. There was, therefore, testimony tending to prove that a proper agreement to arbitrate, executed by the defendant, was proposed to the plaintiff, and that this request in writing was not acceded to. It was also in evidence that Hawkins said he would not sign any agreement that contained the alleged objectionable provision. Now, if this testimony be true, Warren, as we have remarked, was justified in making the alleged denial, and the defendant had the right to have this view particularly presented to the jury. To this end, it very properly asked the following instruction: "That if the adjuster of the defendant company did not deny liability until after the plaintiff had refused to sign a submission to arbitration unless the clause providing that the appraisers should not decide the liability of the company should be stricken out, this was no excuse for the plaintiff's refusal to submit to appraisers, and such denial of liability was no waiver of the plaintiff's obligation to (55) submit, upon a written request, to appraisal."

His Honor instructed the jury as follows: "If L. R. Warren, the adjuster of the defendant company, declared to C. M. Hawkins, president of the plaintiff company, in the office of the latter, without qualification, that he would not for his company, or his company would not, pay one dollar or one cent for loss by reason of the fire, and walked immediately out of the said office, then such declaration was a denial of liability on the part of the defendant, and the jury would respond to the tenth issue Yes. If the said Warren did not make said unqualified declaration, or

if said Warren said only that he neither admitted nor denied liability, then there was no denial, and the jury would respond No to the tenth issue."

The denial mentioned in the issue, in view of the pleadings and evidence, must necessarily mean a wrongful denial. If it was not wrongful, it was no denial, in the legal meaning of the word, as thus used. The instruction prayed for involved, therefore, a delicate question of waiver, which it was very material to the defendant to have clearly and specifically presented to the jury. The instruction given entirely ignores this theory of the defense, and seems predicated upon the idea that the testimony of Hawkins and Whitehead, the only witnesses to the denial, was either that there was an unqualified denial, or a refusal either to deny or admit liability. These are the two views presented by the charge, whereas it might very reasonably have been inferred from the testimony of the said witnesses, and especially that of Whitehead, that the alleged denial was in consequence of the refusal of the tendered propositions. In other words, the finding of the issue was made to turn rather upon the nature of the denial than the right of the defendant, under the circumstances, to make any denial whatever.

(56) We conclude, therefore, that there was error in declining to give the special instruction prayed for by the defendant, and that for this, and other errors which we have indicated, there should be a new trial. Entertaining these views, we deem it unnecessary to pursue the discussion through the labyrinth of exceptions which fill this very voluminous record.

Venire de novo.

Cited: Herndon v. Ins. Co., 107 N. C., 185; *Carey v. Carey,* 108 N. C., 271; *Dibbrell v. Ins. Co.,* 110 N. C., 212; *Brady v. Ins. Co.,* 115 N. C., 355; *Kelly v. Trimont Lodge,* 154 N. C., 101; *Williams v. Mfg. Co., ibid.,* 209; *Nelson v. R. R.,* 157 N. C., 201; *Shuford v. Ins. Co.,* 167 N. C., 550.

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*M. J. WALKER ET AL. v. IOLA M. SCOTT ET AL.

Appeal—Settlement of Case—Amendment of Case—Filing Exceptions—Rule 27—Pleading—Issues.

1. When appellant's counsel, on receipt of appellee's case, sends the papers to the judge to settle the case on appeal, without any "request," as required by The Code, sec. 550, to fix a time and place for settling the case,

*Head notes by CLARK, J.

the judge is not required, in the absence of such request, to give notice, and the case settled will not be set aside in this Court, especially when appellant's counsel took no steps for three months towards securing a hearing before the judge in regard to the matter.

2. While the court will allow a "case" to be withdrawn to be amended by the judge when he expresses a willingness to correct an error or inadvertence, this will not be done when the judge states that there is no error, and that he will "make no change whatever in the case as settled."

3. When exceptions are filed under Rule 27, the recitals contained therein are not conclusive, but it is open to the appellee to controvert them, and to have the judge pass upon their correctness in "settling the case on appeal."

4. If an answer or reply is insufficient, the opposite party may move for judgment, and if the motion is refused, he can have his exception noted. If he fail to do this, the objection is usually waived.

5. Judgment *non obstante veredicto* is only granted in cases where the plea confesses a cause of action and the matter relied on in avoidance is insufficient.

6. A party who fails to tender on the trial such issues as he deems proper, cannot be heard on appeal to complain that the issues submitted do not cover the entire case.

APPEAL from *Boykin, J.,* Fall Term, 1888, CHEROKEE Supe- (57) rior Court.

The facts are stated in the opinion of the Court.

T. F. Davidson and G. A. Shuford for plaintiffs.
E. C. Smith and J. W. Cooper for defendants.

CLARK, J. The appellant asks to withdraw the case and recommit it to the judge to "settle the case" over again. Appellant's counsel files an affidavit that the case as settled by the judge is "erroneous in various particulars, to defendant's hurt, without giving him any notice of time and place of settling the case on appeal," and that the judge has by letter expressed his willingness to give the appellant such notice now, if the court will permit the case to be withdrawn for that purpose. The letter of the judge referred to, states that the appellant's counsel forwarded him the papers to "settle the case" without any request to name a time and place for that purpose; that he was then in the eastern part of the State, and in the absence of such request he did not suppose counsel (who resides in Cherokee) desired such notice; that if desired he will still give it, "but the case as prepared will not be altered in any respect whatever," and that no exception was taken during the trial, except as stated.

The case as settled by the judge must be taken as correct. The law provides that when counsel disagree he must settle it. It is difficult to

see how any other provision could be made. *S. v. Debnam*, 98 N. C., 712, and cases there cited.

(58) The statute (The Code, sec. 550) provides that when appellee's counter-case is served, the appellant shall immediately "request the judge to fix a time and place for settling the case before him." When this case was before us the second time (104 N. C., 481), it was remanded to be settled (if counsel could not agree upon the statement of the case) "under requirements of The Code, sec. 550." The judge having stated that when the papers were sent him to settle the case no request to appoint a time and place was made by appellant, we think that it is too late for him to make the application now. *McCoy v. Lassiter*, 94 N. C., 131. The judge was not required to give a notice which was not asked, and which the law did not require him to give unless requested. The judge was especially justified in thinking notice was not desired in this case, considering the distance appellant's counsel resided from where he was then holding court. The papers were sent to the judge 5 January, 1890. The appellant's counsel does not aver that he intended to appear, and would have appeared, before the judge, if notified, nor does he show why he did not apply to the judge when he failed, in a reasonable time, to receive notice, nor why he did not, after the case was settled, make this application to be reheard before 17 April, the date of the judge's letter. By his non-action he has waited to see what the judge's case would be, and he moves only when it is not satisfactory. While the court will permit a case to be withdrawn when it is properly made to appear that the judge has expressed a willingness to correct an error or omission, *cui bono*, remand the case with an attendant delay of several months, when the judge not only does not desire to make any change, but distinctly says that the case is correct, and that it "will not be altered in any respect whatever." It is apparent that the delay will be the only thing accomplished, and that the appellant is in as good a position to assert his rights and point out errors

(59) committed on the trial now as if his motion were granted.

The motion is denied.

The case on appeal, settled by the judge, states that there were no exceptions taken on the trial, except to the following instruction in the charge.

"His Honor charged the jury, among other things, that if they should find that the defendants, and those under whom they claim, had been in the actual occupation of the land in controversy for twenty years prior to the commencement of this action, the plaintiffs would not be entitled to recover, unless the defendants, and those under whom they claim, during such occupation or possession of said land, recognized and acknowledged the right and title of the plaintiffs, or those under

whom they claim, to the same. That if they should find that the defendants, and those under whom they claim, entered into possession of said land and occupied the same, recognizing and acknowledging the title of the plaintiffs thereto, and held the same under the plaintiffs, and those under whom they claim, the plaintiffs would be entitled to recover, unless, prior to the assertion of this adverse claim, the defendants, or those under whom they claimed, had surrendered the possession of the said land to the plaintiffs, or those under whom they claimed, or shown actual adverse possession of the same in twenty years prior to the beginning of this action."

We see no error therein of which the defendants can complain. Indeed, the exception was not seriously maintained in this Court.

The appellant, however, contends that he filed his exceptions to the case in the clerk's office within ten days after judgment, and that by virtue of Rule 27 of this Court, they became part of the record and control the case stated by the judge. These exceptions recite certain instructions, alleged therein by appellant to have been given by the judge, and certain evidence which he alleged was admitted, and his exceptions to the same. The idea is, at least, novel. An (60) appellant cannot, by such recitals, take away the appellee's opportunity to controvert the fact whether such instructions were given, or such evidence admitted, and deprive him of the right to have the judge pass upon those matters by a "settlement of the case." If this could be done, the provisions of The Code, sec. 550, in regard to the manner of settling cases on appeal, are a nullity, and an appellant can always secure a new trial by filing exceptions to suit himself. The *reductio ad absurdum* is apparent. Rule 27 provides that exceptions shall be set out by appellant, in making up his statement of case on appeal, and, in those few cases in which no statement of case on appeal is required, the appellant can file his exceptions within ten days after judgment, in the clerk's office, and they will be sent up as a part of the record. The rule reads as follows: "Every appellant shall set out in his statement of case served on appeal, his exceptions to the proceedings, rulings or judgment of the court, briefly and clearly stated and numbered. If there be no case settled, then within ten days next after the end of the term at which the judgment is rendered from which an appeal shall be taken, or in case of a ruling of the court of chambers and not in term time, within ten days after notice thereof, appellant shall file the said exceptions in the clerk's office. No other exceptions than those so set out or filed, and made part of the case or record, shall be considered by this Court, except exceptions to the jurisdiction, or because the complaint does not state a cause of action, or

motions in arrest of judgment for the insufficiency of an indictment." This rule is in conformity to sec. 550, and other like provisions in The Code, and is to be construed in connection with them. It provides a mode for presenting exceptions, but it does not relieve a party from the consequences of not having taken an exception at the time which is required by The Code, sec. 412 (2), as to everything except
(61) the charge. As to the charge, exception can be taken for the first time in making up statement of case on appeal. The Code, sec. 412 (3); *McKinnon v. Morrison,* 104 N. C., 354. Nor have recitals of evidence or of the charge, when thus made in appellant's exceptions any other force than as appellant's statement. If exceptions are set out in appellant's statement which were not made in apt time on the trial (other than exceptions to the charge), or incorrect statements of evidence, or charge, or other matters occurring on the trial, it is the duty of the judge, upon disagreement of counsel, to correct these matters. In these few cases in which no "case settled" is necessary, the exceptions filed in the ten days are sent up as part of the record, because, in those cases, the exceptions are necessarily only to matters appearing upon the face of the record, and there are no controverted matters requiring a "statement of the case on appeal."

The appellant further insists that the answer sets up a counterclaim to which the reply is not sufficient in form as a denial; that upon the face of the record he is entitled here to judgment *non obstante veredicto,* and he relies upon The Code, sec. 957; *Thornton v. Brady,* 100 N. C., 38; *McKinnon v. Morrison, supra.* The plaintiff contends that the replication is sufficient, and if it were not, that the answer only sets up an equitable defense—not a counterclaim—and no reply was required. *Barnhardt v. Smith,* 86 N. C., 473. If an answer is insufficient, the plaintiff can move for judgment, and, if it is refused, have an exception noted. If he does not do this, and goes to trial upon the pleadings, without objection, the exception is waived. It is not a fatal defect appearing upon the face of the record—such as a want of jurisdiction and the like. The same rule applies to the reply. The defendant here has waived any objection he may have had by not moving for judgment below in apt time, and having his exception noted if the motion had been refused. "The granting judgment *non obstante*
(62) *veredicto* is very restricted, and is confined to cases where the plea confesses a cause of action and the matter relied on in avoidance is insufficient, and when the plea may be treated as a sham plea." *Moye v. Petway,* 76 N. C., 327; *Ward v. Phillips,* 89 N. C., 215. Besides, the motion, if well founded, should have been made below, and not presented here for the first time.

The appellant further insists that, upon the face of the record, an additional issue should have been submitted upon his demand for affirmative relief in the answer. The court, by not submitting it, seems to have been of the opinion that no issue was raised thereby other than as embraced in the issue submitted. The appellant seems to have thought so too, as he tendered no other issue and made no exception to the issues submitted, nor to the failure to submit others. "A party who fails to tender, on the trial, such issues as he deems proper, cannot be heard, on appeal, to complain that the issues submitted do not cover the entire case." *Kidder v. McIlhenny,* 81 N. C., 123; also *Curtis v. Cash,* 84 N. C., 41; *Bryant v. Fisher,* 85 N. C., 69; *Moore v. Hill,* 85 N. C., 218; *Alexander v. Robinson,* 85 N. C., 275; *Simmons v. Mann,* 92 N. C., 12; *Silver Valley Mining Co. v. Balt. Smelting Co.,* 99 N. C., 445.

No error.

Cited: Whitehurst v. Pettipher, 105 N. C., 42; *Lowe v. Elliott,* 107 N. C., 720; *Harrison v. Ray,* 108 N. C., 218; *S. v. Williams,* 109 N. C., 848; *Merrill v. Whitmire,* 110 N. C., 370; *Milling Co. v. Finlay, ibid.,* 412; *Cameron v. Bennett, ibid.,* 278; *Lewis v. Foard,* 112 N. C., 403; *Maxwell v. McIver,* 113 N. C., 291; *Cotton Mills v. Abernathy,* 115 N. C., 409; *Riddle v. Germanton,* 117 N. C., 389; *Sutton v. Walters,* 118 N. C., 502; *Wagon Co. v. Byrd,* 119 N. C., 461; *Patterson v. Mills,* 121 N. C., 269; *James v. R. R., ibid.,* 532; *Ayers v. Makely,* 131 N. C., 65; *Duffy v. Meadows, ibid.,* 33; *S. v. Dixon, ibid.,* 813; *Moore v. Palmer,* 132 N. C., 976; *Cameron v. Power Co.,* 137 N. C., 101; *Shives v. Cotton Mills,* 151 N. C., 291; *Baxter v. Irvin,* 158 N. C., 279; *Todd v. Mackie,* 160 N. C., 357; *S. v. McKenzie,* 166 N. C., 296; *S. v. Freeze,* 170 N. C., 711; *Barbee v. Penny,* 174 N. C., 573; *S. v. Palmore,* 189 N. C., 540; *Finch v. Comrs.,* 190 N. C., 155; *Gillam v. Jones,* 191 N. C., 622.

(63)

J. A. MALCOM v. THE RICHMOND AND DANVILLE RAILROAD COMPANY.

Contributory Negligence—Passengers.

1. A passenger on a freight train, who stands on the rear platform without holding to anything, is guilty of contributory negligence, and cannot recover for any injury which he may sustain by reason of the sudden starting of the train.

2. A railroad company is not required to give signals to passengers as to the movement of trains.

CIVIL ACTION to recover damages, tried at August Term, 1889, of GUILFORD Superior Court, before *Graves, J.*

On the trial it appeared that the plaintiff was a passenger on the defendant's freight train from Winston to Greensboro. A passenger coach was attached to the train, and there was ample room in the same for the accommodation of all of the passengers.

While the train was taking in wood at a wood station, the plaintiff went on the rear platform of the coach and stood there, without holding to anything, until the train started "with such a jerk as to throw him off violently on the rails," by reason of which he was injured. The negligence attributed to the defendant is that the train was started without any signal or other notice.

At the conclusion of the testimony his Honor intimated an opinion that, upon the testimony, the plaintiff could not recover; whereupon the plaintiff submitted to a nonsuit, and appealed.

J. T. Morehead for plaintiff.
D. Schenck for defendant.

SHEPHERD, J. Whatever may be the duty which the law imposes upon railroad companies in respect to giving signals when their
(64) trains are approaching crossings and regular stations, it is clear that it has no application to the case before us.

The Supreme Court of Alabama in *Railroad v. Hawk,* 18 Eng. and Am. R. R. Cases, 194, in construing statutes requiring such signals to be given, says: "These precautions, so far as applicable to persons, are intended obviously for the benefit of the traveling public, and others who have a right to be warned of approaching trains, for their personal protection against injury. Passengers who are on the trains are not ordinarily included in the letter or spirit of the statute. They do not need such signals of warning for their protection, and they cannot, therefore, be construed to be entitled to them." *Railroad v. Bendrow,* 92 Pa. St., 495.

The place of this accident was a mere wood station, and the train only stopped there for the purpose of taking on wood. The defendant was under no duty to give signals at such a place, except, perhaps, for the purpose of warning its employees, and they alone could take advantage of any omission in this respect.

Apart from this, however, we are of the opinion that the plaintiff was guilty of contributory negligence. "Railroad companies are only

bound to exercise due care that a passenger is not injured through their fault, and are not required to exercise such a supervision over him as absolutely prevents his being injured by his own fault. In other words, if a passenger voluntarily puts himself in a dangerous position he cannot claim indemnity from the company." 2 Wood's Railway Law, sec. 303. "The company, as held in some of the cases, cannot be expected to treat its passengers as children, or to put them under restraint. Passengers must take the responsibility of informing themselves concerning the every-day incidents of railway traveling, and the company could do business upon no other basis." *Mitchell v. Railroad,* 12 Am. and Eng. R. R. Cases, 165.

The plaintiff must have been aware of the dangerous position in which he placed himself. He was warned of this danger by (65) the regulation of the defendant forbidding passengers to ride upon platforms; he must have known of the sudden startings and joltings peculiar to freight trains, and he must also have known, when he placed himself upon the platform, that the train was likely to start at any moment. Notwithstanding all this, he leaves his seat in the coach and puts himself in this dangerous position, without even taking the simple precaution of supporting himself by holding to the railing, or anything else.

That no recovery can be had under such circumstances is, it seems to us, too plain for further discussion. See Wood's Railway Law, *supra,* and the notes.

There was no error in the ruling of the court.

Affirmed.

Cited: Browne v. R. R., 108 N. C., 45; *Denny v. R. R.,* 132 N. C., 345.

JESSIE DOUGLAS ET AL. v. THE RICHMOND AND DANVILLE RAILROAD COMPANY ET AL.

Removal to United States Circuit Court.

1. A stockholder in a resident corporation institutes an action against it and a nonresident corporation, alleging, among other things, that, under a contract between them, the latter holds a majority of the stock of the former and dominates it; that it has wrongfully diverted its funds; that, under its control, the former is about to unlawfully issue certain mortgage bonds, and asking for an account and an injunction, and for other relief: *Held,* that the resident corporation is a proper and necessary defendant, and

that the action is not removable into the United States Circuit Court, on petition of the nonresident defendant corporation.

2. In such action, the controversy is not wholly between citizens of different states, nor is there a separable controversy between the plaintiffs and the nonresident corporation.

(66) MOTION by the defendant, the Richmond and Danville Railroad Company, to remove this action to the United States Circuit Court in and for the Western District of North Carolina, heard before *Graves, J.*, at August Term, 1889, of GUILFORD Superior Court.

It appears that the plaintiffs are citizens of this State, within the district named; that the defendants, the Northwestern North Carolina Railroad Company and the North Carolina Railroad Company are corporations of this State, within said district; that the defendant petitioner is a nonresident corporation of the State of Virginia, and the defendants H. H. Marshall and E. A. Barber are citizens of the last named state.

The plaintiffs allege in their complaint that the defendant, the Northwestern North Carolina Railroad Company, is a corporation sufficiently organized under the laws of this State; that they are stockholders therein, and have been since about the time of its organization, and have respectively fully paid for their stock; that prior to March of 1872, said company had graded its road from Salem to Greensboro, a distance of about twenty-nine miles; that a large part of the cross-ties for the said road had been purchased, several depot buildings erected, and the company owned, besides its franchise, much other property of great value, the whole of the value of $200,000; that an agreement was made by and between the last named corporations, whereof the following is a copy:

"This agreement made and entered into this 29 March, in the year 1872, by and between the Northwestern North Carolina Railroad Company, a corporation chartered by the State of North Carolina, party of the first part, and the Richmond and Danville Railroad Company, a corporation chartered by the State of Virginia, party of the second part—

"Witnesseth, That the said party of the first part, in consideration of the covenants, agreements and understandings of the said
(67) party of the second part, hereinafter set forth, doth hereby agree and bind itself to the said party of the second part—

"1. That it will, upon the execution of this agreement, issue and deliver to the said party of the second part scrip for sixteen hundred shares of its capital stock, to be held and used by the said party of the second part as and for so many shares of full-paid stock.

"2. That it will issue and deliver to the said party of the second part its coupon bonds to the amount of five hundred thousand dollars in sums of not more than one thousand, and not less than one hundred dollars, payable at a period or periods of not less than nor more than thirty years from this date, at the option of said party of the second part, and bearing interest at the rate of six per centum per annum, payable semi-annually, coupons for said interest to be attached to said bonds, and that it will, at the same time execute, deliver and have lawfully and properly a good and sufficient deed of trust, in all its property, rights, privileges and franchises, to secure the said bonds and the interest that may accrue thereon—said deed to be in such form as to meet the approval of the said party of the second part, and so as to constitute the first lien upon all said property, rights, privileges and franchises.

"3. That the said party of the first part will at once proceed to demand and collect, as far as it can, all the unpaid subscriptions to its capital stock now outstanding, and as soon as collected pay the same to the said party of the second part: *Provided, however,* that the said party of the first part shall not be bound to demand the unpaid balance of about twenty-five thousand dollars on the subscription of Forsyth County, N. C., but unless said balance is paid by said county it (that is said county) shall be entitled to subscription for seven hundred and fifty shares only.

"4. That the said party of the first part will at once deliver (68) and hand over to the said party of the second part all the property, material and supplies of every kind which it has on hand, or which it has provided or contracted for.

"5. That the said party of the first part will, if so requested by the said party of the second part, cause a reorganization of its board of directors in accordance with the wishes of the said party of the second part, either by a meeting of its stockholders, to be called for that purpose, or by the action of its board of directors then in office. And in consideration of the foregoing agreements and covenants on the part of the said Northwestern North Carolina Railroad Company the party of the first part, the said Richmond and Danville Railroad Company, party of the second part, doth agree with and bind itself to the said party of the first part—

"1. That it will promptly complete for use and operation all that part of the line of the railroad of said party of the first part lying between Greensboro and Salem in North Carolina, providing therefor all necessary labor, material, iron and other supplies, which are not now on hand, or which may not have been provided by the said party of the first part, so as to finish that part of said line in a substantial, durable

and permanent style, with a good 'T' rail, weighing not less than fifty pounds to the yard; and that it will also build needful and customary structures and buildings, so that said line of railroad shall be ready for practical use on or before 1 January, 1873.

"2. That it will provide said line of railroad, when complete for use as aforesaid, with a sufficient and suitable equipment of rolling stock and machinery for its convenient and continued operation, upon such terms as may hereafter be agreed upon by the parties.

"3. That if the net earnings of said line of railroad shall be insufficient to pay the interest on the bonds aforesaid as it becomes due, it (the said party of the second part) will advance for and during
(69) the period of five years from 1 February, 1872, such sums of money as may be necessary to make up the deficiency, and prevent the property conveyed in the deed of trust aforesaid, or any part thereof, from being sold during said period of five years on account of any default made in the payment of interest; but any money so advanced is to be held as a debt against said party of the first part, and recoverable, with interest at the rate of eight per cent per annum from the time of payment, at any time after the said five years have elapsed, and the said party of the second part shall have the same lien upon the property, etc., conveyed in said deed, that any unpaid holder of coupons would have.

"4. The said party of the second part, moreover, agree to pay the following debts due by said party of the first part, to wit: Debt due F. & H. Fries, in the principal sum of $15,000; debt due J. G. Lash, in the principal sum of $7,500; debt due E. Belo, in the principal sum of $19,446.55, together with any interest which has accrued, or may accrue, thereon up to time of payment; also such other just demands against said party of the first part now executing, as the same have been, or shall be, hereafter liquidated and ascertained, not exceeding altogether the sum of two thousand dollars, all of which said debts to become due and payable by the said party of the second part, as soon as the bonds aforesaid, and the mortgage or deed of trust to secure them, shall have been properly executed and delivered as aforesaid, and the scrip for the said sixteen hundred shares of stock shall have been issued and delivered to the said party of the second part.

"It is distinctly understood and agreed that the said Northwestern North Carolina Railroad Company, party of the first part, shall procure the cancellation of all deeds of trust or mortgages which it has heretofore executed, that the deed contemplated by the agree-
(70) ments shall constitute the first lien on all its property, rights, privileges and franchises.

"It is, moreover, understood and agreed that the Richmond and Danville Railroad Company, party of the second part, may make such disposition of the bonds aforesaid as to it may seem most judicious.

"Witness," etc.

That in pursuance of such contract, certificates for 1,000 shares of said stock were issued to the defendant petitioner, and also the $500,000 of bonds secured by a deed conveying the property of the company owning the road as so contemplated; that—

"7. The plaintiffs allege, upon information and belief, that the said contract of 29 March, 1872, although absolutely in form, was not so intended by the parties thereto; and that the delivery of the $500,000 in bonds, and the issue of 1,600 shares of its capital stock by the Northwestern North Carolina Railroad Company, was with the purpose and intent that the said Richmond and Danville Railroad Company should hold the same as security for the payment of such sum or sums of money as should be expended by said company in the completion of said road, and lawful interest; or, if the said bonds should be disposed of by the said Richmond and Danville Railroad Company, that the proceeds thereof should be fully accounted for; and that the object and intention of the mortgage and contract was to secure the repayment of such an amount to said company, and no more; and that upon the payment thereof by the operating of said road and the receipt of the earnings and income therefrom, the said stock and bonds were to be returned to and become the property of said Northwestern North Carolina Railroad Company; that, in view of this understanding and agreement, the said Richmond and Danville Railroad Company have never parted with said bonds or made any absolute disposition of the same, but, by virtue of a provision in said contract, has deposited said bonds with the said (71) Northwestern North Carolina Railroad Company as collateral security for the payment of its rental, and the said bonds, or nearly all of them, are now held by the said Northwestern North Carolina Railroad Company as aforesaid; that the defendant petitioner did not comply with and perform said contract on its part, in many specified material respects; that it did not complete said road; that so far from finishing said road, as required by said contract, the same has not yet been completed, either as to the construction of its road-bed, cross-ties or iron rails, or as to the buildings or other structures necessary to its successful operation according to the terms of said contract; nor was said road put into such condition as to run trains thereon, or to use and operate the same, until about the middle of August, 1873.

"11. That, as plaintiffs are informed and believe, the said Richmond and Danville Railroad Company has paid tolls and rents to itself for

the use of its road-bed, depots, turn-tables, side-tracks, and in the hire of hands to operate the same, to a large amount, and charged the same to the expense account of said Northwestern North Carolina Railroad Company improperly—to the loss, injury and damage of the said Northwestern North Carolina Railroad Company to the amount of several thousand dollars, the precise amount not known to the plaintiffs.

"13. That, in pursuance of the contract between the Northwestern North Carolina Railroad Company and the Richmond and Danville Railroad Company, there were issued by the former and delivered to the latter company sixteen hundred shares of the capital stock of the former company of the par value of one hundred dollars each, as paid up stock, and also bonds of the former company to the amount of five hundred thousand dollars, bearing interest at the rate of six per cent per annum, payable semiannually, with coupons attached to cover
(72) said interest; and that the said Northwestern North Carolina Railroad Company, in pursuance of said contract, executed and delivered to said Richmond and Danville Railroad Company a deed of trust, conveying to H. H. Marshall and E. A. Barbour, trustees, who are herein sued only as such trustees, all its property, rights, privileges and franchises to secure the said bonds and the interest that might accrue thereon, a copy of which is hereto attached as a part of this complaint.

"14. That, as the plaintiffs are informed and believe, although the Richmond and Danville Railroad Company did not put the said road in order for use and operation until about the middle of August, 1873, notwithstanding its agreement to put the same in running order by 1 January, 1873, yet said Richmond and Danville Railroad Company has charged up to said Northwestern North Carolina Railroad Company interest on said bonds from the ..... day of ..... to the amount of ....., contrary to the true intent and meaning of said contract, it not being the purpose of said company to pay to said Richmond and Danville Railroad Company interest prior to the completion of said road.

"15. That, as these plaintiffs are informed and believe, the profits received by the Richmond and Danville Railroad Company from the operation of the said Northwestern North Carolina Railroad Company's line of road would, by the present time, if properly applied, have paid off the entire indebtedness of said last named company, and have left a large balance for dividends on its capital stock.

"16. That, as these plaintiffs are advised and believe, the said Richmond and Danville Railroad Company, chartered as aforesaid—under the laws of Virginia—had no power or authority under its said charter to purchase or hold the aforesaid stock or bonds of the said North-

western North Carolina Railroad Company, as the last named road did not and does not now connect with the said Richmond and Danville Railroad at any point. (73)

"17. That, as the said Richmond and Danville Railroad Company received from the said Northwestern North Carolina Railroad Company the sums of five hundred thousand dollars in first mortgage bonds and one hundred and sixty thousand dollars of its capital stock (being a controlling interest in the same), the said securities aggregating six hundred and sixty thousand dollars, of which amount it claims to have spent only the sum of two hundred and eighty-seven thousand six hundred and ninety-four dollars and thirty cents ($287,694.30) in the construction of said road, and, moreover, has utterly failed to complete said road from the junction to Greensboro, and to erect depot buildings and other needful and customary structures, all of which it was bound to do by its said contract, the plaintiffs are informed and believe that the said contract, even if in its inception it intended to convey the absolute title to said bonds and stock (which the plaintiffs deny), is no longer binding in law or in conscience upon the said Northwestern North Carolina Railroad Company, and that the said bonds and stock ought to be returned and become the property of the said Northwestern North Carolina Railroad Company on the repayment by it to the said Richmond and Danville Railroad Company of the amount properly expended by said last named company in the construction of said road, with lawful interest thereon.

18. That the charter of the said Northwestern North Carolina Railroad provided that the said road should be constructed in divisions—the first division to constitute that portion of said road lying east of the towns of Winston and Salem, which has been in operation since August, 1873; that no attempt was made to carry said road beyond said towns for about fourteen years; that the said Richmond and Danville Railroad Company, by force of its controlling interest in the capital stock, so improperly acquired and held as aforesaid, has elected its own (74) officers and agents as officers of the Northwestern North Carolina Railroad Company, and, through them, is attempting, or pretending, to extend the said first division beyond the point prescribed by the charter, and to issue bonds secured by mortgage on said first division to a very large amount, with the pretended purpose of constructing said extension to the town of Wilkesboro, all of which actings and doings are without authority of law and in gross violation of the rights and interests of the stockholders of the said Northwestern North Carolina Railroad Company.

"19. That the said Richmond and Danville Railroad Company, through its officers and agents, have assumed to manage and control the business and operation of the said Northwestern North Carolina Railroad Company, and to receive its gross earnings from its construction in 1873 to the present time, amounting to over seven hundred thousand dollars, for all of which it is liable to account to the said Northwestern North Carolina Railroad Company, but has failed to do so.

"20. That the officers of said Northwestern North Carolina Railroad Company, so elected and controlled by the Richmond and Danville Railroad Company as aforesaid, have failed to call regular annual meetings of the stockholders, as required by the charter and by-laws of said company—at one time not calling any such meeting for the period of nearly eight years—and have utterly failed to render to the stockholders, or any committee thereof, detailed statements showing the operations, receipts and disbursements of said company, as it was their duty to do; and have further failed to declare and pay to said stockholders the dividends to which they were justly entitled.

"21. That at a meeting of the stockholders of the said Northwestern North Carolina Railroad Company, held in the town of Winston
(75) on 21 April, 1888, the said Richmond and Danville Railroad Company, by means of the controlling interest so acquired and held by them as aforesaid in the capital stock of said Northwestern North Carolina Railroad Company, instigated and carried through said meeting, in spite of the written protest of the plaintiffs and other stockholders, a resolution authorizing the board of directors of said company to take up the existing mortgage bonds and to issue new bonds at the rate of fifteen thousand dollars per mile of the entire line of road, including the proposed extension, to the amount of about fifteen hundred thousand dollars ($1,500,000), and to secure the payment of the same, with interest thereon, by a first mortgage on all the property, rights and franchises of said company, and to issue additional capital stock at the rate of fifteen thousand dollars per mile to the amount of about one million five hundred thousand dollars, and to place the same upon the market; that the said issue of said bonds and stock as a lien upon the first division of said road, with the intent of devoting the proceeds thereof to the construction of the Yadkin Valley division of said road, is not authorized by the charter of said road, is in gross violation of the rights of stockholders in said first division, and will result in practically destroying the value of their stock, and that the said board of directors are now proceeding to carry out the purpose of the resolution.

"Wherefore, the plaintiffs demand judgment—

"1. That the contract and mortgage be declared a security only for the amount necessarily expended by the Richmond and Danville Railroad

Company in the construction of the Northwestern North Carolina Railroad Company from Greensboro to Winston, and that an account be taken to ascertain the true amount thus expended and the loss and damage resulting to the Northwestern North Carolina Railroad Company from the failure of said Richmond and Danville Railroad Company to complete said road according to its contract. (76)

"2. That an account be taken of the gross earnings and expenses of operating the Northwestern North Carolina Railroad Company.

"3. That an account be taken of all moneys received by the Richmond and Danville Railroad Company from the earnings of the Northwestern North Carolina Railroad Company, and from the sale of its bonds and stock, or from any other source connected with said road.

"4. That if any surplus moneys shall be found belonging to the Northwestern North Carolina Railroad Company, that the board of directors thereof be required to declare dividends in favor of its stockholders, and to pay out the same.

"5. That upon its being ascertained that the Richmond and Danville Railroad Company has been fully reimbursed for its outlay in the construction of the said Northwestern North Carolina Railroad, the bonds and stock issued to it as said security be delivered up to be cancelled.

"6. That the board of directors of said Northwestern North Carolina Railroad Company be enjoined from issuing or in any way disposing of any bonds or stocks constituting, in any way, a lien upon said first division of said road, for the purpose of the construction or completion of any other division of said road.

"7. And for such other and further relief as the nature and circumstances of the plaintiffs' case may require and to the court may seem meet and proper."

The defendants demurred to the complaint, substantially, upon the ground that it did not state facts sufficient to constitute a cause of action.

The defendant (petitioner) contended:

1. That the case was removable under the act of Congress of 3 March, 1887, because "there was a controversy between citizens of different states" in this case. That is, "that all the real parties in interest on the one side are citizens of a different state from all the de- (77) fendants on the other side."

2. That the controversy between the Richmond and Danville Railroad Company, defendant, and the plaintiffs, was a separable controversy, which the Richmond and Danville Railroad Company, a citizen of the state of Virginia, had the right to remove to the Circuit Court of the United States.

His Honor held both these questions against the defendant, the Richmond and Danville Railroad Company, and refused to remove either the whole case or the alleged separable controversy, and directed the parties to proceed with the case.

No other questions arose or were argued.

From this judgment, the Richmond and Danville Railroad Company, having excepted, appealed to this Court.

R. M. Douglas for plaintiffs.
D. Schenck and F. H. Busbee for defendants.

MERRIMON, C. J., after stating the case: It is not pertinent or proper to consider and determine here the sufficiency of the plaintiff's cause of action. The sole question presented for our decision is, is the action one which must, for the causes alleged in the petition, be removed, as to the petitioner, to the Circuit Court of the United States?

The act of Congress, approved 3 March, 1887 (24 U. S. Stats. at Large, p. 552), provides, among other things, in section 2 thereof, as follows: "And when, in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district." It

(78) is conceded that the cause of action alleged in the complaint constitutes a "controversy," of which such Circuit Court might have jurisdiction, in cases contemplated and intended by the statute.

But it is contended by the appellees that such controversy is not *"wholly"* between citizens of different states, and, therefore, the action cannot be removed. This contention, in our opinion, is well founded. It appears that the plaintiffs are citizens of this State; that the defendants, the Northwestern North Carolina Railroad Company and North Carolina Railroad Company are likewise corporations of this State, and that the other defendants, including the petitioner, are citizens of the state of Virginia. Plainly, if the parties, plaintiffs and defendants, are all material and necessary as made, or if one of the defendants, a citizen of this State, is a material and necessary party defendant, and the citizenship of the several parties is as just stated, then the action cannot be removed, because the controversy is not *wholly* between citizens of different states. Hence, it is not denied by the appellant that if the defendant, the Northwestern North Carolina Railroad Company, is a

material and necessary party defendant, and the controversy cannot "be fully determined between" the plaintiffs and the defendants petitioner without it as a party, then the action cannot be removed. It is contended, however, by the petitioner that the Northwestern North Carolina Railroad Company is not a necessary party defendant; that in contemplation of law it is, and must be, treated as a party plaintiff. We cannot think so. If the allegations of the complaint are well founded, the defendant petitioner purports to own a majority of the shares of the capital stock of that company, elects its officers, directs and controls its actions in all respects, and it, under the direction and by the procurement of the petitioner, has done, and does, the unlawful, unwarranted acts and injuries of which the plaintiffs complain; it denies their right—that their allegations are true—and refuses to redress their (79) alleged grievances. The action is brought directly against it by a minority of the stockholders of that company, to compel it and the defendant petitioner, which holds a majority of the shares of its capital stock and dominates it, to account for its property, injuries done to the same, the use and rents of it, its money, its rights and credits, to compel the petitioner to surrender its coupon bonds secured by the deed of trust mentioned, to surrender the shares of the capital stock of the company held by the petitioner, which it alleges it took and holds as security merely, and to account for property, moneys, etc., diverted unlawfully and wrongfully to the use and purposes of the petitioner. It seems to us very clear that the plaintiffs' cause of action is against the Northwestern North Carolina Railroad Company as well as the petitioner, and that it is a necessary and proper defendant in this action. Their controversy is directly with that company, and with the petitioner who controls it and claims to own a majority of the shares of its capital stock. A chief ground of the action is that the officers of the company and the petitioner holding a majority of the shares of its capital stock, wrongfully, injuriously and oppressively, deprives the plaintiffs of their rights and endamages them in the ways and by the fraudulent means alleged. The Northwestern North Carolina Railroad Company is, therefore, a material party defendant and a citizen of this State. Hence, the action cannot be removed on the ground that the controversy is wholly between citizens of different states. *O'Kelly v. R. R.*, 89 N. C., 58; *Gudger v. R. R.*, 87 N. C., 325; *Hyde v. Reeble,* 104 U. S., 407.

What has been already said serves to show that the controversy between the parties cannot "be fully determined as between them," if the action shall be divided and one part of it shall remain in the State court and the other part sent to the Circuit Court of the United States. The

(80) cause of action is not divisible. The State court could not grant the relief demanded by the plaintiffs in scarcely any respect, in the absence of the petitioner defendant; nor could the Circuit Court of the United States grant the relief demanded against the petitioner in the absence of the other principal defendants. Their liability, if it exists, is, to a large extent, common, and the remedy, to a like extent, must be against them jointly. This is too obvious to require further explanation. What we have said rests upon the supposition that the plaintiffs have alleged sufficiently a well founded cause of action. Whether they have or not, as we have said, is a question not now before us to be decided. *Ayer v. Wiswall,* 112 U. S., 187; *Railroad Co. v. Wilson,* 114 U. S., 60; *Railroad Co. v. Ide, ibid.,* 52; *Thorne Wire Hedge Co. v. Fuller,* 122 U. S., 535; *Lordly v. Worthington,* 121 U. S., 179.

It is not the purpose of the act of Congress cited to allow or require that a civil action wherein the controversy is not wholly between citizens of different states, but is between citizens of the same state, and others, citizens of a different state or states, to be removed to the Circuit Court of the United States, as to a nonresident defendant, unless such controversy can "be fully determined as between them"—all the parties to the action, as constituted therein. If it were otherwise, an action could never be completely determined, and there would be, practically, a denial of right and justice. It is only where there is more than one defendant in the action, and one or more of them are citizens of another or other states, and the cause of action as to a nonresident defendant may be divided and fully determined, as to him, as if he had remained in the action in the State court, that he has the right to have the action, as to him, removed into the Circuit Court of the United States. Otherwise, complete justice could not be done. The purpose of the law, in allowing such removals of actions, is not to allow or help parties to evade

(81) justice, but to enable them to avoid, in a measure, possible local prejudice, to promote fair convenience of parties, and to give nonresidents the advantage, if there be any, of litigating in a court, in a larger sense, common to all the states of the union.

Affirmed.

Cited: Bowley v. R. R., 110 N. C., 317; *Baird v. R. R.,* 113 N. C., 610; *Faison v. Hardy,* 114 N. C., 434.

GRANVILLE COUNTY BOARD OF EDUCATION v. THE STATE BOARD OF EDUCATION.

State Board of Education—Action to Compel Public Officer to Perform Duty—Removal of Action.

1. The State Board of Education is an incorporated body, with capacity to sue and be sued.
2. An action lies to compel public officers to discharge mere ministerial duties not involving an official discretion.
3. A motion to remove an action to another county cannot be made after answer filed, although there was time given within which to file answer which has not expired.

MOTION to remove action to WAKE County, heard at January Term, 1889, of GRANVILLE Superior Court, before *Bynum, J.*

The plaintiff brought action against the defendant to September Term, 1888, of Granville Superior Court, which term began on 10 September, 1888. Service was accepted by the Governor on 15 September, 1888.

The plaintiff was then allowed thirty days to file complaint, and the defendant was allowed sixty-five days to file answer.

The complaint was filed on 24 September, 1888, and the answer (82) was filed on 23 November, 1888.

In this complaint the plaintiff prayed that the defendant be required to issue its warrant on the State Treasurer for the sum of eight hundred and twenty-five dollars and twenty-five cents, alleged to be due the plaintiff on account of money withheld from it by defendant in 1886. After the pleadings were filed, and at the succeeding term of the court, to wit, November Term, 1888, which commenced on 26 November, 1888, the defendant made, in open court, a motion to have said action removed to the Superior Court of Wake County for trial. The motion, which was not in writing, but *viva voce,* was made before Judge Shipp, then holding the court of the Fifth Judicial District.

There is no record showing upon what ground the motion was based, the only record being as follows:

"By consent, the motion to remove this cause to the county of Wake is continued."

At January Term, 1889, the motion was heard by the court. The defendant then based its motion on two grounds, arising under section 191, paragraph 2, and section 195 of The Code. The plaintiff's counsel insisted that the motion which was made at November Term, 1888, was only under section 195, addressing itself to the discretion of the court.

The court heard the motion on both grounds, and refused to remove the action, under section 195, as a matter of discretion, and declined to grant the motion to remove as a matter of right, under section 191. The action of the court was not based upon the ground that the motion was not reduced to writing, but that section 191 did not give the defendant, in this particular case, a legal right to have the cause removed to the county of Wake.

The defendant excepted to the ruling of the court in refusing to remove said cause to the Superior Court of Wake County, under
(83) section 191, and appealed.

A. W. Graham for plaintiff.
J. B. Batchelor and John Devereux, Jr., for defendant.

CLARK, J. The defendant moves to dismiss the action on the ground that the defendant is only an agency of the State, and the court has no jurisdiction to entertain the action, as the State does not consent to be sued. The Code, sec. 2503, incorporates the defendant, and directs, among other things, that it "may sue and be sued as such." This is sufficient consent, if such be necessary. In *Bain v. State,* 86 N. C., 49, the Court expressly holds that the Insane Asylum can be sued. Actions against that institution, and against the other great State agency and charity, the Institution for the Deaf and Dumb and the Blind, have been entertained by the courts. *Ellis v. North Carolina Institution for the Deaf and Dumb and the Blind,* 68 N. C., 423, and other cases.

Even were not this beyond question, as the proceeding is to compel public officers to discharge a mere ministerial duty not involving an official discretion, the action will lie. *R. R. v. Jenkins,* 68 N. C., 502; *Marbury v. Madison,* 1 Cranch, 49. The duties here sought to be enforced are purely ministerial. The Code, secs. 2535 and 2537.

The defendant was allowed sixty-five days to file answer. It filed its answer before the time was out. After answer filed, but within the sixty-five days, it made the motion to remove, and from the refusal thereof appealed. The plaintiff contends that the motion came too late. The point is an adjudicated one. In *McMinn v. Hamilton,* 77 N. C., 300, it is held, "if the defendant pleads to the merits of the action, he will be taken to have waived the objection" to the venue. To same effect *Lafoon v. Shearin,* 91 N. C., 370, and *Morgan v. Bank,* 93 N. C., 352. In the latter case, the Court say, "the objection must be made *in limine* before putting in answer." It is true that here the motion to remove was
(84) made before the lapse of the time allowed defendant to answer, but it was after the answer was filed and it had pleaded to the

merits. By its own choice it had shortened the time allowed it, and, after filing the answer, there was no further time in which an answer could be filed. The time for answering expired when the answer was filed.

Affirmed.

Cited: Shaver v. Huntley, 107 N. C., 627; *Chemical Co., v. Board of Agriculture,* 111 N. C., 136; *Russell v. Ayer,* 120 N. C., 186; *Lucas v. R. R.,* 121 N. C., 508; *Howard v. R. R.,* 122 N. C., 947; *Ducker v. Venable,* 126 N. C., 449; *White v. Auditor, ibid.,* 580, 595, 613; *Moody v. State Prison,* 128 N. C., 13; *Riley v. Pelletier,* 134 N. C., 318; *Barnes v. Comrs.,* 135 N. C., 38; *Nelson v. Relief Department,* 147 N. C., 104; *Trustees v. Fetzer,* 162 N. C., 246; *Fisher v. Comrs.,* 166 N. C., 240; *Bickett v. Tax Commission,* 177 N. C., 434; *Zucker v. Oettinger,* 179 N. C., 278; *Refining Co. v. McKernan, ibid.,* 317; *Carpenter v. R. R.,* 184 N. C., 404; *Board of Education v. Comrs.,* 189 N. C., 652; *Clark v. Homes, ibid.,* 710.

NOAH E. WYRICK, EXECUTOR, v. MARY E. WYRICK ET AL.

Statute of Limitations—Final Account of Administrator.

The administrator of A. filed an *ex parte* final account in May, 1875, showing a balance due the next of kin. The administrator died in April, 1883. In May, 1883, the plaintiff qualified as his executor, and in September, 1884, began a proceeding to make real estate assets, to which the administrator *de bonis non* of A. became a party, and filed a complaint to recover the amount due on said final account: *Held*, that the date when the action of the administrator *de bonis non* was commenced was the date when the summons issued in the special proceeding to make real estate assets and that the statute of limitations (The Code, sec. 159) did not bar the action.

THIS was an issue of debt, arising in a proceeding to make real estate assets, and tried before *Bynum, J.,* at February Term, 1889, of GUILFORD Superior Court.

Noah E. Wyrick, executor of George Wyrick, deceased, filed his application to sell real estate to create assets for the payment of debts of his testator. Summons issued and complaint filed 22 September, 1884. The defendant, Barbara Cable, a daughter and devisee of plaintiff's testator, whose lands were charged with the payments of debts, filed an

answer denying the necessity of the sale. An account was taken
(85) by the clerk, report made and exceptions filed. The exceptions were argued before his Honor, Judge Shipp, at August Term, 1888, at which term Thomas Webb, administrator *de bonis non* of one Jane Green, was allowed to become a party, and he on 14 November, 1888, filed a complaint alleging that there was due the estate of his intestate, as appeared by the settlement of her estate by George Wyrick, her administrator, for distribution among her next of kin on 11 May, 1875, the sum of one hundred and thirty-three dollars and sixty-eight cents ($133.68), to which complaint the defendant, Barbara, and her husband filed an answer, alleging that the distributees had been paid, and pleading the statute of limitations.

The following facts were admitted or found:

That George Wyrick, testator of petitioner, Noah E. Wyrick, became the administrator of Jane Green, deceased, on the ..... day of February, 1873, and that on 11 May, 1875, his final account as such administrator was filed and audited; that there was on that last named day in his hands for distribution among her next of kin one hundred and thirty-three dollars and sixty-eight cents; that said George Wyrick died on 22 April, 1883, and Noah E. Wyrick qualified as executor 7 May, 1883; that the plaintiff, Webb, became administrator *de bonis non* of Jane Green on 29 April, 1886.

The defendant, Barbara Cable, contended that as this action was brought for the benefit of the distributees that the action of plaintiff, Webb, was barred by the statute of six years, seven years and ten years, as pleaded in the answer, and argued further to the court, that plaintiff Webb's action not being on an official bond, was barred after the lapse of three years from 11 May, 1875.

His Honor held that the date of plaintiff Webb's action was the date of the issuing of the summons of Noah E. Wyrick, executor, to wit,
22 September, 1884, and instructed the jury to find that the
(86) plaintiff Webb's action was not barred by the statute of limitations. To which ruling and instructions the defendant, Barbara, excepted.

There was a verdict for plaintiff, Webb, and judgment, from which the defendant, Barbara, appealed.

No counsel for plaintiff.
J. T. Morehead for defendant.

SHEPHERD, J. The only question necessary to be considered in order to dispose of this appeal is whether the claim represented by James

Webb, as administrator *de bonis non* of Jane Green, is barred by the statute of limitations.

When George Wyrick, the administrator of the said Jane Green, filed his *ex parte* final account, on 11 May, 1875, it did not have the effect of closing the trust as between him and the distributees, so as to put in operation any statute of limitation for a shorter period than ten years.

Before the adoption of the Code of Civil Procedure there was no statutory limitation or presumption which was put in force by the simple filing of such an *ex parte* final account, and the courts applied only the common law presumption of payment arising from the lapse of many years of inaction. *Davis v. Cotten,* 2 Jones' Eq., 435; *McCraw v. Fleming,* 5 Ired. Eq., 348.

For the reasons given in *Woody v. Brooks,* 102 N. C., 334, we think that The Code, sec. 159 (which bars all actions in ten years which are not specially provided for), applies to such cases, as it does also to an action brought to impeach such final account. We are of this opinion because it was the evident purpose of The Code to prescribe a period of limitation to all actions whatsoever, and thus make it a complete statute of repose. Where, however, there has been a settlement between the trustee and *cestui que trust,* or a final determination of the amount due by a decree of court, the trust is closed, and an (87) action will be barred within three years from a demand and refusal. *Spruill v. Sanderson,* 79 N. C., 466; *Whedbee v. Whedbee,* 5 Jones' Eq., 393; *Barham v. Lomax,* 73 N. C., 78; *Woody v. Brooks, supra.*

Applying these principles to the case before us, it is clear that up to the time of the commencement of this proceeding, in 1884, the claim of the distributees was not barred. Only eight years ran against the distributees up to the death of the administrator, and this proceeding was commenced by his executor about a year afterwards. So that, from the filing of the final account in 1875 to the beginning of the proceeding, but nine years have elapsed.

Even if the trust had been closed by a decree declaring a balance due the distributees, the claim would not be barred, as it does not appear that there was any demand and refusal.

If, then, the claim was not barred when this proceeding was instituted it is not barred at all, as the very purpose of the proceeding is to subject the lands of the testator to the payment of this and all other indebtedness of the estate. James Webb, the administrator *de bonis non,* was not a necessary party, since, for the purposes of the proceeding, he and all others having legal demands against the estate were repre-

sented by the plaintiff executor. Especially is this true as to this particular claim, as the executor acknowledges it, and asks that it be paid.

His Honor was, therefore, correct in holding that the claim was not barred.

Judgment affirmed.

Cited: Kennedy v. Cromwell, 108 N. C., 2; *Culp v. Lee,* 109 N. C., 678; *Edwards v. Lemmond,* 136 N. C., 331; *Brown v. Wilson,* 174 N. C., 670; *Pierce v. Faison,* 183 N. C., 180.

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(88)

THE TOWN OF HENDERSON v. OWEN DAVIS ET AL.

Jurisdiction—Title to Land—Action for Penalty for Obstructing Street —Election, Validity of—Proceeding to Open Street—Notice to Land-owners—Insufficient Evidence.

1. The title to land is not in controversy in a proceeding to recover a penalty prescribed by a town charter for obstructing a street.
2. The charter of a town provided that an election on the question of accepting the charter should be held after ten days notice. The minutes of the commissioners showed that an election was held in accordance with the provisions of the charter, the number of votes cast, and the affirmative majority: *Held,* that the required notice was sufficiently implied.
3. The regularity and validity of an election cannot be collaterally attacked.
4. Where, on the trial of an action to recover a penalty for obstructing a street, it did not appear that notice had been given to adjacent landowners of the purpose of the assessors to assess the advantage and disadvantage, or that such assessment and report thereof had been made, or that the street was opened for public use, or that it was used as a public street at any time: *Held,* that there was not sufficient evidence to go to the jury to prove the existence of the street, or that the defendant had obstructed it.

CIVIL ACTION, originally begun before the mayor of the town of Henderson, and tried before *Armfield, J.,* at Spring Term, 1889, of the Superior Court of VANCE County.

This action was begun to recover the penalty of ten dollars incurred by an alleged violation of an *ordinance* of the plaintiff, whereof the following is a copy:

"Article 3, sec. 1. Any person or persons allowing obstructions to remain or continue in any street, or streets, or alleys in the town of

Henderson, after having been notified by the town constable, shall be fined ten dollars for each day said obstructions shall be allowed to remain.

On the trial before the mayor, the defendant suggested "that (89) the land in controversy is not a street, but the property of the defendant and others," and he insisted that, therefore, the mayor had no jurisdiction. There was judgment for the plaintiff in the mayor's court, and the defendant appealed to the Superior Court. The following is a copy of so much of the case stated on appeal as need be reported:

The defendants moved to dismiss the action because the mayor had no jurisdiction to try the same, because, upon defendants' answer, the title to land was put in issue and involved. His Honor overruled the motion, and defendants excepted.

The plaintiff then offered the charter of the town of Henderson, ratified by the General Assembly 1 April, 1869, and, to show an acceptance of said charter as required by the fifty-first section thereof, introduced the minutes of the proceedings of the commissioners of the town of Henderson, dated 10 April, 1869.

The defendants objected to the reading of said charter, because it appeared affirmatively by the minutes that the election to accept the charter was not held after the ten days' notice required by law.

The plaintiff then introduced an act of the General Assembly (ch. 51, Laws 1883), amendatory of the charter of said town. His Honor thereupon overruled defendants' objection, and allowed the charter to be read, and defendants excepted.

The plaintiff then offered to show that the land in controversy had been duly condemned for the purpose of a street in said town, and, to that end, offered a paper marked "D."

The defendants objected to the reading of said paper—

1. Because it did not appear that there was ever any cause constituted between the plaintiff and defendants in Granville Superior Court in this behalf.

2. It did not appear that there was any cause constituted in (90) said Superior Court at all.

3. That it did not appear that there was any law authorizing the report of the action of the commissioners appointed to open or widen streets in Henderson to be recorded in said Granville County.

4. It did not appear that the defendants were parties to said so alleged record.

5. That said paper was a record of Granville Superior Court.

Objection overruled. The paper was read, and defendants excepted.

The defendants then objected to the alleged condemnation of said land because it did not appear that the damages assessed in favor of the several parties, to wit, Reavis and Calvin Betts, had ever been paid to them in hand, or paid into the office of the clerk of the Superior Court of Granville County, as provided by the charter.

His Honor overruled the objection and the defendants excepted.

It was admitted by the defendants that, in the summer of 1885, they openly, and under a claim of title, entered upon the land in controversy, which is a portion of what is called Breckenridge Street in Henderson, built houses thereon, and have had continuous possession thereof up to the time of suing out the warrant in this cause.

Defendants then offered to show that they had perfect title to the land in controversy, claiming the same through Calvin Betts, among others, and that he was the same Calvin Betts for whom the sum of two hundred and fifty dollars was assessed as damages to said land; and also that said sum has never been paid to said Betts, nor the ancestors of the defendants, who were the immediate grantors of said Betts, nor was ever deposited in the clerk's office of Granville Superior

(91) Court.

His Honor refused to allow any of said evidence to be offered, and defendants excepted.

The plaintiff offered, without objection, the minutes of the board of commissioners of the town of Henderson, dated 22 June, 1870, 23 June, 1870 and 11 July, 1870, showing the condemnation proceedings as recorded by said board, in addition to a transcript of the record of the report of the three assessors, the said transcript being objected to.

The defendants failed to offer any testimony as to the payment of the money due Betts into the office of the clerk of the Superior Court.

A copy of the ordinance passed 10 May, 1888, was handed to the defendants in three weeks after the ordinance was passed.

The defendants did not offer to prove title, except through Calvin Betts.

His Honor charged the jury that, if they believed the evidence, they should find the issue in favor of the plaintiff, to which charge the defendants excepted.

The jury found the issue for the plaintiff.

The court gave judgment for the plaintiff, and the defendants appealed.

A. W. Graham, R. W. Winston and A. C. Zollicoffer for plaintiff.

H. T. Watkins, E. C. Smith (by brief), G. H. Snow and T. C. Fuller for defendants.

MERRIMON, C. J. The objection that the mayor's court did not have jurisdiction of the action because "the title to land was put in issue and involved," is without force. The title to real estate was not in controversy, in the sense of the Constitution (Art. IV, sec. 27), or of the statute (The Code, secs. 834, 836, 837). The substance of the controversy was, whether or not a public street of the plaintiff had been established, and whether or not the defendants had obstructed the same, in violation of the ordinance specified, and (92) thus incurred the penalty sued for. If the street were established, it was not material to inquire who had title to the land subject to the right of the public. Then, obviously, the mayor had jurisdiction of the action. (Private Acts 1868-69, ch. 79, sec. 15; The Code, sec. 3818.)

Nor can the second exception be sustained. The minutes of the proceedings of the commissioners of the town of Henderson pertinent were put in evidence without objection. They show that an election was held "in accordance with" the section of the statute requiring it to be held, the number of votes cast "for the charter," and the number cast "against the charter," and the majority in favor of accepting the same, and they recite, and the commissioners certify, "that the election was held, in all respects, in accordance with the provisions of said charter," etc. The minutes are such as the statute (Private Acts 1868-69, ch. 79, sec. 51) requires, and certainly imply sufficiently that the notice of election required was given. Besides, the minutes showing that an election was held as directed by the statute, the presumption is that notice was given as required. It does not appear that there was any irregularity as to the election referred to, but if there had been, the Legislature cured the same by recognizing and amending the charter of the plaintiff by the statute (Acts 1883, ch. 51). Besides the charter had prevailed and been observed for nearly twenty years. Moreover, the election could not be attacked in a collateral proceeding. If the defendant was not satisfied with the result of the election mentioned, he should have contested it by proper action brought for the purpose in apt time.

The record in this case is very informal and confused, and the statement of the case on appeal for this Court is imperfect, particularly in stating material evidence that it seems must have been produced on the trial. It does not appear, unless by very vague inference, that a street called "Breckenridge Street"—that alleged to have been (93) obstructed by the defendant—was ever located, laid out, established and used by the public at all in the plaintiff town. "The condemnation proceedings as recorded by" the board of commissioners of the plaintiff put in evidence show that on 22 June, 1870, an order was

made by such commissioners, not to lay out such street, but that three freeholders, named, "Be requested to act as appraisers to assess the advantages and disadvantages in opening Breckenridge Street from Chestnut Street to William Street"; that the freeholders so appointed made report, and that their report was adopted by the commissioners. It further appears that the freeholders so appointed returned their valuation and report in respect thereto to the Superior Court of the county of Granville, as the statute required them to do. In that report they state that having been appointed assessors "by the commissioners of the town of Henderson, being duly sworn to view and assess the advantages and disadvantages to the owners of the land arising from the laying off and widening of certain streets in said town of Henderson, and they say that they have viewed the premises on Breckenridge Street, from Garnett Street to Chestnut, and find that no damage accrues to the owners of land on the righthand side of Breckenridge Street, going down from Garnett to Chestnut Street by reason of widening said streets as proposed. . . . Calvin Betts, who owns a lot in this Breckenridge Street at its mouth on Garnett Street, the majority of the assessosrs think is damaged $250, and we so award," etc.

The proceedings, the substance of which is thus stated, constitute all the evidence, so far as appears from the record, produced to show that "Breckenridge Street" was indeed such. It does not appear that the freeholders, assessors, or any other authority whatever gave the land-
owners, whose land and advantage and disadvantage they as-
(94) sessed, any notice by personal service or otherwise, of their pur-
pose to assess the same, or that they had made such assessment and made report thereof to the commissioners and to the Superior Court of Granville County. It does not appear that this street was opened for public use, or that it was used as a public street at any time. It does not sufficiently appear, as it should do, that the commissioners of the plaintiff exercised their jurisdiction and authority conferred by its charter (Private Acts 1868-69, ch. 79, sec. 42), to obtain required right-of-way, and open new streets, as to the alleged street in question. If it appeared that it had been laid out—opened—used by the public—that the town authorities had exercised control over it, then there might arise a strong presumption that it had been esablished by proper authority. In that case, all persons interested would have been put on notice, and they might have taken steps to question, by proper legal methods, the regularity and validity of the action of the commissioners in so opening the street.

It appears in *S. v. Davis,* 68 N. C., 297, cited by the counsel of the plaintiff, that the road in question in that case "was definitely established as a public highway, and an overseer was appointed." And in *S. v. Lyle,* 100 N. C., 497, a survey had been made under the direction of the town authorities and the owner of the lot affected had notice; the street commissioners had been directed, by order, to notify all persons as to encroachments on the streets, etc. In those and like cases it appeared that the proper authorities had exercised their authority, had laid out the road, and were proceeding to widen the street. It may be that the plaintiff's proper officers did so, but it should appear that they did. If it so appeared, possibly it might be inferred that the assessment in favor of Calvin Betts had been paid, and all proper intendments and presumptions would prevail in favor of the regularity and validity of their action. We are constrained to hold that there was not evidence to go to the jury to prove that there was a street of the plaintiff called "Breckenridge Street," and that the de- (95) fendants had obstructed the same as alleged. Hence, there is error, and the defendants are entitled to a new trial, and we so adjudge.

Error. *Venire de novo.*

JAMES A. BRYAN AND WIFE v. WASHINGTON SPIVEY ET AL.

Action to Recover Land—Severance of Suits—Discretion of the Judge—Possession—Complaint, Etc.

1. The owner of land, or of several contiguous tracts consolidated into one body, may bring a single suit to recover possession against a number of trespassers, and it is sufficient to allege that plaintiff is in possession of some part of it.

2. It is within the sound discretion of the court, on motion of the defendants, or any of them, to allow severance and a separate trial as to each defendant if thereby justice will be promoted. But when the court held that the defendants had a right to demand it, it was error, and the judgment rendered upon such holding must be reversed.

3. An order of severance is equivalent to dividing the action into several suits, with all the usual provisions for costs, etc., incident thereto.

THIS was an action heard before *Boykin, J.,* at Fall Term, 1889, of CRAVEN Superior Court, upon a motion by the defendants, upon the pleadings and the affidavit, a copy of which is hereto annexed, for a severance and separate trial of said action against each defendant.

His Honor held that, as a matter of right and as the only way in which the case could be tried to do full justice between the parties, the defendants were entitled to a severance and separate trial, and so ordered. The plaintiffs excepted and appealed.

(96) It was agreed that no exception should be taken to said appeal at this stage of the action.

P. J. Lee, being duly sworn, says that the defendants in the above entitled cause, in addition to the answer heretofore filed, respectfully present to the court the following statement of facts:

"That the tract of land set forth and described in the complaint, of which plaintiffs seek possession in this action, embraces a large village, or town, situated opposite the city of Newberne, on the Trent River, known as James City; that said town was settled some time during the late war between the States, and that most of the defendants have resided therein since the first settlement, or soon thereafter; that there was, at the time of the institution of this suit, and is at this present time, about fifteen hundred inhabitants in said James City, and about four hundred separate lots or parcels of land, on which there are houses inhabited by families, besides churches, school houses, etc., used by the inhabitants thereof; that in most instances these separate lots have been occupied and held by the persons resident thereon as their own property, many exchanges and some sales by deed being made among the inhabitants, and on the death of the parties in possession, as aforesaid, their widows and children, or heirs at law, have taken and retained possession of said property and occupied and held the same as their own; that in their defense to this action, the defendants claim title and the right to possession under a general deed of conveyance affecting all of the defendants, and their respective possessions of their separate pieces or parcels of land under the general deed of conveyance aforesaid; and further, defendants claim title and right of possession as aforesaid by reason of their separate possession of separate tracts or lots of land, each possession being independent of the other, and a number of the defendants have deeds of conveyance to as many independent separate pieces or lots of land included within the gen-

(97) eral conveyance above mentioned, which they hold as colors of title claiming possession by metes and bounds under each of said deeds; that defendants make their defense on their different muniments of title as stated; that the facts herein set forth are stated on advice, information and belief; that in addition to the above the defendants are informed and believe that another action has been commenced, returnable to this term of this court, by the said plaintiff, against over three hundred of the inhabitants of the said James City, as they are advised

and believe, to recover from said inhabitants the lands claimed by them in said James City, the same being part of the land described in the complaint in this action. PHILIP J. LEE.

Sworn to and subscribed before me this 2 December, 1889.
JAS. C. HARRISON, *Deputy Clerk Superior Court.*

COMPLAINT

The plaintiff complains of the defendants, and alleges—

1. That they are owners in fee of the realty following, to wit: Beginning on the south side of Trent River at Ferry Point at the south end of the railroad bridge, and running up with the east side of Trent River to the main road at the east foot of the Trent bridge; thence down and with the public road leading from Newberne to Beaufort, in Carteret County, south 79° east 349 poles, to Scott's Creek; thence down and with the same to Edward Parish's corner; thence with his southwest lines to Neuse River; thence with the river northwesterly to the beginning.

2. That they are entitled to the immediate possession thereof.

3. That the defendants are in possession thereof and wrongfully withhold the same from the plaintiffs.

Wherefore, the plaintiffs demand judgment— (98)

1. For the possession of said premises.

2. That they are entitled to the same in fee simple absolute.

3. For $500 damages for withholding the same.

James A. Bryan, one of the plaintiffs above named, being duly sworn, says that the facts set forth in the above complaint are true of his own knowledge, except as to those matters stated therein on information and belief; as to those he believes them to be true.

JAMES A. BRYAN.

Sworn and subscribed to before me this ..... day of November, 1881.

ANSWER.

All of the defendants named in the summons in the above case, answering the complaint herein filed, save and except Willis Claggan and Peter Claggan, say:

1. That they deny the first allegation of the complaint.

2. That the second article of the complaint is not true.

3. That the third article of the complaint is not true.

Wherefore, the defendants pray judgment—

1. That said case may be dismissed, and that they may go without day.

2. That they may have judgment against the plaintiffs for costs.

State of North Carolina—Craven County.

Philip Lee and Southey B. Hunter, being duly sworn, depose and say that they are defendants in the above action, and that the facts set forth in the foregoing answer, as of their own knowledge, are true; those stated upon information and belief, they believe to be true.

SOUTHEY B. HUNTER.
PHILIP J. LEE.

Sworn to and subscribed before me this 20 June, A. D. 1882.

(99) *W. W. Clark for plaintiff.*
C. Manly and F. M. Simmons for defendants.

AVERY, J., after stating the facts: In actions to recover land it is sufficient if the complaint distinctly describe a tract of land and allege that the defendant is in possession of some part of it. *Speight v. Jenkins,* 99 N. C., 143. It is a well established rule that a number of trespassers, who have settled upon different parts of one tract of land, or upon several, that are contiguous and have been consolidated by the owner of them into one body, may be sued in a single suit brought by the latter to recover possession and have the title adjudicated. *Thames v. Jones,* 97 N. C., 121; *Love v. Wilbourn,* 5 Ired., 344; *Lenoir v. South,* 10 Ired., 237.

After such an action has been brought, it is within the sound discretion of a *nisi prius* judge, on motion of the defendants, or any of them, to allow a severance and a separate trial of the issue of title and possession as to each defendant, if, in the opinion of the court, "justice will thereby be promoted." The Code, sec. 407. It was error to hold that the defendants had a right to demand separate trials, and, as the judge made the order upon the ground that he was not at liberty to deny the motion, the judgment of the court must be reversed, to the end that a similar motion may be submitted and passed upon in the exercise of a purely discretional power.

Where an order of severance is made, it is equivalent to dividing one into a number of distinct actions with almost all of the expense that would have been incident to a suit against each alleged trespasser, and, therefore, it is proper that every defendant should be required to pro-

ceed in the same way, or to make the same provision as to securing the costs of trying the issues involving his own title and possession as if he had been the sole defendant. The Code, sec. 227.

It is, moreover, within the discretion of the court to require (100) each of the defendants, in a case like this, after severance, to file an answer in the nature of a bill of particulars specifically describing the land claimed by him, and disclaiming as to the other land embraced in the deed declared upon by the plaintiff. The Code, 259; *Fitzgerald v. Shelton,* 95 N. C., 519. There is error. The judgment appealed from is reversed.

Error.

Cited: Pretzfelder v. Ins. Co., 116 N. C., 496; *Lucas v. R. R.,* 121 N. C., 509; *Weeks v. McPhail,* 128 N. C., 137.

W. A. SOUTHERLAND, ADMINISTRATOR, v. WILMINGTON AND WELDON RAILROAD COMPANY.

Negligence—Agency—Res Gestæ—Hearsay—Judge's Charge—Competency of Evidence.

1. What an agent says while doing acts within the scope of his agency is admissible as a part of the *res gestæ*, but what he says afterwards concerning his acts is hearsay and inadmissible.
2. When, in an action against a railroad for negligence in killing the plaintiff's intestate by its locomotive, a witness was allowed to testify what he heard the engineer in charge say *after* the killing occurred: *It is held* to be *error.*
3. Nor was such error cured by the subsequent admission of the engineer upon his examination at the trial that he had said what the witness had testified to.
4. If the evidence was competent to contradict when the statements of the witness conflicted, still it was the duty of the judge to instruct the jury that they could consider it only for this purpose.
5. Incompetent evidence, which *might* prejudice the minds of the jury, should not be admitted.
6. When it does not appear affirmatively that there was error in the judge's charge, this Court will assume it to be correct.

THIS was a civil action, tried before *Shipp, J.,* at Spring (101) Term, 1889, of NEW HANOVER Superior Court.

It was in evidence, on the part of the plaintiff, that his intestate, T. J. Southerland, was run over and killed by one of the trains of the defendant on 8 March, A. D. 1887, at about half-past three o'clock in the afternoon. The train was running northward from Wilmington towards Weldon.

The deceased was crossing the railroad bridge over Smith's Creek, and had reached the abutment at its southern end, when he was struck by the cars.

It was further in evidence that three women were walking on the track, with the view of going over the bridge, and were near the southern end of the bridge when, before the train got in sight, they saw the deceased just coming on the bridge at its northern end, and when they saw the train coming around the curve, about eight hundred yards distant, the deceased, they saw, was half way between the northern and southern ends of the bridge; they called to the deceased "to go back, that the train was coming!" but don't know whether he heard them, and began to signal the train down by waving violently, one with her handkerchief and the others with their hands; the said women standing in the middle of the track at the mouth of the bridge, continued waving and signaling until they had to get off the track to keep the train from running over them; that the track, for about eight hundred yards from the bridge, running southwardly, was straight and unobstructed; that the train, when the women began to wave violently and energetically, was about two hundred and forty yards distant from them; that the length of the bridge was about two hundred feet; that a man could be seen easily on the bridge by a train coming around the curve; that the train, at the time the deceased was struck, was running at the speed of about thirty or thirty-five miles an hour; that the wind was against the deceased, blowing in the direction from which the train was coming.

(102) The plaintiff offered in evidence the rules for the government of locomotive engineers on the defendant's road, which was admitted without objection, which contained the following rule as applicable to engineers, to wit: "A hat or any object waved violently by any person on the track signifies danger, and is a signal to stop."

It was further in evidence that on the north side of the bridge there was situated the county poor-house, and that ever since the war, and particularly for ten or fifteen years past, a great many people were in the habit of passing and repassing across said bridge from the poor-house, and from the neighborhood of the same, to the city of Wilmington, and that on certain occasions as many as five hundred persons per day pass over the bridge.

The defendant's counsel contended that the city ordinance did not apply where there were no houses and no streets, and if it did so apply, it was unreasonable, and he prayed the court to charge the jury that the defendant was not guilty of any negligence by reason of running at a greater rate of speed than that mentioned in the ordinance, which would entitle the plaintiff to recover.

His Honor refused so to charge, and told the jury that, "taking the facts in evidence to be true, and if the train of the defendant was run at such a rate of speed that the engineer could not control it; that if he knew that people were in the habit of crossing said bridge from day to day, that such facts, in connection with the ordinance of the city, which had been read, constituted negligence."

To which refusal, and to the charge so given, the defendant excepted.

It was further in evidence that the engineer in charge of the train, and all other engineers, have in their possession the said rules.

It was further in evidence that the engine had no brake on the driving wheels, and that the train was not stopped by the (103) engineer until it had crossed the bridge, and was about one hundred (100) yards on the other side.

The plaintiff then proved by witnesses that they were present at the coroner's inquest, which was held on the day after the deceased was killed, and heard John R. Bissett, who was the engineer in charge of the train, make certain statements, he having been sworn and examined as a witness before the said coroner's inquest.

The defendant's counsel objected; that Bissett was alive and then in the court-room, and his declaration was not admissible.

His Honor overruled the objection, and said he would admit the statement as a declaration of defendant's agent.

The witnesses were then permitted to testify, and stated, that on the said examination, Bissett was asked if he had seen the women waving to him in front of the bridge, and that Bissett answered, "No." That Bissett was then asked if he would not have seen them if he had kept a lookout on the engine, and that he answered in a light and slack way, "that he was not looking out; that it was none of his business; that it was as much as he could do to look out for his engine," *to all of which defendant excepted.*

That the said witness, Bissett, during the trial of this cause, was afterwards introduced as a witness by the defendant, and on cross-examination by the plaintiff, admitted that he made the statements testified to by the plaintiff's witnesses.

The defendant objected to this testimony, and upon the objection being overruled by the court, it excepted.

The plaintiff further offered in evidence a certain ordinance of the city of Wilmington, which is as follows: "No locomotive engine, passenger or burden car, shall be driven within the limits of the (104) city at a greater speed than five (5) miles an hour, except in ascending a heavy grade, which may require a greater rate of speed, when the rate shall not exceed six (6) miles an hour, and at no time move without a brakesman, in addition to the driver, under a fine for each and every offense of twenty dollars."

It was also in evidence that the place where the deceased was when he was struck by the train, was within the corporate limits of the city of Wilmington; that there was one dwelling on the west side of the track, near the track, about one hundred and fifty (150) yards from the bridge; there were two houses within twelve or fifteen hundred feet of the bridge, near the line of the road, and none others on the line of the road from the bridge for about 2,200 feet; that while upon the map of the city streets are mapped out to Smith's Creek, yet none have been laid out or established nearer the bridge than 800 yards; that on the east side of the track for the eight hundred yards was a farm, and on the west side for that distance was an open stretch for about 1,500 feet, with the exception of the house above mentioned, where the city was largely populated; that for a distance of 800 yards there was a slight grade down to the bridge; that it was in evidence that on that grade a train running forty to forty-five miles per hour can be stopped in three hundred (300) yards.

Verdict for plaintiff; motion for a new trial; motion overruled; judgment for plaintiff and appeal by defendant.

J. D. Bellamy for plaintiff.
Junius Davis and George Davis for defendant.

AVERY, J., after stating the facts: What an agent says while doing any act within the scope of his agency, characterizing or qualifying the act, is admissible as a part of the *res gestæ,* and may be (105) offered either for or against the principal; but what the agent says afterwards, though his agency may continue as to other matters, or generally, is only hearsay. *Smith v. R. R.,* 68 N. C., 107; *McComb v. R. R.,* 70 N. C., 178; *Branch v. R. R.,* 88 N. C., 575.

It was clearly incompetent, therefore, to show, on the part of the plaintiff, by another witness, what the defendant's engineer, who was in charge of the engine when plaintiff's intestate was killed, said when examined as a witness at the coroner's inquest held over the intestate's body the day after he was killed. -The error was not cured when Bissett

was subsequently introduced by the defendant, and, on cross-examination by plaintiff, admitted that he made the statement at the inquest which plaintiff's witness had been allowed to repeat. Conceding that it then became competent to impeach him by showing that his former declarations, on oath, were in conflict with his statement as a witness at the trial, such evidence was admissible for that purpose alone, and not to be used as substantive testimony, and it was the duty of the judge to tell the jury that they could consider it only as tending to contradict Bissett, and not to show that he was negligent in failing to keep a look-out in order to ascertain whether the track was clear of obstructions. *S. v. Powell, post,* 635.

His Honor, in his charge to the jury, assumed as a fact not only that the ordinance offered was in force within the corporate limits of the city of Wilmington (which was not controverted), but that there was evidence tending to show that, when the plaintiff's intestate was killed, the defendant's train was running so rapidly that the engineer could not control it, and that he (the engineer) knew that the people were in the habit of crossing daily over the bridge. The instruction sent up was confined to the single proposition that these facts, if proven or admitted, constituted negligence on the part of the defendant. If any question of fact was left to the jury in reference to which there was other competent evidence, it was calculated to prejudice (106) their minds against the defendant to permit them to consider with it the testimony erroneously admitted, that Bissett (the engineer) had made certain declarations, and that he had answered in a "light and slack" manner when examined before the coroner so soon after the plaintiff's death, and especially when they were required to determine whether an engineer who exhibited so little delicacy of feeling and such indifference in speaking of the death of a human being had carelessly lost control of his engine when the train was approaching a bridge over which he knew persons were almost constantly crossing.

It does not appear affirmatively that the instruction set forth in the case on appeal comprehends the whole of the charge; and if it does not, we must assume that the judge cautioned the jury not to consider the admission by Bissett that he had made the declarations mentioned. *S. v. Powell, supra.* Besides, it was not assigned as error that his Honor failed to tell the jury that such admissions were not substantive but only contradictory testimony. *McKinnon v. Morrison,* 104 N. C., 354. But the defendant did except to the ruling of the court admitting proof of the declaration of Bissett before his introduction as a witness, and the testimony was incompetent, being simply hearsay evidence. It is needless to decide whether there was testimony tending to show that

the engineer had lost control of his engine, but it was error to submit the question to the jury if there was no evidence to support the affirmative view of it.

It is not necessary that we should discuss the effect of the city ordinance. If the case should again come before us at all, other points may be presented.

There was error in the admission of the testimony as to Bissett's declarations, for which a new trial must be granted.

Error.

Cited: Williams v. Telephone Co., 116 N. C., 561; *Craven v. Russell,* 118 N. C., 566; *Wills v. R. R.,* 120 N. C., 513; *Albert v. Ins. Co.,* 122 N. C., 96; *Greenlee v. R. R., ibid.,* 984; *Sumerrow v. Baruch,* 128 N. C., 205; *Lyman v. R. R.,* 132 N. C., 724; *Hamrick v. Tel. Co.,* 140 N. C., 153; *Gazzam v. Ins. Co.,* 155 N. C., 341; *Henderson v. R. R.,* 159 N. C., 586; *Styles v. Mfg. Co.,* 164 N. C., 377; *Robertson v. Lumber Co.,* 165 N. C., 5; *Morgan v. Benefit Society,* 167 N. C., 265; *Morton v. Water Co.,* 168 N. C., 587; *Wilkins v. R. R.,* 174 N. C., 283; *Plummer v. R. R.,* 176 N. C., 280; *Berry v. Cedar Works,* 184 N. C., 189; *Godfrey v. Power Co.,* 190 N. C., 33; *Pangle v. Appalachian Hall, ibid.,* 834.

(107)

FALLS OF NEUSE MANUFACTURING COMPANY v. SAMUEL BROOKS.

Action to Recover Land—Statute of Limitation—Pleading—Sheriff's Deed—Judgment—Color of Title.

1. It is competent to prove possession for seven years in support of a general denial in the pleadings that plaintiff was owner—it is not necessary to specially plead the statute.
2. A sheriff's deed, purporting to pass a fee, even though it does not vest the interest of the judgment creditor, is good as color of title after seven years adverse continuous possession under known and visible boundaries, the title being out of the State.
3. This Court will not consider questions not raised by proper exceptions.

CIVIL ACTION for the possession of land, tried before *Clark, J.,* at the August Term, 1889, of BUNCOMBE Superior Court, upon the report of T. H. Cobb, referee, and exceptions filed thereto.

The court overruled the exceptions to the referee's report filed by the plaintiff, and confirmed the report, and plaintiff excepted to the ruling

of the court confirming said report, and to each of his holdings overruling the plaintiff's exceptions.

Reference was made, by consent, to find all the issues, and it was found that the plaintiff was a corporation; that the title to the land in controversy was out of the State; and that plaintiff and defendant claimed under one W. L. Henry.

The defendant claimed by sheriff's deed, made pursuant to sale under several executions issued on judgments obtained against said Henry before the adoption of the Code of Civil Procedure, and transferred to the execution docket according to section 403.

There were several other judgments rendered and executions issued thereon, and under these also the said land was sold at the same time. The purchasers at the sale were G. M. Roberts, W. W. Rollins, Pinkney Rollins and J. L. Henry. (108)

One of the judgments was irregular, but there is no evidence that any of the purchasers had notice of the irregularity. The sheriff's deed was duly probated and recorded.

In February, 1874, J. L. Henry and wife conveyed to Pinkney Rollins and L. M. Welch all their title and right to the land in question by deed, probated and recorded in 1879, as to the husband, but not as to the wife.

In August, 1876, W. W. Rollins and wife, Pinkney Rollins and wife, H. J. Rollins and Lucius M. Welch conveyed their interests in the lands purchased at sheriff's sale to the Falls of Neuse Manufacturing Company by deeds duly probated and recorded.

The defendant at the beginning of this action was in possession and has so continued. From and since the death of his father, George Brooks, in 1874 or 1875, he was in possession jointly with his brothers and sisters up to 13 November, 1882, when they conveyed their interests to him.

On 11 September, 1869, the land in question was conveyed by sheriff's deed to said George Brooks, the deed reciting that the sale was under executions issued on judgments in his favor; and he took possession and claimed under the sheriff's deed, and that he and those claiming under him have had continuous and uninterrupted possession for more than seven years prior to the commencement of this action under known and visible boundaries, claiming and holding the same adversely as their own.

The following additional facts are set out as found by the referee:

19. That, on 9 September, 1873, W. W. Rollins, Pinkney Rollins, G. M. Roberts, J. L. Henry and L. M. Welch instituted an action in the Superior Court of Buncombe County, against S. M. Brooks, James Wise and George Brooks, claiming title to and for the recovery of land

described in the pleadings in this case; that the summons in (109) said action was served upon said defendants on 12 September, 1873; that at ..... term of said court, the death of George Brooks, defendant, was suggested, and it was ordered by the court that "notice issue to the personal representative that he appear and make himself party defendant in this case." Notice was issued, and at October Term, 1876, the following entry was made: "Death of defendant George Brooks, suggested. It is ordered by the court that notice issue to the heirs of George Brooks, deceased, to appear at the next term of this court, to make themselves party defendants in this case." "Issued."

And at Fall Term, 1879, this entry *"alias* order to make the heirs parties." And at Fall Term, 1881, the following entry: "Unless the heirs are made parties by the next term, this case to abate." And at August Term, 1881, this entry: "Continued, and order made that unless the heirs of the defendant are made by regular process parties to this suit by the next term of this court, this suit is to abate." And at Spring Term, 1882, this entry: "Abate. Judgment to be taxed"; and also the word "off." And at the same term the following is the judgment rendered, to wit:

"It appearing to the satisfaction of the court that the defendant in this action is dead, and that the order of the court hereinbefore made, requiring new parties to be made, has not been complied with, it is now, on motion of counsel, ordered that this cause be dismissed. It is further ordered that the plaintiffs pay the costs of this action, to be taxed by the clerk."

20. That the plaintiff in this case, the Falls of Neuse Manufacturing Company, claims title to the land described in the complaint under W. W. Rollins and others, the plaintiffs in the case referred to in the preceding paragraph, and that Samuel Brooks, the defendant in this case, is one of the defendants in the case mentioned in the preceding paragraph, and that George Brooks, another of the defendants in (110) said preceding case, was the father of said Samuel Brooks, and that James Wise, the other defendant, was a son-in-law of said George Brooks, and that the said Samuel Brooks and James Wise were then upon said land as the tenants of said George Brooks.

21. That on 31 October, 1883, the Falls of Neuse Manufacturing Company, the plaintiff in this case, instituted an action in the Supreme Court for said county of Buncombe against S. M. Brooks, the defendant in this case, and James Wise, claiming title and the recovery of the land described by the pleadings in this cause, and other lands; that the summons was duly served upon the defendants, and the case was continued from term to term till December Term, 1887, when judgment of nonsuit was entered against the plaintiff.

22. That the present action was begun on 10 December, 1887.

23. That more than twelve months had elapsed between the final judgment in the action mentioned in paragraph 19 and the beginning of the action described in paragraph 21.

24. That the defendant has not set up or pleaded in his answer in this case any statute of limitations.

From the foregoing facts, the referee submits the following as to his conclusions of law, to wit:

It is admitted that the title to the land in dispute is out of the State, and that both parties, plaintiff and defendant, claim the title under W. L. Henry, and both parties claim through purchasers at execution sale.

The plaintiffs show various judgments against W. L. Henry, executions, levies, and sales and deed by the sheriff, dated 1 July, 1871, to G. M. Roberts, W. W. Rollins, P. Rollins, and J. L. Henry, and a regular chain of conveyances from said purchasers, except G. M. Roberts. (111)

The defendant, as his title, introduces a judgment in favor of George Brooks against said W. L. Henry, and another, of date junior to some of the judgments under which plaintiff claims, and a deed from J. Sumner, sheriff, dated 11 September, 1869, reciting said judgment and execution levy and sale, to George Brooks, the plaintiff in said judgment. He also shows a regular chain of conveyance from said George Brooks, and more than seven years possession under said deed. No execution, showing that George Brooks purchased, is in evidence. The judgment, when it transferred under sec. 403 of the Code of Civil Procedure, was dormant, and therefore the judgment, execution (if there was any), and all the proceedings thereunder were irregular, and George Brooks, the purchaser, being the plaintiff in the judgment, had notice of this irregularity. And therefore no title was conveyed to him by this deed from the sheriff. *Lytle v. Lytle,* 94 N. C., 683; *Curlee v. Smith,* 91 N. C., 172.

This deed to George Brooks is, however, color of title. *McConnell v. McConnell,* 64 N. C., 342. And as he took possession of the land, claiming it under this deed, and as he and those claiming under him, including defendant, have held such possession continuously for more than seven years, the defendant's title has ripened, under section 141 of The Code.

The plaintiff, however, insists that the seven years' possession had not elapsed when W. W. Rollins and others (under whom he claims) began the first action to recover the land, which was on 9 September, 1873. See paragraph 19 of facts. And his learned counsel ably argue that defendant cannot rejoin that more than twelve months elapsed between

the final judgment in this action and the beginning of the second, to wit, from Spring Term, 1882, to 31 October, 1883, because he has not specially pleaded it in his answer, arguing that it is a statute of limitation.

The referee is of the opinion, however, that the defendant is not required to specially plead this, and that the lapse of more than
(112) twelve months between the final judgment in the first action and the beginning of the second one interrupts the continuity of action provided for by section 142 of The Code, and that it is fatal to plaintiff's claim, and that the time should be counted from December, 1869, when George Brooks took possession under the deed, to 31 October, 1883, when the second action (the first by the present plaintiff) began. See paragraph 21 of facts. And that this being more than seven years, the defendant's title has ripened and perfected under section 141 of The Code.

And therefore the issues raised by the pleadings, to wit—

1. Is the plaintiff a corporation as alleged?

2. Is the plaintiff the owner and entitled to the possession of the land described in the complaint, or any part thereof?

3. Was the defendant, at the institution of this action, in the wrongful possession of said land?

Should be answered, the first in the affirmative and the other two in the negative. And the defendant is entitled to judgment accordingly, and that he go without day and recover his costs.

Plaintiff's exceptions to referee's report are as follows:

1. That the referee erred in his conclusion of law that the defendant in this case "is not required to specifically plead" the statute of limitations.

2. That the referee erred in his conclusion of law that the plaintiff is not the owner and entitled to the possession of the land described in the complaint, or any part thereof.

3. That the referee erred in his conclusion of law that the defendant was not in the unlawful possession of the said land at the institution of this action.

4. That the referee erred in his conclusion of law that the sheriff's deed to George Brooks is a color of title.

5. That the referee erred in his conclusion of law that he did not find, upon the whole testimony and the law, that plaintiff was entitled to recover.

(113) 6. That the said referee erred in his conclusions of law in that he did not find, as a conclusion of law on his finding of facts, that the plaintiff is entitled to recover.

E. C. Smith for plaintiff.
G. A. Shuford for defendant.

AVERY, J., after stating the facts: It was competent for the defendant to prove his possession for seven years, under color of title, in support of the general denial in the answer that the plaintiff was the owner of the land in controversy. It was not necessary, or even proper, that he should specifically plead the statute (The Code, sec. 141). *Farrior v. Houston,* 95 N. C., 578.

The sheriff's deed purported to pass an estate in fee simple in the land, and though the interest of the judgment debtor did not vest, by virtue of the conveyance, in the bargainee, the defendant, by continuous adverse possession under it as color of title for seven years, acquired both the legal and equitable estate against the plaintiff, certainly, it being admitted that the land had been granted by the State. *Avent v. Arrington,* 105 N. C., 377.

It being found, as a fact, that the title was out of the State, and that the defendant held the land for seven years prior to the bringing of the action, it would follow that he was then the owner and in the rightful possession. This proposition would dispose of the other four exceptions, if they were so framed as to make it our duty to consider them. But not one of them is so specific in pointing out a particular conclusion of law or fact as to direct attention to it. *Battle v. Mayo,* 102 N. C., 437; *Suit v. Suit,* 78 N. C., 272; *Currie v. McNeill,* 83 N. C., 176. It would be impossible, after admitting the findings of the referee to be true, as they cannot be questioned in this Court, to resist the conclusions reached by him. His clear and full statements of the facts and the law applicable to them, have left little more for the (114) appellate court to do than to affirm, in general terms, the judgment of the court below overruling the exceptions to his report.

The questions discussed by the counsel for the appellant are not raised by the exceptions, and, if they were raised, the facts found by the referee would not sustain the position that the defendant was estopped by his own conduct. It does not appear that he was present at the sale, nor that he even caused execution to be issued, or did or said anything inconsistent with his claim of title to the land, and that might have induced the subsequent purchasers to think he would set up no adverse claim, or concede that the sale was valid, and would pass the title of W. L. Henry.

The question whether such an estoppel *in pais* as that which plaintiff seeks to set up, should have been pleaded, would still remain if the exceptions had been more specific, and the facts different. There is no error.

Affirmed.

Cited: Gilchrist v. Middleton, 108 N. C., 714; *Cheatham v. Young,* 113 N. C., 167; *Johnston v. Case,* 131 N. C., 496; *Shelton v. Wilson, ibid.,* 501; *Johnston v. Case,* 132 N. C., 796; *Cone v. Hyatt, ibid.,* 815; *Whitaker v. Jenkins,* 138 N. C., 478; *Bond v. Beverly,* 152 N. C., 61; *Fleming v. Sexton,* 172 N. C., 253.

D. H. STEPHENSON ET AL. v. THOMAS FELTON ET AL.

Assignment—Fraud—Onus Probandi—Pleadings—Reference— Possession—Husband and Wife—Creditors.

1. In an action to set aside an assignment for fraud, in that it conveyed certain lands and other property to the wife of the assignor without a valuable consideration, it was *held* that the burden was upon him to show such consideration.

2. Allegations in a complaint, not denied in the answer, are sufficient basis for the referee's findings of fact; but allegations not so admitted and not sustained by proof, are not evidence, unless put in evidence.

3. The husband being in possession, there is a presumption of ownership in his own right until rebutted.

4. Where the court would be justified in not submitting to the jury the facts offered upon a given issue, a referee is justified in refusing to consider such facts in his findings.

5. Where it has been made to appear affirmatively that the husband had for years cultivated his wife's farm, and after discharging all the expenses of the family invested the net proceeds in the business of his firm, there being no express contract to repay, the wife's debt was not such as could have been preferred, by assignment of such property, to the debts of *bona fide* creditors.

(115) CIVIL ACTION, tried on exception to a referee's report, before *Armfield, J.,* at February Term, 1889, of WILSON Superior Court.

A warrant of attachment was sued out upon affidavit of plaintiffs, charging fraud on defendants, in that they had promised to pay the amount of their bill for goods bought of plaintiffs, and that they subsequently conveyed all their property, amounting to a considerable sum, for the purpose of defeating the plaintiffs' claim.

The allegations in the complaint, and denials in the answer, and the evidence adduced before the referee in their support, form the basis

upon which the following facts are found and conclusions of law declared (the reference being under The Code):

1. That the plaintiffs, D. H. Stephenson and H. Slingluff, are partners, doing business in the city of Baltimore under name of Stephenson & Slingluff.

2. That on 23 August, 1882, the defendants, Thomas Felton and Joshua L. Scarborough, comprising the firm of Felton & Scarborough, promised to pay the plaintiffs, within four months, for goods sold by the plaintiffs to the defendants, the sum of $518.15.

3. That no part of said amount has been paid.

4. That on 21 December, 1882, the said defendants, Felton & Scarborough, by a deed of assignment, conveyed to the defendant, John E. Woodard, the entire assets of the firm of Felton & (116) Scarborough, consisting of a stock of goods worth about $2,500, and notes and accounts worth $3,000; that said assignment was executed for the purpose of paying debts, and the plaintiffs were in the second class secured in said deed.

5. That in the deed of assignment the defendants, Thomas Felton and Joshua Scarborough, each reserved out of the property conveyed the sum of $500 as his personal property exemption.

6. That on said 21 December, 1882, the defendant, Thomas Felton, conveyed to the defendant, John E. Woodard, certain real and personal property, consisting of the tract of land in dispute, five head of mules, one black horse, ten head of cattle, farming implements, one open and one top buggy, twenty-three hogs, two two-horse wagons, six carts, one Watertown steam engine—all of said property to be held in trust by the said John E. Woodard for the benefit of Victoria Felton, the wife of the defendant, Thomas Felton.

7. That at the time of the execution of said deed, on 21 December, 1882 (recited in finding of fact No. 6), the said Thomas Felton retained no property for himself.

8. That the recited consideration of $3,000 has not been paid by any one to said Felton, or to any one for him.

9. That at the time of the execution of the deed, the land therein described was worth $1,250, and the personal property $1,500.

10. That at the time of the execution of the deed, the trustee, John E. Woodard, was the legal adviser and the general counsel of the defendant, Thomas Felton.

"Upon the foregoing facts, the following are my conclusions of law:

"1. That, upon the pleadings, the burden was on the defendant to show that the deed referred to in finding of fact No. 6 was executed for a valuable consideration.

(117) "2. That there was no evidence to support the allegation in the answer that the defendant, Thomas Felton, was indebted to his wife, and that the said deed was executed in consideration of that indebtedness.

"3. That said deed is voluntary and fraudulent as to the plaintiffs.

"4. That from the relations of the parties—that of husband and wife, and the circumstances attending the transaction—there arises a presumption of fraud, and that no evidence has been offered to rebut the presumption.

"5. That the plaintiffs are entitled to recover of the defendants, Thomas Felton and Joshua Scarborough, the sum of five hundred and eighteen dollars and fifteen cents, and interest thereon at six per cent from 23 December, 1882.

"6. That the plaintiffs are entitled to a decree declaring said deed fraudulent and void as to them, and subjecting the property therein to the payment of their debt, subject to the homestead and personal property exemption of the defendant, Thomas Felton.

By W. R. ALLEN, *Referee.*"

The referee further states that, in support of his ruling, the following cases are relied upon: *Hawkins v. Alston,* 4 Ired. Eq., 147; *Black v. Caldwell,* 4 Jones, 154; *Satterwhite v. Hicks,* Busb., 108; *Barnwell v. Threadgill,* 3 Jones Eq., 65; *Reiger v. Davis,* 67 N. C., 185; *Lassiter v. Davis,* 64 N. C., 498; *Atkins v. Withers,* 94 N. C., 581.

The defendant excepts to the report for that—

1. The referee should have found as a fact from the testimony, that the defendant, Thomas Felton, was, at the time of his marriage, a poor man, had no income except that derived from his wife's property.

2. That the property mentioned in section six of the report was paid for with Mrs. Victoria Felton's money.

(118) 3. That the consideration mentioned in section eight of the report had been received by Thomas Felton, as explained in his answer.

4. That the land conveyed by defendant, Thomas Felton, was worth $1,000, and the personal property .....

The defendants further except to the conclusions of law, for that—

5. The referee based his report upon the pleadings and not upon the evidence, and that, looking to the pleadings alone, he should have held that the deed from Thomas Felton conveying property in trust for his wife, Victoria Felton, was supported by a valuable consideration.

6. The referee, in conclusion No. 2, erred in holding that there was no evidence of Felton's indebtedness to his wife, when he states that he relies solely upon the pleadings.

7. That conclusion No. 3 is erroneous, for reasons above stated.

8. The referee erred in holding that the presumption of fraud arose from the relation of the parties and the circumstances attending the transaction, as explained in their answer.

9. The referee ought to have held, as a matter of law, that Thomas Felton received and used the money of his wife, and rents and profits of her land without her assent; that he was accountable to her for the same as upon an implied promise to repay; that this created a valid indebtedness and that a conveyance of property to satisfy said indebtedness was not void for fraud as against the creditors of her husband, the defendant Thomas Felton.

Upon the hearing in the court below, the judge overruled the defendant's exceptions and confirmed the report of the referee. Judgment was rendered accordingly, and the defendants appealed.

F. A. Woodard (by brief) for plaintiffs.
E. R. Stamps for defendants.

AVERY, J., after stating the facts: The referee, in a note, ap- (119) pended to the conclusions of law, says: "My report is based upon the pleadings, and the evidence is not considered. It is for this reason that I have not passed on the objections to evidence and the demurrer." The ruling of the court sustaining him rests upon the principle that when some of the allegations in a complaint are not denied, or are expressly admitted in the answer, the facts conceded in either way to be true will support a judgment just as though they had been found by a jury. It is not controverted that the husband, being at the time insolvent, conveyed to John E. Woodard, for the benefit of his wife, real and personal property, worth twenty-seven hundred and fifty dollars, by deed, in which there was a recited consideration of the three thousand dollars, but that, in truth, no consideration passed at that time. This appears from paragraphs five and seven of the complaint, and the answers to them.

The defendants refused, when opportunity was offered to introduce any testimony. They failed even to put in evidence the pleadings. So that the pleadings can be considered only in so far as they establish facts by failure to deny allegations. The Code, sec. 268; *Smith v. Nimocks,* 94 N. C., 243.

The defendants rely in their answer upon the defense that the husband, Thomas Felton, received at the time of his marriage (the date of marriage not being given) a large sum of money belonging to his wife, and after marriage received without her assent in the rents of a farm that was her separate property, a large sum, from both sources about

two thousand dollars, all of which he invested in paying for the stock, implements, etc., conveyed to John E. Woodard, in the deed that is declared by the referee fraudulent.

2. That in addition to paying for family expenses he accumulated from the rents of her said farm, taken without her assent, about four thousand dollars, which he used in the business of Felton & Scarborough before the firm made an assignment.

(120) The answer admits that the husband was in possession of the property conveyed before the deed was executed, and the law therefore raised the presumption that it belonged to him in his own right, and cast upon her the *onus* of showing that it was paid for with funds that were her separate property. *Brown v. Mitchell,* 102 N. C., 371.

While the admissions, made in the joint answer of the defendants in response to the charges or allegations of the plaintiffs, are facts found, the averments of the defendants by way of evidence, and their denials, can be accepted as true only when supported by evidence and the verdict of a jury, or court of referee empowered to find the facts. But it is insisted that the referee erred, because he did not consider so much of the testimony offered for plaintiffs, or elicited on cross-examination of plaintiffs' witnesses, as tended to rebut the presumption that the husband held the personal property in his own right and bought the land with his own funds. We have carefully reviewed and considered the evidence, and, admitting the whole of it to be true, there is nothing that a court would have been compelled to submit to a jury if the issue had been tried in the usual way, as tending to rebut the presumption of ownership by the husband of the land and other property conveyed by him to his wife, while the very fact that he did convey the personalty, which he alleges was hers all the while, is a circumstance pregnant with suspicion. The material facts stated by the witness are that the husband of his wife's sister received from her guardian about nine hundred dollars as her share of her father's estate; that the male defendant Felton was very poor when he was married, but was industrious and a good practical farmer and man of business, and that he improved his wife's farm very much, adding greatly to her income from it.

(121) The mere fact that he was very poor before his marriage could not be properly submitted to the jury to overcome the presumption, and we find no other testimony tending to rebut it. Such specimens as the statement of a witness on cross-examination that he did not know of any way that Felton could have made money without the use of his wife's property, would show no error in the referee's ruling, if considered by him. If it did not appear affirmatively that for years

he cultivated his wife's farm, and, after discharging all of the expenses of his family, invested the net profits in the business of Felton & Scarborough (and that averment is not supported by the evidence offered), still she would have failed to establish her right to claim the amount so applied as a debt due from the husband to her as against creditors, and which he could pay by an assignment of property.

In the case of *Battle v. Mayo,* 102 N. C., 438, the referee's finding that there was an express agreement on the part of the husband to pay rents to the wife was adopted by the court, and the contract between them was enforced. The Court say: "It is settled that none of the other sections of chapter 47 of The Code are to be construed as limiting the wife's power to acquire property by *contracting* with her husband, or any other person." In our case, there is no testimony tending to prove an express contract, nor are circumstances shown from which the law would imply that there was a contract between the *feme* defendant and her husband in reference to the rents of her farm.

We concur with the referee in his conclusions of law, for, whether they were predicated upon the admissions in the pleadings, or upon the whole of the testimony, or upon both, "there was no evidence to support the allegation in the answer that Thomas Felton was indebted to his wife," and, therefore, the presumption that he was the owner of the property conveyed, and that the deed was voluntary and fraudulent as to his creditors, was not rebutted. His Honor properly (122) overruled all of the exceptions, as we think, for the reasons we have already given. There is no error. The judgment is

Affirmed.

Cited: Osborne v. Wilkes, 108 N. C., 667; *Blake v. Blackley,* 109 N. C., 264; *Walker v. Long, ibid.,* 514; *Peeler v. Peeler, ibid.,* 631; *McQueen v. Bank,* 111 N. C., 515; *Redmond v. Chandley,* 119 N. C., 580; *Eddleman v. Lentz,* 158 N. C., 73.

CLAUDIA REDMOND v. THE COMMISSIONERS OF THE TOWN OF TARBORO.

Constitution—Municipal Taxation—Solvent Credits.

1. Article 7, sec. 9, of the Constitution was not intended to apply the rules of uniformity and equality to the subjects alone selected by the Legislature for taxation in granting a municipal charter, but requires that *all* property in the municipality shall be taxed, and taxed uniformly and equally.

2. The word "property," as used in Article 7, sec. 9, of the Constitution, includes moneys, credits, investments and other choses in action.

3. Although the power of a municipal corporation to tax is not conferred by the Constitution, yet, where such power is exercised, the Constitution (Article 7, sec. 9), independent of the provisions of the charter, *commands* that *all* property in such municipality, real and personal, including moneys, credits and the like, shall be taxed according to its value and by a uniform rule.

4. The words "all real and personal property," in Article 5, sec. 3, of the Constitution, are to be taken in their most comprehensive legal import, and include every kind of real and personal property whatever, *not excepting* the several classes of personal property expressly mentioned in the first clause of the section.

(MERRIMON, C. J., dissenting.)

THIS was a controversy submitted without action under sections 567-569 of The Code, tried before *MacRae, J.*, at Spring Term, 1888, of the Superior Court of EDGECOMBE County.

(123) The following were the facts agreed:

1. That the plaintiff Claudia Redmond is a resident of the town of Tarboro, and has been for a number of years.

2. That in 1888, at the time required for listing property for taxation in said town, she refused to give in to the list-taker of said town $43,213 which she owned in solvent credits.

3. That, by an order of the board of commissioners of said town, the said solvent credits were ordered to be placed by the list-taker on the list, and were ascertained from the county list-taker's list, and were accordingly returned by the town list-taker on his list for taxation in said town, against the protest of the said Claudia, as was done in other like cases of solvent credits owned by persons resident in said town.

4. That of said solvent credits of plaintiff so placed upon the town list, $39,973.97 were owing by parties resident outside of the town, and such amount is secured on property not located within the limits of said town, and $3,328.03, or thereabout, were owing by parties residing within and citizens of said town, with the exception of a few dollars which she cannot accurately determine.

5. That the said board of commissioners, at their regular meeting in 1888, levied a tax of one-half of one percentum, or fifty cents on the one hundred dollars' worth of property, including solvent credits; in the words of the order, "that an assessment of fifty cents on the one hundred dollars valuation be levied on all property in the town of Tarboro not exempt from taxation, both real and personal included, all moneys, credits in bonds, stocks, joint stock companies or otherwise."

6. That the tax list for said year 1888-89 was put in the hands of John W. Cotton, tax collector for said town, who made demand upon plaintiff for the sum of $216.56, which said sum was for taxes on the solvent credits placed as aforesaid upon the list of taxa- (124) bles against the protest of plaintiff, at the rate levied aforesaid, and the plaintiff, under protest, paid the said sum for said taxes on solvent credits, and holds therefor the receipt of the tax collector.

7. That said plaintiff has made demand in writing on the defendant board for the return of said taxes, and they refused to pay over to her the same.

The question presented to the court is whether the solvent credits so listed, or any part of them, are liable to the levy so made by the town of Tarboro.

The charter of the town of Tarboro, chapter 228, section 24, Laws 1876-77, provides "that, for the improvement of said town (Tarboro), and for the payment of the expenses thereof, the commissioners shall annually, before the first day of July, levy a tax on all the real and personal property not exempt under the State laws in said town," etc.

The court gave judgment as follows:

"It is considered and adjudged that the solvent credits listed by the plaintiff are liable to the levy as made by the town of Tarboro. It is further adjudged that the plaintiff pay the costs of this proceeding."

The plaintiff excepted, and appealed.

John L. Bridgers, H. L. Staton and James Norfleet (by brief) for plaintiff.

Donnell Gilliam (by brief) for defendants.

SHEPHERD, J. The very important question presented by this appeal is whether the town of Tarboro has the power to levy a tax upon the solvent credits of its citizens.

It is necessary to an intelligent consideration of the question that we should review the several decisions of this Court in reference to municipal taxation, and extract from the conflict of authority and con- (125) fusion in which the subject is involved the true principles gov- erning such taxation. Section 9, Art. VII of the Constitution, provides that "all taxes levied by any county, city, town or township shall be uniform and *ad valorem* upon all property in the same, except property exempted by this Constitution."

Does this provision simply apply the rule of uniformity and equality to the particular subjects which may be selected by the Legislature for taxation, or does it *command* that *all* property of whatsoever description shall be taxed, and taxed according to the said principles? If the latter

be the correct view, and "moneys, credits, investments," etc., are embraced in the said section, it necessarily follows that all general laws and the special provisions of the charters of the various municipalities which conflict with the said provision of the Constitution are void, and that the refinements of construction which are sought to be applied to their particular phraseology become wholly impertinent to the present discussion.

1. We will first inquire, then, whether the said provision of the Constitution *commands* that *all property* shall be taxed?

"Taxes are defined to be burdens or charges imposed by the legislative power of a State upon persons or property, to raise money for public purposes" (Blackwell on Tax Titles), and the power to levy them is one of the essential attributes of sovereignty, and is inherent in, and necessary to, the existence of every government. *Knowlton v. Supervisors of Rock Co.,* 9 Wis., 418; *McCulloch v. Maryland,* 4 Wheat., 316.

In the absence of constitutional limitations there is, it is said, no restraint whatever upon the Legislature, and it may discriminate in favor of or against a particular class of persons or property, and pass laws in violation of every principle of just government, by an unequal distribution of the public burdens. The check upon such an abuse of power is in the influence of the constituents over their representatives; and the weight of authority is that the courts have no right to (126) interfere with this exercise of the legislative will.

Thus it is seen that a wide field is open for a war between different classes of property, in that one class may be taxed to the exclusion or to the prejudice of another, and that under the forms of a free government, an excited partisan legislative majority may commit wrongs against the rights of property as flagrant and oppressive as those which have disgraced the reigns of the most despotic rulers.

But it is said that the General Assembly will be influenced by proper motives, and will levy taxes upon a just basis. Experience, in many of the states, has shown that the principles of taxation should not be left to the uncertainty or caprice of successive Legislatures, but that they should be fixed and immutable, and embodied in the fundamental law, under whose broad shield all property, of whatsoever species, may be equally protected.

This, we think, was the purpose of the framers of our Constitution in inserting therein the section referred to, as well as section 3, Art. V, relating to State taxation.

No one who reads these and other provisions of the Constitution, will fail to be impressed with the earnest effort there made to engraft upon our organic law the great principle of equality in taxation.

"The subjects of every state ought to contribute to the support of the government, as nearly as possible, in proportion to their respective abilities, that is, in proportion to the revenue which they respectively enjoy under the protection of the State. The expense of government to the individuals of a great nation is like the expense of management to the joint tenants of a great estate, who are all obliged to contribute in proportion to their respective interests in the estate. In the observation or neglect of this maxim consists what is called equality or inequality of taxation." Such are the words of the author of "The Wealth of Nations," quoted with approval by *Judge Cooley,* and we think that they well illustrate the true spirit and pur- (127) pose of our constitutional provisions upon the subject.

We are of opinion that section 9, Art. VII, was not intended to apply the rules of uniformity and equality to the subjects which the Legislature might alone select for taxation, but that it requires that all property shall be taxed, and taxed in accordance with the said rules.

A contrary view was taken by the Court, soon after the adoption of the Constitution, in the case of *Pullen v. Commissioners of Raleigh,* 68 N. C., 451. The charter enumerated eight subjects of taxation, "beginning with real estate situate in the city, and ending with encroachments on the streets by porches," etc.; but it did not include moneys, credits, etc. The Court affirmed the opinion of the Superior Court judge, that the Constitution was "intended to declare simply the manner in which municipal corporations should levy taxes, to wit, that they should be uniform and *ad valorem,* and not to declare the subjects to be taxed by them." The decisions in which this case has been cited (such as *Winston v. Taylor,* 99 N. C., 210; *S. v. Bean,* 91 N. C., 554; *Latta v. Williams,* 87 N. C., 126, and perhaps others) have reference *only* to the taxing of trades, professions and the like, and these, not being property, are correctly placed within the principle declared therein.

Under the construction of the Constitution, as declared in *Pullen's case,* it would be in the discretion of the Legislature to unequally distribute the burden necessarily incident to government, and the worst species of class legislation would be tolerated. "It would" (says *Dixon, C. J.,* in *Knowlton v. Supervisors,* 9 Wis., 422) "make the Constitution operative only to the extent of prohibiting the Legislature from discriminating in favor of particular individuals, and would reduce the people, while considering so grave and important a proposition, to the ridiculous attitude of saying to the Legislature, 'You shall not discriminate between single individuals or corporations, but you (128) may divide the citizens up into different classes as . . . owners

of different species or descriptions of property, and legislate for one class and against another as much as you please, provided you serve all of the favored or unfavored classes alike,' thus affording a direct and solemn constitutional sanction to a system of taxation so manifestly and grossly unjust that it will not find an apologist anywhere—at least outside of those who are the recipients of its favors."

Such a construction, in our opinion, not only offends the true spirit of the Constitution, but has been distinctly and solemnly repudiated by the uniform decisions of this Court in subsequent cases. These cases decide that when the taxing power is exercised for a public purpose, the Constitution, and not the Legislature, declares *what* property shall be taxed, and that it requires that *all* shall be taxed and by a uniform rule and *ad valorem*. This construction is conceded, as to State and county taxation, under section 3, Art. V, and we are unable to conceive why the same rule should not apply to section 9, Art. VII, as the language of the latter is even more imperative than that of the former.

In *Cobb v. Elizabeth City*, 75 N. C., 1, *Rodman, J.*, after quoting section 9, Art. VII, says: "All taxes, therefore, must be levied as well on personal as on real property, *notwithstanding any contrary provision in the charter.*"

In *Kyle v. Commissioners of Fayetteville*, 75 N. C., 445, it was decided "that shares of stock in a national bank are proper subjects of State, county and municipal taxation." The Court said *(Bynum, J.*, delivering the opinion) that, "in our view, it was unnecessary for the Revenue Act, or the charter of the town of Fayetteville to tax specifically the national bank shares of either residents or nonresidents. . . . The Constitution seizes them and exacts from them their proportional share of the public burden. Neither the Legislature nor the (129) town corporation can exempt them from taxation without doing violence to the Constitution. . . . It is the provision and the purpose of the Constitution that thereafter there should be no discrimination in taxation in favor of any class, person or interest; but that everything possessing value as property, and the subject of ownership, shall be taxed equally and by a uniform rule. In this respect, the present Constitution shows no favors and allows no discretion. If, then, the town of Fayetteville has the power to tax, the Constitution steps forward and commands that all property shall be taxed and by a uniform rule." To the same effect are *Young v. Henderson*, 76 N. C., 420; *London v. Wilmington*, 78 N. C., 109; *Puitt v. Commissioners*, 94 N. C., 709.

The language of the Court in these decisions can admit of no question, and if anything further were needed to sustain the principles there

laid down, we have the high authority of the late distinguished *Chief Justice,* in *Vaughan v. Murfreesboro,* 96 N. C., 317, who says that the Constitution (Art. VII, sec. 9) "commands that all taxes levied in any city, town or township, shall be uniform and *ad valorem* upon all property in the same, except property exempt by this Constitution; by *force of which,* notwithstanding the omission in the charter, personal, as well as real property, must be assessed and subjected to the same public burden." This overwhelming weight of authority, so consonant with the principles of equality in taxation everywhere pervading the fundamental law, conclusively establishes the proposition that wherever the taxing power is exercised for a public purpose, *all* property shall be taxed, notwithstanding any contrary provisions in the general law of the charter.

2. It only remains, therefore, for us to consider whether the word "property," in said section 9, Art. VII, includes moneys, credits, investments and other choses in action.

Considering the essential justice of the principles we have (130) mentioned, and which are so plainly recognized in the several provisions of our Constitution, the mind naturally rejects, in their interpretation, any narrow or strained rules of construction which may be relied upon to defeat their beneficent purpose. These provisions should be construed in the light of their general spirit and intention, and thus full effect be given to the will of the people, as expressed in their fundamental law. Clear and convincing indeed, then, must be the reasoning which gives a restricted meaning to the word "property," when used in reference to municipal taxation, while, as to all other taxation, it is to be taken in its natural and general sense. Upon what principle can it be contended that one who has no tangible property, but who owns a hundred thousand dollars in solvent credits, may enjoy all of the conveniences, safeguards and other benefits of town life, and contribute nothing whatever in the payment of the common expenses? Yet such will be the effect if the restricted interpretation contended for is to prevail. It is clear that all who enjoy these privileges should pay their part of the expenses. For instance, the evidences of these very solvent credits receive greater protection by the police of a town, and yet the police are to be paid only by those who own tangible property. No good reason can be assigned in support of such an unjust discrimination, while every principle of justice and common fairness sternly forbids it. In support of this restricted interpretation of the word "property," the plaintiff relies upon the case of *Vaughan v. Murfreesboro, supra.* The charter provided that the tax should be levied "upon all persons and property within the town subject to taxation for county

purposes, under the general laws of the State." Under sections 3 and 6, Art. V, of the Constitution, there can be no question but that choses in action were taxable for county purposes, but it was held that under the charter they were not included. It is not easy to un-
(131) derstand how the language of the charter was material to the decision of the case, as the opinion, as we have seen, fully committed the Court to the principle that the Constitution, and not the charter determines what property shall be taxed.

While the opinion lays much stress upon the "localizing" words ("within the town") which are used in the charter, it seems to approve of the following *dictum* in *Pullen v. Raleigh, supra:* "In regard to that word (property), by the bye, we see that the Constitution does not make it include money, credits, investments in bonds," etc. These words are spoken of in *Vaughan's case* as an "adjudication," when, from an examination of the opinion, it will appear that the decision rested entirely on the ground that the objects to be taxed depended "upon the charter," and the charter having enumerated eight specific subjects, in none of which were embraced "debts and securities for money," the latter were excluded.

So far from adjudicating the meaning of the word, the learned *Chief Justice* is careful to say that "the word 'property' about which so much was said on the argument, is not embraced in that enumeration of the subjects of taxation." The *dictum* is founded *solely* upon the supposed distinction made in the use of the words "real and personal property" in section 3, Art. V, which words, it is said, are "used in a sense to exclude such credits and investments." The section is as follows:

"Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and also all real and personal property, according to its true value in money." The suggestion is (for, after all, it is but a suggestion), that by the verbal arrangement of this section, the words "real and personal property" are so restricted in their meaning as to exclude moneys, credits, etc., and that this limited sense is to be attached to the
(132) word "property" as used in section 7, Art. IX.

It, therefore, becomes material that we should examine section 3, Art. V, and ascertain whether there is, in fact, such a distinction as is contended for. It is true that the meaning of the section is not very happily expressed, but it must be construed with reference to the context and spirit of all the constitutional provisions upon the subject, and their general intent and purpose cannot be defeated by the confused arrangement of words, or, as is suggested, by the presence of a semicolon between the two first clauses, since, even in the interpretation of

an ordinary deed, punctuation must be disregarded, and words may be transposed to "bring them to the intent of the parties." *Bunn v. Wells,* 94 N. C., 67.

Let us now see whether such a distinction exists, or has ever been recognized and acted upon by this Court. If there be such a distinction, the argument founded upon it must be followed to its logical results, and it cannot be used in the construction of one section of the Constitution and abandoned as to others. Now, if the words "real and personal property" are used in the second clause in such a sense as to exclude "moneys, credits," etc., and the two clauses are divorced, as is argued, by a semicolon and the words "and also," and are therefore entirely independent of each other, upon what rule of construction has this Court so often applied the principle of *ad valorem,* mentioned in the second clause, to the "moneys, credits," etc., mentioned in the first clause? Clearly, this cannot be done but by holding that the words "real and personal property" include "moneys, credits," etc.

Again, if these clauses are independent of each other, how, we may ask, has this Court so frequently applied the rule of uniformity contained in the first clause to the real and personal property contained in the second clause?

These considerations alone ought to be sufficient to meet the supposed distinction upon which the *dictum* is founded. We are not without aid, however, in the construction of this provision of (133) the Constitution. It seems to have been taken from the Constitution of Ohio, as the language is precisely the same.

In that state, in the case of *Exchange Bank of Columbus v. Hines,* 3 Ohio St., 1, an effort was made to draw the very distinction which we have been discussing, and the Court said: "But it is argued that the uniform rule in taxing, required by the Constitution, applies only to moneys, credits, investments in bonds, etc. Why should so important a rule as that of uniformity in taxation be established by the Constitution and then limited in its operations to a few specific classes of personal property? It is said that all other property is to be taxed *'according to its true value in money.'* This requirement, however, only fixes the standard for ascertaining the taxable valuation, and does not necessarily imply equality and uniformity, either in the rate and mode of assessment or the different localities throughout the State. The taxable valuation may be fixed according to the true value in money, and yet discriminations may be made between different classes of property and different localities in the State imposing unequal and unjust burdens of taxation."

In speaking of the first clause, it is said that, "This provision, arising out of abundant caution, was not intended to give these enumerated things any new distinctive classification, nor does it, in fact, exclude them from the denomination of personal property, to which, by their nature and legal incidents, they belong. Mr. Broom, in his 'Selections of Legal Maxims' (page 415), says 'that the maxim, *"Expressio unius est exclusio alterius,"* requires always great caution; thus, where several words are used in a written instrument, it is necessary, in the first instance, to determine whether those general words are intended to include other matters besides such as are specifically mentioned or to be referable exclusively to them, in which latter case only can the above (134) maxim be properly applied.' In the interpretation of legal instruments, words used out of abundant caution are often to be tolerated at the expense of tautology.

"The object of the language of the Constitution under consideration was comprehension, not exclusion. The words 'all real and personal property,' therefore, in the second clause of the section are to be taken in their most comprehensive legal import, including every kind of real and personal property whatsoever, *not excepting* the several classes of personal property expressly mentioned in the first clause of the section. If this interpretation be in any sense liable to the charge of tautology, it certainly is not to that of repugnancy. If this had not been the meaning intended by the framers of the Constitution, there would have been added to the words 'all real and personal property' these words, 'other than that above mentioned.' It is more in harmony with the settled rules of construction, to convict the lawmakers of some inelegancies in rhetoric and the use of unnecessary words, than to depart from the leading object and intent of the instrument. . . . Any other interpretation than this would lead to consequences at variance with the manifest spirit and true intention of the Constitution. If moneys, credits, investments in bonds, stocks, joint stock companies, etc., may be subjected to a different rate of taxation from that imposed on other kinds of property; or if moneys, credits, investments in bonds, stocks, etc., may be taxed at less than their true value in money, while all other property is required to be taxed at its true value, in either case, great and unfair inequalities may be created by legislative discretion. . . . There can exist no sound reason why a person, whose property consists of moneys, credits, stocks, etc., should bear a less burden of taxation than that which is imposed on lands and chattels of the agriculturist, the implements, machinery and materials of the manufacturer, (135) or the goods and wares of the merchant; and the Constitution, truly interpreted, recognizes no such distinction."

This case was decided in 1853, and has been cited with approval by this Court in *Worth v. R. R.,* 89 N. C., 301, in which it is said that the provision under consideration "was copied from the Constitution of Ohio." The construction put upon it, therefore, by the Supreme Court of that State is entitled to great weight. "Where the terms of a statute which has received judicial construction are used in a later statute, whether passed by the Legislature of the same state or country, or by that of another, that construction is to be given to the latter statute." *Comm. v. Hartwell,* 3 Gray, 450; *Ruchmaybe v. Mottichmed,* 32 Eng. L. & Eq., 84; *Bogardus v. Trinity Church,* 4 Sand. Chan., 633; *Riggs v. Wilton,* 13 Ill., 15; *Adams v. Field,* 21 Vt., 256. "It is presumed that the Legislature which passed the latter statute knew the judicial construction which had been placed on the former one, and such construction becomes a part of the law." Potter's Dwarris Statutes, 274, note; *Bridgers v. Taylor,* 102 N. C., 89.

The foregoing rule, while not absolutely binding, is used as a valuable aid in the construction of laws.

This high authority determines, we think, that the words "real and personal property," as used in the said section, comprehend moneys, credits, investments, etc., and that there exists no such distinction as that relied upon to sustain the argument which seeks to place a restricted meaning upon the word "property" when used in other parts of the Constitution, and especially in section 9, Art. VII.

If the latter construction prevails, much obscurity, confusion and conflict will be introduced into the organic law which can easily be avoided by holding, as we do, that section 9, Art. VII, is but a concise form of expressing the principle contained in section 3, Art. V, the difference in the language employed being attributable to the probability that the two sections were framed by different com- (136) mittees of the convention.

A contrary construction would lead to results which were little contemplated by the framers of the Constitution. For instance, if the word "property," in section 9, Art. VII, does not comprehend "moneys, credits," etc., they are without the pale of constitutional protection, and municipal corporations may tax them without regard to the rule of uniformity and equality.

Thus it will be in the power of the Legislature to put the entire or an unequal part of the burden of municipal government upon moneys, credits, investments in bonds, stock, etc., and, in this way, indirectly confiscate this species of property.

Such an abuse of the taxing power would, in the language of *Miller, J.* (delivering the opinion of the Supreme Court of the United

States in the case of *The Loan Association v. Topeka,* 20 Wall., 655), be "none the less a robbery, because it is done under the forms of law, and is called taxation." And it is manifest that such an unlimited power of discrimination was not intended to be permitted by the Constitution.

It should, therefore, be a matter of serious consideration to the owners of this species of property, that in attempting to escape the payment of their part of the public municipal burdens, they are invoking a principle which excepts them from the protecting power of the limitations contained in the organic law. Another incongruity growing out of the construction contended for, is presented by section 6, Art. VI, which provides that county taxes "shall be levied in like manner with State taxes." State taxes, as we have seen, must be levied on moneys, credits, etc., by a uniform rule and *ad valorem.* The word "county" is, for some purpose, inserted in section 9, Art. VII, preceding the words "city, town or township." Now, if this section is to have any effect upon county taxation, and the word "property" is to
(137) be taken in its restricted sense, we have a direct conflict with section 3, Art. V, both in respect to the subjects of taxation and the principles by which such taxation is governed.

Again, if such an interpretation is correct, it must be followed in section 1, Art. V, which provides that "the General Assembly shall levy a capitation tax on every male inhabitant of the State, . . . which shall be equal on each to the tax on *property* valued at three hundred dollars in cash. . . . And the State and county capitation tax combined shall never exceed two dollars on the head." As the word "property" alone is used, moneys, solvent credits, etc., constituting, it is estimated, one-eighth of the taxable values of the State, would be excluded from the benefit of the limitation in the above section, and would not enter into the calculation of the amount to be raised at any given per cent on the equation system for State or county purposes.

In passing, we will remark that the importance of imposing some restriction upon city and town authorities as to this species of property is enhanced by the fact that this Court has held that the constitutional limitation as to the *per centum* on the value of property does not apply to such municipal corporations. *Young v. Henderson, supra; French v. Wilmington,* 75 N. C., 482.

It does not follow, however, that because there is only a legislative limitation the principle of equation shall not be enforced, nor that the municipality may not collect from polls an amount equal on each to the tax imposed for municipal purposes on property worth three hundred dollars. In which case there would be no obligation to devote it to the

support of schools and the poor, as section 2, Art. V, only directs the application of the capitation tax collected for State and county purposes.

These views are presented to illustrate how the whole system of taxation growing out of the construction we have given to the organic law could be made to operate harmoniously, as well as justly, whether imposed by the State or a municipal corporation under the (138) powers conferred upon it.

Just here we will notice an argument derived from language of the foregoing provisions of the Constitution. It is said that because property is there required to be valued at its true value in cash, it is a recognition of the distinction in section 3, Art. V. This is a *petitio principii* as the existence of such a distinction is the very point in question. We have shown, we think, both by reason and authority, that no such distinction exists, and that the said section means that all property, of whatsoever description, must be taxed at *its true value,* and by a uniform rule. Upon this we have also a legislative construction in chapter 218, Acts 1889, sec. 18, where solvent credits, investments, etc., are required to be taxed at their "true current or market value."

We will also add the remark of *Rodman, J.,* in *Wilson v. Comrs., supra,* that such a construction of the word would place this class of property outside of the Bill of Rights, in respect to jury trial and other privileges guaranteed therein, as the word "property" only is there used. It must be apparent to every one that if such a finely drawn distinction is to be deduced from an involved sentence and made the basis of a limited definition of the word "property," we will meet with nothing but confusion and incongruities in many parts of the Constitution; whereas, if the general and legal meaning of the word is adopted, all of its provisions will be in perfect accord, working out together the benign principles of equality and uniformity in taxation.

For the foregoing reasons, we think that the *dictum* in *Pullen's case* was unfounded, and it is singular that it should still be quoted as authority. It was clearly not so regarded by its author, the distinguished *Chief Justice,* and we find the same Court over which he presided with such great ability, declaring, in *Wilson v. Comrs. of Charlotte, supra,* that "such an inference is hasty and cannot be fairly drawn," and unanimously deciding that the word "property," as used in (139) section 9, Art. VII, *does* include money, credits, etc. Again, in *Wheeler v. Cobb, supra,* the Court held that the word "property" includes bonds, stocks, solvent notes, etc.

In *Kyle v. Comrs., supra,* the Court said *(Bynum, J.,* delivering the opinion) : "For wherever the power to tax is exercised, all taxes, whether

State, county or town, by force of the Constitution, must be imposed upon all the real and personal property, moneys, credits, investments in bonds, stocks," etc.

In *Pruitt v. Comrs., supra,* the late learned *Chief Justice* in delivering the opinion of the Court, quoted the foregoing language with unqualified approval. These well considered cases, it seems to us, establish as well as judicial authority can establish anything, that the word "property" used in said section is not to be taken in the restricted sense as suggested, but that it includes "moneys, credits, investments, or any other chose in action."

But the opinion in *Vaughan's case* does not rest alone upon the "hasty" inference alluded to, but apparently seeks the aid of the common law definition of the word "property." The cases referred to are where it is used in residuary clauses of wills, in which a sale and division of the proceeds were directed. It was held, says *Reade, J.,* in *Hogan v. Hogan,* 63 N. C., 223, "that money on hand and choses in action did not pass, the *prominent* reason being that they are not ordinarily the subject of sale, and in all the cases a sale was directed and a division of the proceeds."

Rodman, J., in *Wilson v. Charlotte,* after examining one of the cases and showing that the decision was controlled by the context of the will, remarks that "there can be no doubt, I suppose, that a bequest of 'all of my property' to A. would pass bonds belonging to the testator." It is hardly necessary, however, to pursue this phase of the discussion further, as the opinion in *Vaughan's case* admits that these de-
(140) cisions are not in harmony, and are referred to as showing how the *usual import* of words may be restrained in their operation by the context."

While we do not for an instant concede that the manifest spirit and intent of the organic law of a State is to be controlled by the strict technical definitions of the common law as applied to wills and other dispositive instruments, we will insert some authorities which plainly show that at common law the word "property," when not limited by the context of the instrument in which it is found, includes choses in action.

It is a *nomen generalissimum.* "Standing alone, the term includes everything that is the subject of ownership." Anderson's Dict. of Law. "Property" includes not only ownership, estates and interests in corporeal things, but also rights, such as trade marks, copyrights, patents and rights *in personam* capable of transfer or transmission, such as debts. See *Burchill v. Pugin,* L. R., 10 C. P., 397; 2 Aust. Juris., 817 *et seq.* "Property," in a policy of insurance, has been held to include current bank bills owned by the assured. 5 Metchalf Rep., 1.

The terms "goods and chattels" include choses in action. 12 Co., 1; Atk., 182. The word "property" includes choses in action as well as choses in possession. It includes money due as well as money possessed. *Carlton v. Carlton,* 72 Me., 116; *Ide v. Harwood,* 30 Minn., 195. "A credit," says *Reade, J.,* in *Lilly v. Comrs.,* 69 N. C., 307, "is property, and, as such, is liable to taxation as any other property." In *Adams v. Jones,* 6 Jones' Eq., 221, *Manly, J.,* speaking for the Court, said that "the share of stock in the R. & G. Railroad Company is property to be sold under the 11th clause of the will. The word is among the most comprehensive of those in use to signify things which are owned, and subject to be owned and enjoyed."

Speaking of constitutional provisions similar to ours, Cooley on Taxation, 134, says: "These provisions preclude discrimination in favor of or against any classes of property or persons whatsoever; they require the taxation of loans or any other credits, (141) these being property as much as lands or chattels in possession."

Moreover, we have a legislative interpretation of the word which is to be used "in the construction of all statutes," and which reflects much light upon its meaning when used in the Constitution. The Code, sec. 3765, provides that "the words 'personal property' shall include moneys, goods, chattels, choses in action and evidences of debts, including all things capable of ownership not descendible to the heirs at law. The word 'property' shall include all property, both real and personal." To the suggestion that this view of the subject will discourage the investment of capital in towns and cities, we answer that such a consideration should have no weight in a legal discussion, but that it is not true that such a result will follow, as the owner of solvent credits, etc., is only taxed, as to them, at the place of his domicile.

After this lengthy discussion, made necessary by the doubt and obscurity into which the subject has fallen, and sustained, as we are, by the general intention of the Constitution as interpreted by the repeated decisions of this Court and other weighty authorities, we conclude that, although the power of a municipal corporation to tax is not conferred by the Constitution, yet, when such a power is exercised, the Constitution "steps in," and, without regard to the provisions of its charter, *commands* that *all* property therein, real and personal, including moneys, credits, etc., shall be taxed, and that it shall be taxed according to "its true value in money," and by a uniform rule.

This, we feel sure, is in accord with the true spirit and meaning of the fundamental law, whose evident purpose is not to be defeated by a construction based upon a supposed distinction growing out of "inelegancies in rhetoric" and the improper punctuation of one of its provisions.

(142) For the reasons given, it is unnecessary that we should examine into the provisions of the charter. We are of opinion that his Honor properly held that the solvent credits of the plaintiff were liable to taxation by the defendant corporation.

MERRIMON, C. J., dissenting: I do not concur in the decision of this case, and, as it is one of moment, I will state some of the grounds of my dissent.

The decision of the question raised by the assignment of error must depend upon the proper interpretation of several important provisions of the Constitution, affecting, as they do materially, the whole subject of taxation. Their true meaning is not entirely free from doubt, and to settle this is the more embarrassing, as such provisions have come before this Court repeatedly, and its decisions in respect to some aspects of them are not, as will be seen, in harmony with each other.

Article V of the Constitution is entitled, *"Revenue and Taxation,"* and is devoted mainly to the designation and classification of the several subjects of taxation, as to the particular kinds and character of them, and the methods of levying taxes. These distinctions and classifications are fundamental, and must be observed, and prevail in all proper connections. Moreover, terms used must be strictly applied in the sense in which they are employed.

The first section of the article just cited provides and declares that, "the General Assembly shall levy a capitation tax" as therein prescribed, which shall be equal on each person subject to it, "to the tax on *property* valued at three hundred dollars in cash," and "the State and county capitation tax combined shall never exceed two dollars on the head."

The third section thereof provides that "Laws shall be passed taxing, by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and per-
(143) sonal property, according to its true value in money. 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." These sections are general, leading and controlling as to the subjects of taxation for general purposes, and as to how the same shall, or may be, taxed.

It will be observed that there are four distinct classifications of subjects: First, that of "capitation tax," which is defined and limited, and the limitation is based on the prescribed valuation of *property,* classified as such because such property, as we shall presently see, *must* be taxed according to its *value,* and thus it has that quality of definiteness.

This is important for such purpose, and as tending to show the meaning to be attributed to the term "property."

A second classification is that of moneys, credits, investments in bonds, or however made, as such, all of which must be taxed "by a uniform rule"—not necessarily according to their value in money, but each of the subjects so enumerated must be taxed in the same way as the others and in the same measure, whatever this may be. Thus, they may be taxed according to their value, or a fixed per cent, or otherwise, "by a uniform rule," in the wise discretion of the General Assembly. It must pass laws taxing such things, but it is left to judge of the expediency of taxing them more or less, and the particular method of taxing them by a uniform rule as indicated. Money, in general, passes rapidly from one person to another. Credits, bonds and investments are very variable and uncertain, and often precarious in their values, and, therefore, considerations of justice and public policy might induce the Legislature to tax them at a greater or less rate as a class of subjects of taxation than other like subjects. Such seems to have been the reasons, or some of them, for such classification. Anyhow, the Legislature is invested with such power. The classification distinctly appears; the constituent parts of it are enumerated and (144) must be taxed, and it is particularly prescribed that they must be, "by a uniform rule"; there is no other limitation or restriction on the power of taxation as to them. This classification is distinctly separated from that which next follows it in sense and application by a semicolon, while the succeeding one specifies another subject designated as "real and personal property," as distinguished from the next preceding one, which must be taxed "according to its true value in money." The distinction so prescribed would be unnecessary and nugatory, if the subjects embraced by it were put on the same footing and in the same classification with "real and personal property." The distinction specified can, and must, mean something—serve some purpose—and it is difficult to see that it means anything else than the clear classification indicated.

A third classification is that of "all real and personal property" (with specified exceptions), which must be taxed "according to its true value in money." Thus a clear and important fundamental distinction, for the purposes of taxation, is made between "moneys, credits and investments," as specified, and "property." The latter term is used in the limited sense of reality—land—and personalty, tangible things other than such as are specified in the second and fourth classifications prescribed. While the term "property," in its broadest and most general signification, embraces all kinds of property, including choses in action,

rights and credits, and the like things, it is very often and conveniently used in its limited sense, as in the connection under consideration, and this is so notwithstanding the statutory provision (The Code, sec. 3765, par. 6). This provision could not affect the meaning of terms employed in the Constitution; indeed, it purports to apply only to statutes,
(145) and to them, when the meaning is manifestly otherwise than as therein provided and defined.

"Real and personal property" thus classified, is such property as is most durable, less transitory, more uniform and steady in its value, and more generally owned and used by individuals of all classes and conditions than any other. It constitutes, ordinarily, the most certain and leading subject of taxation in every respect. Hence, the Constitution classifies it, and prescribes a just and reasonable rule of taxation as to it, that puts it beyond the control of the Legislature, except as to the measure of the taxes levied. The rule as to it is, in effect, that it must be taxed uniformly and *ad valorem,* because all lands must be taxed.

A fourth classification is that of "trades, professions, franchises and incomes." It is not made mandatory upon the General Assembly to pass laws taxing these subjects of taxation. It is left to it to determine when it is just and expedient to do so. There might be reasons of justice and public policy that would render it unwise to impose a tax on them. And, for the like reason, the tax, when levied, is not necessarily to be uniform. It might be wise to tax some trades, professions, franchises and incomes and not others, and at one time and not at another. The subject is intentionally left to the wisdom and discretion of the Legislature.

Thus, the subjects of taxation and the methods of taxing them for the purpose of raising the general revenues of the State are prescribed and established by the Constitution.

In section 6 of the same article of the Constitution, it is provided that "the taxes levied by the commissioners of the several counties for county purposes, shall be levied in like manner with the State taxes, and shall never exceed the double of the State tax, except for special purposes, and with the special approval of the General Assembly." The several counties are constituent parts of the State, and are political instrumentalities thereof, intended to promote and aid in the ad-
(146) ministration of the government, particularly in the localities where they are situate. It is in and through them, to a very large and material extent, that the government is administered and the public revenues necessary for that purpose are correspondingly large. Hence, the provision just recited finds an appropriate place in the article of the Constitution on the subject of "Revenue and Taxation";

and hence, also, the general revenue laws of the State embrace counties, and the raising of revenue through them for their proper county purposes. Hence, too, the provision in the section last recited, that "the taxes levied for county purposes shall be levied in like manner with State taxes," implies that they shall be levied "in like manner" in all respects, including the subjects of taxation. Otherwise, the "like manner" would be partial and not to the whole extent as intended.

The article of the Constitution cited above makes no reference to taxation of cities and towns. In another article—that entitled "Municipal Corporations"—(section 9 thereof) it is provided that "all taxes levied by any county, city, town or township, shall be *uniform and ad valorem* upon all *property* in the same except *property* exempted by this Constitution." The term "property" thus employed is used in the same restricted sense, and for the like purpose, that it is in the third class of subjects of taxation already adverted to above. It applies to the same subjects of taxation, and must be taken in the same sense, nothing to the contrary appearing, and nothing does so appear. By the third classification mentioned, "all real and personal property," as pointed out above, must, in effect, be taxed uniformly and *ad valorem,* and thus it likewise appears that the word "property" is used in the same sense in both of the sections recited. Indeed, the intention of the last recited section is to exclude the possible inference and conclusion that "municipal corporations" could levy taxes on "property"—real and personal property—otherwise than as the Legislature might do for (147) the general purposes of the State, and to prevent the Legislature from allowing them by statute to do so. Moreover, the use of the word "property" in the exceptive provision of the section last recited, also tends to show that it is used in the restricted sense. Such corporations shall not levy taxes upon "property" exempt by the Constitution, and all such "property" is real and personal, in the restricted sense of that term. (See Article V, sec. 5.) Besides, to use the term "property" in the last recited section in its broadest sense, would render that section as to counties incompatible with Article V, section 6, above recited. This section requires that taxes for county purposes must be levied in "like manner with the State taxes." It is certainly unreasonable and unwarranted to merely infer, in the face of what so appears to the contrary, that cities and towns may—must—levy taxes uniform and *ad valorem* upon all "property" embraced by that term used in its broadest sense. Cities and towns cannot levy taxes at all except as the Legislature may allow them to do so, and when they are allowed to levy taxes on property simply, this implies property in the limited sense, and taxes levied upon the same must be "uniform and *ad valorem.*" They

cannot tax one sort of such property and not another, nor can they levy a tax otherwise than *ad valorem*. The Constitution has fixed the meaning of the term "property" when used in connection with the subject of "Revenue and Taxation," and that meaning must be accepted and acted upon. The Legislature can only levy taxes on the subjects of taxation accordingly as classified, and in the way prescribed and allowed by the Constitution.

There is no provision of the Constitution that requires or allows cities and towns, where they already exist, or shall be created, to levy taxes for their purposes on all or any property of any kind whatever within them, nor is there any such provision that requires the Legisla-
(148) ture to confer upon them power or authority to do so. The single provision as to them in respect to taxation is, that "all taxes levied by" them "shall be uniform and *ad valorem* upon all property in the same." This must imply, when they shall be allowed, by appropriate enactment of the Legislature, to levy taxes on *property* as explained above. The purpose of the provision is to prevent cities and towns from taxing one species of property they may be allowed to tax and not another, and one kind more than another, and likewise to prevent the Legislature from allowing them to do so.

The Constitution does not regulate the subject of taxation in cities and towns otherwise than as just explained. It is left to the Legislature to allow them to tax property, moneys, credits, investments, trades, professions, franchises and incomes as it may deem wise and expedient; but it is not bound to do so, nor is it required to allow them to tax all such subjects of taxation, or none.

Moreover, it is unreasonable and unwarranted to make Article V, section 3 of the Constitution, apply to cities and towns and not section 1 thereof, in respect to the *equation of taxation*. What reason can be suggested for such discrimination? Taxation may be unlimited as to towns—it *must* be limited as to the State and counties!

The power of the Legislature to confer upon cities and towns powers of taxation, grows out of its power to create and invest them with such powers as it may deem proper, not inconsistent with the Constitution. The power to create them implies the power to effectuate the purpose by proper pertinent means.

It is wisely left to the Legislature to determine what powers of taxation they shall exercise, and what subjects thereof they may tax. They are not regular instrumentalities of government like counties. Their purposes are special in a large degree; they afford the people who live in them special advantages, oftentimes varied and peculiar in their
(149) nature; they possess more corporate powers and functions than

counties, and serve the purpose of the corporators as such much more than the same of the public and government. Hence, what powers of taxation, and what they ought to tax, may depend largely upon their circumstances and conditions, the population, the kinds and character of their business, their industries, the volume of business done by them, their locations and like considerations.

In *Pullen v. Raleigh,* 68 N. C., 451, it is distinctly held that the power of city authorities to levy a tax upon "debts and securities for money held by the citizens depends upon the charter," and that they can only levy taxes on such subjects of taxation as are specified therein; and, therefore, the city of Raleigh could not levy a tax upon money and credits of its citizens as such subjects of taxation were not specified in its charter. The Court say, in respect to the word "property," that the Constitution (Art. V, sec. 3) does not make it include "money, credits, investments in bonds," etc., and that "real and personal property" is used in a sense to exclude such "credits and investments." The opinion is brief and not very satisfactory, but the case has been cited with approval in numerous cases. *Wilson v. Charlotte,* 74 N. C., 752; *Latta v. Williams,* 87 N. C., 126; *S. v. Bean,* 91 N. C., 554; *Winston v. Taylor,* 99 N. C., 210. In *Vaughan v. Murfreesboro,* 96 N. C., 317, a recent case, it is cited and commented on at considerable length and approved as good authority; and it was held in that case—the latest—that where a statute allowed a town to levy a tax upon all *persons and property* within the same, it did not authorize a tax on solvent credits, moneys or bonds. This case, that of *Pullen v. Raleigh, supra,* and other like cases, are necessarily overruled by the present one.

In *Wilson v. Charlotte, supra,* it is strongly suggested that the term "property," as used in Article VII, section 9, is not confined "to tangible property"; but this was no more than a suggestion, because, in that case, the charter of the defendant, in terms, expressly (150) allowed it to tax all subjects of taxation. This case is cited in *Cobb v. Elizabeth City,* 75 N. C., 1, as authority to support the decision therein, that under the Constitution (Art. VII, sec. 9) all taxes "must be levied as well on personal as on real property, notwithstanding any contrary provision in the charter. The word 'property' includes bonds, stocks, solvent notes," etc. This is an extreme view, and the Court give no reason for it—it simply so decided.

In *Kyle v. Mayor,* 75 N. C., 445, it is broadly held, without citing any authority, that inasmuch as the town of Fayetteville possessed the power of taxation, therefore, perforce of the Constitution (Art. V, sec 3; Art. VII, sec. 9), the town *must* tax all the real and personal property, moneys, credits, etc., situate in the town.

In such a state of conflict and confusion of authorities in a respect so important, I deem it the duty of the Court to put an end to doubt and such conflict, as far as practicable, by its decision in this case. It will be observed that I have followed, mainly, *Pullen v. Raleigh, supra,* and the cases in harmony with it. It seems to me that the interpretation I have given the clauses of the Constitution cited and commented upon is reasonable, as well as necessary to the free and efficient operation of the organic law in respects of serious moment to the people. Moreover, what I have said is sustained in material measure by a line of decisions already cited.

In the present case, the charter of the defendant town allowed it to levy a tax "on all the *real and personal property,* not exempt under the State laws, in said town," etc. As has been seen, such provision did not confer on the defendant power to tax moneys and solvent credits.

It, therefore, had no authority to tax the credits of the plaintiff, as it undertook to do, unless it had such authority by virtue of the general statute (The Code, sec. 3800), which provides, among other (151) things, that the commissioners of towns may "lay taxes for municipal purposes on all persons, property, privileges and subjects within the corporate limits, which are liable to taxation for State and county purposes." I think it had no authority thus conferred, because its charter specified particularly the subjects of taxation it might tax, and the same statute (The Code, sec. 3827) provides that "this chapter shall apply to all incorporated cities, towns and villages, where the same shall not be *inconsistent* with special acts of incorporation, or special laws in reference thereto," etc. The limited power to tax "real and personal property" is not consistent with the larger power to tax all subjects of taxation. For some reason the Legislature limited the defendant's power in such respect. It is not to be presumed that nothing was intended by such limitation. If the general statute would apply, then the limitation was useless—served no purpose.

I think there is, therefore, error. The judgment ought to be set aside, and judgment entered in favor of the plaintiff in accordance with the stipulation in the controversy submitted.

Per Curiam. Judgment affirmed.

Cited: Wood v. Edenton, post, 153; *Wiley v. Comrs.,* 111 N. C., 400, 404; *Harper v. Pinkston,* 112 N. C., 301; *United Brethren v. Comrs.,* 115 N. C., 493; *Worth v. Wright,* 122 N. C., 336; *Winston v. Beeson,* 135 N. C., 277; *Collie v. Comrs.,* 145 N. C., 181; *Trustees v. Avery,* 184 N. C., 470; *Person v. Watts, ibid.,* 541; *New Hanover County v. Whiteman,* 190 N. C., 334; *Comrs. v. Blue, ibid.,* 642.

FRANK WOOD v. THE TOWN OF EDENTON.

Municipal Taxation—Solvent Credits.

All notes, bonds, etc., owned by a resident of a municipality, whether owing by residents or nonresidents, are subjects of municipal taxation.

(See *syllabus* in preceding case.)

THIS was a civil action, instituted before a justice of the peace, (152) and carried, by appeal, to the Superior Court of CHOWAN County, and tried before *Boykin, J.,* at Spring Term, 1889, of that court, upon the following facts agreed:

1. That the defendant is a duly incorporated town, and authorized under its charter (chapter 123, Private Laws of North Carolina, 1869 and 1870) to annually levy and collect taxes "on all real and personal estate within said town," etc.

2. The plaintiff is a resident of said town, and, on the ..... day of June, 1888, he listed for taxation, before the proper list-taker of Chowan County, the notes, bonds and solvent credits owned by him and in his possession, amounting to $17,000, and the councilmen of the town of Edenton took the same from the said county list and levied a tax of one-half of one per cent upon said notes, bonds and solvent credits, and collected from the plaintiff thereon the sum of $85, which the plaintiff paid under protest.

3. That of the notes, bonds, etc., so levied upon, $4,000 worth were against persons living in town, and secured by deeds of trust upon property in said town, and $13,000 worth against nonresidents of the town, and secured by property not located in said town.

4. The plaintiff demanded said amount, in thirty days, of the treasurer of said town, which being refused, he, after ninety days, brought this action, and otherwise complied with the requirements of chapter 137, Laws of 1887.

The court gave the following judgment:

"This cause coming on to be heard upon appeal of plaintiff from a judgment rendered by H. DeB. Hooper, J. P., and being heard and considered by the foregoing facts agreed, it is adjudged by the court that the plaintiff recover of the defendant the sum of sixty-five dollars, being one-half of one per cent collected by the defendant of the plaintiff upon thirteen thousand dollars of bonds against nonresidents of Edenton, and secured by mortgage upon lands outside the corporate limits of the said town, together with the costs of this action, to be (153) taxed by the clerk."

The defendant excepted and appealed to this Court.

W. D. Pruden for plaintiff.
Charles M. Busbee for defendant.

SHEPHERD, J. For the reasons given in the case of *Redmond v. The Commissioners of Tarboro, ante,* 122, the judgment below is reversed.

All notes, bonds, etc., whether owing by residents or nonresidents, are subjects of municipal taxation.

Judgment reversed.

H. G. SPRINGS v. JOHN T. SCHENCK ET AL.

Action to Recover Land—Lost Papers in Justice's Court—Evidence—Books and Documents—Jury not Allowed to Inspect — Estoppel—Tenancy—Judge's Charge—Correction of Error.

1. On the trial below the Court found that the papers in an action tried before a justice of the peace had been lost, and the justice was permitted to identify the entries made by him in his docket at the date of the trial before him, and to testify as to the substance of the lost papers: *Held,* not to be error.

2. The finding of the court below that the papers in a case tried before a justice had been lost, and could not be found, is not, in its bearing upon the admissibility of secondary evidence to prove their contents, reviewable in this Court.

3. An estoppel, growing out of the judgment of a justice's court, in an action involving the question as to whether the defendant was plaintiff's tenant, exists only for the time that the defendant was adjudged to be such tenant.

4. A custodian of a book or document, or one in charge of any writing filed or lodged by law in his keeping, is authorized to tell a jury *ore tenus,* when the original is offered in evidence, what is the true entry, if the writing cannot be easily read, or if, by the custom of the office, some sign be used to supply the place of an omitted word.

5. In such case, the jury should not be permitted to inspect the book or writing.

6. In an action to recover land, the court charged the jury that title having been shown to be out of the State, a plaintiff can show title "first, by a paper title; second, by adverse possession for seven years under known and visible boundaries, and under colorable title by plaintiff and those under whom he claims; and third, by estoppel." If it was error to leave the jury without further explanation, it was cured when the court further charged that if the deed (under which plaintiff claimed) covered the land in dispute, including a certain lot, and the agents rented and gave that

lot in for taxes for seven years before the suit was brought, the possession of the lot would, by law, be extended to the boundaries of the deed, and the plaintiff and those under whom he claimed would, by construction of law, be in possession of the whole.

THIS was a civil action, tried before *Gilmer, J.*, at Fall Term, (154) 1888, of MECKLENBURG Superior Court.

The action was brought to recover possession of the land described in the complaint. When the case was called for trial, the plaintiff announced that he was not ready to try, because of the absence of one T. J. Orr, a surveyor, by whom he expected to prove that the land described in the complaint was covered by the deeds from Phelps to Rothchilds, and from Rothchilds to the plaintiff, hereinafter referred to. The defendants' counsel replied that defendants wished to try, and would admit what plaintiff stated he expected to prove by the witness Orr, and defendants did admit that the said deeds covered the land described in the complaint.

The plaintiff introduced evidence tending to show that the title was out of the State. He then introduced a deed from Herman Phelps to S. & F. Rothchilds, dated 18 June, 1868, and a deed from said Rothchilds to plaintiff, dated June, 1883. Copies of said deed are (155) hereto annexed and made part of the case.

J. J. Sims, a witness for the plaintiff, testified: "I was agent of S. & F. Rothchilds from 1870 to 1880, and took possession of land in dispute as agent. I rented the 'Mary White cabin lot' from year to year and from 1870 to 1880; this was all the rent I got. The balance of the land was not in cultivation. The 'Mary White cabin lot' is not on the *locus in quo*. In 1880 I rented the lands covered by the deed of Rothchilds from Phelps to defendant Schenck, and told him I did not know the boundaries, but would rent him all land called for in that deed. He was to pay $3 for the first year and $5 for the second year. I turned over the land to E. K. P. Osborne in 1880 or 1881. The first conversation with Schenck was in 1879. The 'Mary White cabin' was burnt just before, perhaps the year before. I did not know I was renting lot No. 1110, but rented all covered by deed."

E. K. P. Osborne, a witness for the plaintiff, testified: "I was agent for the Rothchilds in 1881, but did not know the lands I was to take charge of until I saw the deed to Rothchilds. Schenck was in possession; I applied to Schenck for rent. He agreed to pay rent, and afterwards I had a conversation with him about buying the land. I agreed to sell him the land covered by the Rothchilds deed. I did not get the money, and afterwards Schenck told me he had arranged to get it, and, if he did not, would pay rent. This was in 1881 to 1883."

H. G. Springs, in his own behalf, testified: "I bought the land in 1883, and afterwards informed Schenck of the purchase. Schenck cultivated the land in wheat that year (1883). Schenck said he had rented it from Sims."

The defendants denied that they, or either of them, had ever rented the land described in the complaint, or any part of it, from Sims,
(156) or Osborne, or the plaintiff, and alleged that it was the "Mary White cabin lot" that Schenck had rented from Sims in 1879 or 1880, and from Osborne, and it was the property referred to in conversation with plaintiff. In order to estop the plaintiff as to this, the defendant proposed to show that an action had been brought in 1883 for a part of the wheat raised on the *locus in quo,* as rent, by plaintiff against the defendant Schenck, which resulted in a judgment for Schenck, and for this purpose the defendant introduced as a witness Capt. R. P. Waring, who testified that he was a justice of the peace for Charlotte township, Mecklenburg County, in the year 1883.

The witness was then asked by the defendants' counsel if he had tried an action between the plaintiff Springs and the defendant Schenck in that year, and if so, what was the nature of the action?

The plaintiff objected to this question on the ground that the papers in the case were the best evidence of the nature of the action, and should be produced.

The defendants' counsel then asked the witness if he had the papers, and could he produce them. The witness replied that he had made diligent search at the last trial of the case, and since, among his papers for the papers in said case, and had looked for them where they should be; that they ought to be among his papers at his office at the mint, but, after diligent search there, he had been unable to find them, and that he thought they were lost.

His Honor found as a fact that diligent search had been made by the witness for the papers, and that they could not be found, and accordingly overruled the plaintiff's objection, and plaintiff excepted.

The witness, therefore, testified: "I tried an action between the plaintiff Springs and the defendant Schenck in August, 1883. The
(157) action was brought to recover unthreshed wheat from Schenck as rent due the plaintiff for the land on which it was raised."

The witness produced his justice's docket, and the defendant proposed to have the witness read the entries made therein by him as justice in the case of *Springs v. Schenck,* above referred to.

The plaintiff objected to the entries in the docket as evidence because the docket was not a record, and the witness who made the entries is alive and can testify as to what he did.

The objection was overruled, and the plaintiff excepted.

The witness read from the docket the following entries: "19 July, 1883, issued summons returnable 20 July, 1883, at ....o'clock ....M., and delivered same to C. C. King, constable. Summons returned executed. Case came on for trial. Continued to August, 1883. Both parties in court, and, after patient investigation and elaborate argument of counsel, it is adjudged that the defendant is not a tenant of the plaintiff, so as to entitle him to the remedy of claim and delivery. It is, therefore, ordered that plaintiff return property described in the complaint to defendant. Judgment against plaintiff for cost in full. Appeal prayed and granted. Notice waived, with parties present. Appeal withdrawn."

Cross-examined.—The witness further testified: "I made these entries the evening the case was tried. There is an entry on the docket of a motion made by plaintiff to make S. & F. Rothchilds parties plaintiff to use of Springs, but this motion was withdrawn or overruled. My recollection is that the action was for the recovery of some rent wheat under the landlord and tenant act. I have not been able to find papers in the case."

The defendants on this point introduced Schenck, who testified: "I was present at the trial before Capt. Waring. The action was brought to recover certain wheat grown on the land in dispute by me in 1883, and claimed by the plaintiff as rent. The plaintiff alleged in that suit, and offered evidence to show that I was his tenant, and had (158) not paid the rent, and that he was entitled to wheat as rent. I denied this, and the question was, whether I was tenant of plaintiff Springs in 1883, or not, of the lands in dispute."

The plaintiff here introduced E. K. P. Osborne, who testified: "I was present at the trial before Waring, and appeared as attorney for the plaintiff. My recollection is that the question before the justice was whether the title to real estate came in controversy, and the decision of the justice turned on that point—the justice, as I recollect, holding that, as Springs purchased from Rothchilds, there was no privity between him and Rothchilds, and he could not maintain the action, and that there was no tenancy."

The defendants then offered in evidence a deed from Robert F. Davidson to Gray Toole, dated 7 October, 1869, covering the *locus in quo*, and registered in 1884.

John T. Schenck, witness for the defendant, testified: "The deed was made to Toole, though I had paid half of the purchase money, and it was understood and agreed at the time (7 October, 1869) that I should have a deed for half of the land. Afterwards the deed was made by Mr. Davidson to me for one-half interest, with consent of Toole, and in pursuance of the agreement. The deed was dated as of the time of

agreement with me, because it was understood that it should have effect as of that time. It was registered 28 April, 1883. It was made by Mr. Davidson to me, because we thought this would be the same as if Toole had conveyed to me, and Toole and I had fallen out. I rented the 'Mary White cabin lot' from Sims in 1879 or 1880, and not the land in dispute. I had no idea of renting the land in dispute, and did not think I was renting it, or that Mr. Sims or Mr. Osborne thought so. I went into possession of the *locus in quo* shortly after Mr. Davidson gave us the deed in 1869, and cultivated it. First pastured on it and then cultivated it; have had possession of it in this way ever since,
(159) using it as mine and Toole's; went into possession of it with Toole's consent, under the Davidson deed, the boundaries of which covered the land. I cultivated up to the line or fence of the 'Mary White cabin lot,' until shortly after the cabin was burnt, and then I rented the cabin lot, as I could cultivate it conveniently with my land after the cabin was burnt, and could get from my land over it better than before. The 'Mary White cabin lot,' was surrounded by a fence, but the other land was not enclosed. I cultivated *locus in quo* from the time fence law was passed, in 1876, and after cabin was burnt, in 1879, I continued to cultivate it with the cabin lot. I agreed with Mr. Osborne to rent the cabin lot and some land on the other side of the road, and some near the St. Catherine's mine tract. He did ask me to buy some land belonging to Rothchilds. Said he could not locate it, and that I would have to hunt it up. I was advised not to buy, and did not. I paid rent on the 'Mary White cabin lot,' but on no other land, and none on the *locus in quo,* and never rented it from anybody, for we always claimed it. Told Mr. Osborne that I claimed land down there. In 1883 Mr. Springs, the plaintiff, sued me before Captain Waring, a magistrate, for wheat raised on the disputed land, claiming that I was his tenant, and had not paid the rent, and that he was entitled to wheat under the landlord and tenant act. It was decided by the magistrate that I was not his tenant. Neither Mr. Sims nor Mr. Osborne read the Rothchilds deed to me."

Frank Caldwell, a witness for defendant, testified: "I knew the cabin lot, where Mary White lived, and remember when it was burnt. I know the land in dispute. Schenck worked it one year before the cabin was burnt, but not the lot where the house was. He worked that afterwards."

Defendants introduced other evidence tending to show that defendant worked the disputed land before the cabin was burnt in 1879,
(160) and worked the cabin lot afterwards, and that the cabin lot was enclosed by a fence.

The plaintiff introduced the tax books for the year 1875, for the purpose of showing that neither of the defendants listed the land in dispute for taxation that year.

Plaintiff proposed to exhibit the tax books to the jury for the purpose of showing that certain marks in the returns of Gray Toole were ditto marks, immediately under the previous return. The defendant objected to the plaintiff's showing the books to the jury. His Honor ruled that it was not proper to exhibit the books to the jury, but the witness Cobb, who was on the stand, and register of deeds and keeper of the books, was allowed to describe the marks and their appearance from the books; and the witness under plaintiff's examination described fully the marks and appearance of the returns, both the return of Gray Toole, and the return of the taxpayer immediately preceding his return—which last mentioned return, it appeared from the book, was for one city lot.

Plaintiff excepted.

There was evidence that Toole had afterwards given the land in for taxes, and there was also evidence as to the possession of the land by the plaintiff, and those under whom he claims, and by the defendants, but it is not necessary to be stated to present the exceptions of the plaintiff.

His Honor charged the jury as follows:

"The case turns on one or two points. Plaintiff alleges that he is the owner of the land described in the complaint, and is entitled to the possession, and these allegations the defendants deny. The plaintiff, in support of his allegations, offers a deed from Phelps to Rothchilds, and from the latter to him, which have been read to you. The burden is on the plaintiff; he must recover on the strength of his own title, not on the weakness of defendants. He must show where the land he claims is, and that it is covered by his deeds. He says the deeds cover the 'Mary White cabin lot.' The defendants admit the deeds cover the (161) *locus in quo,* but not the 'Mary White cabin lot,' which plaintiff alleges, and defendants deny, is a part of the *locus in quo.* You must decide how this is upon the evidence, the descriptions in the deeds and complaint, the plats, position of streets and railroad, and other evidence before you. If you believe the evidence, the title to the land is out of the State, and being out of the State, the plaintiff can show title to it in several ways—first, by a paper title; second, by adverse possession for seven years under known and visible boundaries, and under colorable title by the plaintiff, and those under whom he claims; and third, by estoppel. The plaintiff claims to have shown title by adverse possession for seven years under colorable title, and also by estoppel. Color of title has been shown by plaintiff, as the deeds of Phelps to Rothchilds and Rothchilds to plaintiff, constitute color of title. He claims to have shown adverse possession for seven years, under his color of title by his witnesses, the agent of Phelps and Rothchilds, who stated that they rented the land and gave it in for taxes. If you find that plaintiff, and those under whom he claims, have had possession for seven years of the *locus*

in quo, at any time prior to the bringing of this action, it would ripen their color of title into a good title and he would be entitled to recover. If the agent rented it and gave it in for taxes, that would constitute adverse possession. If the deed of Phelps to Rothchilds covers the land in dispute, including the 'Mary White cabin lot,' and the agents rented and gave that lot in for taxes for seven years before suit was brought, the possession of the 'Mary White cabin lot' would, by the law, be extended to the boundaries of the deed, and the plaintiff, and those under whom he claims, would, by construction of law, be in possession of the whole; and if you find this to be the case, the plaintiff would be
(162) entitled to recover, and you will respond to the first and second issues, 'Yes,' and assess plaintiff's damages. The defendants say that they have had possession of the *locus in quo* since 1876, the date of the passage of the stock law, claiming it under the Davidson deed, except the 'cabin lot,' which they never claimed. You must decide who has had the possession, the burden being on plaintiff. The plaintiff further alleges that Schenck entered as tenant of plaintiff, and under those whom he claims, and that Toole entered by collusion with Schenck, and that it would be a fraud in Schenck to claim title without first surrendering the possession. This is what is called an estoppel. This is perhaps the most material matter for you to consider under the first and second issues. If he entered as tenant, and Toole entered by his consent, or by collusion with him, they would be estopped to deny the plaintiff's title. Plaintiff alleges that he, and those under whom he claims, rented the *locus in quo* to Schenck, including the 'cabin lot.' The defendants deny this, and say that they never rented the *locus in quo* from anybody; that they went into possession of it soon after they received the deed from Davidson in 1869, and have had possession of it ever since, claiming it as their own. That Schenck, in 1879 or 1880, rented the 'Mary White cabin lot' from Sims after the cabin was burnt, but that the 'cabin lot' is no part of the *locus in quo*. That it was an enclosed lot, and used and occupied as a distinct parcel of land from the *locus in quo*. You must decide how this is. The burden is on the plaintiff to show the facts upon which he bases the estoppel. If Schenck was tenant and Toole entered by his consent, or by collusion with him, you will respond to the first and second issues 'Yes,' and assess plaintiff's damages. It is contended by the defendants that the question of tenancy was tried and decided by Mr. Waring, a justice of the peace, in an action between plaintiff and Schenck to secure some rent wheat grown on the *locus in quo*. If the question involved in that action was
(163) whether the title to real estate came in controversy and the case was decided on that point, and the question of tenancy was not passed upon, or if any other question was decided than the one of

tenancy of the *locus in quo* plaintiff would not be concluded by the judgment in that action. If the question as to Schenck's tenancy of the *locus in quo* was the sole question involved and was, on its merits, decided against the plaintiff, then plaintiff would be bound by the judgment, but only for the year 1883, and the estoppel of the judgment would not cover any time but the year 1883, and the plaintiff would not be estopped to show that Schenck rented before that year (1883) from Rothchilds, though Sims and Osborne are agents, and that he acquired the Rothchilds' title by purchase."

The issues were submitted as set forth in the record, and a verdict thereon returned for the defendant. Motion for a new trial by plaintiff refused.

The plaintiff assigned the following errors:

1. That his Honor admitted incompetent testimony as above set forth.

2. That his Honor refused to admit competent testimony as above set forth, and he refused to allow the jury to see the tax books as above set forth.

3. For that his Honor charged the jury, that there must be an adverse possession of seven years, *"under known and visible boundaries,"* and under colorable title, etc., the plaintiff objecting to the words *"under known and visible boundaries."*

4. Because his Honor charged that if, in renting the land from the agent of Rothchilds, Schenck honestly thought he was renting only the "Mary White cabin lot," and not the *locus in quo,* and there was a misunderstanding about what land was being rented, the tenant estoppel would not apply. (When the plaintiff moved for a new trial he assigned this error, and his Honor remarked that he did not so charge the jury, but told them that it did not depend upon what either party understood, but upon what both agreed; and his (164) Honor did so charge the jury.)

5. That his Honor charged the jury that if the suit before Justice Waring was for rent-wheat for the year 1883, and the question tried and decided was whether Schenck was tenant of the premises, and it was adjudged that he was not tenant, they must find the issues for the defendant. (His Honor stated, when this error was assigned on the motion for a new trial, that he did not so charge the jury, but that he had charged them that the estoppel of the judgment could not cover more time than the year 1883, or it did not prevent the plaintiff from relying upon any tenant estoppel existing before that year, nor upon anything which occurred since that year.)

There was a judgment for the defendants, and the plaintiff appealed.

G. F. Bason and C. W. Tillett for plaintiff.
P. D. Walker for defendant.

AVERY, J., after stating the facts: The finding of the court below that the papers in a case tried by a justice of the peace had been lost by him, and could not, after diligent search, be found, is not, in its bearing upon the admissibility of secondary evidence to prove their contents, reviewable in this Court. *Bonds v. Smith, post,* 553; Greenleaf on Evidence, secs. 84, 509 and 558; *ibid.,* vol. 2, sec. 17.

A justice's court is not a court of record, and, as was said in *Reeves v. Davis,* 80 N. C., 209, "the rule has been for many years to admit the judgments of justices' courts in evidence, on proof of their handwriting, of their being in office at the time, and of the rendition of the same within their counties. When properly proven and admitted, such judgments, until reversed, are conclusive as to all the facts
(165) found and questions of law determined between the parties and privies thereto, not only in later litigation in the same action, or for the same cause of action, but in any subsequent suit between the same parties involving a different part of the same transaction that was the subject of the first controversy. *Brunhild v. Freeman,* 80 N. C., 212.

In the case before us for review, after the judge, upon satisfactory evidence, had found that the original papers had been lost, the justice of the peace identified the entries upon his docket, kept at the time of the previous litigation, and was then allowed to state the substance of the lost papers. The officer, who was the custodian of the book and the author of the writing in it, was qualified to tell what contemporaneous entries were made by him, according to the express requirement of The Code, and such fragmentary summaries were admissible in evidence. *Jones v. Henry,* 84 N. C., 320; 1 Greenleaf Ev., sec. 513; 1 Wharton on Ev., secs. 134 and 135.

In his charge his Honor told the jury, in effect, that if the testimony of the officer was true, the estoppel, growing out of the alleged tenancy, would only exist as to the year 1883, for which the justice had adjudged that the defendants were the tenants of the plaintiffs, as to the land in controversy, and liable for rents out of the crops raised thereon. We think that the testimony was competent, and the charge in relation to it correct. *Williams v. Clouse,* 91 N. C., 322; *Temple v. Williams,* 91 N. C., 82. This conclusion disposes of the first and second exceptions, and that last taken to the instruction given by the court.

It was not competent, when the register of deeds, who was the custodian of the tax books, was put upon the stand and identified said book, to hand it to the jury for the purpose of allowing them to com-

pare the entry of the return of the defendant, Gray Toole, with that of the taxpayer whose name immediately preceded his own on the book, and who had returned one city lot for taxation, and determine whether certain marks opposite to the name of said defendant (166) were not "ditto marks," indicating that said defendant had made the same return. The judge refused to allow the jury to inspect the book, but the witness was permitted to tell them what the return of the defendant was, as appeared from the book in his keeping as an officer. The custodian of a book or document, or one who is in charge of any writing recorded, filed or lodged by law in his keeping, is the proper person to certify a copy of any such written instrument to be read as evidence in the courts (The Code, sec. 1342), and he is, therefore, authorized to tell the jury, *ore tenus*, when the originals are offered, what is the true entry, if the writing cannot be easily read, or, by the custom of the office, some sign be used to supply the place of an omitted word.

The general rule is that written documents are not allowed to be given to the jury for comparison or inspection. It is not necessary that we should discuss that rule, or point out the exceptions to it. It is sufficient to say that this case comes within the rule.

Counsel very properly declined to discuss and insist upon any other exceptions, save that growing out of the statement by the court in first part of the charge, of the abstract proposition that title, being proven or admitted to be out of the State, a plaintiff can show title—"first, by a paper title; second, by adverse possession for seven years, under known and visible boundaries, and under colorable title by plaintiff, and those under whom he claims; and third, by estoppel."

If we concede (which we must not be understood as doing) that it would have been error to leave the jury without further explanation to reach the possible conclusion from this instruction that plaintiff could not recover under the law as laid down, unless he had shown an actual *possessio pedis* of the land claimed, up to the boundaries of his paper title, and also had located the lines of his deed, we think (167) that the lucid explanation which was given in applying the law subsequently to the specific facts of this case, cured the error complained of, certainly if it was not more favorable to the plaintiff than the evidence justified the court in making it. The jury were told that if the deed of Phelps to Rothchilds covered the land in dispute, including the "Mary White cabin lot," and the agents rented and gave that lot in for taxes for seven years before the suit was brought, the possession of the "Mary White cabin lot" would, by law, be extended to the boundaries of the deed, and the plaintiff, and those under whom he

claims, would, by construction of law, be in possession of the whole, and if they found this to be the case, the plaintiff would be entitled to recover, and they would respond to the first and second issues Yes, and assess plaintiff's damage.

The whole case depended upon the bar of the action by estoppel growing out of the alleged tenancy. So far as it affected the interests of the plaintiff, that question was fairly and clearly submitted to the jury.

We see no sufficient ground for sustaining any of the plaintiff's exceptions, and the judgment must be

Affirmed.

Cited: Darden v. Steamboat Co., 107 N. C., 447; *S. v. Hendricks,* 187 N. C., 335.

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(168)

F. R. ROSE AND WIFE v. THE WILMINGTON AND WELDON RAILROAD COMPANY.

Carriers—Manner of Expulsion of Passenger.

On the trial of an action for damages for putting the *feme* plaintiff off a railway train, it appeared that the tickets held by herself and husband were not stamped as required, and the conductor told the husband that they must pay or get off, after the husband had urged him to telegraph for leave for them to go on to W. on the unstamped tickets; that when they reached the next station, the conductor returned and said, in a "brusque, decided manner," to the husband, "This is Halifax, if you are going to get off"; and he, saying that he had no intention of getting off unless ordered, the conductor said, "very decidedly, quickly and rudely," "Then I order you to get off," at which plaintiff and her husband got off, but returned and paid their fare: *Held*, that the company was not liable for damages for the manner of expulsion, although the *feme* plaintiff was riding on pillows and apparently unwell.

THIS was a civil action, tried before *MacRae, J.,* at December Term, 1889, of CUMBERLAND Superior Court.

The *feme* plaintiff and her husband had purchased tickets from Fayetteville, N. C., to Old Point, Va., and return, with a condition endorsed on the tickets that they were to be stamped by the agent at Old Point.

The court instructed the jury, in effect, that as the *feme* plaintiff who brought the suit had failed to have her ticket stamped, the con-

ductor had a right to put her off, and the only question for the jury to consider grew out of his manner of expelling her.

There was a verdict and judgment in favor of the plaintiffs, from which the defendant appealed. The plaintiffs did not appeal.

Thos. H. Sutton for plaintiffs.
Geo. M. Rose and Junius Davis for defendant.

AVERY, J., after stating the facts: The judge told the jury, (169) in his charge, that their inquiry in passing upon the first issue (as to defendant's negligence) was narrowed down to the question whether the *feme* plaintiff was expelled from the train in a rude and insulting manner, considering her condition at the time, and all of the attendant circumstances. The plaintiff did not appeal, and, therefore, the question whether the regulation in reference to stamping the ticket was reasonable does not arise, and we must consider this appeal as if it were admitted that the conductor had the right to put the plaintiff off the train. *Pickens v. R. R.,* 104 N. C., 312; *Boylan v. R. R.,* 132 U. S., 146; *McKinnon v. Morrison,* 104 N. C., 354.

This Court, *Justice Ashe* delivering the opinion, stated the rule to be that "when there is an element either of fraud, malice, such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice, wilfulness, or other causes of aggravation in the act or omission causing the injury, punitive damages may be awarded by the jury." *Holmes v. R. R.,* 94 N. C., 318; *Knowles v. R. R.,* 102 N. C., 66.

In order to entitle one to recover punitive damages from a railroad company for expulsion from its train, there must be some violation of duty on the part of the servants of the company, accompanied by rudeness, oppression, insult, or one of the concomitants mentioned above. *R. R. v. Ballard,* 85 Ky., 307. In this case, the conductor finding soon after he took charge of the train, that the *feme* plaintiff (who brings this suit against the defendant company for damages,) and her husband did not have tickets that would pass them, told the husband that they must pay or get off, after the husband had urged him to telegraph for leave for them to proceed to Wilson on their unstamped tickets.

The conductor, after giving the notice mentioned, left the husband, went on through the train, and, returning when they reached Halifax, said in a "brusque, decided manner" (addressing the (170) husband), "This is Halifax, if you are going to get off." The husband replied: "I have no intention of getting off, unless you order me to get off." The conductor then said, according to the witness, "very decidedly, rudely and quickly," "Then I order you off." The husband

and wife got off, but came immediately back and paid the fare to Wilson, where they passed on to another railway.

The better rule is that, where a passenger is wrongfully expelled from a railway train, he is entitled to recover the actual damages that he sustained therefrom, and if the expulsion is attended with undue force, or other aggravating circumstances calculated to humiliate the passenger or wound his pride, or if the passenger be lawfully ejected, but undue force used, accompanied by fraud or an exhibition of malice, rudeness, recklessness or other wilful wrong, such exemplary damages may be allowed as the jury think are warranted by the facts. *Hicks v. Hannibal R. R. Co.,* 68 Mo., 329; *R. R. v. Ballard, supra; Forsee v. R. R.,* 63 Miss., 66; *R. R. v. Rice,* 38 Kansas, 398; *R. R. v. Anns,* 91 U. S., 489; *R. R. v. Hœflich,* 62 Md., 300; 50 Am. Rep., 223; 3 Wood's R. L., sec. 364; *Clark v. R. R.,* 91 N. C., 512.

In this case there is no question raised as to the right to expel the plaintiff from the train, and there is no suggestion that any force at all was used, but his Honor rested his ruling, it seems, upon the idea that the conductor subjected the company to liability by failing to display greater courtesy and politeness to a female passenger, and to take some special notice of the fact that she was riding on pillows, apparently unwell. It is true that the contract of common carriers to transport passengers embraces an implied stipulation to protect females against hearing obscenity, witnessing immodest conduct or submitting to wanton approach. *Com. v. Power,* 7 Metcalf; *Cooper v. R. R.,* 36 Wis., (171) 657; *Nieto v. Clark,* Clifford, 145; *Chamberlain v. Chandler,* 3 Mason, 242.

But there was no agreement to carry the plaintiff to Wilson, and there was no evidence that her modesty or her nervous system was subjected to any shock except such as was necessarily incident to the discharge of the conductor's duty. A railway company cannot be held liable to answer in damages because its servant, who is required to collect fares and protect it against imposition by expelling those who have not paid in the time that elapses between stations that are often but a short distance apart, informs a husband in a brusque manner, in the presence of his wife, whose head is resting on a pillow, that they must pay or get off, and, after waiting until the train reaches the next station, says, in a decided or rude tone, that they must get off.

The language was certainly such as it was the right, if not the duty, of the conductor to use, and the defendant cannot be held responsible for his failure, in the hurry of the moment to modulate his voice so as to make it soft or gentle, especially when he was giving a command in the line of his duty, which the plaintiffs had shown themselves loth to obey. Conductors ought to be, and we hope generally are, gentlemen,

and can, therefore, discharge a disagreeable duty in a considerate manner where it affects female passengers.

There is error, for which a new trial must be had. *Venire de novo.*

Cited: Tomlinson v. R. R., 107 N. C., 330; *Browne v. R. R.*, 108 N. C., 42; *Hansley v. R. R.*, 115 N. C., 605, 606, 611; *Smith v. R. R.*, 130 N. C., 307; *Ammons v. R. R.*, 138 N. C., 559; *Ammons v. R. R.*, 140 N. C., 198; *Stewart v. Lumber Co.*, 146 N. C., 69; *Webb v. Telegraph Co.*, 167 N. C., 487; *Meeder v. R. R.*, 173 N. C., 59; *Baker v. Winslow*, 184 N. C., 5; *Harrison v. R. R., ibid.*, 91.

(172)

*I. L. McLEAN v. NANCY SMITH.

Possession—Lappage—Presumption—Intent—Evidence.

1. Where the title deeds of two rival claimants to land lap upon each other, and neither is in the actual possession of any of the land covered by both deeds, the law adjudges the possession of the lappage to be in him who has the better title.
2. If one be seated on the lappage, and the other not, the possession of the whole interference is in the former.
3. If both have actual possession of the lappage, the possession of the true owner, by virtue of his oldest title, extends to all not actually occupied by the other.
4. Where the father of a junior grantee enclosed within his field, thirty-five or forty years before the trial was brought, an acre of the lappage, including the site of one of the four corners of defendant's land, and he and the plaintiff, as his successor, had cultivated said land continuously for more than thirty years before the action was brought: *Held*, nothing more appearing, (1) that plaintiff's father would be presumed to have enclosed the field and cultivated it in the assertion of a claim of right under his deed, and his possession would extend to boundaries of his deed; (2) that in order to make the question of intent one for the jury, there must be testimony tending to rebut the presumption raised by such possession; (3) that the jury can pass upon the intent, where the apparently adverse occupancy extended over an area so minute or insignificant that the occupant might naturally have mistaken his boundary, and the true owner would not, by ordinary care and vigilance, have discovered the trespass thereon, where there is evidence of an actual mistake of the parties in the original location of a division fence; (4) that the test of the character of the possession is involved in the question whether the true owner could maintain an action of trespass against the occupant; (5) that the court erred in leaving the jury to pass upon the intent in this case, because there was not sufficient evidence tending to rebut the presumption of adverse claim.

*Head notes by AVERY, J.

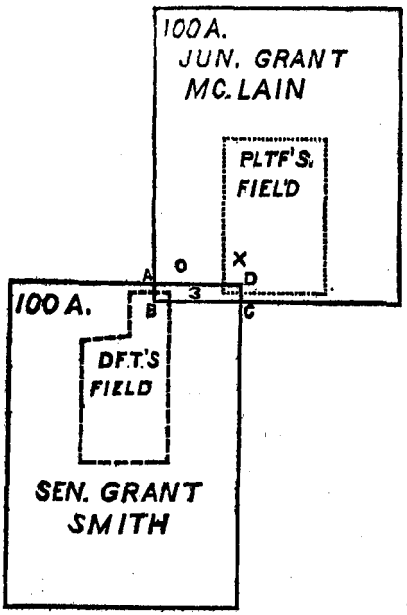
5. Occasional entries on the lappage by the holder, under the senior grant, for the purpose only of cutting trees or hauling lightwood or pine straw off, would not extend her possession to all of the intereference, except the actual *possessio pedis* of the plaintiff.

6. She must show that she continuously subjected some portion of the disputed land to the only use of which it was susceptible, unless she herself, or her servants or agents occupied a house upon it, or kept some portion of it enclosed, before she can limit the operation of plaintiff's possession to his enclosure.

(173) CIVIL ACTION, tried before *Merrimon, J.*, at January Term, 1889, of the Superior Court of ROBESON County.

It was admitted by the parties that the title to the land was out of the State, and the plaintiff admitted that the defendant had and held under the older grant.

A plat of the plaintiff's and defendant's lands, showing the line of their respective tracts, and a lappage, A, B, C, D, A, is here given as a part of the case on appeal:



A, B, C, D represents lap.
Dotted lines show plaintiff's field, about ¼ acre of which is on lap.
Broken lines show defendant's field, about ¼ acre on lap.
The part of lap outside of the dotted and broken lines is wood land.

The plaintiff testified that he is in possession of the lands (174) conveyed by his father's grant; his residence had been there since he could remember; his possession inclosed by fence; in cultivation thirty-five or forty years ago; fence around it now; fence has been moved in once or twice; it was cultivated a long time before fence was moved in; part between "O" and "X" was once in his inclosure; the other part was woodland, outside of "X"; he had been using it for anything he could use woodland for; made rails, lightwood; cut one stick of timber off of it, about all there was on it; had been there twelve years; had farm under his control; don't know how long his father lived there; can remember thirty-five years back; has known his father to make rails on it and haul straw; his father kept up fence around "X" since he (witness) can remember; his father died in 1876; there is a possession by defendant, Henry McLean, defendant, Nancy Smith's tenant, at "O" ("O" on plat); he moved there in 1879 ("O" is a field); has been there ever since. Summons issued in this case 22 December, 1884; the part at "O" not worth much—not more than one-fourth an acre—something over three acres in lap; didn't know where his line was until D. S. Morrison surveyed it, about the year 1880; never knew defendant, Nancy, claimed it; he claimed all the grant called for; didn't know where the line called for; told McCaskill, about 1879, he was using the land outside of his field. Nancy Smith has been in possession of her land; there was clearing on it when he could recollect; didn't mean to take possession of defendant's land when he went there; defendant showed him once about where his line run; she showed him about where his corner was.

Daniel Leach testified, for the defendant, that he knew where the lands in dispute were; had known all his life; was thirty odd years old; was principally raised there; had hauled lightwood and straw off the land for defendant; did it when he was a little boy (175) (before the war), and continued to do it.

W. J. Currie testified, for defendant, that he had got timber off the land, and paid defendant for it; never heard of the plaintiff's claim till the commencement of this action; got pine timber off the land four or five years ago; was agent for defendant, Nancy.

This was about all of the oral evidence in the case.

The plaintiff requested the following special instructions:

That if the jury believe from the evidence that the plaintiff, and those under whom he claims, have had actual possession under color of title for seven years or more, by enclosing or cultivating some of the land in space "X," being actually seated on same—the defendant, nor those under whom she claims, not being seated on the interference at

all during this time—the possession of the whole lappage covered by both grants would be in the plaintiff exclusively, the possession of part included in both grants being possession of all of it, and plaintiff would have a good title to the whole, and would be entitled to recover, though his is the junior grant.

The court declined to charge as requested, and the plaintiff excepted.

The court instructed the jury that, if the plaintiff's ancestor entered upon the lap with the intent to claim against the defendant, who, the plaintiff admits, has and claims under an older grant, and occupied it for seven years under his grant, openly and notoriously, so as he exposed himself to the action of defendant, or those under whom she claims, his title would be completed and perfect; but, if the ancestor of the plaintiff did not intend to set up a claim within the line of defendant's lands, his possession was not adverse, and plaintiff could not recover.

Plaintiff excepted.

The plaintiff claimed through his father, and defendant had (176) the older grant. It appeared to the court that the testimony of the plaintiff did not show necessarily an adverse possession of the lappage by the plaintiff's ancestor, and that it was a proper case to leave it to the jury to say with what intent the ancestor placed his fence across the defendant's line at "X." If the ancestor's possession was not adverse to defendant, the evidence did not show an adverse possession by the present plaintiff for seven years of any part of the lappage except that enclosed by his fence. He testified himself that his possession began in 1876, and that defendant's tenant, Henry McLean, went into possession of the lot at "O" in the year 1879.

There was a verdict for defendant. Plaintiff moved for a new trial. Motion denied. Plaintiff appealed.

T. A. McNeill (by brief) for plaintiff.
William Black for defendant.

AVERY, J., after stating the facts: It is settled that where the title deeds of two rival claimants to land lap upon each other, and neither is in the actual possession of any of the land covered by both deeds, the law adjudges the possession of the lappage to be in him who has the better title. If one be seated on the lappage and the other not, the possession of the whole interference is in the former. *Green v. Harman,* 4 Dev., 158; *Williams v. Miller,* 7 Ired., 186; *Scott v. Elkins,* 83 N. C., 424; *Dobbin v. Stevens,* 1 Dev. & Bat., 5; *Smith v. Ingram,* 7 Ired., 175; *Kitchin v. Wilson,* 80 N. C., 191. But if both have actual possession of the lappage, the possession of the true owner, by virtue of his older title, extends to all not actually occupied by the other.

When the plaintiff's father, under whom he claims, enclosed, thirty-five or forty years before the trial (at the end of the parallelogram formed by the lapping lines of the two one hundred-acre (177) deeds), one acre of the three and three-eighths acres embraced in the disputed territory, the presumption was that he entered in the assertion of a claim of right under his deed, which covered his possession as it is now and was at the trial, and also (nothing more appearing than that he had enclosed and cultivated it in the ordinary course of husbandry) that his title to it had matured after seven years of such possession. *Berryman v. Kelly,* 13 Ired., 269; *Williams v. Buchanan,* 1 Ired., 535; *Yates v. Yates,* 76 N. C., 146; *Lenoir v. South,* 10 Ired., 237; *McCormick v. Munroe,* 3 Jones, 332; Malone R. P., p. 99; *Kinney v. Viven,* 32 Tex., 125; *French v. Pierce,* 8 Conn., 443; *Staton v. Mullis,* 92 N. C., 623. His adverse possession under a deed with definite boundaries extended to all land covered by it. *Davis v. Higgins,* 91 N. C., 382; *Lenoir v. South, supra.* If every man who is induced by an honest misunderstanding as to the sufficiency of a title that purports upon its face to convey land to enter into possession were denied the benefit of his open, notorious adverse occupancy until he should take the laboring oar and satisfy a jury that he did not make a mistake, the difficulty of proving the actual intent entertained by one under whom claim is made, in first entering on the land, would often destroy titles acquired by possession and universally recognized as good. Indeed, the doctrine of color of title is founded upon the idea of entering upon land in the reasonable belief that one is the true owner. Sedgwick & Wait, sec. 759. The defendant did not extend her fence across the lappage at "O," in the other extreme corner, till 1879, when the previous possession of the plaintiff, if it was not equivocal, had already vested the title to the whole in the latter. Occasional entries on or before that time by the defendant for the purpose only of cutting trees or hauling lightwood or pine straw off the land, would not constitute a possession on her part and extend, constructively, as was contended on the argument, to all of the interference except the actual *possessio* (178) *pedis* of the plaintiff. *Williams v. Wallace,* 78 N. C., 354; *Bartlett v. Simmons,* 4 Jones, 295; *Loftin v. Cobb,* 1 Jones, 406; *Everett v. Dockery,* 7 Jones, 390; *Morris v. Hayes,* 2 Jones, 93. She must show that she continuously subjected the same portion of the disputed land to the only use of which it was susceptible, if she herself or her servants or agents occupied a house upon it, or kept some portion of it enclosed, before she can limit the operation of plaintiff's possession to his enclosure. *Williams v. Wallace, supra; Moore v. Thompson,* 69 N. C., 120. The extreme length to which this Court has gone on that

subject was in holding that making turpentine annually on land, or constructing a team-way into and bringing cypress and juniper from swamp lands, unfit for other use, was a possession that would mature title under color. *Bynum v. Carter,* 4 Ired., 313; *Tredwell v. Reddick,* 1 Ired., 56.

It devolved upon the defendant to show, by the testimony offered by the plaintiff, or that introduced on her own behalf, or for both, that the possession at "X" was, as she contended, equivocal in its character. If she offered competent testimony tending to rebut the presumption raised by the long continuous possession of plaintiff, under color of title, it was proper to submit it to the jury, for it is as essential to the efficacy of possession in maturing title that it should be open and unequivocal as that it should be continuous. *Osborne v. Johnston,* 65 N. C., 22. But it has been held proper to allow the jury to pass upon the character of the possession only in cases where the apparently adverse occupancy extended over a very insignificant area, and there was, moreover, evidence tending directly to prove that the entry was made by mistake on the part of the holder of the junior grant, or on the part of both him and the true owner, as where the former, or both, acting in concert, have made slight departures from the correct line, in locating and building a fence without a compass, between corners or
(179) known points in the dividing line, and in cases where the holder of the superior title did not show a want of diligence, according to the admitted facts, in failing to bring an action against the intruder till the end of the statutory period. Wood on Lim. of Actions, sec. 263; *King v. Wells,* 94 N. C., 344; *Green v. Harman, supra; Gilchrist v. McLaughlin,* 7 Ired., 310; Buswell L. & A. P., sec. 250. The test by which we can determine whether there is sufficient evidence to submit to the jury as to the intent of the holder of the junior title, when he first entered upon the land in controversy, is involved in another question, Whether there is testimony tending to show that the true owner might then have failed to recover in an action brought against an intruder, because the circumstances indicated that it was an entry by a mistake as to the location of a line upon a very minute territory belonging to the former? It is admitted that about one acre of the area in dispute was enclosed in the plaintiff's field. It does not appear how far it extended over the lappage, but, as it seems on the map sent up to cover about one-fourth of the land in controversy, we are at liberty to assume that the fence may have extended seventy or one hundred yards over the line of defendant's grant. We have no information that either plaintiff's father, or defendant, or both, *actually made* any mistake, or had any understanding about the location of the fence forty

years or more since. The quantity of land taken into the enclosure is not so insignificant that a vigilant man would have overlooked the trespass, or that a man who knew what he was doing would have committed it otherwise than for the purpose of asserting title to his boundary. Besides, the defendant has shown *laches,* indeed inexcusable want of diligence, in failing to ascertain that the plaintiff had enclosed inside of his field one of the four corners of her one-hundred-acre tract of land, it being in the shape of a parallelogram. If she had had her land surveyed at any time within thirty years or more, she knew this fact. She was very negligent if she failed for that period, or (180) for seven years even, to ascertain the location of her corner, or, if knowing where it was, she slept upon her rights till long after the end of the statutory period. If she had brought an action against the plaintiff's father for trespass before he had held the possession seven years under his grant therefor, there would have been no evidence, as far as we can see, to go to the jury tending to show, under the plea of not guilty, that he made a mistake in cutting down the corner tree and clearing and enclosing an area of land around it, so as to include nearly the whole width and about one-fourth of the length of the lappage, and to extend (we are not informed how far, but we may assume) probably seventy or one hundred yards over the line for about one-fourth of its length. The testimony tends to show, if it has any bearing upon his intent, that plaintiff's father entered with the purpose of asserting title under his grant, and the law presumes that such was his intent, if nothing appears to the contrary. The fact that the fence had been twice moved, without showing how far or why its location was changed, would not tend to show that he made a mistake in constructing it at first.

In *King v. Wells,* 94 N. C., 344, the Court said: "Where there is a long line running over a wild mountainous ridge, such as that was, up to which the defendant obtained a possession, a small portion (in this instance less than one-fourth of an acre) might be taken and held for years without any one knowing whether there was a trespass or not." Therefore, where the extent of a wrongdoer's possession is so limited as to afford a fair presumption that the party mistook his boundaries, or did not intend to set up a claim within the lines of the deed of the other party, it would be proper ground for saying that he had not the possession, or that it was not adverse."

In *Green v. Harman, supra, Ruffin, C. J.,* says: "There ought (181) to be some evidence of the owner's knowledge of the claim besides the mere possession of so small a part. And if the land taken is *very minute,* so that an *owner* of *reasonable diligence* and *ordinary vigilance* might remain ignorant that it included his land, the possession should

not be deemed adverse." But in this case we know the fact that the defendant carelessly permitted the father of the plaintiff for more than twenty years, and the plaintiff for several years, to cultivate a considerable body of land, including the site of a muniment of title, without bringing an action for the trespass. There was less than a fourth of an acre taken by the long line of Well's fence in the case of *King v. Wells,* and his counsel contended that when he extended his fence so as to actually take in one-fourth of an acre, in 1861, it was no longer a *minute* portion. Seeming to concede the correctness of the position, if sustained by the facts, the Court said that the period from 1861 to the bringing of the action was not sufficient, omitting in the computation the time when the statute of limitations was suspended. After examining the authorities, we conclude that, where the extent of the trespass on the part of the junior grantee is so great that it should have attracted the attention of a vigilant owner, and there is no direct testimony tending to excuse the negligence of the senior grantee in failing to bring an action against the intruder, there is no evidence to go to the jury to rebut the presumption that the former acquired title to the extent of his boundaries at the end of the statutory period, which, in this case, is seven years. *Lenoir v. South, supra.* In such instances there is no probable ground for believing that the encroachment was inadvertent and without claim of right on the part of the former, nor permissive or overlooked without fault on the part of the latter. There was error in refusing the instruction asked, for which there must be a new trial.

Error.

MERRIMON, C. J., dissented.

Cited: Ruffin v. Overby, 105 N. C., 86; *Brown v. King,* 107 N. C., 315; *Cox v. Ward, ibid.,* 512; *Turner v. Williams,* 108 N. C., 212; *S. v. Boyce,* 109 N. C., 756; *Miller v. Bumgardner, ibid.,* 418; *Asbury v. Fair,* 111 N. C., 255; *Lewis v. Lumber Co.,* 113 N. C., 62; *Walker v. Moses, ibid.,* 531; *Dargan v. R. R., ibid.,* 601; *Boomer v. Gibbs,* 114 N. C., 84; *McLean v. Smith, ibid.,* 365; *Hamilton v. Icard, ibid.,* 537; *Shaffer v. Gaynor,* 117 N. C., 21; *Everitt v. Newton,* 118 N. C., 923; *Prevatt v. Harrelson,* 132 N. C., 252; *Currie v. Gilchrist,* 147 N. C., 654; *Berry v. McPherson,* 153 N. C., 6; *Coxe v. Carpenter,* 157 N. C., 561; *Locklear v. Savage,* 159 N. C., 239; *Stewart v. McCormick,* 161 N. C., 627; *Land Co. v. Floyd,* 167 N. C., 688; *Cross v. R. R.,* 172 N. C., 120; *Waldo v. Wilson,* 173 N. C., 693; *S. c.,* 174 N. C., 628; *Alexander v. Cedar Works,* 177 N. C., 147; *Hayes v. Lumber Co.,* 180 N. C., 254; *Land Co. v. Potter,* 189 N. C., 62; *Penny v. Battle,* 191 N. C., 224.

(182)

THE CITY OF GREENSBORO v. J. A. HODGIN, COUNTY TREASURER, AND THE BOARD OF EDUCATION OF GUILFORD COUNTY.

Constitution—Distribution of County School Fund—Charter of Greensboro—Graded Schools.

1. The public school fund in any county, from whatever source arising, must be distributed *pro rata* among the several school districts, respectively, according to the number of children in each.
2. The following provision in the charter of the city of Greensboro, "All taxes now paid, or which hereafter may be paid, by the citizens of the city of Greensboro for State and county school purposes shall be paid by the county treasurer to the treasurer of the city of Greensboro, and, by him, applied to the graded schools of the city as provided by law," is unconstitutional and void.
3. The Legislature may provide that the portion of the school fund going to any school district may be devoted to the support of "graded schools" in such district, but such "graded schools" must be subject to the public school authorities to the extent of enabling them at all times to see that proper school advantages are extended to every child entitled to attend the public school in such district.

THIS was a controversy, submitted without action, and heard before *Armfield, J.*, at February Term, 1890, of the Superior Court of GUILFORD County.

The facts agreed were as follows:

1. The county of Guilford is divided into school districts, ninety-five for white children and thirty-eight for colored children within six and twenty-one years of age, including two districts in the city of Greensboro, one for white children and one for colored children.

2. The number of school subjects, male and female, white and colored, in the whole county, including the city, as shown by the census of November, 1889, is 9,577, and of this number 6,519 are white children and 3,058 are colored children.

3. In the two districts aforesaid, within the corporate limits (183) of the city of Greensboro, there are 738 school subjects, and of these 465 are whites and 237 are colored.

4. The total amount of the school fund, for the whole county, from all sources (there being none from the State Treasury), deducting for insolvents, sheriff's five per cent commissions and county treasurer's two per cent commissions, is $15,500, as near as can be estimated, and this sum being reduced by $700 for salary of superintendent and other necessary expenses, leaves the net sum of $14,800 for apportionment among the districts.

5. This sum of $14,800, divided among the school subjects in the whole county, to wit, among 9,577 children, gives $1.54 to each child.

6. Of said sum of $14,800, there is raised from the city of Greensboro school funds as follows:

15 cents on $100 of property listed for taxation ($1,264,524)	$1,896.78
Polls, 325 at $1.91	620.66
Total of property and poll taxes	$2,517.44
Add for bar-rooms, $80 each for five bars	400.00
In all from the city of Greensboro	$2,917.44

7. In the new charter of the city of Greensboro, passed at session of 1888-89, section 78, and ratified 11 March, 1889, there is this clause: "All taxes now paid, or which hereafter may be paid by the citizens of city of Greensboro, for State and county school purposes, shall be paid by the county treasurer to the treasurer of the city of Greensboro, and by him applied to the graded schools of the city, as provided by law."

8. The city of Greensboro, under said section of said charter, claims to be entitled to the whole of said sum of $2,917.44 paid by the citizens of the city.

(184) 9. Deducting said sum of $2,917.44, as claimed by the city, from the $14,800, the net amount for the whole county, we have $11,882.36 for apportionment among, or on account of the children outside of the city, to wit, 8,839, and that gives them $1.34 *per capita,* and the sum of $2,917.44, if separated and paid over to the city, as the city claims shall be done, apportioned or divided among the school subjects resident in the city, will give $3.95 *per capita* to them.

10. The city of Greensboro has demanded of defendant Hodgin, county treasurer, to pay over to the city treasurer the said sum of $2,917.44, raised from its citizens, and said Hodgin has refused to pay over the same for want of any appropriation beyond the sum of $984, which he has paid, or is ready and willing to pay.

11. The board of education for the county of Guilford has appropriated and ordered to be paid over to the districts, or for the districts, in the city of Greensboro, the sum of $984, in the same proportion to all the other districts in the county, and as to the residue of the school funds raised from the citizens of Greensboro, it has refused to appropriate or order its payment to the city treasurer upon the belief, in good faith entertained, that the clause in the charter above set forth is in violation of the Constitution of the State, and contrary to the laws governing the public school system, but holds unappropriated an estimated amount to satisfy the city's demand, if, upon the facts herein, it is so adjudged by this Court.

Upon the foregoing facts the city prays judgment that it recover judgment for the sum raised by its citizens towards the school fund for 1889, less the $984, which has already been appropriated to it, and the defendants pray judgment that the clause of the city's charter, under which the city claims, be held unconstitutional and inoperative, and the board of education be adjudged to go on and apportion the fund, left in hand to await the decision of the Court, among all the districts in the county as directed under the Constitution and (185) general school law of the State.

The court gave judgment as follows:

"1. That section 78 of the charter of plaintiff, enacted by the General Assembly at its session of 1888, ratified 11 March, 1889, the same as mentioned in the case agreed, is constitutional.

"2. That the taxes to be paid over to the treasurer of the plaintiff by virtue of said section, are the taxes levied on property and poll, and do not include the tax on license to sell spirituous and malt liquors.

"3. That the defendants set apart and pay to the treasurer of the plaintiff all taxes paid by the citizens of the city of Greensboro on property and poll levied for State and county school purposes, to wit, the sum of $2,517.44.

"4. That plaintiff recover of defendants the costs of this controversy without action."

From this judgment the plaintiff appealed, assigning as error that the court construed "the 78th section of the city charter so as to not include the taxes paid for liquor license in the amount which should be paid to the city treasurer." The plaintiff appealed in open court, and assigns for error such construction of the statute and refusal to give judgment for the whole amount claimed.

The defendant also appealed, assigning as error that the court "adjudges the 78th section of the plaintiff's charter constitutional, and directs defendant to set apart and pay to the treasurer of plaintiff the taxes paid by the citizens of Greensboro on property and poll levied for State and county school purposes."

J. T. Morehead (by brief) for plaintiff.
Dillard & King (by brief) for defendant.

MERRIMON, C. J. The organic law of this State requires and provides for the free education of the people. The 9th Article of the Constitution is devoted exclusively to the subject of education. (186) It declares its prime importance, and that it shall "forever be encouraged." The second section of that article provides that "the General Assembly, at its first session under this Constitution, shall provide,

by taxation and otherwise, for a general and uniform system of public schools, wherein tuition shall be free of charge to all children of the State between the ages of six and twenty-one years." Thus, the Legislature is required to promote popular education by devising and establishing a plan—a scheme—consisting of necessary and well-appointed constituent parts, and the whole organized into a complete system of public schools. Such system must be general—not local—not limited to one or more places or localities in the State; it must extend and prevail throughout its borders; and so, also, it must be uniform in all material respects as contemplated by the Constitution—that is, the system cannot be so regulated by statute as that it will apply and operate as a whole in some places, localities and sections of the State, and not in the same, but in different ways, in other places, localities and sections. An essential requirement of the provision above recited is that the system, whatever it may be, in whatever manner constituted, must be general and uniform as a whole, and therefore so in all its material parts, the purpose being to extend to all the children within the prescribed ages, wherever they may reside in the State, the same opportunity to obtain the benefits of education in free public schools—certainly to the extent that the State itself shall supply means to support such schools. The provision declares that tuition in such schools "shall be free of charge to all the children of the State between the ages of six and twenty-one years"—not to one child more or less than another, nor to children in one place or locality more than another.

The fourth section of the article cited above prescribes what property and funds the State shall be devoted to the support of such
(187) schools, and it declares that the same "shall be faithfully appropriated for establishing and maintaining in this State a system of free public schools, and for no other uses or purposes whatsoever." Obviously, this clause has reference to the general and uniform system of public schools referred to above. The means so provided, and required to be provided, are to be faithfully appropriated and devoted to the support of such system of schools—not in one place or locality more or less than another, but in all places in and throughout the State in like manner and just and equal proportion.

A very material part of the fund thus devoted to the support of public schools is taken from the ordinary revenue of the State, raised by taxation, but this does not imply, nor does it follow, that the fund thus raised is to be distributed to the support of schools located in the neighborhood of those taxpayers who paid the taxes, or most, thereof, but it is to be distributed as nearly as may be *per capita* for the education of all the children in the State, as prescribed, without regard to who paid the taxes, or the locality from which the fund, or most of it,

came. The State supports the system of schools out of certain of its specified resources, and its ordinary revenue to a large extent, and without charge to those who send their children to such schools, and this is a chief purpose of the system. It is deemed essential by the State and the people, and they have declared in their organic law that all the children of the State, as prescribed, rich and poor alike, shall have free opportunity to share in the benefits of such schools without charge, and there appears a clear purpose to extend such benefits equally to all—every one—without distinction as to individuals or localities.

But the funds necessary for the support of public schools—the public school system—are not derived exclusively from the State. The Constitution plainly contemplates and intends that the several counties, as such, shall bear a material part of the burden of (188) supplying such funds. Section 3 of the article cited, provides that, "Each county of the State shall be divided into a convenient number of districts, in which one or more public schools shall be located four months in every year; and if the commissioners of any county shall fail to comply with the aforesaid requirements of this section, they shall be liable to indictment." The duty thus imposed upon the county commissioners is peremptory, and it is intended that they shall discharge it, and they fail to do so at their serious peril. But how can they maintain such schools without means to do so? The necessary inference is that the Legislature shall invest the proper county authorities with power to levy taxes in their respective counties for the support of such schools. Otherwise, the provision just recited would be meaningless and practically nugatory.

That the Constitution intends that each county, as such, shall have permanent constituent connection with the public school system, and join in the support of such schools within its bounds, appears further in that fifth section of the article thereof cited, prescribes and defines what property and resources of the several counties shall constitute the *"County School Fund,"* and it declares and requires that such fund "shall belong *to and remain in* the several counties, and shall be faithfully appropriated for establishing and maintaining free public schools in the several counties of this State: *Provided,* that the amount collected in each county shall be annually reported to the superintendent of public instruction." It seems that the settled purpose in making the counties of the State severally constituent parts of the public school system is to give it additional strength and greater local efficiency. It facilitates in some measure the distribution of taxes paid for the support of such schools in the counties where they were levied, and this, it

(189) seems, is not deemed unreasonable or unjust. But, whatever the motive, the provision and purpose appear.

As we have seen, the general school fund of the State is distributed to each county in proportion to the number of children in each within the age prescribed. The county school fund must be disbursed in the county to which it belongs, and in addition to that supplied by the State. The clause of the section last above recited provides that the county school fund "shall belong to and remain in the several counties." It would be idle to bear the burden of the inconvenience and expense of a county school fund, if it is to be considered and treated as a part of the general public school fund of the State. In that case the funds that make up the county school fund might as well be paid into the State treasury at once. We may add that the Legislature has uniformly interpreted the clause last mentioned as we have done. We do not doubt the correctness of our interpretation of it.

We think, also, that the Constitution intends and requires that the State and county school funds shall be distributed to the several school districts in the county in such way as to extend to all the children thereof, as nearly as practicable, equal school opportunities and advantages, and so to make the school term or terms in each district in every year, as nearly as may be, equal with the same of every other district in the county. This is necessary to just equality. Indeed, to this end, Art. 9, sec. 3, requires that, "Each county of the State shall be divided into a convenient number of districts, in which one or more public schools shall be maintained at least *four months* in every year." This provision is very important and should be very scrupulously observed. It is thus the school funds, from whatever source they come, reach the beneficiaries.

As we have seeen, the public school fund of the State must be distributed to the several counties in proportion to the number of
(190) school children in each. It is likewise required that the funds supplied by the counties shall supplement that of the State, and be distributed in the counties supplying the same, as pointed out above. The Constitution as certainly applies and directs the distribution of the public school funds of the different counties within the county supplying the same, as that of the State, for the like considerations and substantially in the same terms. Such county fund is, by the Constitution, devoted to the support of the "general and uniform system of public schools" in the county to which it belongs, and hence the Legislature has no power to divert it, or any part thereof, from its application as above explained; nor has it power to divert the State fund appropriated to the support of such schools, from its application as indicated above.

Some question has been made as to whether or not the Legislature has power to provide by statute that parts of the State and county public school funds shall be appropriated to the support of "Graded Schools," organized as allowed by law.

While the Legislature has power to devise and establish a general and uniform system of public schools, and to amend or modify the existing system, consistently with the Constitution, it certainly cannot provide for and establish particular kinds of schools in particular cities, towns and localities, that offered greater or less advantages than the public schools, to the disadvantage or detriment of the latter in any respect. We think, however, that where "Graded Schools" are, or may be, established in regular school districts, with the sanction of law, and they are required to afford to the children therein substantially the same school opportunities and advantages as do the ordinary public schools, the Legislature can provide by statute that the portion of the public school funds, county and State, going to such school districts respectively, shall be devoted to the support of such "Graded Schools" in the school district where they respectively exist. But such "Graded Schools" must be made subject to the public school (191) authorities, certainly to the extent of enabling them freely and at all times to see that proper school advantages in every respect are extended to every child entitled to attend the public school in the school district where the "Graded School" is located. The latter must fully supply the place of the public school, whatever additional and larger advantages it may afford.

For the reasons stated above, we are clearly of opinion that section 78 of the statute (Private Acts, 1889, ch. 219), which recites that "all taxes now paid, or which hereafter may be paid by the citizens of the city of Greensboro, for State and county school purposes, shall be paid by the county treasurer to the treasurer of the city of Greensboro, and by him applied to the graded schools of the city as provided by law," is repugnant to the constitutional provisions cited above, and, therefore, void, and we so declare.

It follows that so much of the judgment as the plaintiff appealed from must be affirmed, and so much thereof as defendants appealed from must be reversed, and judgment entered for the defendants in the court below. To that end let this opinion be certified to the Superior Court.

Judgment affirmed in part and reversed in part.

Cited: Bd. of Education v. Comrs., 111 N. C., 584; *Comrs. v. Bd. of Education,* 163 N. C., 407; *Bd. of Education v. Bd. of Comrs.,* 174 N. C., 473.

(192)

S. E. KOONCE v. THE BOARD OF COMMISSIONERS OF JONES COUNTY.

County Treasurer—Compensation—Pleading—Complaint—Mandamus to Board of Commissioners.

1. The plaintiff, sheriff and *ex officio* county treasurer and treasurer of the county board of education, brought an action against the board of county commissioners for compensation for the years 1881 to 1885. In his complaint he alleged that the defendants have not only refused to audit and allow him the sum demanded as commissions, but have refused to audit and allow him *any commissions: Held*, that an admission by plaintiff that an allowance had been made him as treasurer of the educational fund is not an acknowledgment of a settlement in full for his services as county treasurer: *Held further*, that an allegation that he has accounted for all moneys received and disbursed by him as county treasurer during the years mentioned is not an admission that the defendants have made him an allowance on the moneys so accounted for, or that they have audited or paid his claim.
2. If the board of county commissioners refuse to consider his claim, the proper remedy is by *mandamus* to compel action on the subject.
3. Under the law, every county treasurer is entitled to compensation for his labor and responsibility, in no case less than two and a half per cent. per annum on the amount collected, where it cannot exceed two hundred and fifty dollars.

THIS was a civil action tried at Fall Term, 1889, of the Superior Court of JONES County, before *Boykin, J.*

The judge intimated that upon the pleadings, as amended in accordance with the suggestions of *Shipp, J.*, made at a previous term, the plaintiff could not recover; whereupon, the plaintiff submitted to judgment of nonsuit and appealed.

The pleadings were as follows:

COMPLAINT AS AMENDED AFTER THE RULING OF JUDGE SHIPP.

The plaintiff complains, and alleges—

1. That he was appointed and duly qualified and inducted into the office of sheriff of Jones County on 7 February, 1881; that since
(193) which time, to wit, 7 February, 1881, by regular election to said office, he has been the duly qualified and acting sheriff of said county of Jones, and still fills said office, giving all bonds required thereby, and rendering in due course an account of the funds coming into his hands, and the obligations and duties of the said office of sheriff.

2. That, before this plaintiff's first qualification and entering on the duties of said office of sheriff as aforesaid, the office of treasurer of the county of Jones, under the general provisions of the statute had been abolished, and by virtue of the Act of Assembly (The Code, sec. 770), this plaintiff, as sheriff, has, *ex officio,* been the treasurer of the county of Jones, and during said time has performed all the duties and obligations of treasurer aforesaid.

3. That, since his qualification as treasurer aforesaid, and holding said office, the tax lists for the years 1881, 1882, 1883, 1884, 1885 have been duly placed in his hands, and he has held and disbursed the funds arising therefrom as treasurer aforesaid, for the first four years above enumerated, and has regularly accounted therefor to the proper authorities, except for said list of 1885, the funds arising from which he stands ready and willing to account for.

4. That, as treasurer *ex officio* of the county of Jones, he has received no compensation nor commissions for the years above mentioned, and he alleges that he is entitled to the compensation of treasurer provided in the Act of Assembly (The Code, sec. 770), as he is informed and believes.

4½. That plaintiff's commissions as treasurer of the county of Jones aforesaid, during the years 1881, 1882, 1883, 1884, 1885, are reasonably worth the sum of fifteen hundred and eighty-five dollars and four cents.

5. The tax lists, including county and school funds which have come into the hands of plaintiff for the years above named are as follows in amounts:

(194)

1881	$ 5,780.01
1882	6,581.79
1883	13,642.33
1884	8,914.47
1885	4,721.83

on which the commissions, as plaintiff is advised, informed and believes, would be as follows, 1½ per cent for receipts, and 2½ per cent for disbursements, to wit, for

1881	1½	per	cent	for	receipts,	$ 86.69;	2½	per	cent	for	disbursements,	$144.50
1882	"	"	"	"	"	98.71;	"	"	"	"	"	164.44
1883	"	"	"	"	"	204.70;	"	"	"	"	"	341.18
1884	"	"	"	"	"	133.11;	"	"	"	"	"	222.85
1885	"	"	"	"	"	70.82;	"	"	"	"	"	118.04

making a total for commissions for said years, due plaintiff, of $1,585.04.

6. That during said years the plaintiff has been allowed, as he is advised, informed and believes, as treasurer of county board of education, the sum of two and one-half per cent commissions, which he has duly received, which list and percentage therein is as follows:

1881	tax-list	$2,866.49	;	2½	per	cent	$	71.66
1882	"	3,039.34	;	"	"	"		75.88
1883	"	4,430.85	;	"	"	"		110.77
1884	"	3,066.70	;	"	"	"		76.66
1885	"	2,316.82	;	"	"	"		57.92

making total commissions as treasurer of the county board of education, as he is advised, informed and believes, the sum of $392.89.

7. That plaintiff has demanded of the defendant board, payment of the said commissions as treasurer of the county of Jones, which they refuse to allow or pay to plaintiff.

8. That the plaintiff presented the aforesaid claim to the defendant board of commissioners to be audited and allowed; that the said
(195) board refused to audit and allow said claim and refused to audit or allow any commissions to plaintiff.

9. That the defendant board stated to plaintiff at the time of the demand aforesaid, that it would not allow the commissions aforesaid, as asked for, for the reason that it was not assured of its legal liability under the statute, and proposed that plaintiff and defendant should submit the matter to the judgment of the Court, as to plaintiff's commissions.

Wherefore, the plaintiff prays that he may recover of the defendant board of commissioners the sum of $1,585.04 and the costs of this action, and that he may have such other and further relief, etc.

ANSWER.

The defendant answers the complaint—

1. It does not deny the first, second and third articles of the complaint.

2. It denies the fourth article of the complaint on information, advice and belief, and says that it is advised that such *ex officio* treasurer is entitled to such compensation, not exceeding one-half of one per cent on moneys received, and not exceeding two and a half per cent on moneys disbursed by him, as the board of commissioners may allow, subject to the proviso in section 770 of The Code.

2½. It denies the allegation of article four and a half of the complaint.

3. It denies the fifth article of the complaint, in so far as it alleges that the plaintiff is entitled to any sum of money whatever for com-

missions, as alleged in said article of the complaint, as it is informed, advised and believes.

4. In answer to article six of the complaint, it says it is informed and believes that the plaintiff was allowed two and a half per cent commissions on the amount collected for school fund, and that the same was allowed by said board of commissioners, as defendant (196) is informed and believes, in full of compensation to said treasurer.

5. It does not deny the seventh article of the complaint.

And for further answer, defendant says—

1. That settlements were had of the accounts of said *ex officio* treasurer for the years 1881 to 1884 inclusive, as stated in article third of the complaint, and no claim was made by plaintiff for compensation as such *ex officio* treasurer, except the amount allowed as stated, as defendant is informed and believes.

2. That more than three years have elapsed since the cause of action for collection for years prior to year 1883, and before the commencement of this action, as appears from the summons and complaint, to which reference is made.

3. That it is advised and believes that plaintiff cannot maintain this action, because plaintiff, as such *ex officio* treasurer, was only entitled to such compensation (not to exceed the amounts stated in said section 770 of The Code) as the board of commissioners may allow, and it is not alleged in the complaint that any amount has been allowed by said board of commissioners, for such compensation, nor has any amount been allowed, as defendant is informed and believes, other than said commissions on said school money as stated.

Wherefore, defendant demands judgment, that it go without day, for such further relief, etc., and costs.

RULING OF JUDGE SHIPP AT SPRING TERM, 1889.

In this cause it was agreed that the answer should be regarded and treated as a demurrer to the complaint.

The plaintiff alleges that he, acting as treasurer, is entitled to commissions amounting to the sum of $1,500, or thereabouts.

He alleges that he "has demanded of the defendant board pay- (197) ment of said commissions as treasurer, or acting as such, which they refuse to allow or pay to the plaintiff." (See paragraph seven of complaint.)

It appears to the court that the amount of the commissions to be allowed is, to some extent, at least, a matter of discretion, the maximum being fixed by The Code, sec. 770.

Assuming the facts, as stated, to be true, the plaintiff is apparently entitled to some commission. The amount, however, is uncertain and indefinite. It does not appear that a request or demand has been made upon the board of commissioners, or the county, to audit, adjust or allow this special claim. It appears to the court that the complaint is defective in this respect. (See paragraph 757, The Code, etc.; see *Jones' case,* vol. 73, and cases cited therein.)

It may be that the plaintiff can amend his complaint.

In this view of the case, the demurrer must be sustained, and the plaintiff may amend, as he is advised. The defendant may answer the amended complaint, the terms for the amendment to be in the discretion of the succeeding court.

AMENDED ANSWER.

The defendant answers the amended complaint, and, in addition to the original answer—

1. It denies the allegations contained in the fifth article of the complaint.

2. It denies the allegations contained in the eighth article of the complaint.

3. It denies the allegations in the ninth article of the complaint.

5. And it reaffirms, and makes a part hereof, all the denials and defenses set up in the original answer filed herein.

(198) PLAINTIFF'S REPLY.

The plaintiff, replying to the second cause of defense, as set out in the answer, says:

1. That the allegations of fact in the first article thereof are untrue, as plaintiff is advised, informed and believes, and he denies the same.

2. In answer to the allegation in the second article thereof, he says that he denies that more than three years have elapsed before the commencement of this action since the cause of action of plaintiff, or any part thereof, accrued.

C. Manly and F. M. Simmons for plaintiff.

P. M. Pearsall (Green & Stevenson filed a brief) for defendant.

AVERY, J., after stating the facts: The plaintiff was *ex officio* treasurer of the county by virtue of his election to the office of sheriff, and became, in the same way, treasurer of the county board of education. The Code, secs. 768 to 771. For his services in collecting and disbursing the ordinary county fund, The Code (section 770) declares that he shall "receive as a compensation in full of all services required of him such sum, not exceeding *one-half of one per cent on moneys received, and not exceeding*

two and a half per cent on moneys disbursed by him, as the board of commissioners of the county may allow: Provided, that in counties where his compensation cannot *exceed two hundred and fifty dollars,* the said treasurer may be allowed a sum *not exceeding two and a half per cent* on his receipts and disbursements."

The plaintiff alleges in the sixth paragraph of the complaint that an allowance has been made to him of two and a half per cent of the sum total received and disbursed by him in the capacity of treasurer for the county board of education for the five years from 1881 to 1885, both inclusive. He alleges further, in substance, that the defendants have not only refused to *audit and allow the sum demanded* for (199) services as treasurer of the county, but have refused to *audit or allow any commissions* to him, and have assigned as the reason for failing to comply with his demand that they denied their legal liability to pay him any compensation as county treasurer, and proposed to make him an allowance only when forced to do so by judgment of the court.

The plaintiff is required, as treasurer of the board of education, to file a separate bond with different conditions from those embraced in that given in his capacity of county treasurer, and in case of any breach an action must be brought by the county board of education; whereas for any default in accounting for the county funds proper, he must be sued by the board of county commissioners. The Code, secs. 766 and 2554; *County Board of Education v. Bateman,* 102 N. C., 57. We do not, therefore, concede the correctness of the position taken by the defendant, that the admission by the plaintiff that an allowance had been made to him for collecting and paying out the educational fund was an acknowledgment of a settlement in full for his services in both capacities. And we cannot concur in the view that the plaintiff, in alleging in the third paragraph of the complaint that *he* has accounted for all moneys received and disbursed by him as treasurer of the county for five years preceding the year 1885, has admitted that the defendants have made him an allowance on the moneys so accounted for, or audited or paid his claim, especially when he subsequently says, in explicit terms, that they have refused to either audit or pay, and have invited him to resort to his legal remedy.

It is well settled that where county commissioners are clothed by law with power to make or not to make any allowance at all to an officer for his services, as they may think best for the public welfare, the Court cannot control their discretion by a writ of *mandamus.* (200) But where they refuse to entertain the question or exercise the discretion given to them in reference to it, the courts will enforce action by *mandamus,* where no other legal remedy exists. Moses on Mandamus, p. 104. In the case of *Boner v. Auditor,* 65 N. C., 643, while conceding

the unqualified discretion of the auditor in allowing or rejecting claims presented against the State, *Reade, J.*, delivering the opinion, said: "The most this Court could do, would be to order the auditor *to examine the claim* and report the fact, with his opinion, to the General Assembly."

If the board of county commissioners refused, therefore, to entertain the plaintiff's request to consider his claims and say whether he was, in their opinion, entitled to any compensation for his services, we think that there is no other remedy provided by law but a *mandamus* to compel action upon the subject. If the defendants deny that they refused to act as alleged, then an issue was thereby raised, and should have been submitted to the jury preliminary to entertaining the motion for a writ of *mandamus*. We are not prepared to admit that the defendants had such absolute discretion that they could compel a sheriff to assume grave responsibility in the receipt and collection of the whole county fund proper, and to file a bond and subject himself to the risk incident to the accountability thus devolved upon him, and then deny him any compensation whatever after he had rendered a faithful account of his trust. Such a construction of the law would practically confer upon the county commissioners the power to compel an officer objectionable to them to resign for want of support, and stretch their discretion to provide for a favorite who supplanted him.

We think that the law, fairly interpreted, was intended to give to every county treasurer a compensation for his labor and responsibility, that in no case should be less than two and a half per cent per annum,
(201) on the amount collected, where it cannot exceed two hundred and fifty dollars.

The judgment of nonsuit must be set aside, and a new trial granted. *Venire de novo.*

Cited: Wool v. Edenton, 115 N. C., 15; *White v. Auditor,* 126 N. C., 598; *McCullers v. Comrs.,* 158 N. C., 84; *Comrs. v. Credle,* 182 N. C., 445; *Bd. of Education v. Comrs.,* 189 N. C., 652.

F. G. SIMMONS, EXECUTOR, v. GEO. E. ANDREWS, ADMINISTRATOR.

Appeal—Settlement of Case on Appeal—Duty of Appellant—Judge's Failure of Memory.

1. It is the duty of an appellant, after the service of the counter-case on appeal by the appellee, to *immediately* request the judge to fix a time and place for settling the case.

2. If he fails to do so till after so great a lapse of time that the judge is unable to remember what took place at the trial, the judgment will be affirmed if there are no errors on the face of the record proper; but if application is made within a reasonable time, and the judge is unable to settle the case on account of an indistinct memory as to what took place at the trial, a new trial will be granted.

3. It is the duty of the appellant, if the case on appeal is not settled, to show affirmatively that the fault is not his.

4. If no exceptions are stated by appellant in the case on appeal, and there are no errors in the record proper, the judgment will be affirmed.

5. *Quære:* If the surety on the bond given on appeal from the justice to the Superior Court is a "party" who can appeal from the judgment of the latter Court.

THIS was a civil action, tried before *Shipp, J.*, at March Term, 1889, of JONES Superior Court.

There was judgment for the plaintiff, and the defendant appealed.

The facts sufficiently appear in the opinion.

S. W. Isler for plaintiff.

C. M. Busbee for defendant.

CLARK, J. The appeal in this case was taken at March Term, (202) 1889, of Jones Superior Court. The appellant served his case on appeal and the appellee his countercase. Thereupon the statute (The Code, sec. 550) made it the duty of the appellant to "immediately" request the judge to fix a time and place for settling the case. On the contrary, it appears that no application was made by appellant to the judge for that purpose till 15 October, a delay of nearly seven months. The judge then adopted appellee's case, but added that he did not distinctly remember what had occurred, owing to the long lapse of time before the case had been presented to him. At last term, the Court deeming that this was not very satisfactory, remanded the case, that the judge might have an opportunity to make out a more definite statement if he desired. To this the judge returns that his memory of the case is too indistinct to say more than he has already done, and adds that retaining cases for so long a time, and then presenting them for the judge to settle the case on appeal, is asking too much.

There are numerous precedents that if the case cannot be settled by the judge by reason of loss of papers, or (prior to the amendatory act) by reason of his having gone out of office, or otherwise, a new trial will be granted, and, by analogy, the same rule will be adopted where, by the great lapse of time, the judge is unable to settle the case. But, without

exception, these cases all contain a proviso that this will not be done unless it is made to appear that the appellant was not guilty of *laches*. *Simonton v. Simonton,* 80 N. C., 7; *S. v. Murray,* 80 N. C., 364; *S. v. Fox,* 81 N. C., 576; *Sanders v. Norris,* 82 N. C., 243; *S. v. O'Kelly,* 88 N. C., 609; *S. v. Randall,* 88 N. C., 611; *Burton v. Green,* 94 N. C., 215. The appellant has not made it appear that he was not guilty of *laches* in delaying over six months to present the case to the judge to be settled. That, with the multiplicity of matters coming before him, the judge should, after such lapse of time, not retain a very distinct impres-
(203) sion of the *minutiæ* of the trial is only what might have been expected. To give an appellant a new trial on account of his own *laches* would be to grant to his delay all that he could have obtained by a successful appeal. Such a precedent cannot safely be set, *non dormientibus sed vigilantibus leges subveniunt.* There is no evidence of any waiver of time, and if there had been, the appellant cannot be allowed, even by consent, an unlimited time till all memory of the case shall have faded from the mind of the judge. Causes are not to be thus won by "masterly inactivity."

Bynum, J., in *Wade v. New Bern,* 72 N. C., 498, after reciting the rules governing the prosecution of appeals under The Code, says they are reasonable and "exact no greater degree of vigilance than is required for the deliberate, orderly and sure administration of justice. *Within certain limits* the parties may, by consent, waive the time of complying with the rules, and the Court will respect such agreements of the parties if they appear on the record. But unless they do so appear, this Court must respect the provisions of The Code, by adhering to and enforcing the rules there prescribed for the government of appeals."

In *Kirkman v. Dixon,* 66 N. C., 406, where, on return of appellee's case, the appellant failed to apply to the judge to settle the case, the court (there being no error on the face of the record proper) affirmed the judgment. The condition of appellant here is no better, for, though he applied, it was after so long a delay that it resulted, and could reasonably result, in nothing.

In *Russell v. Davis,* 99 N. C., 115, the Court say: "If the appellee files no exceptions to the appellant's statement, it will be treated as the case on appeal; if the appellee files exceptions and the appellant fails to have the case settled by the judge, the exceptions will be treated as amend-
ments to the case." It can make no difference whether there is a
(204) failure to apply, or an application after so long a lapse of time as to avail nothing.

It may be that the *laches* here was that of the appellee. But the appellant is the moving party, and if the case is not settled, he must show

affirmatively that it is no fault of his. If he had shown that the fault was not his, but the appellee's, then the appellant's case would be taken as the case on appeal. *Russell v. Davis, supra.* Conceding, however, for the sake of the argument, that in this case the appellee was derelict, and taking the appellant's statement alone (which is also sent up in the record), as the case on appeal, it appears therefrom that there were no exceptions taken on the trial, no errors appear in the record and the judgment, upon his own showing, must be affirmed. There is a suggestion—not an exception—taken below that no jury trial was had. It is sufficient to say that an inspection of the record shows this entry on the minutes: "By consent, defendant pleads payment, and that the note is subject to the scale of Confederate money, and the case to be tried by the court without a jury." There is also a similar "suggestion" (without exception, below) that the defendant administrator had not been made a party. The record shows notice was issued to him, and the court below finds and adjudges that he "has been made a party."

The defendant has taken no appeal, but one of the sureties on the bond given by the defendant before the justice (where the action was first tried) to stay execution on the appeal to the Superior Court, has entered the appeal to this Court. We are not to be understood as passing upon the question whether he is a *"party"* aggrieved, who can appeal under The Code, sec. 547, as it is unnecessary to do so.

This action was begun twelve years ago before a justice of the peace to recover money due by promissory note. The execution of the note was not denied, and, as appeared, both by the record and appellant's case, the defense set up was that the sum paid on the note was enough to satisfy the "scale" value of the note, it having been executed in (205) 1864. That such a case should have been kept in litigation for so long a period amounts virtually to a denial of all practical benefit to the plaintiff from the judgment the courts have at last held to be his due. Such delays are calculated to bring reproach upon the administration of justice, which should be simple and speedy.

Affirmed.

Cited: Owens v. Paxton, post, 480; *Booth v. Ratcliffe,* 107 N. C., 8; *Peebles v. Braswell, ibid.,* 69; *S. v. Price,* 110 N. C., 600; *Pipkin v. Green,* 112 N. C., 356; *Heath v. Lancaster,* 116 N. C., 70; *McGowan v. Harris,* 120 N. C., 140; *Stroud v. Tel. Co.,* 133 N. C., 253; *Comrs. v. Chapman,* 151 N. C., 328.

ANN BEST, ADMINISTRATRIX OF J. H. BEST, v. THE TOWN OF KINSTON.

Action by Administrator to Recover Damages for Death of Intestate—Must be Brought Within One Year.

1. An action by an administrator to recover damages for the death of his intestate (under sec. 1498 of The Code) must be brought within one year after the death of the intestate.
2. The fact that no administrator was appointed does not vary the rule, as no explanation why the action was not brought within one year can avail.

THIS was a civil action, tried before *Bynum, J.*, at November Term, 1889, of the Superior Court of LENOIR County.

After the jury was impaneled, the plaintiff's complaint was read and the plaintiff then admitted that the intestate of plaintiff was killed (as she alleges, by the negligence of defendant corporation) on the ..... day of December, 1886; that on 3 May, 1888, no administrator having been appointed, the plaintiff, who was the wife of the deceased, brought suit in her own name and filed her complaint. On 4 January, 1889, plaintiff took out letters of administration and made herself a party to the suit.

Upon this statement of facts the court intimated that plaintiff (206) could not recover, whereupon she submitted to judgment of nonsuit and appealed to this Court.

S. W. Isler for plaintiff.
George Rountree for defendant.

SHEPHERD, J. This action is brought by the administratrix of John H. Best, deceased, to recover damages resulting from the death of her intestate, occasioned, it is alleged, by reason of the negligence of the defendant.

Such an action could not be brought at common law, and is only entertained by the courts under the provision of The Code, sec. 1498, which embraces the principal features of the humane legislation known as "Lord Campbell's Act." The period prescribed for the commencement of such an action is "one year after the death of the intestate," and it has been decided in several states "that the right of action vests at the death which is the cause of action," and that the statute of limitations begins to run from that time, although an administrator has not been appointed. Pierce on Railroads, 400, citing *Fowlkes v. N. & D. Railroad Co.*, 9 Heisk., 829; 5 Baxter, 663; *Jeffersonville, M. & I. Railroad Co. v. Hendricks*, 41 Ind., 48; *Needham v. Grand Trunk Railroad Co.*, 38 Vt., 294, 306. See, also, Wood's Railway Law, 1415. The cases cited by the learned

counsel for the plaintiff (in which the non-existence of an administrator is said to be material) relate only to cases arising under the general law of limitations and presumptions, and have no application to a case under the above section of The Code. It has so been expressly held by this Court in *Taylor v. Cranberry Iron Co.,* 94 N. C., 525. The Court says that "this is not strictly a statute of limitations. It gives a right of action that would not otherwise exist, and the action to enforce it must be brought within one year after the death of the testator or intestate, else the right of action will be lost. It must be accepted, in all respects, as the statute gives it. Why the action was not brought within (207) the time does not appear, but any explanation in that respect would be unavailing, as there is no saving clause as to the time within which the action must be begun."

There, as in this case, the action was brought more than a year after the death of the intestate, and it was held that it could not be maintained. This is decisive of the present case.

No error.

Cited: Roberts v. Ins. Co., 118 N. C., 435; *Howell v. Comrs.,* 121 N. C., 363; *Killian v. R. R.,* 128 N. C., 263; *Meekins v. R. R.,* 131 N. C., 2; *Hartness v. Pharr,* 133 N. C., 571; *Gulledge v. R. R.,* 147 N. C., 235; *S. c.,* 148 N. C., 568; *Hall v. R. R.,* 149 N. C., 110; *Trull v. R. R.,* 151 N. C., 547; *Bennett v. R. R.,* 159 N. C., 347; *Dockery v. Hamlet,* 162 N. C., 120; *Renn v. R. R.,* 170 N. C., 146; *Dowell v. Raleigh,* 173 N. C., 200; *Reynolds v. Cotton Mills,* 177 N. C., 426; *Allen v. Reidsville,* 178 N. C., 521; *Chatham v. Realty Co.,* 180 N. C., 508; *Hatch v. R. R.,* 183 N. C., 620; *McGuire v. Lumber Co.,* 190 N. C., 809; *Brick Co. v. Kinston,* 191 N. C., 641.

MT. PLEASANT MANUFACTURING COMPANY v. THE CAPE FEAR AND YADKIN VALLEY RAILROAD COMPANY.

Common Carriers—Connecting Lines—Liability for Overcharge—Evidence.

1. An action lies, after payment, to recover back an overcharge by a common carrier.

2. When freight is shipped over connecting lines, no action lies against the last carrier to recover back a charge in excess of rate agreed upon by first carrier in the absence of proof that the first carrier, who gave the bill of lading, had authority to bind the connecting lines by its contract rate of shipment, or that the last carrier agreed to refund the sum paid in excess of the amount agreed by first shipper to be charged.

3. Where, in such action against the last carrier, it was evidence that the agent of such carrier at the point of destination stated to the consignee that he would not let consignee have the freight without payment of a certain sum (which was largely in excess of the rate specified in the bill of lading), but if, after an investigation made with the roads over which the car came, there was an overcharge, it would be refunded; that he would try to get it corrected, as there was evidently an overcharge from the bill of lading, but it would have to go through all the roads over which it came; and also wrote letters to the consignee, stating in one that "the overcharge has been filed and should come in next month. In cases of overcharge, the railroad does not allow goods taken without full amount being paid, and when overcharge is worked up by all the roads, the G. C. agent will remit same back." And in another: "Enclosed will find message I received from G. F. A., Mr. Kyle. It seems we are unfortunate on overcharges. Hope this one will be adjusted now. I have done all that is possible or necessary on my part to do in presenting the case to the general freight agent." And there was also evidence that he had communicated assignee's claim to the general transportation agent: *Held*, that there was sufficient evidence to go to the jury that the defendant company assumed to refund the amount overcharged, if an investigation showed such overcharge to have been made, and the court below erred in instructing the jury to find a verdict for defendant.

(208) THIS was an action brought before a justice of the peace in Guilford County, and carried, by appeal, to the Superior Court, tried before *Graves, J.*, at December Term, 1889, of GUILFORD Superior Court.

The plaintiff sued to recover the sum of $100.86, overcharge for freight shipped from Philadelphia, Pa., to Liberty, N. C., and collected from the plaintiff by defendant. The facts sufficiently appear from the opinion. His Honor, upon the evidence, directed the jury to find the following issue for the defendant:

"Did defendant assume to pay the plaintiff the difference between $45.54 and $146.40? Answer: No."

Judgment was, thereupon, entered for the defendant, from which the plaintiff appealed.

Charles M. Busbee for plaintiff.
J. T. Morehead for defendant.

CLARK, J. When there is an overcharge by a common carrier, an action lies to recover it back after payment. It is well settled that where money is paid with a full knowledge of the facts and circumstances upon which it is demanded, or with the means of such knowledge, it cannot, ordinarily, be recovered back. The party will not be permitted to
(209) allege his ignorance of the law, and it will be considered a voluntary payment. But an exception to this rule obtains when the

payment has been made by compulsion. The parties here did not stand on equal terms. The plaintiff was compelled to pay the freight demanded or do without his machinery, probably at a great loss to his business. Not to allow a consignee, under these circumstances, to accept the goods, pay the freight and sue to recover back the overcharge would be to subject the consignee and shipper, in a majority of cases, to pay any freight demanded, as a lesser evil than the loss by the detention of the goods. The principle that one, whether shipper or consignee, who pays excessive rates, can recover back the excess, is settled by numerous cases, both in England and this country. It is sufficient to cite *West Virginia Transportation Co. v. Pattison,* 41 Ind., 312, in which the authorities are carefully collated and reviewed.

In the present case, the first company, the Pennsylvania Railroad Company, gave a bill of lading for the goods "marked Mt. Pleasant Mfg. Co., Liberty, N. C., to be transported and delivered at the regular freight station of the company at ..... to via W. S. P. & Norfolk Railroad, upon the following rates (naming the charge per 100 lbs.), making through rate $45.54 per car." There was one car-load. On its arrival at Liberty, N. C., the defendant demanded and received $146.40, which plaintiff paid, as the defendant refused otherwise to let him have the machinery, and brings this action to recover back the $100.86 overcharge. It was in evidence that the way-bill which accompanied the goods, and which passed from company to company as the goods were transferred from one to another, contained a charge of $146.40 for freight. The bill of lading stipulated against any responsibility of the shipping company beyond its own line. A case exactly in point is *Schneider v. Evans,* 25 Mich., 241. In this case, as in that, each (210) of the companies acted independently. In that case, it is held, in a well considered opinion, that the remedy of the consignee for the charge paid, in excess of the agreed rate, is against the first company, as it had made the contract. It says: "It is more reasonable to impose on the owner who, knowing the custom, causes the goods to be delivered to the carriers without notifying them of his secret contract, the burden of resorting to the company with which he contracted, than to impose on the carriers the burden of ascertaining at their peril all the secret agreements between the shipper and prior carriers from whom the goods are received, affecting their right to receive the ordinary freights." On a rehearing of that case the authorities were carefully reviewed and the decision was affirmed.

In *Condict v. Grand Trunk Railway,* 4 Lans., 106, it is held that, in the absence of proof that the first company was authorized to bind the connecting lines by a contract to carry at a fixed price, such first com-

pany assumes the duty of having the goods carried the whole distance for the fixed price. Each of the other companies is responsible for the carriage over its own line and entitled to charge its regular rates. To the same effect are *Little Rock and Fort Smith Railroad v. Daniels,* 32 Am. & Eng. Railroad Cases, 479, and *Detroit and Bay City Railroad Co. v. McKensie,* 43 Mich., 609. The opinion in the latter case is by *Judge Cooley,* the president at the present time of the Inter-State Commerce Commission, and in it *Schneider v. Evans,* above cited, is referred to and affirmed.

There is no evidence that the rates exacted were in excess of those allowed by law. The plaintiff cannot, therefore, in the absence of some agreement by the defendant to refund, recover of it the sum paid in excess of what the Pennsylvania Railroad Company agreed to ship the goods for, the remedy being to sue the Pennsylvania Railroad
(211) Company on the contract. The only remaining question is whether there is any evidence tending to show that the defendant company assumed, or agreed to refund, any amount paid in excess of the agreement of the Pennsylvania Railroad Company. The judge below told the jury that there was not, and instructed them to return a verdict for defendant. To that charge the plaintiff excepted.

A witness for the plaintiff testified, without exception, that he applied for plaintiff to Glosson, the agent of the defendant at Liberty, for the machinery, who stated that he would not let plaintiffs have it without paying the $146.40, but if, after investigation made with the roads over which the car came, there was an overcharge, it would be corrected and the overcharge refunded; and that he would try to get the overcharge corrected, and he would do all he could to have it refunded, as there was evidently an overcharge from the bill of lading; that Glosson said "if there was an overcharge it would be refunded, but it would have to go through all the roads over which it came." There was also in evidence two letters from Glosson to plaintiff, in one of which he says: "The overcharge on car machinery has been filed and should come in next month. In cases of an overcharge the railroad does not allow goods taken without full amount being paid, and when overcharge is worked up by all the roads, the G. F. Agent will remit same back." In the other, he says: "Enclosed will find a message I received from G. F. A., Mr. Kyle. It seems we are unfortunate on overcharges. Hope this one will be adjusted soon. I have done all that is possible or necessary on my part to do, in presenting the case to the general freight agent." There was also in evidence a letter from Glosson to Mr. Rose, the general transportation agent of the defendant company, communicating plaintiff's claim for an overcharge.

The bill of lading fixing the through rate at $45.54 is uncon- (212) tradicted, and is evidence of the charge agreed upon between the shipping company and the plaintiff. While, in the absence of evidence that the shipping company was authorized by the other companies to agree for them upon that rate, and in the absence of evidence that they took the freight with knowledge that such rate had been agreed on, and thereby ratified it, such other companies would be entitled to charge their regular rates, still, there was, we think, evidence sufficient to go to the jury that the local agent of the defendant company communicated with the general agents, and that the defendant company assumed that it would refund the amount overcharged, should it prove, on investigation, that there was such overcharge as claimed by the plaintiff. The only overcharge claimed by him, was that the sum paid was in excess of that agreed on by the bill of lading, and there is evidence tending to show that defendant, after investigation, admitted the correctness of such claim. The question should have been submitted to a jury.

Venire de novo.

Cited: Randall v. R. R., 108 N. C., 614.

(213)

JULIA A. CREECH v. J. W. GRAINGER, ADMINISTRATOR D. B. N. C. T. A. OF R. G. CREECH.

Wills—Executors—Trusts in Will—Powers of Administrator c. t. a.—Pleading—Demurrer.

1. Under a will directing the executor therein named to continue testator's business as long as the executor should think it profitable, and such of the profits as the executor night think actually necessary for the support of testator's wife and children to be paid to the wife; also, to invest six thousand dollars, bequeathed by testator to his children, and apply the interest, annually, to the education of the children; also, to have entire control of testator's business, to continue or discontinue in all, or any department of it, at any time he might find it not yielding a reasonable profit, and out of the profits pay to testator's wife, from time to time, such amounts as he might consider actually necessary for her support and the support of the children: *Held*, that upon the death of the executor and the appointment of an administrator *d. b. n. c. t. a.* the trust in respect to the investment of six thousand dollars, for the education of testator's children, passed to the administrator; the other trusts were *personal to and discretionary with* the executor, and became extinct at his death.

2. An administrator, with the will annexed, becomes a trustee for any trusts declared in the will which could pass and be transferred to any one, as much as if he had been named executor.

3. When a will directs the executor to invest a certain fund and apply the interest to the *education* of testator's children, no part of such interest can be applied to the *maintenance* of the children.

4. In such case, in an action by testator's widow against the administrator *d. b. n. c. t. a.* for a certain amount paid by her for the children's tuition, the complaint is demurrable if it fails to allege that the payment was made by authority either of the executor or the administrator.

THIS was a civil action, tried before *Graves, J.*, at February Term, 1890, of LENOIR Superior Court, on exceptions to the report of a referee in overruling the demurrer of the defendant.

The plaintiff alleged:

(214) 1. That R. G. Creech died on 5 January, 1880, leaving him surviving the plaintiff, his widow.

2. That R. G. Creech died leaving a last will and testament, in which Travis E. Hooker was appointed his executor, and the said Hooker was duly qualified as executor by the probate court of Greene County on the ..... day of ....., 1880, and immediately entered upon the discharge of his duties of said executorship.

3. On 16 June, 1880, said T. E. Hooker, executor as aforesaid, received in goods and moneys as a portion of the estate of his testator $12,294.95, as per inventory rendered and filed in the office of clerk of Superior Court of Greene County.

3. (a) That at the time of the decease of said R. G. Creech, the family of deceased consisted of the plaintiff, widow as aforesaid, and their four children, the oldest of whom is at this time sixteen years of age.

4. That on the ..... day of ....., 1880, the plaintiff, as provided by law, dissented from the will of her said husband, before the clerk of the Superior Court of Greene County.

For a second cause of action, plaintiff alleges:

1. That the aforementioned children have resided with the plaintiff continually since the death of their father; and that they have been boarded, clothed and supported by the plaintiff at her own cost and expense since 17 January, 1885, and with the expectation of being paid therefor.

2. That the board, support, and clothing of the said children is reasonably worth $100 per annum for each one.

3. That the said R. G. Creech by his last will and testament, which said will is hereto annexed and made a part of this complaint, directed his executor to set apart and invest in United States bonds, or deposit in

bank, the sum of $6,000, and from the income thereof to pay for the maintenance and education of his said children, which said sum was so deposited by said Hooker in the National Bank of Wilson, (215) upon certificate of deposit at 6 per cent interest, payable to said Hooker as executor.

4. That said Travis E. Hooker, executor, died on 16 March, 1887, without having fully administered the estate, and without having fully performed the trusts imposed upon said executor in said will, and that the defendant, J. W. Grainger, was, on 23 February, 1888, duly appointed and qualified as administrator *d. b. n. c. t. a.* of the estate of said R. G. Creech, deceased, and, as such administrator came into possession of the said estate, including said certificate of deposit with the accumulated interest thereon.

5. That said J. W. Grainger, administrator *d. b. n. c. t. a.*, has in hand $10,266.70, and interest due on certificate and notes, of which amount the sum of over $2,500 is the accumulated interest upon the sum of $6,000, set apart as a fund, in the will of said Creech, for the support and education of said children.

For the third cause of action, plaintiff alleged:

1. That plaintiff has sent to school the said children for one term, and is liable for their tuition to the sum of $37.50, which is a reasonable charge.

2. That there are no outstanding debts against the said estate, other than those herein set forth.

The defendant demurred to plaintiff's second and third causes of action, and to each of them, and, as grounds of demurrer, submitted that he is not, in law, liable for the board, support, clothing, schooling and tuition of the said children of plaintiff, for which plaintiff seeks to charge him in said complaint.

It appears from the complaint, paragraph 3 of the second cause of action, that a testamentary trust was imposed upon the executor, Hooker, and, from paragraph 4, that said executor died without having fully performed the trusts imposed upon him, and that defendant was duly appointed administrator *d. b. n. c. t. a.* of said Creech, de- (216) ceased. It is submitted that the duties and trusts imposed by said will and testament upon said Hooker, executor, as specified in paragraph 3, were personal to said Hooker, implying personal confidence on the part of his said testator, and that, upon the demise of said Hooker, said duties and trusts terminated, and that they did not pass to the defendant administrator *d. b. n. c. t. a.;* that defendant did not succeed to the rights and duties of said Hooker, executor, in so far as the testator Creech constituted his said executor trustee of a certain fund for

the benefit of his said children. Wherefore, as to plaintiff's second and third causes of action, defendant prayed judgment dismissing same at costs of plaintiff.

The material parts of the will were as follows:

. . . . . .

"*Item.* It is my will and desire that my mercantile business, harness shop, blacksmith shop and carriage shop be continued as long as in the judgment of my executor it shall be profitable, and such of the profits resulting therefrom as may, in the judgment of my said executor, be actually necessary for the support of my wife and children be paid over to my beloved wife, Julia Creech.

"*Item.* I give and bequeath to my children the sum of six thousand dollars, to be paid to my executor and by him invested in United States bonds, or deposited in some safe bank of this State, as in his judgment he may think best—the interest accruing thereon to be drawn annually and applied to the educating of my said children, and when they shall severally arrive at the age of twenty-one years, it is my will and desire, and I so direct my executor to pay them their proportional part of the said six thousand dollars.

"*Item.* I give and devise to my beloved wife, Julia Creech, all the real estate wheresoever situated, including my dwelling-house, my store houses and all houses and lots I now own in the town of Hooker-
(217) ton, together with all my personal property of every description not herein otherwise disposed of, to have and to hold to her, the said Julia Creech, for and during her natural life. It is, however, my will and desire that my executor shall have entire control and management of all my business, and to continue or discontinue all or any department of it at any time he may find it not yielding a reasonable profit, and, out of the profits resulting from said business, pay to my wife, from time to time, such amounts as he may consider actually necessary for her support and the support of my children.

. . . . . .

The cause having been referred to J. Q. Jackson, Esq., the referee overruled defendant's demurrer. On exception to the referee's report, the court sustained the referee in overruling the demurrer, and rendered judgment in favor of plaintiff and against defendant for the sum of $1,848.30, the amount found due by the referee.

From the judgment rendered defendant appealed.

George Rountree for plaintiff.
N. J. Rouse for defendant.

CLARK, J. The demurrer to the second cause of action should have been sustained. This cause of action is based upon the allegation that by the will the interest on the sum of $6,000 was devoted to the maintenance and education of the children. A reference to the will, item 3, as set out in the record, shows that such interest was devoted to the education of the children only. This cause of action seeks to apply it to the maintenance of the children, and could not have been maintained against the executor himself if living. Clauses two and four of the will appropriate the profits of the business, to be continued by the executor in his discretion, to the maintenance of the children. If the pleadings as to this cause of action were reformed so as to allege (218) that so much of the fund in the hands of the administrator as is not the aforesaid $6,000, and accumulated interest thereon, arose from the said profits, and that the executor agreed upon or promised compensation for the maintenance of the children, or refused to exercise his discretion in regard to the amount, it may be that then the plaintiff would have a cause of action to have compensation awarded her out of such accumulated profits. But it is not necessary that we decide the point as it is not now before us.

The demurrer to the third cause of action should also have been sustained. It is not clearly made to appear whether the liability of plaintiff for the $37.50 for tuition was incurred before or since the death of the executor. If before his death, and plaintiff incurred it at his instance, or by his authority, a good cause of action as to this would be shown, but the burden to clearly allege and to prove the state of facts entitling her to recover is on the plaintiff. In fact, however it was conceded in the argument that this liability was incurred since the executor's death. Putting out of view the absence of any allegation that plaintiff incurred the liability at the instance, or by authority of, defendant, which defect is fatal to plaintiff's claim, we will consider, as the parties desire it, the question whether the defendant, an administrator *de bonis non cum testamento annexo,* had power to execute the trusts expressed in the will. The statute (The Code, sec. 2168) is as follows: "In all cases where letters of administration, with the will annexed, are granted, the will of the testator must be observed and performed by the administrator with the will annexed, both in respect to real and personal property, and an administrator with the will annexed has all the rights and powers, and is subject to the same duties as if he had been named executor in the will." As to powers conferred upon the executor by the second and fourth items of the will to continue the business of the testator, as long as in the executor's judgment it shall be profitable, and to pay out of the profits such (219)

amounts as in his judgment should be necessary for the support of testator's widow and children, they were *personal to and discretionary with* the executor, and became extinct at his death. They could not be judicially prolonged and vested either in the administrator *c. t. a.*, nor in a substituted trustee. *Young v. Young,* 97 N. C., 132; Lewin on Trusts, 435.

As to all the other powers and duties conferred by the will, including that of holding the $6,000 and applying the annual interest to the education of the children, the administrator with the will annexed becomes a trustee for any trusts declared in the will which could pass and be transferred to any one, as much as if he had been named executor. *Jones v. Jones,* 2 Dev. Eq., 387. In the present case, however, there is no trust which can survive and pass to the administrator under the statute, except that imposed in regard to the $6,000. The discretion given to the executor as to that was only as to the manner of safekeeping, an incidental matter which does not extinguish it at his death. The general duties of the executor in regard to settling the estate pass, of course, to the administrator. On such settlement he should pay over to the distributees, or their guardian, the fund remaining after payment of debts and charges of administration, except the $6,000, and interest thereon, which trust he should execute under the will.

We are aware that there are decisions in New York and some other states that only such powers pass to the administrator as belonged to the executor *virtute officii,* and that the other trusts conferred by the will which are not in the scope of the common-law duties of an executor do not pass to the administrator, but that a trustee must be appointed to execute them. A scrutiny of these cases shows that they all enforce the idea that, as an executor at common law had no control over realty,

a power conferred on him by the will to sell real estate, does not
(220) pass to the administrator. Our statute, however, (The Code, sec.
1493) expressly provides that it shall, and the reasoning in those cases has no application here, and we prefer to follow our own precedent. *Jones v. Jones, supra.* As the appointment of an administrator and of a trustee would be by the same court, and both are required to give bond and to make returns, and in all respects are subject to the same supervision, there seems no good reason to require the appointment of a trustee, when The Code (secs. 1493 and 2168), by a fair and reasonable construction, indicates clearly the intention to devolve upon the administrator *c. t. a.* "all the rights and powers" conferred on the executor by the will. It would add to the expense, but hardly to efficiency in executing the will, to have two officers instead of one. The same general legislative intent is shown by chapter 147, Acts 1887, which

provides that the executor or administrator of a mortgagee, in a mortgage containing a power of sale, may sell under the power without the necessity of the Court appointing a new trustee.

The demurrers to both causes of action should have been sustained, with leave to plaintiff to amend the complaint if desired. The cause is remanded that it may be so ordered.

Error.

Cited: Clark v. Peebles, 120 N. C., 34; *Murphy v. Reed,* 180 N. C., 627.

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(221)

D. G. MORISEY v. JOHN E. SWINSON.

Petition to Rehear—Mortgagee in Possession—Rents and Profits.

On the former hearing, this Court overlooked the defendant's exception that the referee did not charge the plaintiff mortgagee in possession with rents and profits up to February Term, 1889, the date of trial: *Held,* that the defendant is entitled to the rents and profits as claimed, but, as the facts are in some doubt, a further account should be taken and the judgment corrected so as to conform to the facts.

PETITION by defendant to rehear the decision of this case, made at September Term, 1889. (See 104 N. C., 555.)

The facts sufficiently appear in the opinion.

W. R. Allen for plaintiff.

H. L. Stevens for defendant (petitioner).

MERRIMON, C. J. This is an application to rehear the case of *Morisey v. Swinson,* 104 N. C., 555, decided at the last term, upon the ground that the court failed to advert to the third exception of the defendant therein to the report of the referee, which exception was in these words: "The referee errs in stopping the accounting for the rents and profits of the mortgage premises at 1884, when the plaintiff is still in possession of the mortgage premises, cultivating the lands and using the storehouse for a guano-house, and is in receipt of the rents and profits up to February Term, 1889. It seems that this exception may have been overlooked. The record was voluminous, confused, and, to some extent, misleading. The plaintiff excepted to the report mentioned, on the ground that rents were allowed to the defendant up to the time of the trial, and this may have led the court to lose sight of the defendant's

exception to the contrary. The plaintiff now earnestly insists
(222) that rents were allowed to the defendant as claimed by him. It seems to us otherwise.

This Court, overruling the plaintiff's exception, decided that the defendant was entitled to rents for the time claimed by him. If the account did not embrace them for that time, it should have done so. As the matter is in some doubt, the judgment of this Court should direct the court below to inquire how the fact is, and, if need be, direct a further account to be taken as to the rents, and correct the judgment so as to make it conform to the facts as, upon inquiry, they may appear to be.

The case specified in the petition must be reheard, and the judgment therein of this Court modified in accordance with this opinion, and, as so modified, certified to the Superior Court, to the end that further steps may be taken there in the action, according to law.

Petition allowed.

CHRISTOPHER STEPHENS v. FRANK D. KOONCE.

Practice—Jurisdiction of Supreme Court—Motions, When Made.

1. The final judgment in any action, as affected by the orders and judgment of this Court, is in the Superior Court, and all proper motions in the action should be made in the Superior Court, except such motions as may be made affecting the appeal and the action of this Court therein. But no motion can be entertained in the Superior Court inconsistent with the judgment or directions of this Court.

2. The chief purpose of the statute (Acts 1887, ch. 192) seems to be to preserve the judgment appealed from intact and give it force and effect as a lien upon property as if it were a docketed judgment, pending the appeal, and to have this Court to exercise its jurisdictional functions in ordinary cases simply as a court of errors. The authority of this Court is not abridged in any respect or degree, deriving its powers, as it does, from the Constitution, and not from the General Assembly.

(223) THIS was a motion, in the nature of an *audita quarrela,* made by defendant in this Court.

The defendant, after notice to plaintiff, moved for an order directing plaintiff to deliver to him certain property described in the pleadings in this action, or to have the value of the same assessed by a jury, and that plaintiff be restrained from issuing execution to enforce the judgment heretofore rendered in this action, etc. (See this case, reported in 103 N. C., 266.)

STEPHENS *v.* KOONCE.

Charles M. Busbee for plaintiff.
S. W. Isler for defendant.

MERRIMON, C. J. This purports to be a motion in the case of *Stephens v. Koonce,* 103 N. C., 266, decided at the February Term of 1889, the purpose being to compel the plaintiff to deliver to the defendant therein certain parts of a steam engine, the subject of the action, etc., or to submit to the trial of certain issues of fact, etc.

The motion is improvidently made in this Court. If it be a proper motion to be made at all, it cannot be entertained here, because the final judgment, as affected by the orders and judgment of this Court, is in the Superior Court, and all proper motions to enforce it, or that might appropriately be made in the action, should be made in the latter court, except such motions as may be made affecting the appeal and the action of this Court therein. But no motion can be entertained or allowed in the Superior Court that shall, or may, be inconsistent with the judgment and directions of this Court. The latter are con- (224) trolling in the action so far as they apply to and affect it, and must be observed in all appropriate connections. Otherwise, the decisions of this Court, as a court of errors, would not be authoritative, and there would be no end to controversy.

It may be that, in some cases, a final judgment may now be rendered in this Court, as was formerly the prevailing practice in most cases, except in criminal cases and interlocutory orders and judgments. The Code, sec. 962. But now, ordinarily, the order or judgment appealed from is affirmed, reversed or modified as the order or judgment of the court below, as this Court may decide, order and direct. Such is the course of procedure and practice prescribed by the statute. Acts 1887, ch. 192, secs. 1, 2, 3. The first section thereof prescribes that "The stay of execution provided for in title thirteen, chapter ten of The Code, shall not be construed to vacate the judgment appealed from, but, in all cases, said judgment shall remain in full force and effect, and the lien of said judgment shall remain unimpaired, notwithstanding the giving of the undertaking or making the deposit required in said title, until the judgment appealed from is reversed or modified by the Supreme Court." The second section provides simply that execution shall not issue pending the appeal. The third section provides "That section 962 of The Code be amended by adding to the end thereof the following paragraph: 'In civil cases, at the first term of the Superior Court after such certificate' (that of this Court mentioned and provided for in The Code, sec. 962) 'is received, if the judgment is affirmed, the court below shall direct the execution thereof to proceed, and, if

said judgment is modified, shall direct its modification and performance. If a new trial is ordered, the cause shall stand in its regular order on the docket for trial at such first term after the receipt of the certificate from the Supreme Court.' "

(225) The chief purpose of these statutory provisions seems to be to preserve the judgment appealed from intact, and give it force and effect as a lien upon property, as if it were a docketed judgment pending the appeal, and to leave this Court to exercise its jurisdictional functions in ordinary cases simply as a court of errors. They could not have the effect to abridge the authority of this Court in any respect or degree. It is a coördinate department of the government, and derives its powers from the Constitution, and not from the General Assembly. The latter may, however, and it is its duty to pass laws to facilitate the exercise of its jurisdiction, powers and authority.

The motion is denied and dismissed.

Motion denied.

Cited: Black v. Black, 111 N. C., 304; *Tussey v. Owens,* 147 N. C., 337.

WALTER L. PARSLEY ET AL. V. A. DAVID.

Lien of Materialman—Sufficiency of Complaint—Payments by Owner After Notice—Evidence—Verdict and Judgment.

1. Where, in an action to enforce a materialman's lien under secs. 1801-1802 of The Code, the complaint alleged that, after the lien was filed the defendant paid the contractor $375, and also $500 as a consideration for the cancellation of the contract, thus placing it beyond his power to complete his contract, which allegations the answer denied, and the issue thus raised was tried by the jury, this Court will deny a motion to dismiss the action because "the complaint does not state facts sufficient to constitute a cause of action, in that it fails to allege that anything was due from the defendant to the contractor when the lien was filed."

2. In such case, it is competent to prove by the defendant how much he had paid the contractor under the contract at the time notice was served on him by the plaintiffs.

3. Where the defendant had testified that he had not paid the contractor anything after plaintiffs' notice was served, and had been cross-examined as to payments thereafter made to show that they were made on account of the contractor, it is competent to corroborate the defendant by the testimony of his bookkeeper as to the date of the last payment to the contractor.

4. In such case, where the jury found that the defendant had made certain payments after notice served on him by plaintiffs, among them a certain sum to the foreman of contractor to be used in paying hands, and also that the defendant was not indebted to the contractor at the time of said notice, the court having put the burden on the defendant to show, by a preponderance of testimony, that the payments were not made under the contract between defendant and contractor: *Held*, that judgment was properly entered for the defendant.

THIS was a civil action, tried before *Bynum, J.*, at September (226) Term, 1889, of NEW HANOVER Superior Court.

The defendant had made a contract with one Frank Wood, by which the said Wood was to build a house for him in the city of Wilmington, and the plaintiffs, who were engaged in the manufacture and sale of lumber, furnished material, which was used in the building of said house, to the value of $339.24. The said sum was not paid by the said Wood, and, on 12 October, 1886, the plaintiffs gave notice to the defendant, as required by sections 1801 and 1802 of The Code, to create a lien on said house, and this action is brought to enforce payment.

Among other things, the plaintiffs allege that, after the notice was given to the defendant, "the said defendant did pay the said Wood sums of money amounting to $375, as plaintiffs are informed and believe."

They further allege that, after the said notice, the defendant "did pay to said Frank Wood a large sum of money, to wit, about $500, as a consideration to said Frank Wood to give up the contract of construction, thus putting it beyond the power of *defendant* (contractor?) to complete his contract."

These allegations are denied in the answer.

The following issues were submitted to the jury: (227)

1. Did the plaintiffs sell and deliver to one Frank Wood, the contractor, building material of the value of $345.48, used in the erecting of defendant's house?

2. Did the defendant pay to Frank Wood, or his agent, any money under his contract after the notice served on him by plaintiffs? If so, how much?

3. Was the defendant indebted to said Wood at the time of said notice? If so, how much?

4. Did the defendant pay to any person, for material furnished and used in said building, any money, after said notification to him by plaintiffs? If so, how much?

5. Was any part of said sum paid by defendant, because he had assumed the payment thereof, independent of the contract with Wood? If so, what amount?

W. S. Parsley, one of the plaintiffs, testified "that before Wood began work on the house of the defendant, the defendant told him he had nothing to do with the purchase of the material, but he did not intend anybody in Wilmington should lose anything on it."

It was in evidence for plaintiffs that, after the notice of Parsley & Wiggins to the defendant, and before the contract between Wood and the defendant was canceled, the defendant paid to one Fuller, foreman of Wood under the contract, from $180 to $210, being one week's payroll for the hands employed in doing the work.

On cross-examination witness said: "It was to pay off the hands, and if any money was paid under the contract this was; that defendant told him of the notice given by plaintiffs, but that his lawyer told him to pay off the hands, and he did, and this was the last money he drew under the contract with Wood."

It was in evidence for the defendant that, under his contract with Wood, made 23 March, 1886, he was to pay $6,500 for building his house. Wood was to furnish all materials and complete it according to certain plans and specifications, forming part of the contract,

(228) and that, on 20 October, 1886, Wood, finding it impossible to complete the buildings, by reason of "having drawn an amount in excess" of his contract, and the "said David being unwilling to pay or advance more" money to complete the said buildings, and being himself pecuniarily unable to do so, and being "further satisfied that the balance which would be due and owing on the contract price would be utterly insufficient to cover the expenses and outlay incident thereto," executed to said David a release "from any and all liability," by reason of said contract, and acknowledged full receipt of all moneys due to him from said David.

Mr. Marsden Bellamy, who was attorney for defendant, and drew the release executed, further testified: That the day it was signed Wood came to witness' office; said that he had overdrawn from David, that he had no credit, and David would make no advances. I went to David with him at his request. Wood then said David had largely overpaid him, and had refused to pay him any more. He wanted David to pay him $500. David refused. Said he had paid him $500 before to pay debts, and he had not done it, but had appropriated it to his own use. Witness further says he then drew the cancellation of the contract; that David paid him no money. That David came to witness about paying the hands who were at work on the house, and he advised him to open an account and pay the hands himself, as he had to complete his building.

Upon cross-examination, says he means by paying the hands, the payment that was made to Fuller the Saturday after notice given by Parsley.

The defendant testified in his own behalf as follows: "I contracted in May, 1886, with Wood; he was to furnish material and finish my house for $6,500."

Proposed to ask witness how much he had paid Wood under the contract when the notice was served by plaintiffs. Objection; overruled and exception.

Witness answered: "I had paid Wood $5,800. I made no (229) alterations in the original plan of the house, and I paid out for completing it $2,400, after paying Wood $5,800. I did not pay Wood a cent after 12 October, 1886. On 20 September I paid him $500; did not owe it to him, but gave it to him to pay debts he said he owed. I paid the hands after this notice on my own account. I paid the payroll, because I promised the workmen to do it when I canceled the contract. I was advised to do this by Mr. Bellamy. I did not owe Wood a dollar. I told Fuller when I was notified by plaintiffs that I could not pay Wood any more, but to keep the hands working and I would pay them."

Upon cross-examination, says: "The contract was canceled 20 October. I paid to Fuller to pay the hands $119.84 on 16 October; I paid Wilson $85 for shingles after 12 October. I had agreed with Wilson when the shingles were shipped to become responsible for this. I gave Barker a suit of clothes in settlement of a bill to Wood, after 12 October, about $30 or $35. Mr. Strange had a suit against Wood, and I settled it at $40; the claim was $800; I paid him $40; he gave a receipt in full; don't know whether receipt was as to Wood or not. I paid Springer $75 after 12 October; I had agreed with Springer, when Wood made the account, to be responsible for it. Springer says the account was made by Wood in June, 1886. I did not pay Lee, Grant, or Foster, or Giles & Murchison any debts made by Wood for material furnished for the house. I did pay for the mantels. A certain amount was estimated in the contract for the mantels, and I was to retain this amount, and select, and order, and pay for them, which I did, and they were shipped to me, not to Wood."

W. A. Dick, a witness for defendant, testifies: He was bookkeeper and cashier for defendant until December, 1886, and kept the account between Wood and the defendant.

Proposed to ask witness, for the purpose of corroborating de- (230) fendant as to time of his last payment to Wood, when the account between Wood and defendant closed. Overruled, and excepted.

Witness states: "Do not know whether it was by the consent of Wood or not, but the books showed no entry on that account after 9 October, 1886; after that it was kept as a new account of the defendant."

Upon cross-examination, says: "Wood knew nothing about the closing of the account."

Upon the close of the evidence the plaintiffs asked for the following instructions:

"1. It being shown that said payment to Fuller was paid before the contract was canceled, the burden rests upon the defendant to show that the said payment was not made under the contract.

"2. If the jury believes that A. David paid the money to D. B. Fuller, foreman of Frank Wood, after the notification of the plaintiff, and before said David F. Wood canceled the contract between them, whether the same was actually due according to the terms of the contract (there being more money coming to Wood when the contract was completed), such payment would be a payment under the contract, and the jury must find second issue Yes."

The court gave the instructions, adding to the second the following: "Unless the defendant satisfies you, by a preponderance of the testimony, that the payment was not made under the contract with Wood."

The court instructed the jury as to the third issue:

"3. If, from the whole evidence in this case, you find that the contract between Wood and the defendant was, that Wood was to build for the defendant and deliver to him a completed house, and when completed defendant was to pay him $6,500, then you will answer the third issue Yes, as the defendant admits the house was not com-
(231) pleted when the notice was served, and that he had only paid him $5,800.

"4. If you find the contract between the parties to be that Wood was to build for the defendant and deliver to him, completed, the house, and to be paid for it when so completed and delivered, $6,500, and after the making of the contract, or at the time it was made, David agreed with Wood to advance to him money, as the house was being built, to be accepted by Wood in part payment of the $6,500, and to be accounted for by him on a final settlement after the house was completed and delivered, and defendant had paid to Wood $5,800 before the notice was served on defendant by the plaintiff, and you shall further find that the $5,800, paid by David and accepted by Wood, paid for all the material furnished by Wood and the work done by him on the house of the defendant at the time the notice was served, you will answer the third issue No, and the burden is on the defendant to satisfy you by a preponderance of the testimony, that the $5,800 was paid by him, and

accepted by Wood, to be credited on the amount of $6,500; and further, to satisfy you, by a preponderance of the testimony, that the $5,800 paid Wood for all the material furnished by him was before service of the notice by the plaintiffs.

"5. The defendant had a right to pay any and all bills of the said Wood that he chose to pay without subjecting himself to liability to the plaintiff, unless the defendant was indebted to Wood on the contract at the time of such payment."

"The jury responded Yes to the first issue by consent of the parties.

"To the second issue, Yes, $119.84.

"To the third issue, No.

"To the fourth issue, Yes, $230.

"To the fifth issue, Yes, $190."

The plaintiffs moved, on the verdict, for judgment against the (232) defendant for $159.84, which was refused.

There was judgment for the defendant, and the plaintiffs appealed.

John D. Bellamy for plaintiffs.
Sol. C. Weill for defendant.

DAVIS, J., after stating the facts: It is proper to state that the record shows that the plaintiffs asked for a new trial upon "the ground that the third issue was found contrary to the weight of the evidence, in fact, found without evidence." But this was abandoned by counsel in this Court.

In this Court, the defendant moved to dismiss the plaintiffs' action, as upon demurrer *ore tenus,* for the reason that the "complaint does not state facts sufficient to constitute a cause of action, in that it fails to allege that anything was due from the defendant to Wood, the contractor, when the lien was filed." For this he cites the case of *Turner v. Strensil,* 70 California, 28, in which it is said: "A materialman is only entitled to be paid from that portion of the contract price which remains due and unpaid to the contractor by the owner when he (the materialman) files his lien, and when the complaint fails to allege that anything is due from the owner to the original contractor when plaintiffs' lien was filed, it does not contain a statement of a cause of action." In this case no such allegation was made, and the Court said: "It nowhere appears that the owner had not paid to the contractors, prior to the filing of the lien, all that was due to them."

In the case before us, it is alleged that the defendant paid the contractor, after the lien was filed, the sum of $375, and that he also paid $500 to Wood as a consideration for the cancellation of the contract, and thus placing it beyond his power to complete his contract.

(233) These allegations were denied, and whether the defendant owed the plaintiff anything or not, was a controverted question which, though decided by the jury in the defendant's favor, presented an issue of fact fairly raised by the complaint and answer, and the motion to dismiss cannot be allowed.

1. The plaintiffs except to the testimony of the defendant, in regard to payments made to Wood, under the contract, when the notice was served by the plaintiffs. How, otherwise, could it be determined whether the "defendant was indebted to the said Wood at the time of the said notice?" If it was competent for the defendant, as it clearly was, to prove that he was not indebted to the contractor when the lien was filed, then it was competent to prove that he had paid what he owed him up to that time. The evidence was competent, and there can be no question as to the competency of the witness.

2. The testimony of the witness Dick is objected to. The defendant had testified that he did not owe Wood a dollar after 12 October, and had not paid him a cent. He was cross-examined as to various payments made after that time, manifestly with a view to show that they were made for or on account of Wood, and the testimony of Dick was competent to corroborate him, as tending to show that the payments were not made on any indebtedness to Wood.

3. The plaintiffs insist that—the jury having found, in response to the second issue, that the defendant had paid to Frank Wood, or his agent, under the contract, $119.84 after service of notice; and, in response to fourth issue, that he had paid $230 for material furnished and used in the building after said notification—they are entitled to judgment, notwithstanding the finding upon the third issue, that the defendant was not indebted to Wood at the time of said notice. The authorities cited by the counsel for the appellant do not go to that extent.

(234) In *Wright v. Roberts,* 50 N. Y. (Supreme Court Reports), 415, it appeared that "a sum of money had been earned, according to agreed price, in excess of all payments to Lyons, sufficient to pay the lienors." It is true that the contract had not been fully performed, but enough had been done under it sufficient to pay the "lienors."

In *Mayer v. Mutcher,* 50 New Jersey, 162, the contractor had not completed the contract, and it was held that the lien attaches not only to what may be due to the contractor at the time of the notice, but whenever the period arises when the owner could be compelled to answer to the contractor for any portion of the contract price, he must respect the notice theretofore given. It was held that, if money became due after the notice, the lien would attach, and it was said that the lien

would attach if the money could be sued for and recovered. The cases cited by counsel for appellant are distinguishable from the case before us, in which, according to the verdict, nothing was due at the time of the notice, and nothing ever became due.

In *Pinkston v. Young,* 104 N. C., 102, it is said: "If, at the time of such notice (under The Code, secs. 1801, 1802), the owner or lessee of the land has not paid to the contractor the money due, or to come due, to him, or an account of the contract, and shall refuse to retain out of the amount so due so much, if there shall be so much due, as shall be due or claimed by the party having the lien, the latter may proceed to enforce his lien," etc.

In *Bradburn v. S. L. Grape and Wine Co.,* 67 N. Y. Rep. (Court Appeals), 215, the Court held that the defendant had a right to prove that the contractor became unable to complete the building, and that he was forced to complete it himself, and if, in consequence, he made payments to third parties, they could not be treated as admissions of indebtedness to the contractor. It may be that if, by any act of the owner, the contractor was prevented from performing his contract, and the contractor would have a right to recover, either (235) upon the contract or upon a *quantum meruit* from him, a materialman's or a laborer's lien would attach to the amount that might be so recovered, but we think that he is entitled, by virtue of his lien, to have his debt paid out of such sums as the contractor owes at the time of the filing of the notice, or might afterwards become entitled to secure under his contract, and no more.

The defendant having made payments after the notice, his Honor put the burden upon him of showing, by a preponderance of testimony, that the payments were not made under the contract with Wood. There was nothing in the charge of his Honor of which plaintiffs could complain, and there was no error in the judgment.

Judgment affirmed.

C. M. GRIFFIN v. J. L. NELSON.

Appeal—Duty of Appellant to Have the Record Printed—Not the Duty of Counsel.

1. Where, on a motion to reinstate an appeal dismissed for failure to print the record, the appellant alleged that he employed an attorney to represent him in this Court; that he was not aware of the rule requiring the record to be printed, and that if his attorney had notified him he would

have had it printed, but did not allege that he applied to his counsel to learn the requirements of prosecuting appeals, nor that he furnished any money or took any steps to have the record printed: *Held*, that no excuse is shown for his negligence, and the motion must be denied.

2. It is not the duty of counsel for an appellant to have the record printed.

(236) THIS was a motion made by the defendant (appellant) to reinstate the appeal in this case. The action was tried at Fall Term, 1889, of LENOIR Superior Court, before *Bynum, J.*, and the defendant appealed to this Court.

When the case was reached, on motion of plaintiff's counsel, the appeal was dismissed for failure of the defendant (appellant) to have the record printed.

The facts appear in the opinion.

N. J. Rouse for plaintiff.
George V. Strong for defendant.

CLARK, J. This was an action on a plain note of hand. At Fall Term, 1889, of Lenoir Superior Court, the court held the answer frivolous, and rendered judgment upon the verified complaint. The appeal was docketed here, January 4, 1890. When the case was reached for argument, no counsel represented appellant. Appellee's counsel was prepared to argue the case, but there being no printed record the Court declined to hear argument. Thereupon, appellee's counsel moved to dismiss for failure to print the record, which was allowed.

Appellant, upon notice given, now moves to reinstate appeal, and in his affidavit alleges that he employed one of the attorneys who appeared for him in the lower court to represent him here; that he was not aware of the rule requiring the record on appeal to be printed, and if his attorney had notified him thereof he would have had the record printed, and was able to do so. The appellee files a counter affidavit, that ten days before the case was reached for argument in this Court, he saw the counsel who represented the appellant in the court below, who resided in Kinston, and desiring to avoid the expense of counsel in this Court, proposed to him to dismiss the appeal, and he would indulge defendant,

(237) the appellant, till next fall; that said attorney said that he represented appellant, who only wanted delay, and he thought his client ought to accept the offer; that afterwards said attorney told him his client declined the proposition; that thereupon he (appellee) retained counsel at considerable expense to represent him in this Court; that appellant has, from the beginning, endeavored, in every possible manner, to hinder and delay plaintiff's recovery; that the day after

summons was issued the defendant assigned and disposed of his property, real and personal; that he filed an answer which the court below adjudged frivolous; that appellee firmly believes that it was under appellant's direction, and by his sanction, that no counsel was here to represent him, and avers that appellant has been guilty of personal negligence and inattention as to his appeal. No reply was filed to this affidavit.

The appellee was entitled to have the case argued or disposed of at this term. The appellant shows no excuse for his negligence. Indeed, the appellee's counsel contended that the conduct of appellant indicated an intention to use noncompliance with the rule of the Court which requires the printing of the record, as a means of procuring delay, and the appeal itself, not as an opportunity of obtaining justice and correcting an error, but of hindering and baffling appellee of the relief adjudged to him by the court below. However that may be, the appellant does not allege that he made any application to his counsel to learn the requirements as to prosecuting an appeal, nor that he furnished any money or took any steps to have the record printed. By the affidavit it appears that the counsel he applied to is a nonresident of his county, and is not in the habit of attending this Court. He makes no reference to his other counsel, who resides in his county, and who, appellee alleges, had a negotiation with him as to abandonment of the appeal. Besides all this, it was the duty of appellant himself to attend to sending up the appeal and having the record printed. In *Churchill v. Life Insurance Company,* 92 N. C., 485, it was held and provided that (238) providing an appeal bond is no part of the professional duty of counsel, and that if the latter undertook to do it, and neglected to do so, it was a mere agency, and the neglect of such agent was the neglect of the principal. To the same effect is *Winborn v. Byrd,* 92 N. C., 7, and several other cases. The same reasoning applies with equal force to the failure to have the record sent up in time to have it printed, and similar matters which are not strictly professional duties, but are matters which an appellant or a nonprofessional agent can attend to fully as well as an attorney. Upon the plaintiff's own showing, he failed to post himself as to the duties expected of him in prosecuting an appeal to this Court. This was gross negligence *(Elliott v. Holliday,* 3 Dev., 377; *Smith v. Abrams,* 90 N. C., 21; *Turner v. Powell,* 93 N. C., 341), and will not be allowed to deprive the appellee of his right to have the cause finally disposed of at this term.

This case differs from *Wiley v. Logan,* 94 N. C., 564, in that there the counsel applied to was in the habit of attending this Court. Besides, that case was decided not long after the rule requiring the printing of the

record was adopted. It was not then generally known and acted upon as is now the case. In *Bowen v. Fox*, 99 N. C., 127, the Court refer to *Wiley v. Logan,* and say that the duty of having the record printed is one which "does not come ordinarily within the sphere of professional duty." Not unusually it is printed and sent up, together with the transcript, on appeal. As a matter of fact, we believe when the printing is done here, counsel have usually no supervision of the work, but it is done under the directions of the clerk of this Court. The appellant, if he chose, might get it done, probably, in most cases, under the supervision of the clerk below, or supervise it himself. The slightest inquiry by appellant would have given him information of his duty in this regard.

Rule 28, as to printing the necessary parts of the record, was (239) adopted in the interest of the public, and of all parties, to facilitate the more prompt and careful consideration of appeals. We cannot permit a neglect of its observance to become a prolific source of delay and obstruction. Nor can we allow failure in such nonprofessional duty to work a continuance, when the lack of an argument by counsel is no ground therefor, nor for a rehearing.

Motion to reinstate appeal denied.

Cited: Smith v. Summerfield, 107 N. C., 581; *Edwards v. Henderson,* 109 N. C., 84; *Finlayson v. Accident Co., ibid.,* 200; *Dunn v. Underwood,* 116 N. C., 525; *Manning v. R. R.,* 122 N. C., 828; *Ice Co. v. R. R.,* 125 N. C., 22; *Calvert v. Carstarphen,* 133 N. C., 26; *Lunsford v. Alexander,* 162 N. C., 531.

DAVID M. BAIN, ADMINISTRATOR, v. DANIEL BAIN.

Practice in Supreme Court—Premature Appeal.

Where, upon objection, certain testimony was excluded on the trial below, and the plaintiff submitted to a judgment of nonsuit, which was afterwards stricken out and the case reinstated for trial, no appeal lies to this Court, and an appeal taken by defendant will be dismissed.

THIS was a civil action, tried before *Connor, J.,* at November Term, 1887, of CUMBERLAND Superior Court.

On the trial certain testimony offered by the plaintiff was excluded, whereupon plaintiff submitted to a nonsuit.

Afterwards the court directed the judgment of nonsuit to be stricken out and the case to be reinstated for trial, and the defendant appealed.

The facts appear in the opinion.

W. A. Guthrie for plaintiff.
N. W. Ray for defendant.

DAVIS, J. The allegations of the complaint, so far as material to the question now before us, are, substantially, that on 8 April, 1844, the defendant executed to John Bain, Sr., the intestate of the (240) plaintiff, a bond for the sum of $500, with certain conditions attached, which is made part of the complaint. That, on the same day that the bond was executed, the said John Bain executed to the defendant a deed in fee simple, conveying to him the land set out in the complaint. That said deed, though absolute on its face, was made with the "express understanding and agreement" that the defendant would take said land and certain personal property referred to in the bond, and hold the same in trust for the payment of certain debts mentioned. That the defendant never performed the conditions of the bond, nor has he executed the trust for which said land was conveyed to him.

The plaintiff asks judgment for $500 mentioned in the bond, with interest thereon, and that it be adjudged that the land be held in trust for its payment, and so applied.

The answer is a substantial denial of the allegations of the complaint, and the defendant says that he was in the possession of the land set out in the complaint at the time of the execution of the deed by John Bain (his father), and has been continually since in open adverse possession. He insists upon the lapse of time and the statute as a bar.

Upon the trial, the plaintiff proved that D. J. McAllister, the subscribing witness to the bond, was dead, and offered to read in evidence the bond, upon the certificate of the clerk and register of deeds. This was objected to. The objection was sustained, and plaintiff excepted.

Various other questions relative to the competency of witnesses and testimony were presented and decided adversely to the plaintiff, who excepted, and "thereupon submitted to a nonsuit."

"The court, after consideration, being of the opinion that there was error in the ruling made in the exclusion of evidence, directed the judgment of nonsuit to be stricken out and the case to be (241) reinstated for trial, from which judgment the defendant appealed to the Supreme Court."

Not only was the appeal in this case prematurely taken from a judgment which was not final, but which, in no possible aspect of the case could deprive the appellant of any substantial right. That such an appeal will not be entertained by this Court is well settled. *Hailey v. Gray,* 93 N. C., 195, and cases cited.

The case on appeal cannot present the questions raised by plaintiff's exceptions, his Honor having, upon consideration, concluded that there

was error in the exclusion of evidence, but they appear in the record, and counsel unite in the following request: "In this case the counsel on both sides agree to waive all irregularities in making up the case on appeal and request this Court to decide the point presented."

If by now expressing an opinion upon the "points presented" an end would be put to the controversy, the Court would be warranted in acceding to the request. *Thornton v. Lambeth,* 103 N. C., 86, and the cases cited. It appears, however, from the complaint and answer, that other and important "points" are presented, and many questions may arise, and appeals cannot be considered in this fragmentary way. The appeal must be

Dismissed.

(242)

D. K. McGILL ET AL. v. JOHN BUIE.

Petition for Partition—Necessary Allegations—Demurrer—Possession of Tenant in Common.

1. Where a petition for partition of land alleged that the petitioners and the defendant are tenants in common, and that the defendant is in possession. claiming title to one share, a demurrer upon the ground that the petition "does not allege that the petitioners are in possession of the land, and only alleges that they are entitled to have possession," will be overruled.

2. Where there is no actual ouster, the possession of one tenant in common is in possession of all tenants in common, and this continues to be so until, from the lapse of time, the sole possession becomes evidence of title to the sole enjoyment.

3. A petition for a sale for partition need only allege that the petitioners and defendant are tenants in common and in possession of the land, and the necessity of a sale for partition. The Court will treat allegations in regard to the relationship of the parties intended to show from and through whom title to the land was derived, etc., as useless and unnecessary.

THIS was a petition for the sale of land for partition, heard on appeal from the clerk of CUMBERLAND Superior Court, before *Philips, J.,* at Chambers, on 2 February, 1888.

The petition was as follows:

"The petition of D. K. McGill, Margaret McGill, Rebecca McGill, Neill McGill, Mary McGill, Annie Ellis, William Campbell, Daniel McGill—

"1. Respectfully represents that they and Catherine McDonald (under whom the defendant John Buie claims an interest in the lands hereinafter

described) are the next of kin and heirs at law of the late Duncan Bann Buie and his children, Neill Buie, Donald Buie, Mary Buie and Flora Buie.

"2. That the said Duncan Bann Buie and his widow, Christian (243) Buie, are dead.

"3. That the said Neill Buie, Donald Buie, Mary Buie and Flora Buie (children of said Duncan Bann Buie) are also dead, and died intestate and without issue.

"4. That your petitioners and said Catherine McDonald are the nearest collateral relatives of said Duncan Bann Buie, Neill Buie, Donald Buie, Mary Buie and Flora Buie, who, as citizens of the United States and of the State of North Carolina, were capable of inheriting real estate belonging to said Duncan Bann Buie, Neill Buie, Donald Buie, Mary Buie and Flora Buie, at the time of their several deaths, being, in degree, third cousins to said Duncan Bann Buie, and first cousins to said Duncan Bann Buie's children (Neill Buie, Donald Buie, Mary Buie and Flora Buie). The said Duncan Bann Buie and his widow, Christian Buie, were second cousins to each other at the time of their marriage.

"5. That your petitioners and said Christian McDonald are tenants in common of all the lands of which said Duncan Bann Buie and said Neill Buie, Donald Buie, Mary Buie and Flora Buie died seized and possessed in equal shares of one-ninth of the whole to each.

"6. That said Duncan Bann Buie, Neill Buie, Donald Buie, Mary Buie and Flora Buie died seized in fee simple and possessed of the following described tracts or parcels of land, situated, lying and being in 71st township, in Cumberland County, adjoining Hugh McCall, P. D. P. Munroe and others, on Stewart's Creek, viz., 50 acres Hugh Leslie land; 50 acres Neill Buie land; 100 acres Neill Buie land; 25 acres Duncan Buie land; 100 acres McIntyre land; and other lands described in the deed of Catherine McDonald to the defendant, hereinafter referred to.

"7. That your petitioners and said Catherine McDonald, or her assignee, are, as tenants in common aforesaid, entitled to the possession of said land, and to partition thereof.

"8. That since the death of said Duncan Bann Buie and Neill (244) Buie, Donald Buie, Mary Buie and Flora Buie, viz., 14 August, 1875, said Catherine McDonald, by deed of said date, registered in Book E, No. 4, page 621, in the office of register of deeds for Cumberland County, has assigned and conveyed to the defendant, John Buie, all her right, title, interest and share in the aforesaid lands.

"9. That said John Buie, the defendant, is in possession of said lands, claiming title to Catherine McDonald's share therein under the aforesaid deed, as your petitioners are informed and believe.

"10. That owing to the number of persons interested, size and location of said tracts of land, actual partition thereof cannot be made without injury to some or all of the parties interested.

"11. That your petitioners desire partition of said lands, and to the end that division thereof may be had according to their respective interests, above set forth, pray that said lands may be sold by a commissioner appointed by the court, upon such terms as the court may direct, and for such other and further relief as your petitioners may be entitled to or may be necessary."

The defendant demurred to the petition, and assigned the following causes:

"1. That it does not allege or show the petitioners are in possession of the land sought to be partitioned, and only alleges that they are entitled to have possession.

"2. The petition attempts to show plaintiffs' source of title, and fails to show facts sufficient to constitute such cause of action, in that—

"1. It alleges impossibilities in law, because petitioners could not be heirs of Duncan Bann Buie whilst he had children, as alleged, nor could they be heirs of any of the children as long as any other child was living, nor could they be heirs of any child whilst the father or mother was living, and it alleges that Duncan Bann Buie, Neill Buie, Daniel
(245) Buie, Mary Buie and Flora Buie all died seized in fee simple and possessed of the lands referred to, whereas, without any allegation to the contrary, it is presumed that some of them lived longer than others. The petition, having attempted to show source of title, should have shown the person last seized, from whom they derived title by descent, and how they derived title, and how they were heirs.

"2. The petition, having alleged a failure of lineal descendants, should have shown who was the *first purchaser* of the land, and how the plaintiffs claimed and became heirs under said purchaser.

"3. The petition does not allege that petitioners and Catherine McDonald are sole heirs.

"Having attempted to show sources of title, it should have done so clearly and plainly and concisely, so that defendant could know who were proper parties in petitioners' claim, and also know how to answer the petition."

The clerk sustained the demurrer, and from his judgment the plaintiffs appealed, and the following judgment was rendered by Judge Philips:

"After hearing and considering the argument of counsel, it is adjudged that the judgment of the clerk sustaining the demurrer be reversed and the demurrer overruled.

"The clerk will allow the defendant to answer as the law directs, and proceed with the cause according to law."

From this judgment the defendant appealed.

W. A. Guthrie and T. H. Sutton for plaintiffs.
N. W. Ray for defendant.

DAVIS, J., after stating the facts: 1. The counsel for defendant say "that possession of defendant is not enough, unless he admits the tenancy in common; and the allegation impliedly admits that defendant resists their claim." So far from this being so, the demurrer admits the facts alleged in the petition, and it distinctly alleged that the (246) petitioners and the defendant are tenants in common, and "that said John Buie, the defendant, is in possession of said lands, claiming title to Catherine McDonald's share therein under the aforesaid deed, as your petitioners are informed and believe."

It is well settled that where there is no actual ouster, the possession of one tenant in common is the possession of all the tenants in common, and this continues to be so until, from the lapse of time, the sole possession becomes evidence of title to the sole enjoyment. Here no ouster is admitted. It is in no way admitted, directly or indirectly, that the defendant claims to be *sole seized,* or that he claims any other than Catherine McDonald's share in said land. It is admitted that he is in possession. His possession is the possession of his cotenants, and the first ground of demurrer cannot be sustained.

2. It would have been sufficient to allege, as alleged and admitted by demurrer, that the petitioners and defendant were tenants in common and in possession of the land mentioned, and the necessity of a sale for partition, and the useless and unnecessary allegations in regard to the relationship of the parties were plainly intended only to show from and through whom title to the land was derived, and that all the parties to whom the petitioners and defendant's assignor were thus related, and through whom they claim, are dead. If they are all dead intestate, and without lineal descendants, and petitioners and the defendant's assignor are the next of kin and heirs at law of the survivor of them, it is sufficient, for the purposes of this petition, and, fairly construed, it only meant, in this respect, to allege a failure of lineal descendants. The allegations were redundant and unnecessary, and might have been omitted or stricken out. *Best v. Clyde,* 86 N. C., 4; *Thames v. Jones,* 97 N. C., 121.

It would make nonsense of the petition to suppose that it in- (247) tended to allege that the petitioners and Catherine McDonald

were the heirs at law or next of kin of Duncan Bann Buie at the time of his death, leaving children, or that they were the heirs at law of any one of his children, so long as another was living, and while the petition might have been more accurate and more concise, as for the matter of that, in alleging the failure of lineal descendants, *utile per inutile non vitiatur,* and the defendant can clearly see from the petition what is demanded by the petitioners, and it is sufficient to inform him of everything necessary to enable him to answer intelligently. If he denies the petitioners' title, or if he claims to be *sole seized,* or has any other defense, he can so answer, and the case can be tried upon its merits. The second ground of demurrer cannot be sustained.

No error.

Cited: Conly v. R. R., 109 N. C., 696; *Godwin v. Early,* 114 N. C., 12.

C. L. ALLRED v. J. F. BURNS.

Exceptions to Evidence Should Specify Grounds of Objection—Construction of Contract—Time of Payment.

1. Exceptions to evidence, in order to have force, should specify some sufficient ground of objection to the evidence to which they have reference.
2. Where the plaintiff sold his lease of a mine and land to the defendant for thirty-five hundred dollars, of which one thousand dollars, by written agreement, was to be paid "upon the making of the third payment to the defendant by D." (to whom defendant had sold) "on 22 September, 1885": *Held,* that the payment of the one thousand dollars to plaintiff was not conditioned upon the payment to the defendant by D. of his third payment, but was determined by the words of the agreement, "on 22 September, 1885."

(248) THIS was a civil action, tried before *Merrimon, J.,* at April Term, 1889, of the Superior Court of MOORE County.

The plaintiff brought this action to recover the sum of $250, which, he alleges, he placed in the hands of the defendant to be paid and applied to a purpose specified, and which he failed to so apply, but used for his own purposes; and also the other sum of $1,000, which the defendant obliged himself to pay to the plaintiff by their mutual agreement, whereof the following is a copy:

"WHEREAS, John F. Burns and wife, by an instrument in writing, dated 25 March, 1881, leased to C. L. Allred, for the period of ten years,

an interest in what is known as the Moody Hill Gold Mine (including about ten acres of land, on the waters of Folly Branch, in Moore County, North Carolina); and whereas, said Burns and wife have sold said mine and land to Robert H. Duncan, and conveyed the same to him by deed dated 22 September, 1882.

"Now, in consideration of the premises, and the sum of twenty-one hundred dollars in cash paid, the receipt of which is hereby acknowledged, and the agreement of the said Burns to pay the said Allred the following additional payments, the said Allred and Burns agree as follows:

"1. That said Allred hereby agrees and hereby does surrender, cancel and deliver up the said lease, and all his right and claim in and to said leased premises.

"2. That the said Burns hereby agrees to pay the said Allred the sum of one thousand dollars upon the making of the third payment to the said Burns by the said Duncan, on 22 September, 1885. Also the said Burns agrees to pay the said Allred an additional five hundred dollars upon the making of the seventh payment to the said Burns by the said Duncan on 22 September, 1889.

"In testimony whereof, the said parties hereunto set their hands (249) and seals, 25 September, 1882.

"J. F. BURNS. [Seal.]
"C. L. ALLRED. [Seal.]

"In presence of
"ROBERT H. DUNCAN."

On the trial, the plaintiff testified that he left in the hands of the defendant $250, part of the $2,100 set forth in the contract, to be paid to one E. N. Moffitt, as plaintiff's portion of a joint liability of plaintiff and defendant. This amount was to have been paid in two weeks. Defendant had repeatedly informed him since the commencement of this action that he had never paid this amount to Moffitt, or to any one for him. Defendant excepts.

He further claimed that no part of the $1,000, which he claimed was due by said contract on 22 September, 1885, had ever been paid to him, or to any one for him; that he did not think that Duncan had ever made the third payment, but he did not know. Defendant excepts.

The defendant introduced no evidence.

The following issues were submitted to the jury:

"Is the defendant indebted to the plaintiff?"

"If so, in what amount?"

The defendant requested the presiding judge to instruct the jury that the plaintiff was not entitled to recover judgment for $1,000 until he

had shown affirmatively that Duncan had made the third payment to the defendant. Refused. Defendant excepts.

The judge instructed the jury that there was no evidence that Moffitt had released the plaintiff of his portion of said joint liability, and that if they believed the evidence, the plaintiff was entitled to recover the full amount demanded in his complaint.

(250) Verdict for the plaintiff. Rule for a new trial. Rule discharged. Judgment for the plaintiff. Appeal by the defendant.

J. C. Black for plaintiff.
W. J. Adams for defendant.

MERRIMON, C. J., after stating the facts: The first and second exceptions are too indefinite to be entertained. They do not specify, as they should do to have force, some sufficient ground of objection to the evidence to which it seems they were respectively intended to have reference. So far as appears, the evidence objected to was pertinent and competent to prove material facts.

We think the court below properly interpreted the agreement in question in respect to the sum of one thousand dollars to be paid to the plaintiff by the defendant. It appears, from its face, that the plaintiff sold his lease of the mine and the land mentioned, to the defendant for the price of thirty-five hundred dollars. Of this sum, twenty-one hundred dollars were paid at once. The balance was to be paid in two installments, coming due at different times—one—that in question—of one thousand dollars, to be paid "upon the making of the third payment to said Burns by the said Duncan, *on 22 September, 1885.*" The nature of the transaction constituting the basis of the agreement and the terms of the latter, give point and meaning to the words just quoted. It was expected that Duncan would certainly pay to the defendant a third installment of the purchase money for the mine at the time specified, and the latter intended to devote one thousand dollars of the money so to be received by him to the payment of the sum of money so agreed to be paid to the plaintiff at that time. The agreement was not simply to pay the money *at any* time "upon the making of the third payment to the said Burns by the said Duncan," but upon the making of such payment "*on*

(251) *22 September, 1885.*" The latter words fixed the time of payment to the plaintiff—the time his debt should be due—the purpose of the other words were simply to suggest and assure the plaintiff that the defendant would, at that time, have a particular fund that he could and would devote to the payment of the plaintiff's debt.

There is nothing in the nature of the agreement, nor are there terms used in it, which imply that the defendant would pay the plaintiff the

sum of money specified in question, on condition, or in the event and only in the event, Duncan should pay to the defendant the third installment of the price of the mine, nor are there words which, fairly interpreted, imply that the sum of money should be due at some indefinite period after the time so specified. Indeed, it seems to us that no other interpretation could be given the agreement, in the respect in question, other than that we have given it, that would make it reasonable and practicable.

Judgment affirmed.

Cited: Everett v. Williamson, 107 N. C., 210.

ELIAS FREEMAN v. BRANT PERSON ET AL.

Probate of Deed in Which Clerk of Superior Court is Grantee Before Same Clerk.

1. The probate of a deed in which the clerk of a Superior Court is a grantee, taken by the said clerk, is invalid and void, under sec. 104, sub-sec. 3 of The Code.

2. Such probate is not validated by sec. 1260 of The Code, as amended by ch. 252 of the Laws of 1889.

THIS was a civil action, for the recovery of land, tried before *Shipp, J.,* at August Term, 1889, of the Superior Court of MOORE County.

The plaintiff claimed title in part under a deed executed by (252) K. H. Worthy, as sheriff of Moore County, to A. H. McNeill, John Shaw and J. C. Jackson, the land in controversy having been sold under sundry executions against one John Morrison.

The defendants objected to the introduction of this deed, for the reason that A. H. McNeill, one of the grantees in said deed, was, at the time of the probate thereof, clerk of the Superior Court of Moore County, before whom said deed was duly admitted to probate.

It was admitted that said McNeill was clerk of the court at the time of said probate.

His Honor being of opinion with the defendants, sustained their objection.

The plaintiff excepted, submitted to a nonsuit, and appealed.

W. J. Adams and J. C. Black for plaintiff.

No counsel contra.

AVERY, J. The Code, sec. 1260, as amended by chapter 252 of the Laws of 1889, is as follows:

"Wherever the judge of the Supreme Court or the Superior Court, or the clerk or deputy clerk of the Superior Court, *mistaking their powers,* have essayed previously to the first day of January, one thousand eight hundred and eighty-nine, to take the probate of deeds and the privy examination of *femes covert,* whose names are signed to such deeds, and have ordered said deeds to registration, and the same have been registered, all such probates, privy examinations and registrations, so taken and had, shall be *as valid and binding to all intents and purposes* as if the same had been *taken before or ordered by the clerk of the Superior Court, or other proper officer having jurisdiction thereof.*"

It is provided by The Code, sec. 104, and subsec. 3, that "No (253) clerk can act as such in relation to any estate or proceeding . . . *if he or his wife is a party* or a subscribing witness to any deed of conveyance, testamentary paper, or *nun cupative* will, but this disqualification ceases when such deed, testamentary paper, or will has been finally admitted, or refused, probate by another clerk, or the judge of the Superior Court."

The defendant McNeill made no *mistake* as to his power to take the probate of deeds, for the law, *in terms,* clothed him alone with the authority *both to hear the evidence and order the registration* where the land lay in Moore County, and the grantor and grantees resided there, though clerks of the Superior Courts of counties were empowered to admit to probate and order such deeds to be recorded by construing the requirements of the statute as directory only. Justices of the peace and clerks of the inferior courts were subsequently authorized to take the privy examination of married women, and hear and certify the acknowledgment or proof of the execution of instruments required or allowed to be registered in such cases, but not to order their registration. The defendant McNeill overlooked or disregarded the provisions of a statute, passed in affirmance of the general principles of the common law, which is founded upon a rule of propriety, as well as public policy, that no man ought to exercise judicial authority, where he or his wife have any interest, that may be affected by his decision. When the words "or clerk" were inserted by the amendatory act in the original statute the legislative intent evidently was to provide for and cure mistakes made by clerks as to the general scope of their powers, as where the grantor resided and the land conveyed was located in a county other than that in which the clerk lived. But there was no purpose to give efficacy and vitality to a certificate of probate or adjudication of its correctness, where the error consisted not in misconceiving the extent of the

power affirmatively conferred by law, but in disregarding a plain (254) prohibition of the statute, and committing a breach of propriety in breaking over the barriers constructed to limit their authority. When a new judicial system had been inaugurated, and numerous changes had been made to adapt it more perfectly to the ideas, habits, or traditions of our people, it was natural that subordinate officers should often misunderstand the territorial limits, as well as the subject-matter, to which their jurisdiction extended, and such curative acts as that which we are construing were intended to prevent injury or inconvenience to the people by reason of such ignorance on the part of the officer. But it was never intended that an officer, who exercised authority in the face of a plain statutory prohibition, should, under the curative provisions of this act, derive benefit from thus disregarding such legal restrictions for his own advantage or convenience. The irregular "probates, privy examinations and registrations" are declared by the section, as amended, to be as "valid and binding as if the same had been taken before or ordered *by the clerk of the Superior Court, or other proper officer having jurisdiction,*" and thus the purpose is plainly shown to be, not to reach cases where a clerk, having general authority, has violated a special provision of the law, imposing restraint or limitation upon the exercise of his power in particular instances, but where some officer has, *by mistake,* invaded the province of a clerk or another officer, and usurped his authority as to the probate of deeds. But a clerk was never empowered to act as a judge in any matter affecting his personal interest, and an attempt to exercise such authority was never valid or binding on others. An officer who has so disregarded the law and the unwritten rules of common propriety, would not be, within the meaning of the act of 1872, a "proper officer." There was no error.

Judgment affirmed.

Cited: White v. Connelly, 105 N. C., 71; *Kelly v. R. R.,* 110 N. C., 432; *Lowe v. Harris,* 112 N. C., 491; *Long v. Crews,* 113 N. C., 259; *McAllister v. Purcell,* 124 N. C., 264; *Land Co. v. Jennett,* 128 N. C., 4.

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(255)

CHRISTOPHER STEPHENS v. F. D. KOONCE.

Appeal—Dismissal for Failure to Print Record—Motion to Reinstate.

A motion to reinstate an appeal will be denied where it appeared that the appeal was docketed on 12 March, and reached in regular order on 13 March, when it was dismissed for failure to print the record, under the

rules, though counsel for appellant being present during the call of the district, and not seeing the case on docket, left before the call was concluded. The dismissal was not for failure to argue, but for failure to print, and this was not a professional duty, and the negligence was that of the client.

THIS was a motion to reinstate an appeal dismissed for failure to print the record.

The facts appear in the opinion.

Charles M. Busbee for plaintiff.
John Devereux, Jr., for defendant (petitioner).

CLARK, J. This action was tried at November Term, 1889, of Onslow Superior Court. The transcript of the record on appeal was docketed in this Court 12 March, 1890, during the call of the district to which it belongs. It was reached in regular order on 13 March, and, on motion of appellee's counsel, it was dismissed for failure to print the record as required by the rules. On 26 March, a motion to reinstate appeal was entered and set for hearing 3 April. On that day no cause was shown, and the motion was denied. On 9 April, the motion to reinstate was again made, on the ground that the counsel retained by the original counsel in the cause for the purpose of making the motion to reinstate had notified the latter that the motion would be heard 3 April, but the latter was then absent from home and did not return till after the motion was (256) heard and denied. For this reason, appellant asks that the judgment denying the motion to reinstate be set aside, and for cause to reinstate the appeal, the original counsel files an affidavit that he was here during the call of the district, and, not seeing this case on docket, he left before the call was concluded, and that the record was not printed because his client supposed that, in an appeal like this, from an order in the cause, the record was not required to be printed.

If the transcript of the record on appeal had not been docketed before the close of the call of that district, the appellee would have been entitled to docket and dismiss. Rule 17. It could be no advantage to appellee, and was no compliance with the Rule, to docket the record, but in such condition that it could not be heard when reached for want of a printed record. Rule 28. If the transcript of the record on appeal had been delayed by failure of the judge to settle the case on appeal in time, it was the duty of the appellant to docket a transcript of the rest of the record and move for a *certiorari* before the close of the call of the district at the first term of this Court begun after judgment rendered, or the appellee would have had the right to dismiss. *Pittman v. Kimberly*, 92 N. C., 562. But nothing even of this kind appears. The appellant might, and should,

have had the appeal docketed long before he did. Having permitted it to be held back till the last moment, he should have sent up with it the record ready printed. The appellee had a right to have the case argued or dismissed at this term. He cannot be deprived of it by the appellant sending up the case at the last minute, almost, and then with no printed record, so that the cause could not be argued. The appellee's counsel was willing to argue the case without the printed record, but the Court, under the rules, could not hear it, and he had no remedy except to have the appeal dismissed. Indeed, if appellant's counsel had remained to attend to the interests of his client, as appellee's counsel did, there was ample time to have had the record, which was very short, (257) printed after the appeal was docketed and before it was reached the next day for argument. The appellant himself is a lawyer, and, if he were not, his counsel was familiar with the practice here, and, if applied to, could have informed him of the requirements as to prosecuting appeals in this Court.

The Court cannot permit appellants to procure a continuance on this docket by not sending up appeals in time, or not having the record printed. This has been repeatedly held. Still less can it permit appellant to obtain six months delay by his counsel leaving the Court and permitting the case to look after itself. The appellee ought not to suffer damages from the act of appellant's counsel, for he has no recourse against him. If the appellant, however, is injured thereby, he has a recourse by action against his counsel. *University v. Lassiter,* 83 N. C., 38. The Court, in such circumstances, will give the appellee the remedy to which he is entitled by dismissing the appeal, if appellee moves therefor, as entitled to do by Rule 29 of this Court.

We are not to be understood as holding that there was no negligence in the original counsel of appellant causing appellee's counsel to be notified to attend to oppose the motion to reinstate and then leaving home without learning the date the motion was set for hearing, or furnishing affidavits in support of the motion. This was a disregard of the time of this Court, and might have put the appellee to considerable inconvenience and expense.

Motion denied.

Cited: Edwards v. Henderson, 109 N. C., 84; *Pipkin v. Green,* 112 N. C., 355; *Turner v. Tate, ibid.,* 458; *S. v. Freeman,* 114 N. C., 873; *Dunn v. Underwood,* 116 N. C., 525; *Blount v. Ward,* 117 N. C., 242; *Wiley v. Mining Co., ibid.,* 491; *Stainback v. Harris,* 119 N. C., 108; *Guano Co. v. Hicks,* 120 N. C., 30; *Parker v. R. R.,* 121 N. C., 504.

(258)

CHAUNCEY HARRELL v. THE WILMINGTON AND WELDON RAILROAD COMPANY.

Railroad Company—Nonshipment of Freight—Action for Penalty—Agency—Delivery.

In an action against a railroad company for a penalty, under sec. 1967 of The Code, it was in evidence that plaintiff carried a bale of cotton to defendant's warehouse and found the agent and one R. in the office; that he said he wished to deposit a bale of cotton; whereupon R. went with him, weighed the cotton and gave him a bill of lading in the agent's presence, with the agent's signature "per R." It was also in evidence that R. had been in the agent's office several months; that he had delivered freight; that eleven days thereafter plaintiff found that the cotton had not been shipped, and heard the agent abuse R. for carelessness: *Held*, that there was sufficient evidence to warrant the jury in finding a verdict for the plaintiff, upon an issue as to whether the cotton had been delivered to the defendant.

THIS was a civil action to recover a penalty under section 1967 of The Code, begun before a justice of the peace and tried, on appeal, before *Bynum, J.*, at November Term, 1889, of DUPLIN Superior Court.

There was judgment for the plaintiff, and the defendant appealed.

The facts are stated in the opinion.

W. R. Allen for plaintiff.

G. A. Ramsay (by brief) and Geo. Rountree for defendant.

DAVIS, J. "By consent, the only issue submitted to the jury was whether the cotton in controversy was delivered by plaintiff to defendant company on 13 November, 1888."

The defendant insists that there was no evidence sufficient to go to the jury, upon which the instructions of his Honor, set out in the

(259) record, and excepted to, could be based, and the instructions were misleading.

As the sole questions presented for our consideration are involved in the single question as to whether there was any evidence to warrant the instruction given, we reproduce only so much of the case on appeal as relates to the charge of his Honor and the evidence relied on by the plaintiff to sustain it.

Chauncey Harrell, the plaintiff, was sworn in his own behalf, and testified that on 13 November, 1888, he carried a bale of cotton to the defendant's warehouse at Duplin Roads, and went to the office of the railroad company and saw in the office one Beall, the agent of the com-

pany, and also one Robinson; that witness said, "Good morning," and, without addressing his remarks to any particular one, said, "I wish to deposit a bale of cotton"; whereupon, Robinson went with witness and weighed the cotton, and gave witness a bill of lading therefor; that the office is about six feet by ten in size; that Beall and Robinson were in the office when witness went there; that witnesss does not know whether Beall heard his remark or not; when witness went back to the office, Robinson gave him the bill of lading, of which the following is a copy, to wit:

"13 November, 1888.

"Received of Chauncey Harrell, D. Roads, N. C., one bale of cotton marked, numbered and weighed as below, to be transported at company's convenience by the Wilmington and Weldon Railroad Company unto C. J. Southerland, of Wilmington.

No. Bales	Marks	Weight
1	C. H.	500

(Signed) "B. J. BEALL,
"Per R."

Beall and Robinson were in the office; that the next time witness saw the cotton was 24 November; it was in the same ware- (260) house, and he ordered it shipped that day, and it was shipped. No new bill of lading was given him that day. Witness made complaint to Beall. He (Beall) cursed and abused Robinson, saying it was the third time he had done so that fall.

Cross-examined, witness testified that the cotton was shipped 24 November; that on the 13th, when he called to deposit the cotton, Beall was at the telegraph instrument, but he did not think he was operating; that witness simply went to the door of the office, and after bidding them "good evening" said he wanted to deposit a bale of cotton for shipment; that he did not demand a bill of lading on the 24th, but had demanded it on the 13th; that Beall was abusing Robinson for carelessness; that witness did not hear Beall say that Robinson had no right to receive freight and give bills of lading, and never heard Beall say so.

Redirect: Robinson and Beall were three or four feet apart at the time witness went to office on the 13th. Robinson had been staying there several months; witness had seen Robinson handling and delivering freight, and witness had heard that he was studying telegraphy there. Witness never saw Robinson give a bill of lading for freight before, but had seen him deliver freight to Malard and to Murphy Brothers. Witness cannot single out any other person to whom Robinson delivered freight. He saw Robinson open warehouse door and

assist those parties to get goods out, but does not know whether the agent was there then or not; does not remember whether he saw him there or not. Witness has seen parties go to Robinson and tell him they had freight, and he would show them where to put it on the platform. Witness has seen a party take a coop of chickens to Robinson to ship, but at such time witness does not know whether the agent
(261) was present or not; does not know how long this was before shipment of his own cotton—probably three or four months.

At the plaintiff's request his Honor, in his charge, instructed the jury as follows, to wit:

"1. That, while the agent Beall could not delegate his authority, he could employ a servant; and if the jury believe that said Beall employed Robinson to assist him in his office by the payment of money or by teaching him telegraphy for his services, and that it was within the scope of Robinson's employment to receive freight and give bills of lading, and this was known to defendant company, and they assented to it, and that said Robinson, acting under such employment, received the bale of cotton and gave the bill of lading, the act of Robinson would be the act of Beall, and the jury should, in such case, answer the issue in the affirmative.

"2. That the defendant company may have more than one agent at its several depots; and if the jury believe that Robinson was in the habit of receiving freight and giving bills of lading, and doing other acts for said company with its knowledge and acquiescence, and that said Robinson received the bale of cotton of the plaintiff and gave the bill of lading in evidence, the said company would be bound by the acts of said Robinson, and the jury should answer the issue Yes.

"3. [Being a modification of plaintiff's third requested instruction.] If the defendant company knew that Robinson had been receiving freight, although he had not been employed by them, and they had permitted him to do this, and the plaintiff knew this; or, if knowing Robinson had been receiving freight, they so acted on his receipts as to induce the public to believe that he was their authorized agent, they would be bound by his action, and the jury should answer the issue Yes.

"4. [Being a modification of plaintiff's fourth requested in-
(262) struction.] That if said Robinson had no authority from Beall or the defendant company to receive the bale of cotton and give the bill of lading, the said company would still be bound by the acts of Robinson if it ratified them; that said company could not ratify a part of his acts and repudiate a part, but must ratify the whole or repudiate the whole; that the fact that the defendant company shipped the bale of cotton on the bill of lading given by Robinson, and gave no new bill of

lading, if the evidence satisfies the jury that the company, and not only Beall, knew it, is evidence from which the jury may infer that said company ratified the act of Robinson, and if the jury should find that the defendant company ratified the act of Robinson, they should answer the issue Yes, although they believe that Robinson had, in fact, no authority from Beall or the company."

To these instructions the defendant excepts on the grounds:

"1. That there was no evidence that the defendant company had knowledge of, or assented to, or acquiesced in, any of the acts of Robinson in receiving freight and giving bills of lading for the same.

"2. That there was no evidence that Robinson had been in the habit of receiving freight and giving bills of lading therefor.

"3. That there was no evidence that the defendant company had previously so acted on the receipts of Robinson as to induce the public to believe that Robinson was its authorized agent.

"4. That there was no evidence that the defendant company had notice of shipment of this cotton being made without a new bill of lading, and that without such notice they could not ratify such act. And the defendant insists that in said particulars there was misdirection of the jury in his Honor's charge."

The defendant requested his Honor to instruct the jury as (263) follows:

That in order to recover it was incumbent on the plaintiff to establish by proof that the defendant railroad company knew, or had reason, from observation, information, or otherwise, to believe that Robinson was acting for the railroad company in receiving freight, or that Beall actually knew of the receipt of this cotton, and made the receipt of it his own act. [That there being no evidence of either fact, direct or indirect, it is the duty of the jury to answer the issue No.]"

His Honor gave the instruction, except the part here enclosed in brackets, which part he refused to give. Defendant excepts for that: "First, there was no evidence that the defendant company knew, or had reason from observation, information, or otherwise, that Robinson was so acting for the company; second, that there was no evidence to go to the jury that Beall actually knew of the receiving of this particular cotton, at the time of its receipt by Robinson, and made the receipt of it his own."

The question for our consideration is not one of preponderance of evidence, but whether there was any evidence reasonably sufficient to go to the jury in the aspects of the case presented by the charge excepted to; for, if there was no evidence which the jury had a right to consider, or only a *scintilla* of evidence, or if there was no evidence to which the instructions of his Honor were applicable, then, however

correct they may have been as abstract propositions of law, the defendant would be entitled to a new trial. This is too well settled to need citation of authority.

1. As to the first exception, it is insisted that his Honor, in his charge, *assumed* that there was evidence from which the jury would be justified in finding "whether Beall had employed Robinson to receive freight and give bills of lading, and *this was known to the defendant company and they assented to it,* and that said Robinson, acting under
(264) such employment, received the bale of cotton," whereas, as the defendant says, there was no evidence that the company knew of such employment or assented to it.

What is necessary to constitute notice or assent? In Wood's Railway Law, vol. I, sec. 166, it is said: "The law of agency is especially applicable to business corporations, because all their business must be conducted by agents. Especially is this the case as to railroad companies." And again, section 168: "It is well settled that notice to an agent, actual or implied, relative to a matter affecting his agency, and while such agency exists, is notice to the principal, and such is also the rule as to a knowledge of facts relating to the business of his agency acquired while acting for his principal," etc.

Assuming, therefore, that Beall, by the maxim *"Delegatus non potest delegare,"* had no authority to employ Robinson as an *agent* for the railroad company—if, in fact, he was acting as such—notice or knowledge of the fact to Beall was notice to the company—not only so, but if Beall employed Robinson as a servant to assist him, which we think he had a right to do, then Robinson's act was Beall's act, as much so as if performed by Beall himself. As a matter of fact, the receipt was signed "B. J. Beall, per R."

The evidence for the plaintiff is to the effect that when he carried the cotton to the defendant's wareroom, Beall and Robinson were in the office—a room about six feet by ten in size; that they were three or four feet apart; that, after salutation, he said, "I wish to deposit a bale of cotton," whereupon Robinson went with him and weighed the cotton, and went back to the office and gave him the receipt, Beall and Robinson being in the office; that Robinson had been there several months; that he had seen him handling and delivering freight; that he had seen a party take a "coop of chickens" to Robinson to be shipped; that when the cotton was shipped, no "new bill of lading" was
(265) given; that when he complained to Beall, "he (Beall) cursed and abused Robinson, saying it was the *third* time he had done so that fall"; that Beall was "abusing him for carelessness; that he did not hear Beall say that Robinson had no right to receive freight and give bills of lading, and never heard him say so." Robinson was in the

office with Beall when plaintiff said, "I wish to deposit a bale of cotton," and if, when Robinson, instead of Beall, weighed the cotton and gave the receipt, it was the plaintiff's duty, before delivering the cotton to him and taking the receipt, to inquire by what authority he was acting, as insisted by the defendant, was it not more clearly the duty of Beall, who knew, or ought to know, what was being done in and about the office, to have acted himself and said, "I am the man to receive your deposit of cotton; I am the agent, and not Robinson; he has no authority"? So far from doing anything like this, according to the plaintiff's testimony, he never repudiated the act of Robinson, though performed in his presence, gave no other bill of lading, and only abused Robinson for *"carelessness,"* impliedly admitting that he had some duty about the office. But the defendant says, and it is conceded, that "to constitute a delivery of property to a carrier's agent, in the proper sense, the thing offered for transportation should come into the hands of the carrier's agent for receiving freight—not of any person whom the carrier may employ for other purposes." Did the plaintiff so deliver the cotton to the defendant's agent for transportation? The plaintiff carried the cotton, according to his testimony, to one of the regular places for receiving freight by the defendant company. Both Beall and Robinson were in the office. He stated his wish without addressing either of them. Robinson went out and weighed the cotton, and went back into the office where Beall was and gave the receipt. Under the circumstances, would any "plain man" have stopped to ques- (266) tion the authority of Robinson before taking the receipt?

There was evidence.

2. As to the second exception, defendant says that there was no evidence that the company had "more than one agent at their depots," and that there was not the slightest evidence that Robinson ever "received any freight or gave any bill of lading," etc. We think there was some evidence in the facts detailed in plaintiff's testimony. From the evidence, it appears that Robinson was engaged about the office, acting for defendant company, and Beall himself, abusing him for "carelessness," said it was the *third* time he had done so during the Fall. The evidence would warrant one going to the Duplin Roads Station, and, under the circumstances detailed by plaintiff, in supposing that Robinson was *the* agent, as on that occasion, in the presence of Beall, he discharged the duties of agent, and it only appears otherwise from the receipt, which seems to have been given in the office, in the presence of Beall.

3. The knowledge of Beall, as to Robinson's acts in and about the office, affected the company with notice, and what has been said in regard to the first and second exceptions applies to the third.

4. Robinson did nothing that it was not the duty of Beall to do. Beall was present. The cotton was in the defendant's warehouse and no receipt was given except that given by Robinson, and, without any other receipt, the cotton was shipped, and what has been said in regard to the other exceptions applies to the fourth, and also to that part of the instruction asked by the defendant and refused by his Honor.

Affirmed.

Cited: Williams v. R. R., 155 N. C., 271; *Newberry v. R. R.*, 160 N. C., 159.

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(267)

J. W. TAYLOR AND WIFE v. HENRY POPE.

Excusable Neglect—Judgment by Default—Findings of the Court.

1. Where a defendant employed counsel before the return term, and himself attended court at that term for four days, and was then to'd by his attorney that his case should be attended to, and, relying upon this, he left, and judgment by default was entered against him: *Held*, to be a case of excusable negligence under The Code, sec. 274.
2. This Court will not review the facts in such case found by the court below.
3. Where the court below, adopting the findings of a former judge, states of record that his own findings were after careful consideration of the evidence, etc.: *Held*, that this Court cannot entertain suggestions, on argument, that all the evidence had not been considered.
4. Discussion by MERRIMON, C. J., as to what constitutes excusable neglect.

MOTION, to set aside judgment, heard at Fall Term, 1889, before *Shipp, J.*, of CUMBERLAND Superior Court.

This was a motion to set aside a judgment obtained by the plaintiffs for want of an answer, because of excusable neglect, as allowed by the statute (The Code, sec. 274). The following is the material part of the entry and findings of fact by the court and its judgment thereupon:

"Motion to set aside judgment by default rendered at May Term, 1888, being the same cause heard and allowed by his Honor James E. Shepherd, at Chambers, at Wadesboro, 7 September, 1888, reported in 101 N. C., 368, and now heard, by agreement of counsel, upon the merits, in open court, William M. Shipp, judge presiding.

"After a careful consideration of the evidence, by affidavit, on both sides, I concur in the findings of facts, as stated and on file, by

his Honor, Judge Shepherd, and also concur in his conclusions (268) of law," which are as follows:

"That the defendant was duly served with a summons in this case, returnable to the May Term, 1888, of the Superior Court of Cumberland County; that before said term the defendant employed an attorney who practiced in said county, and paid him a retainer to attend to this case; that he and his attorney were both present at said term, the defendant remaining four days, his attorney remaining longer. The defendant knew of the pendency of this suit at said term, and reminded his attorney of it, and relied upon him to advise him as to all things necessary to its defense, and depended upon him for instructions as to what should be done; that his attorney assured him that he would attend to the case. The defendant put his counsel in full possession of the facts relied upon for his defense, and showed him his deeds constituting his title; that after remaining at said court four days, he left, under the assurance of his said attorney that he would attend to the case, and that all would be done that was necessary; that the attorney failed to attend the case, and judgment was rendered by default against the defendant; that defendant has, apparently, a meritorious defense.

"That a verified complaint was filed on the second day of the said May Term, and no answer, bond, or affidavit in lieu of a bond, were filed; that the attorney looked for the case on the docket, but erroneously supposed that the suit was brought to Harnett County; that the case was regularly docketed and could have been found by a careful inspection."

The court, therefore, gave judgment as follows:

"It is considered and adjudged that said judgment by default be set aside, and that defendant be allowed to file answer, he having already, in compliance with the terms imposed, paid the costs and filed bond, approved by the clerk, for costs and damages."

From this judgment the plaintiffs, having excepted, appealed (269) to this Court.

T. H. Sutton, W. E. Murchison and N. W. Ray for plaintiffs.
R. P. Buxton and D. H. McLean for defendant.

MERRIMON, C. J. This Court has no authority to review, change or modify, in any respect, the findings of fact by the court below in matters purely legal in their nature. *Coates v. Wilkes,* 92 N. C., 376. Nor has it authority in motions to vacate orders of arrest, warrants of attachment, to set aside judgments because of mistakes, inadvertence, excusable neglect and the like. *Clegg v. Soapstone Co.,* 66 N. C., 391;

Greensboro v. Scott, 84 N. C., 184; *Burke v. Turner,* 85 N. C., 500; *Hale v. Richardson,* 89 N. C., 62; *Winborne v. Johnson,* 95 N. C., 46; *Branch v. Walker,* 92 N. C., 87.

The counsel of the appellants insisted on the argument that it sufficiently appeared from the record that the court below had not considered all the evidence produced in opposition to the motion, and had not properly found the facts, in that it adjudged the findings of fact by another judge who had heard the evidence, etc. We must be governed by the record, and the Court states therein that, "after a careful consideration of the evidence by affidavits on both sides," it concurs with the former findings of fact by another judge. This implies, plainly, that the court had examined and considered all the evidence submitted, and it adopted the former findings, already drawn out and in writing, for convenience. That is the fair and reasonable inference. It is not to be presumed that a learned and just judge would trifle in the discharge of his duties by accepting the findings of fact by another that he ought himself to make. The presumption is to the contrary. If, upon a careful consideration of the evidence, the court found the facts to be as did his predecessor on a former like occasion in the same
(270) matter, the mere fact that he adopted the findings of fact as set down in writing is not good ground of exception or objection. *Silver Valley Mining Co. v. Baltimore Smelting Co.,* 99 N. C., 445.

This Court must adopt the facts as found by the court below, and the single question presented by the record for its decision is, Was there, in any reasonable view of the facts as they appear, "mistake, inadvertence, surprise or excusable neglect" on the part of the appellee defendant in his failure to appear and make defense to the action in time? If there was, then this Court cannot review the exercise of discretion of the court below in granting the motion to set the judgment aside. *Branch v. Walker, supra; Foley v. Blank,* 92 N. C., 476; *Beck v. Bellamy,* 93 N. C., 129; *Winborne v. Johnson, supra.*

We think clearly there was "mistake, inadvertence, surprise or excusable neglect," such as warranted the action of the court in granting the motion to set the judgment aside. The defendant manifestly intended in good faith to make defense in the action, and to that end, in apt time, employed and instructed counsel to represent him therein. He attended the court at the return term for the purpose of giving attention to the action, and remained there four days, reminding his counsel, who was there, that he had been served with a summons returnable there and then. His counsel assured him that "he would attend to the case." With this assurance, he left the court, leaving his counsel still in attendance. He was thus reasonably diligent. His

counsel was less so, but the latter was misled by his expectation that the action had been brought in the Superior Court of Harnett County, where, regularly, it should have been brought. The counsel's *laches* as to his duty to enter his appearance and file proper pleadings, cannot be attributed to the defendant and allowed to prejudice him.

In *Griel v. Vernon,* 65 N. C., 76, this Court said: "In this (271) case the party retained an attorney to enter a plea for him; that an attorney should fail to perform an engagement to do such an act as that, we think may fairly be conceded a surprise on the client; and that the omission of the client to examine the records in order to ascertain that it had been done was an excusable neglect." That case was recognized in the respect just mentioned, with approval, in *Bradford v. Coit,* 77 N. C., 72, and *Wynne v. Prairie,* 86 N. C., 73; *Francks v. Sutton, ibid.,* 78; *Geer v. Reams,* 88 N. C., 197, are all cases much in point and to the like effect.

It was objected further, that the defendant failed to execute and file with the clerk of the court an undertaking, as required by the statute (The Code, sec. 237), in order to entitle him to plead in the action, and it was no part of the duty of the counsel to prepare and give such undertaking. But it must be said that the defendant was in attendance on the court for four days, to give attention for that or any other like purpose in the action, and, under the circumstances, was misled and chargeable with only excusable negligence. Moreover, if his counsel had entered his appearance, no doubt the court would, in view of the misleading facts and the diligence of the defendant, upon application of the counsel, have extended the time within which he might give the required undertaking.

On the argument, one or two other questions were discussed, but they are not presented by the record and we are not called upon to advert to them.

There is no error. The judgment must be affirmed, and the action disposed of in the court below according to law.

Affirmed.

Cited: Williams v. R. R., 110 N. C., 474; *White v. Lokey,* 131 N. C., 72; *Timber Co. v. Butler,* 134 N. C., 51; *Dunn v. Marks,* 141 N. C., 233; *Sircey v. Biggs,* 155 N. C., 299; *Lumber Co. v. Buhmann,* 160 N. C., 387; *Grandy v. Products,* 175 N. C., 513; *Schiele v. Ins. Co.,* 171 N. C., 431.

(272)

A. J. SEAWELL v. RALEIGH AND AUGUSTA RAILROAD COMPANY.

Negligence—Killing Live Stock—Presumption—Judge's Charge.

1. Where an engineer was behind time and running, in the night-time, faster than schedule time, but within the limit allowed, killed the plaintiff's live stock, and his engine being provided with all the usual modern appliances, he could not have stopped it in time to prevent the killing: *Held*, not to be negligence.
2. Where, in such case, the court below told the jury that if the train, running faster than schedule time, could not be stopped within the distance the object was discovered, it was negligence: *Held*, to be error.

THIS was a civil action, originally commenced before a justice of the peace, and, on appeal, tried before *Shipp, J.*, at August Term, 1889, of the Superior Court of MOORE County.

The action is brought to recover damages of the defendant for killing plaintiff's bull by the negligent running of defendant's train.

The killing was admitted, and there was evidence as to the value of the animal. It was also in evidence that "the bull was one and one-half miles from the house of the plaintiff when killed."

The defendant introduced as a witness its engineer, B. R. Lacy, who testified: "I was engineer and in charge of the defendant's freight train on the night of 13 September, 1887, and remember killing the plaintiff's stock. It was not raining, but a dark, murky night, and after 8 o'clock. I left Sanford about half hour behind time, and was running a shade over schedule time to make it up. The schedule time was sixteen miles an hour. We are permitted to run thirty miles an hour. I was running about twenty or twenty-five miles an hour. It was a straight stretch for two or three miles in front, and was slightly up
(273) grade. I discovered the dim outline of the cattle some 150 feet in front, but so indistinctly that I got within 50 to 75 feet before I could distinguish the objects. I then blew the cattle alarm and attempted to reverse the engine, and to blow on the brakes. I do not know whether the brakes were put on or not. The speed was not checked, and I do not believe could have been checked, before knocking the animals off. I could not stop the train, going at its speed, within the distance. By the headlight, which was the usual one, I could see fifty or seventy-five feet ahead. I was at my post and looking forward on the track at the time of the killing. I had good brakesmen, and my engine was provided with all the modern appliances for stopping the train in such emergencies. I did all in my power to prevent the accident. I have been an engineer about fifteen years."

A witness, Mr. Guess, testified that B. R. Lacy was a man of good character, and a prudent and skillful engineer.

Upon the foregoing evidence, the plaintiff insisted that the statutory presumption of negligence, the action having been brought within six months (The Code, sec. 2326) was not repelled. On the other side, the defendant insisted that there was no negligence, and that if there was, the plaintiff was guilty of contributory negligence, and that, in either event, he was not entitled to recover damages.

The court told the jury that, according to the statute in such cases, the action having been brought within six months, the law presumes negligence, and it was the duty of defendant to remove that presumption. That if the facts showed that there was, in truth, no negligence, it was their duty so to find; that negligence was a mixed question of law and fact; that in this case, if the train was run faster than schedule time, and was running at the time at so rapid a rate that it could not be controlled or stopped within the distance where the (274) object was discovered, it would have been negligence.

That there was no evidence of contributory negligence. Defendant excepted.

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

R. P. Buxton for plaintiff.
J. C. Black for defendant.

DAVIS, J. We think his Honor erred in charging the jury "that, in this case, if the train was run faster than schedule time, and was running at the time at so rapid a rate that it could not be controlled or stopped within the distance when the object was discovered, it would have been negligence." The defendant can be held to no such rigid rule of accountability as this. According to the only testimony upon the question the engineer was permitted to run thirty miles an hour. He was running twenty or twenty-five miles an hour, and if, as soon as he saw, or with proper care might have seen, the animal on the track, he did everything that could be safely and reasonably done to avoid the accident, it would be a full defense to plaintiff's claim to damages. *Winston v. R. R.*, 90 N. C., 66, and cases there cited. If the facts testified to by the engineer be accepted by the jury as true, there was no negligence on the part of defendant.

There was error, and the defendant is entitled to a new trial.

Error.

Cited: Malloy v. Fayetteville, 122 N. C., 484; *Fleming v. R. R.,* 168 N. C., 249.

(275)

J. A. ADAMS, ADMINISTRATOR, v. WILLIAM GUY, ET AL.

Judgment Docketed—Justice of the Peace—Statute of Limitations—Execution—Leave of Court.

1. A judgment was obtained before a justice of the peace in 1878 on a prior judgment, also obtained before a justice of the peace; the last judgment was docketed in the Superior Court, and in 1886 leave was obtained, after objection, to issue execution: *Held*, that the leave was properly granted.
2. A judgment docketed in the Superior Court, as prescribed by statute, becomes "a judgment of the Superior Court in all respects."
3. Leave to issue execution upon a judgment so docketed may be granted at any time within ten years from the docketing.
4. The motion for leave was made in apt time, though the ten years expired pending the appeal, and though it appears that no undertaking was given.
5. The time during which the judgment creditor was restrained by the operation of the appeal is not to be counted, as the appeal had the effect to prevent the issuing of execution within the time prescribed.

MOTION for leave to issue execution, heard before *Armfield, J.*, at Fall Term, 1889, of HARNETT Superior Court.

The plaintiff obtained a judgment in the county of Harnett in the court of a justice of the peace, against the defendant, on 1 June, 1878, founded on a former similar judgment, for $46.04, with interest from 19 May, 1867, till paid, and for costs, $1.60, on which was a credit. This judgment was duly docketed in the office of the Superior Court clerk of that county on 3 June, 1878.

On 1 April, 1886, the plaintiff moved, before the clerk of said Superior Court, for leave to issue execution upon the said judgment. The defendants opposed this motion, upon the ground that the judgment was barred by the statute of limitations (The Code, sec. 153, par.
(276) 1). The clerk allowed the motion, and the defendants appealed to the judge in term time. In term, the court held that the judgment was not barred by the statute mentioned, or at all, and allowed the motion, and the defendants, having excepted, appealed to this Court.

S. F. Mordecai for plaintiff.
T. R. Purnell for defendants.

MERRIMON, C. J. The statute (The Code, sec. 153, par. 1) prescribes that "An action on a judgment rendered by a justice of the peace" must be brought within seven years next after "the date thereof," else the same will be barred. Hence, the judgment of the plaintiff was barred by the statute at and before the time he made his motion for

execution, unless the docketing of the same in the office of the clerk of the Superior Court had the effect to render it such a judgment of that court as could be barred only by the lapse of ten years next after the rendition thereof.

The statute (The Code, sec. 839), provides that a judgment of a court of a justice of the peace may be filed and docketed, in the way prescribed, in the office of the clerk of the Superior Court of the county where the judgment was rendered, and that, from the time of such docketing, it "shall be a judgment of the Superior Court in all respects." The clause of the statute just quoted has been repeatedly interpreted by this Court, and it has been held uniformly that the purpose of such docketing of the judgment of the court of a justice of the peace is to create a lien on real estate and have execution to enforce the same, in the same way and within the same time as if the judgment had been given originally in the Superior Court.

In *Broyles v. Young,* 81 N. C., 315, this Court said, and decided, that a transcript of a judgment of a justice of the peace, filed and docketed in the office of the Superior Court clerk of the proper (277) county, made it a judgment of such Superior Court "for the purposes of lien and execution, enforcible on the same property by the same kind of executions, and issuable within the same limitations as by law is prescribed for the lien and enforcement of the proper judgments of the Superior Court, including the power in the clerk of the court, on notice to the adverse party, to grant execution after the judgment became dormant, as provided for in the Code of Civil Procedure, sec. 256." This is certainly so, if the judgment of the justice of the peace was not dormant at the time it was so docketed. *Williams v. Williams,* 85 N. C., 383. In this case, the judgment was so docketed within a few days next after it was rendered, and no question as to its dormancy arose. The case of *Broyles v. Young, supra,* has been repeatedly recognized, and in no subsequent case disregarded. We are not at liberty to disturb what was decided by it. We cite further, as bearing on the subject under consideration, *Spicer v. Gambill,* 93 N. C., 378; *Coates v. Wilkes,* 94 N. C., 174; *Lytle v. Lytle, ibid.,* 683; *Lilly v. West,* 97 N. C., 276.

It appeared that the plaintiff's application for leave to issue an execution upon his judgment was made before the clerk of the Superior Court in which his judgment was docketed, on 1 April, 1886; and within ten years next after it was so docketed. The order of the clerk therefore, allowing execution to be issued, which was affirmed by the judge, upon appeal to him, as so affirmed, must be affirmed by this Court.

On the argument the counsel for the defendant contended that, as it appears from the record that the lapse of ten years next after the judg-

ment was docketed was complete pending the appeal, therefore the plaintiff's right is barred by such lapse. He insisted that the appeal did not suspend the running of the statute as to the judgment during its
(278) pendency, especially as the appellant gave no undertaking upon appeal from the order of the clerk of the court. This contention is without substantial foundation. The motion for execution was properly made before the clerk, and he, acting for the court, had authority to grant or deny it. The Code, sec. 440; *McKethan v. McNeill,* 74 N. C., 663. The statute (The Code, sec. 252) prescribes that "any party may appeal from any decision of the clerk of the Superior Court, on an issue of law or legal inference, to the judge, without undertaking." It appears that there was an undertaking for costs, upon appeal from the judgment of the judge. But the undertaking upon appeal was not material in the case, as contended by the defendant's counsel, because the statute (The Code, sec. 435) prescribes, among other things, that a properly docketed judgment shall be a lien on the real property of the judgment debtor in the county where the same is docketed "for ten years from the date of the rendition of the judgment. But the time during which the party recovering or owning such judgment shall be or shall have been restrained from proceeding thereon . . . by the operation of *any appeal,* . . . shall not constitute any part of the ten years aforesaid as against the defendant in such judgment, or the party obtaining such orders or making such appeal, or any other person who is not a purchaser, creditor or mortgagee in good faith." This clause applies to the case under consideration. The appeal did not leave the plaintiff at liberty to have an execution and enforce the same during its pendency. The judgment appealed from was not one directing the judgment of money, or one that came within the statute (The Code, secs. 554-558) requiring a particular undertaking as prescribed, in order to stay execution pending the appeal. As the appeal had the effect to restrain and prevent the plaintiff from enforcing his
(279) judgment by execution, the term of its pendency cannot be treated as making part of the ten years relied upon by the defendant to bar the plaintiff's right to have execution, as demanded by him.

Affirmed.

Cited: McIlhenny v. Trust Co., 108 N. C., 312, 314; *Pipkins v. Adams,* 114 N. C., 202; *Dysart v. Brandreth,* 118 N. C., 974; *Patterson v. Walton,* 119 N. C., 502; *Dunham v. Anders,* 128 N. C., 212; *Oldham v. Rieger,* 148 N. C., 550; *Tarboro v. Pender,* 153 N. C., 430; *Barnes v. Fort,* 169 N. C., 434; *Pants Co. v. Mewborn,* 172 N. C., 333.

STEPHEN BETHEA v. RALEIGH AND AUGUSTA RAILROAD COMPANY.

Killing Live Stock—Presumption—Specific Instructions—Exception to Judge's Charge—Contributory Negligence.

1. Failure to give specific instructions when not asked, even though proper in themselves, is not the subject of exception.
2. When plaintiff permitted his steer to leave home and wander upon defendant's track, he is not, therefore, guilty of contributory negligence.
3. The law presumes negligence when the action is brought within six months of the killing, but this presumption may be rebutted by showing there was none in fact.
4. Substantial compliance with a request to charge is all that can be required.

CIVIL ACTION, originally commenced before a justice of the peace, to recover damages for the killing of an ox by the negligent running of defendant's train, and, on appeal, tried before *Shipp, J.*, at August Term, 1889, of the Superior Court of MOORE County.

The killing of the animal was admitted, and there was evidence as to its value. There was also evidence on behalf of the defendant company, tending to show that there was due diligence and no negligence.

The evidence of the engineer, which, if accepted by the jury as true, would make a competent defense to the charge of negli- (280) gent killing, is set out in full in the case on appeal, but "error cannot be assigned and become the subject of review in an omission or neglect to give a specific instruction, even when proper in itself, unless asked, and thus called to the attention of the judge in order that he may rule thereon." *S. v. Bailey,* 100 N. C., 528, and cases cited. We need not, therefore, advert to the testimony or reproduce it here.

The only exceptions presented for our consideration are to the refusal of his Honor to instruct the jury as requested, and to the charge as given.

The defendant asked the court to charge the jury as follows:

1. That if the defendant's engine and cars were furnished with all the modern appliances for stopping the cars in emergencies of this kind, and the usual headlight, and the defendant's engine and cars were in charge of a prudent and skillful engineer, who was running his train within the prescribed limit, was at his post, looking forward on the track, and, soon as he discovered the steer on the track by means of his headlight, reversed his engine, blew on brakes, sounded the cattle alarm, and otherwise did all in his power to stop the engine, then the defendant was not guilty of negligence.

2. That if the plaintiff permitted his steer to leave home and stray upon the track of the defendant's road, the plaintiff was guilty of contributory negligence.

The court declined to give the instructions as requested, but instructed the jury as follows, to wit:

"In cases of this character, where an action was brought within six months, the law presumes negligence; that, notwithstanding this presumption, if the facts showed that there was, in truth, no negli-
(281) gence, the defendant would be entitled to a verdict. The court further stated to the jury that, if the defendant had on the train a competent engineer, and that they had all the appliances necessary to control the train and manage the same, and that the engineer kept a good lookout, and, as soon as he discovered the object before him, he used all the means in his power to stop the train, and could not possibly do so, the defendant would be entitled to a verdict."

To the refusal of the judge to give the instructions requested, and to the charge as given, the defendant excepted.

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

R. P. Buxton for plaintiff.
J. C. Black for defendant.

DAVIS, J. 1. The court did not give the instructions asked in the very language of the request, but they were substantially given, though in different language. The court is not bound to give instructions in the words of the prayer, but it is sufficient if they be given in substance. This is too well settled to need citation of authority. Upon the question of negligence on the part of the defendant, we can see no substantial difference between the instructions asked and those given.

2. The instruction asked in regard to contributory negligence was properly refused. There was certainly no such proximate or concurrent negligence on the part of the plaintiff as to bar his right to recover damages. *Proctor v. R. R.*, 72 N. C., 579; *Horner v. Williams,* 100 N. C., 230.

There is no error. Affirmed.

Cited: Merrell v. Whitmire, 110 N. C., 370; *S. v. Mills,* 116 N. C., 997; *Patterson v. Mills,* 121 N. C., 269; *Malloy v. Fayetteville,* 122 N. C., 484; *Ferrell v. R. R.*, 190 N. C., 127.

(282)

REBECCA HARRISON, ADMINISTRATOR, v. NANCY HARRISON ET AL.

Real Estate Assets—Motion in the Cause—Void and Irregular Proceedings—Infants—Heirs—The Code—Service.

1. When, on petition to make real estate assets, no service was made upon the defendants except one, and the infant defendants were not represented, either by guardian *ad litem* or otherwise, and the land brought only one-third of its value, and the sale was without notice to defendants of its time and place: *Held*, that these proceedings were in such utter disregard of the rights of property and the fundamental principles of law, that they might be pronounced void, on motion in the cause made many years after final judgment.
2. Decrees in such proceedings are absolutely void against heirs, whether infants or adults, not served in some sufficient way.
3. Sec. 387 of The Code does not cure such want of service as to infants, unless they were represented in some proper manner.
4. Where the defendants knew it, but took no benefit of such void sale, though they recited the proceedings in some subsequent action, such notice cannot have the effect of service.
5. Mere delay in making the motion to declare void such proceedings cannot preclude the heirs.

THIS was a case heard upon motion, before *Graves, J.*, at July Term, 1889, of GRANVILLE Superior Court.

The facts are stated in the opinion.

J. B. Batchelor and John Devereux, Jr., for plaintiff.
A. W. Graham, R. W. Winston and E. C. Smith for defendants.

SHEPHERD, J. The coexecutor, George Harrison, was removed without notice, and L. A. Paschal appointed administrator, with the will annexed. This administrator, in October, 1870, filed a petition against Nancy E. Harrison, the widow of the testator, and the other defendants, his devisees, to sell certain real estate for assets. No (283) service of any kind was made upon any of the defendants except George Harrison, as to whom there was service by publication. No guardian *ad litem* was appointed for the infant defendants, nor were they in any way represented.

On 3 December, 1870, an order was made directing a sale upon thirty days notice. The administrator sold the land on 5 December, and the sale was confirmed on the 19th of the said month. The land brought only one-third of its value. The defendants had no notice of the time and place of the sale, nor of the order of confirmation.

The simple recital of these facts shows such an utter disregard of the rights of property and of the fundamental principles of law by which these rights are protected, that it is difficult to realize that such proceedings could have been had in a court invested with such important jurisdiction.

As the interest of the widow ceased at her death, in 1887, this motion to set aside the order of sale, and the proceedings thereunder, is made by all of the remaining defendants, except George Harrison.

We cannot hesitate in affirming the judgment of his Honor declaring the proceedings void. However anxious the Court has been to uphold irregular orders and decrees in favor of innocent purchasers, we can find no decisions which authorize judicial sanction to any proceeding in which there has been no service of process of any kind upon the parties interested. Such proceedings, under the Bill of Rights, as well as upon every conceivable principle of natural justice, must be declared utterly void and of no effect.

The Code, sec. 1438, provides that no order of sale in such cases shall be granted until the heirs or devisees of the deceased have been made parties by *service* of summons. "This provision embraces infants as well as adult persons. Hence, the Court has repeatedly and uniformly held that such proceedings, decrees and judgments are *void* and (284) of no effect against the heir not, in some sufficient way, made a party to the same, whether infant or adult. *Stancill v. Gay,* 92 N. C., 462, and the cases cited." *Perry v. Adams,* 98 N. C., 167.

It is contended, however, that the omission of service as to the infant defendants is cured by section 387 of The Code. It has been held that this provision is inoperative unless the infant has been represented by a guardian *ad litem,* or next friend, as the case may be. In *Perry v. Adams, supra,* it is said that "the curative statute is to cure the judgment and the proceeding when such personal service was omitted, but it does not embrace cases where *no service* was made upon the infant or any other person in his behalf, as the statute requires to be done." Again, in *Stancill v. Gay, supra,* the Court said that "the Legislature did not intend that a judgment against an infant in an action or special proceeding, wherein he was not made a party defendant, but treated as a defendant, should be rendered effectual against him. A statute with such a purpose would contravene fundamental right and shock the moral sense of just men." These authorities, if, indeed, any were necessary, abundantly sustain the ruling of the court below.

It is further insisted that defendants have, in some way, ratified the said order of sale. There is much diversity of opinion as to whether void sales of this character may be ratified. Mr. Freeman in his "Monograph on Void Judicial Sales, 67," says that "these sales may be rati-

fied either directly or by a course of conduct which estops the party from denying their validity; thus, if the defendant in execution, after a void sale of his property has been made, claims, and recovers the surplus proceeds of the sale, with a full knowledge of his rights, his act must be thereafter treated as an irrevocable confirmation of the sale."

Granting this to be true, and putting it on the more logical ground of estoppel, we can find nothing here which debars the (285) defendant from having the proceedings declared void. The defendants have never taken any benefit under them, and the mere fact that their pendency was recited in the petition for dower, filed by their mother, cannot have that effect, even if it clearly appeared that such petition was ever served upon them, or otherwise brought to their knowledge. Something more than bare notice is necessary to estop one from setting aside a void proceeding. Neither can a delay in making this motion preclude them. *Larkins v. Bullard,* 88 N. C., 35, and the cases cited.

Whatever equity the purchasers may have by way of substitution to the claims of the creditors to the extent of the purchase-money, must be asserted when the defendants seek to recover the property.

Affirmed.

Cited: Harrison v. Hargrove, 109 N. C., 347; *Williams v. Johnson,* 112 N. C., 436; *Harrison v. Harrison,* 114 N. C., 220; *Harrison v. Hargrove,* 120 N. C., 99; *Ditmore v. Goings,* 128 N. C., 327; *Simmons v. Box Co.,* 148 N. C., 345; *Holt v. Ziglar,* 159 N. C., 277; *Harris v. Bennett,* 160 N. C., 341; *Mann v. Mann,* 176 N. C., 377; *Clark v. Homes,* 189 N. C., 708; *Fowler v. Fowler,* 190 N. C., 541.

IDA T. TUCK v. JESSE D. WALKER.

Judgment Creditor—Sale of Land for Assets—Personal Property—Administrators—Demurrer—The Code—Fraud of Creditors.

1. A judgment was obtained and docketed in 1878 against one W., who afterwards purchased a tract of land, and, being at the time indebted beyond his ability to pay, executed a deed to one C. The assignee, for value of the judgment brought action to declare void the conveyance, and to have the land sold in discharge thereof. The defendant demurred that only the administrator of W. could maintain an action to sell W.'s land: *Held,* that the demurrer must be sustained.

2. The Code, sec. 1446, provides explicitly for sale of lands for assets which have been conveyed in fraud of creditors.

3. The administrator, and not the judgment creditor, is the proper person to sell lands to pay judgment debts, for it is the duty of the administrator to exhaust the personal property for this purpose before the real estate can be reached.

(286) THIS was a civil action, tried at February Term, 1889, of the Superior Court of PERSON County, before *Bynum, J.*

There was an appeal from an order overruling a demurrer. The complaint, demurrer and judgment are as follows:

The plaintiff alleges—

1. That on 31 December, 1878, W. A. Lemlie obtained and had docketed in the Superior Court of Person County a judgment against N. N. Tuck and W. H. Winstead for $3,206.66, and the plaintiff Ida T. Tuck became the assignee thereof for value, which said judgment is due and unpaid. W. H. Winstead died on the ..... day of ....., and ..... was appointed his administrator.

2. That on 8 July, 1879, the said W. H. Winstead purchased of Jesse Chambers, commissioner of the Probate Court of Person County, a certain lot of land in the town of Roxboro, in said county, as will appear from the deed, which is duly recorded on page 363, Book Y, of the records in the office of the register of deeds for said county.

3. That on 23 September, 1879, the said W. H. Winstead conveyed said lot of land to the said Jesse Chambers, the deed to which is recorded on page 368, Book Y, in office of register of deeds.

4. That on 18 July, 1881, the said Jesse Chambers conveyed, by deed, said land to John G. Chambers, which deed is recorded on page 361 in Book Z, in office of said register of deeds.

5. That on 8 May, 1882, the said John G. Chambers conveyed said land to John R. Chambers by deed, which is recorded on page 258 of Book Z, in office of register of deeds.

6. That on 1 July, 1886, the said John R. Chambers conveyed
(287) an undivided half interest in said land to J. I. Brooks, which is recorded in Book C C in the office of register of deeds.

7. That on 4 January, 1886, said John R. Chambers and J. I. Brooks conveyed said land to the defendant Jesse D. Walker, by deed, which is recorded on page 500, Book C C, in office of said register of deeds.

8. That said Jesse Chambers, and all parties claiming said land under him, had due notice of the docketing of said judgment as foresaid.

9. That said W. H. Winstead, at the time of the docketing and conveying said land as aforesaid, was indebted in an amount exceeding his ability to pay, and the attempted transfer to said Jesse D. Chambers,

and those claiming under him, was in fraud of the rights of this plaintiff and those under whom she claims.

Wherefore, plaintiff demands judgment: (1) that said transfer of land to Jesse D. Chambers be declared null and void, and the deeds be delivered up to be canceled; (2) that some discreet person be appointed commissioner of this court to sell lands and apply the proceeds to the payment of the judgment aforesaid; and (3) for the costs of this action, to be taxed by the clerk.

DEMURRER.

In this action, the defendant, having obtained leave to withdraw his answer, now demurs to the complaint filed, on the ground that only the administrator of W. H. Winstead could maintain an action to sell the lands of W. H. Winstead, and if the judgment of said plaintiff be a lien thereon, the same can be enforced in the application of the proceeds of said sale, and that the plaintiff has no right, as a creditor of said estate, to maintain this action.

JUDGMENT. (288)

This cause coming on to be heard by demurrer, filed by defendant, after hearing argument on same in behalf of each party, upon motion of J. S. Merritt and Graham & Winston, attorneys for plaintiff, it is ordered that the demurrer be overruled, and it is further ordered that defendant have leave to file an answer herein.

A. W. Graham and R. W. Winston for plaintiff.
J. W. Graham for defendant.

AVERY, J., after stating the facts: When it becomes necessary to sell the real estate of a decedent to make assets, The Code, sec. 1446 provides, in explicit terms, that the court may decree a sale of "all real estate that deceased may have conveyed with intent to defraud his creditors, and all rights of entry and rights of action, and all other rights and interests in lands, tenements or hereditaments, which he might devise, or by law would descend to his heirs," and the language has been so construed by this Court. *Mannix v. Ihrie,* 76 N. C., 299; *Heck v. Williams,* 79 N. C., 437.

It is well settled that, though there may be unsatisfied judgments constituting a lien upon the land of a debtor, when he dies the judgment creditor is not allowed to sell it under execution, but the administration of the whole estate is placed in the hands of the personal representative, who is required first to apply the personal assets in payment of the

debts, and if they prove insufficient, then the statute prescribes how the land may be subjected and sold so as to avoid a needless sacrifice by selling any of it for cash, or a greater quantity at all than is required to discharge the indebtedness. The Code, secs. 1436 to 1446; *Sawyers v. Sawyers,* 93 N. C., 325; *Mauney v. Holmes,* 87 N. C., 428; *Lee v. Eure,* 82 N. C., 428; *Williams v. Weaver,* 94 N. C., 134.

We conclude, therefore, that this action cannot be maintained (289) except by the personal representative of W. H. Winstead, or by making him a party, if he refuse to discharge the debt out of the personal assets, or to institute a proceeding to have the land sold to satisfy it. *Wilson v. Pearson,* 102 N. C., 290.

There is error. Judgment reversed.

Cited: Holden v. Strickland, 116 N. C., 190; *Hobbs v. Cashwell,* 152 N. C., 190.

G. C. FARTHING v. J. H. SHIELDS AND WIFE.

Married Women — Separate Estate—Bond—Mortgage—The Code—Charge—Support of the Family—Necessary Personal Expenses—Consent in Writing.

1. The Code, sec. 1826, does not confer upon the wife power to make a *legal* contract, even with the written consent of her husband, or where it is for her personal expenses.

2. The object of this section was to require the written consent of her husband to charge her statutory separate estate, except for necessary expenses, the support of the family, and to pay ante-nuptial debts.

3. When the husband and wife signed a bond and mortgage upon the wife's land, to secure a sum advanced to discharge a prior mortgage thereon, and to secure supplies bought principally by the husband and used for himself and family, and it did not appear that they were *necessary* for her personal expenses, for the support of the family, or to pay ante-nuptial debts: *Held,* the action being upon the bond, simply, and not to foreclose the mortgage, judgment against her could not be recovered. *Held second,* that the separate estate could not be specifically charged.

4. A bond executed jointly by husband and wife is, "with his consent in writing," within the meaning of the statute, but is not sufficient to charge the wife's separate estate, unless it expressly designates it.

5. Unless the contract is for the wife's benefit, or of such a nature as necessarily to imply a charge, it must be specific.

6. The wife, with the written consent of her husband, and, in the excepted cases mentioned, without it, may charge her statutory separate *personal* estate by executory contracts, but in case of *real estate*, the privy examination of the wife is necessary.

7. When the consideration is sufficient to necessarily imply a charge, no express charge or written consent is necessary as to her personal estate. There must be a deed and privy examination to charge real estate.

8. Discussion by SHEPHERD, J., of the law relating to the separate estate of married women.

THIS was a civil action, tried before *Armfield, J.*, at January (290) Term, 1890, of the Superior Court of DURHAM County, brought by plaintiff to recover of defendants a balance of about $1,000 on a note executed by defendants in the following words:

"On or before the first day of April, 1887, we, or either of us, promise to pay G. C. Farthing $1,340, with interest from date, at the rate of eight per cent, until paid.

"JOE H. SHIELDS. [Seal.]
"FRANCHAN SHIELDS. [Seal.]

"Witness: ROBERT MCCAULEY.
"13 July, 1886."

The court rendered a judgment against the defendant, Joe H. Shields, but refused a judgment as to the *feme* defendant.

From this ruling the plaintiff appealed, and the questions involved relate to the liability of the *feme* defendant and her separate estate for the balance due upon the bonds sued upon. The complaint does not allege that the *feme* defendant has anything but real estate.

The plaintiff tendered the following issue: "What sum, if any, do the defendants owe plaintiff?"

His Honor refused to submit that issue, and submitted the following: (291)

"1. Was the debt made by the wife for her necessary personal expenses?

"2. Was the debt made for the support of the family of the wife?

"3. Did the wife contract the debt with the written consent of her husband?

"4. Was it the intention of the wife, in contracting the debt, to charge her separate estate?

"5. Was there fraud on the part of the plaintiff, or a mutual mistake of plaintiff and defendant, in making the bond sued on?

"6. How much is due upon the bond sued on from Joseph Shields?

"7. How much is due upon the bond sued on from Franchan Shields?"

To these issues the plaintiff excepted.

The original complaint simply alleged the execution of the bond, and that there had only been paid upon it the sum of $544.91, which was paid on 4 June, 1888. To this complaint the defendant demurred, and the complaint was amended so as to allege that the bond was executed with the written consent of the husband; that the consideration was for the necessary personal expenses of the wife, and also for the support of her family. It was also alleged that "she had a separate estate in real property, and the debt secured by said note was specially charged on her separate estate and property at and before the execution thereof, to wit, the mortgage to plaintiff for $1,340, dated 13 July, 1886."

To this there was a general denial. The succeeding several pleadings contained particulars as to the dealings of the parties, and the correctness of the accounts, for the settlement of which the bond and mortgage were executed. Fraud in the consideration was also alleged, all of which particulars it is not material to state.

(292) The only witnesses to material matters were the plaintiff and the female defendant. It was in evidence, and admitted, at the time of executing said note, that defendants also executed to plaintiff a mortgage to secure the same upon land belonging to the female defendant. The plaintiff testified that he was a merchant in Durham, and had been, for several years, dealing in dry goods, groceries, and general merchandise. That defendant, J. H. Shields, had become indebted to him for provisions and agricultural supplies, clothing, etc., to the amount of several hundred dollars; that he procured for defendants a loan for $550 from one Walker, which they secured by a note and a mortgage on the *feme* defendant's land (part of the land embraced in the mortgage afterwards in 1886 given to plaintiff); that the money procured from Walker was paid to plaintiff as a credit on the account then due him, and never actually went into the hands of either defendant; that when said note and mortgage became due Walker wanted his money, and defendants were unable to pay, and, at the request of Walker, he went to see them, and informed them that Walker said he would sell the land under his mortgage if they did not raise the money and pay his note; that both defendants requested plaintiff to pay Walker's note, and have his mortgage canceled, and they would give him a note and mortgage on a part of the *feme* defendant's land to cover the amount so to be paid to Walker, and would include what was then owing to him on the account in the name of the male defendant; that at their request, and in consideration of such promise, he did pay the Walker note and mortgage, $550 and interest, and had the same canceled, and delivered it and the note to defendants, and charged the amount of such payment on J. H. Shields' account; that, in a few days thereafter, defendants executed the $1,340 note and mortgage to him,

above set out; that the male defendant came to Durham (the defendants lived in Orange County), and told him to write his note and mortgage and he would take it home and he and his wife would execute (293) both and return them to him; that he did write them; J. H. Shields took them and returned them the next day executed by himself and his wife, with the mortgage proven before a justice of the peace of Orange County; that the goods which were part of the items of charge on the account which the note of $1,340 was given to pay, were bought principally by the male defendant, and less than $50 worth of them by the *feme* defendant. That he had no written or verbal orders from her to sell the said goods; that when he saw her about the Walker mortgage, he showed her a statement of the sums due him, and she said the account was larger than she thought, and that some of the things that her husband was charged with he had not brought home, and that plaintiff ought not to have let him had them without a note from her, but promised to give a note and mortgage to secure it; that J. H. Shields was well acquainted with the account and its items, and frequently looked over it, and did so on the day the $1,340 note and mortgage were drawn, and agreed to the same as correct. That J. H. Shields has no property.

Mrs. Franchan Shields testified that she never saw the account; did not know, and never did know, what items composed it; that she had nothing to do with it; did not authorize her husband to buy the things for her; that when she bought goods from plaintiff she always paid cash for them; knew her husband was buying goods from plaintiff but did not inquire into his business. She gave no testimony about the Walker note and mortgage, or its payment, nor about the execution of the note sued on, or the mortgage given to secure it.

His Honor directed the jury to answer the first five issues No; to the sixth, $997.58, with interest from 4 June, 1888, the amount unpaid on said note; and the seventh, Nothing. To which di- (294) rections, singly and jointly, plaintiff excepted.

His Honor charged the jury that the law required that the goods sold by plaintiff should have been bought by defendant Franchan Shields, and for her necessary and personal expenses, before they could answer the first issue Yes; and that, upon the evidence, they must answer it No. To this plaintiff excepted.

That they could not answer the second issue Yes, unless the goods charged on the account of plaintiff were bought by Franchan Shields, and for the support of her family; and that there was no evidence that they were so bought, and they must answer that issue No. Plaintiff excepted to this instruction.

That they could not find that the debt was contracted by the *feme* defendant with the written consent of her husband, because by *"the debt"* was not meant the *bond sued on,* but the account which the note was given for; and that there was no sufficient evidence to entitle the jury to answer the third issue in the affirmative, and they must answer it No. To this instruction plaintiff excepted.

That even if *"the debt"* meant the bond sued on, yet the evidence was not sufficient to justify the jury in answering said issue in the affirmative, for the signature thereof by the husband was not a written consent to its execution by his wife, but only indicated his willingness to be bound on the note. To this instruction plaintiff excepted.

Judgment as set out in the record. Plaintiff moved for a new trial, and alleged as grounds therefor the errors complained of above as specially pointed out. Motion overruled. Plaintiff gave notice of appeal to the Supreme Court.

W. W. Fuller and F. L. Fuller for plaintiff.
J. S. Manning for defendants.

(295) SHEPHERD, J. This action is not brought to foreclose the mortgage executed by the defendants on the wife's land, but its purpose is either to obtain a personal judgment on the bond, or to enforce its payment out of the general statutory separate estate of the *feme* defendant.

As the plaintiff obtained a personal judgment against the husband, it is only necessary for us to consider the liability of the wife, or her statutory separate estate for the debt sued upon.

Apart from the mortgage given to secure it, the bond is an executory contract, and it is well settled by the uniform decisions of this Court that, except in the cases mentioned in The Code, secs. 1828, 1831, 1832, 1836, a *feme covert* is, at law, incapable of making any executory contract whatever. Accordingly, it has been determined that The Code, sec. 1826, requiring the written consent of the husband in order to affect her real or personal estate, did not confer upon her (even when such written consent was given, or where the liability was for her personal expenses, etc.) the power to make a legal contract. Its object was to require the written consent of her husband, in order to charge in equity her statutory separate estate, on the same principle which requires the consent of the trustee when the separate estate is created by deed of settlement. *Pippen v. Wesson,* 74 N. C., 437; *Flaum v. Wallace,* 103 N. C., 296.

In the light of these, and other decisions, the section should read as follows: "No woman during her coverture shall be capable of making any engagement in the nature of an executory contract, by which her statutory real or personal estate is to be charged in equity, without the written consent of her husband. But where the consideration is for her necessary personal expenses, or for the support of the family, or where it is necessary in order to pay her ante-nuptial indebtedness, she may so charge such real or personal estate without such consent of the husband." As to the real estate, it will be seen that this con- (296) struction is hereinafter modified.

The necessary conclusion, therefore, is that Mrs. Shields had no legal capacity to execute the bond sued upon, and that no personal judgment can be rendered against her.

Appreciating this difficulty, the plaintiff amended his complaint so as to charge the separate estate.

As the instrument executed by the wife, with the written consent of her husband, did not specifically charge the separate estate, it was necessary to show such a consideration inuring to her benefit, or the benfit of her said estate, as would necessarily imply such a charge. *Flaum v. Wallace, supra.* It was for this purpose that the plaintiff undertook to show that the consideration of the instrument was either for the wife's necessary personal expenses, or for the support of the family. These facts being alleged in the amended complaint and denied by the defendants, the issues settled by his Honor were correct, and the exception in respect to their submission must be overruled. We also concur in the ruling of the court that there was not sufficient evidence to show that the indebtedness was incurred for the necessary personal expenses of the wife, or for the support of the family. The plaintiff testified that the bond was given to secure the indebtedness of the husband to the plaintiff, "for provisions, agricultural supplies, clothing, etc.," and that only about $50 of them were bought by the *feme* defendant. The character of the articles received by her is not stated, nor does the testimony disclose anything which is inconsistent with the idea that she received them on account of her husband. Very clearly, it is not shown that they were obtained for the support of the family, or that they were necessary for that purpose, by reason of the husband's neglect to perform his duty in that respect. *Berry v. Henderson,* 102 N. C., 525. Neither can we see that they were purchased for her "necessary personal expenses." Indeed, it seems that she had but little to do with the making of the accounts, and that the transactions were (297) managed solely by the husband and for his benefit. For these reasons, we think that there was no error in the instructions given on the first and second issues.

As to the third issue, it is argued that there was error, on the part of the court, in charging the jury that the writing was not executed with the written consent of the husband. In this, we agree with the plaintiff, but in view of the findings on the preceding issues, the erroneous ruling becomes immaterial. For, conceding that the husband gave his written consent, the writing would still be insufficient to charge the separate estate, as it contains no express charge upon it, and this is absolutely necessary where the consideration is not for the benefit of the wife, or her said estate, and of such a character as to necessarily imply a charge. (See *Flaum's case, supra.)*

This disposes of all the grounds specifically set forth in the complaint upon which the separate estate is sought to be charged. But as there was evidence tending to show another consideration inuring to the wife, and the fourth issue having been framed so as to comprehend it, we assume that his Honor passed upon this phase of the case also, and we will, therefore, consider it. It seems that the husband, defendant, was indebted to the plaintiff in the sum of several hundred dollars for provisions, agricultural supplies, etc., and that the plaintiff procured from one Walker, a loan of $550, which was secured by a mortgage on the land of the defendant wife. The money never went into the hands of either of the defendants, but was applied by the plaintiff to the indebtedness of the husband. When the mortgage matured Walker threatened to foreclose, and the plaintiff paid off and canceled the said mortgage and took one to himself, from the wife and husband, on apparently the same land, to secure the amount so paid to Walker, and also some eight or nine hundred dollars due him by the husband.

(298) It is contended that, inasmuch as a part of the consideration of the bond sued upon was for the benefit of the separate estate of the wife, in relieving it from the burden of the Walker mortgage, that her general statutory separate estate is chargeable for the same.

We had occasion, in *Flaum v. Wallace, supra,* to discuss at some length a married woman's capacity to charge, and the manner in which she may charge, her statutory separate estate. We there held that the wife could, with the written consent of the husband (and without his consent, in the cases within the exceptions in The Code, sec. 1826), bind her statutory separate *personal* estate by way of engagements in the nature of executory contracts. We further declared that she could so charge her said separate personal estate where the consideration was not for her benefit, or for the benefit of the estate, provided she expressly charged it in the instrument creating the liability. We were greatly influenced in so holding because of the power of the wife to absolutely dispose of her statutory separate personal estate by the simple written

assent of her husband, and we deemed it but reasonable that if she could so absolutely dispose of such property, she might exercise the lesser power of charging it, either expressly or by necessary implication.

But when we come to the statutory separate *real* estate, the foregoing reasoning fails, because, under our statute law, the wife and husband cannot dispose of such property unless the former has been privately examined, separate and apart from the husband. Whatever may be the rulings in other states (and they are admitted to be in hopeless conflict), we prefer to adhere to the principle, so often declared by this Court, that a married woman, as to her statutory separate property, is to be deemed a *feme sole* only to the extent of the powers conferred by the Constitution and laws creating the same. Holding, as we do, that her power to charge such separate estate, by an engagement in the nature of a contract, is measured and limited by her power to dispose of the same, it must follow that if the wife, with the written (299) consent of her husband, had expressly charged her statutory separate real estate, it would have been of no avail without privy examination.

But it may be said that no such express charge or written consent is necessary where the consideration is sufficient, as in this case, to necessarily imply an intent to charge. This is true, as we have said, as to the personal estate, but it has no application, we think, to the statutory separate real estate.

The case of *Withers v. Sparrow*, 66 N. C., 129, cited by the plaintiff, was a bill in equity, under the old system, to charge the equitable separate estate of a married woman, and is no authority in cases where charges are sought to be enforced against the statutory separate estate. Neither was the point directly called to the attention of the court and passed upon in *Arrington v. Bell*, 94 N. C., 247.

On the other hand, it is well settled by this Court that the lands of a married woman cannot be charged by any undertaking on her part in the nature of a contract, unless it be evidenced by deed accompanied by privy examination. This view is strongly expressed by the Court in *Scott v. Battle*, 85 N. C., 184, where the land of a married woman was sought to be charged with the purchase money received by her from a purchaser to whom she had executed a deed, but to which she had not been privily examined. *Ruffin, J.*, said that "upon principle, too, it seems impossible to conceive that the law will ever permit that to be done indirectly which it forbids to be done directly. Or that it will give its countenance to a doctrine which must subvert its whole theory in regard to the contracts of married women. To do so would be equivalent to saying that a *feme covert* cannot, by express deed, unless privately examined thereto, convey or charge her lands, and yet may, by a mere

contract to sell, and the acceptance of the purchase money, create
(300) such a lien upon it as a court of equity will enforce by a sale against her will. If this be tolerated, then the statute intended to regulate the contracts of a married woman has no longer any virtue left in it, and all the teachings of the common law as to her disability are swept away. As to her not being privileged to commit fraud, there can grow no fraud out of the contract of a married woman. It stands upon its own strength, both in law and equity. If perfect, then well and good; if imperfect, then it is an absolute nullity. No matter upon what consideration, and, as was said in *Towles v. Fisher,* 77 N. C., 438, no one can reasonably rely upon the contract of a married woman, or on a representation as to her intentions, which is, at best, in the nature of a contract, and by which he must be presumed to know that she is not legally bound."

The distinction between the liability of the wife's separate estate for undertakings in the nature of contracts, and where she has obtained an undue advantage by fraud, is well illustrated by the following cases: *Weathersbee v. Farrar,* 97 N. C., 106; *Walker v. Brooks,* 99 N. C., 207; *Towles v. Fisher,* 77 N. C., 437; *Boyd v. Turpin,* 94 N. C., 138; *Burns v. McGregor,* 90 N. C., 222. Applying these principles to the case before us, it is plain that transaction amounted to nothing more than a loan of money by the plaintiff to the wife. The plaintiff, it is presumed, knew of her inability to charge her general statutory separate real estate in any other way than by a deed and privy examination, and if we were to give the effect contended for to such a transaction, it would, as *Judge Ruffin* said, be doing, indirectly, what the law forbids to be done directly.

In passing, we will state that the case of *Smaw v. Cohen,* 95 N. C., 85, may be sustained, as to the liability of the separate estate, on the ground that the statute, ch. 41 of The Code (Liens), directly charges it.
(301) There is another view, however, which is fatal to the plaintiff. Where the separate estate is sought to be charged, "the complaint should allege that the wife has a separate estate subject to the charge." *Dougherty v. Sprinkle,* 88 N. C., 300; *Flaum v. Wallace, supra.*

Here the only separate estate described in the complaint is the land upon which the plaintiff has a mortgage for the money paid to Wallace by the plaintiff, and it does not appear that the wife has any other property whatever.

In closing, we may remark that it is not a little strange that this mortgage does not appear, upon the pleadings, to have been foreclosed before resorting to the present action.

Upon a review of the entire record, we are of the opinion that the conclusion reached by his Honor was correct, and that the judgment should be affirmed.

Affirmed.

Cited: Thurber v. LaRogue, 105 N. C., 310; *Thompson v. Smith, post,* 357; *Wood v. Wheeler, post,* 513; *Hinton v. Ferebee,* 107 N. C., 155; *Bevill v. Cox, ibid.,* 177; *Long v. Rankin,* 108 N. C., 337; *Patterson v. Gooch, ibid.,* 506; *Weir v. Page,* 109 N. C., 223; *Thompson v. Taylor,* 110 N. C., 72; *Fort v. Allen, ibid.,* 192; *Williams v. Walker,* 111 N. C., 608; *Bailey v. Brown,* 112 N. C., 57; *Armstrong v. Best, ibid.,* 60; *Mayo v. Farrar, ibid.,* 69; *Draper v. Allen,* 114 N. C., 52; *Jones v. Craigmiles,* 114 N. C., 616; *In re Freeman,* 116 N. C., 200; *Cotton Mills v. Cotton Mills, ibid.,* 649; *Wilcox v. Arnold, ibid.,* 710; *Bates v. Sultan,* 117 N. C., 98; *Bank v. Howell,* 118 N. C., 274; *Hedrick v. Byerly,* 119 N. C., 421; *Bank v. Fries,* 121 N. C., 243; *Sanderlin v. Sanderlin,* 122 N. C., 3; *Bank v. Ireland, ibid.,* 574; *Mahoney v. Stewart,* 123 N. C., 110; *Weathers v. Bordors,* 124 N. C., 611, 612, 614; *Jennings v. Hinton,* 126 N. C., 51; *Bazemore v. Mountain, ibid.,* 317; *Rawls v. White,* 127 N. C., 20; *Zachary v. Perry,* 130 N. C., 291; *Harvey v. Johnson,* 133 N. C., 355; *Vann v. Edwards,* 135 N. C., 673; *Smith v. Bruton,* 137 N. C., 82; *Ball v. Paquin,* 140 N. C., 92, 93, 95; *Ricks v. Wilson,* 154 N. C., 287; *Lipinsky, v. Revell,* 167 N. C., 509; *Warren v. Dail,* 170 N. C., 409; *Graves v. Johnson,* 172 N. C., 180; *Thompson v. Coats,* 174 N. C., 195; *Lancaster v. Lancaster,* 178 N. C., 23; *Sills v. Bethea, ibid.,* 318; *Comrs. v. Sparks,* 179 N. C., 586.

HIRAM DAILY v. RICHMOND AND DANVILLE RAILROAD COMPANY.

Negligence—Damages—Idiot—Intoxication—Crossing.

1. A., an idiot, and under the influence of liquor, crossed a railroad track at a usual place of crossing in or near a populous town, and was struck and injured by a passenger train, running at about the usual speed of twenty or twenty-five miles an hour. Owing to obstructions near the track, upon another railroad, he could not have seen the train until within six feet of the track he was crossing. It did not appear how near the train was to him, nor whether the engineer saw or could have seen him in time to have stopped: *Held,* that it was not error in the court below to decide that plaintiff could not recover in any view of the case.

2. Even if the engineer had seen him crossing the track in time to stop his train, and did not know of his infirmity, he was justified in assuming that he would get off in time to avert danger, and he was not bound to check its speed. If he (the engineer) carelessly refrained from checking speed, when he might, without injury to the passengers, have averted the injury, he is guilty of negligence, even though the party injured was guilty of contributory negligence.

(302) CIVIL ACTION, tried before *Philips, J.*, at February Term, 1889, of the Superior Court of CATAWBA County.

This action was to recover damages in the sum of $2,000 against the defendant above named for injuries suffered by Hiram Daily, an idiot, said injuries alleged to have been caused by the negligence of the defendant.

W. A. Clay, a witness for the plaintiff, testified as follows: "I live in Hickory; I am a boot and shoemaker; my shop is west of the public square and depot. The street from east to west is Morganton street—two passways. The railroad runs between the streets; both the streets, including the railroad track, is 150 or 200 feet. The wide-gauge is the Western N. C. R. R.; the narrow-gauge is the Chester and Lenoir N. G. road. They run side by side half mile or more. I saw Daily the day he was hurt; I spoke to him; I said, 'Come in, it's raining.' He passed by my shop; was going in the direction of his home. There is a footway that crosses the railroad; I have known it four or five years. I saw him after he was hurt."

John Watson, a witness for the plaintiff, testified as follows: "I was in Hickory and saw Daily; me and Howell Harris were sitting side by side; heard a train, and we saw a man cross the railroad; we remarked when the train struck him, 'There goes a drunken man.' The train was coming as fast as the narrow-gauge road; this was 700 feet from the depot; rainy day; wind blowing, carrying sound toward the west; I heard no bell and no whistle. This passway was first used as a
(303) wagonway; then it was annulled as a wagonway and used as a pass or footway; it is generally used as a footway. I have been in Hickory fourteen years. It was in the evening; downtrain, 5:14, but it was a little behind. There were three box-cars on the narrow-gauge road. He could not get across without going around the box-cars. Daily could not have seen the descending train until he got to the track of the W. N. C. R. R. He was struck with the bumper on the top of the cowcatcher; the bumper struck him; it knocked him ten feet, or further."

Cross-examined: "I came from Caldwell County. There are four passenger trains and four freight trains, and two more construction

trains—ten trains in all; six trains on the other road—sixteen in all daily. The box-cars were on the narrow-gauge road. There might have been some flat-cars. The train was coming from towards Morganton. Came down the cars on side-track and started across. He made no halt; didn't look up. Four or five feet between the side-track of narrow-gauge to narrow-gauge; this is three and one-fourth; then there is five feet from the narrow-gauge to the main track. He could have seen train if he had looked. I saw the train and heard it. We said, 'There goes a drunken man.' We thought he must have been drunk to attempt to cross the road. Took place in 1887. The suit was brought. I didn't expect any suit. I wasn't asked any questions. Don't know when I first said I didn't hear any whistle. I don't swear the bell didn't ring, or the whistle didn't blow."

Redirect: "The narrow-gauge had a side-track at the time. That plat is a correct plat of the track at the time, that has been shown to me, and that I have spoke of." Witness testified to accuracy of plat shown him by defendant's counsel.

M. E. Bradford, a witness for the plaintiff, testified as follows: "I was in Hickory the day that Daily got hurt. I know nothing about the train striking him. I saw him after he was struck. His leg was broken in two places; hip knocked out of place. He is a pretty (304) bad cripple. He was confined to his bed for two months. I have been in Hickory thirteen years. It was first used as a wagon-crossing. About eight years ago the town stopped keeping it up as a wagon-crossing, and it is used as a foot-crossing. The R. & D. Railroad controls the road. I live seventy-five or eighty feet from the mother of plaintiff. Hiram generally used this crossing in coming from town to his mother's. The narrow-gauge had some iron on the R. & D. near this crossing. There was but one track of narrow-gauge at that time, when the plaintiff received the injury. At that time there was six feet between the narrow-gauge and the Western road. The train was behind time, and was coming tolerably fast. Daily was struck two hundred yards from the depot. Narrow-gauge runs twenty miles an hour. That crossing is two hundred feet from the public square. I don't know how fast the train was running at the crossing, but it was running pretty fast little over half mile before it got there to the crossing where the injury occurred. He has been cautioned by the citizens. He is an idiot. He is afraid of the train."

Cross-examined: "He was cautioned because he was an idiot. He has crossed the track many times when he had no business. I don't think that there was any side-track at that time on the narrow-gauge. I didn't know about any box-cars on the track. I didn't see any box-cars, nor

did I see the man until he was hurt. The train was about half hour behind. The town put this crossing there. The company leaves cars on the track now. Depot is the center of the public square now. The section hands work along the ditch, and take it up and put it back."

Redirect: "This was about the only convenient pass-way along there; population is about 2,500 or 3,000; narrow-gauge stops across street-crossing sometimes."

(305) *Recross:* "Hickory is a long town; built on either side of railroad mostly."'

Howell Harris, a witness for the plaintiff, testified as follows: "I saw the plaintiff when he was hurt; I was sitting down within 250 yards of the place, looking up the road; he, the plaintiff, was going right across the track when the engine struck him; there was one flat-car, loaded with dirt, right across this foot-crossing; he could not see the descending train until he passed this car on the track; when he stepped off the narrow-gauge he would be in six feet of the main track."

Cross-examined: "The track at the crossing is a little higher than the street; the dirt was on flat-cars, and was there to put under the depot; they were fixing to lay some track and getting some dirt; the tracks have all been changed now; plaintiff did not look; could have seen if he had looked; didn't stop, just come right across; and there were five or six feet between the tracks; I heard the blow and they began to ring the bell about this crossing; there was a train due; the cars on the track were loaded with dirt."

Redirect: "I heard the station whistle; this is the place they generally begin to ring the bell."

Mrs. Daily, mother of the plaintiff, testified as follows: "He was badly crippled; his leg was broken in two places; hip was stove up; his elbow was stove up; his hip appeared like it was bursted from backbone; he can't do anything, hardly; one leg is longer than the other; he can't stoop down to pick up anything; before that he could tote water and make fires; could send him anywhere; I am a widow; he is the only child I have with me; he was afraid of the train; would catch me when the train came on, when I was there; he suffered much; I never received anything from the railroad; Dr. Baker said he tried to get something when he got his pay, for attending him; he is forty-six years old."

Robert McLean, a witness for plaintiff, testified as follows:

(306) "The section master of Western road kept up that crossing; three section hands."

Cross-examined: "When we come along to work we took them up and put them back; I didn't know when it was used as a wagon-way; I saw the train come in; I didn't see it strike the man."

When the examination of the witnesses for the plaintiff was concluded the court, after argument, intimated an opinion that, upon the plaintiff's own evidence, he was not entitled to recover; that he contributed to his injury by his own negligence.

The plaintiff asked, upon this intimation, and obtained, leave to submit to a nonsuit, and then appealed, alleging for error the aforesaid intimation and ruling of the court.

No counsel for plaintiff.
George F. Bason for defendant.

AVERY, J., after stating the facts: We concur with the court below in the opinion that plaintiff is not, in any view of the testimony, entitled to recover. He could not, according to the evidence, have seen the approaching train until he stepped off the narrow-gauge road and was within six feet of the main track along which it was coming. There is no testimony tending to show how near it was to him when he attempted to cross, and it would have been impossible for the jury to have determined whether the defendant's agents were negligent in failing to stop the train (if it was their duty to make any attempt to stop at all) without information as to the actual distance between him and the engine at the moment when he passed upon the track in front of it, and in the absence of proof as to the number of yards within which the train could have been stopped by the use of all the appliances at the command of the engineer, after he saw, or might, by reasonable care and watchfulness, have seen the plaintiff on the track. But (307) if the witness had thrown additional light upon the transaction by giving the data mentioned, the plaintiff's right to recover would not still have been established, even *prima facie,* unless there had been evidence also tending to show that the engineer knew him when he saw him upon the track, or could, by the exercise of ordinary care, have seen him, and had actual knowledge, or reasonable ground for the belief that, on account of some mental or physical infirmity, he could not assume that plaintiff would step off the track in time to escape injury. If, with such actual knowledge or information, the engineer carelessly refrained from all effort to check the speed of the engine, when he might, without peril to the passengers on the train, have prevented the injury by stopping it short of the point where plaintiff was stricken, then the defendant was liable in damages, nothwithstanding the negligence of the plaintiff. 2 Woods' R. L., sec. 320; *Parker v. R. R.,* 86 N. C., 221; Wharton Neg., 389a; *McAdoo v. R. R.,* 105 N. C., 140. In the absence of actual knowledge or information as to the plaintiff's infirmity, and of opportunity for recognizing him, the engineer was justi-

fied in assuming that the plaintiff was a man of ordinary intelligence and would get off the track in time to avert danger, and that it was not necessary to delay the train by checking its speed merely because an apparently and presumably reasonable human being was crossing at a point far enough in his front to enable him to stop it, if he chose, before reaching such person. *McAdoo v. R. R., supra.*

No error. Judgment affirmed.

Cited: Deans v. R. R., 107 N. C., 690, 691; *Meredith v. R. R.,* 108 N. C., 618; *Clark v. R. R.,* 109 N. C., 453; *Norwood v. R. R.,* 111 N. C., 240; *Purnell v. R. R.,* 122 N. C., 850; *Beach v. R. R.,* 148 N. C., 163; *Mitchell v. R. R.,* 153 N. C., 117.

(308)

THOMAS R. SHARP v. DANVILLE, MOCKSVILLE AND SOUTHWESTERN RAILROAD COMPANY.

Judgment Confessed—Corporation—Motion in the Cause—Receiver—Fraud—Irregularity—Final Judgment—Findings of Fact.

1. Upon motion in the cause, it appeared that the defendant railroad company, by order of its board of directors and the action pursuant thereto of its president and secretary, had confessed certain judgments in favor of its president, just prior to the road's going into the hands of a receiver: *Held,* that the court below properly refused to consider any allegations of fraud. These should be made in an independent action properly constituted for this purpose.

2. Judgments by confession being final judgments, cannot be attacked for fraud in this way; and no substantial irregularity being shown, this Court will not, in the proceedings had in this action, review the findings of fact by the Court below.

3. A corporation, nothing to the contrary appearing, may, by the action of its proper officers, confess judgments as a natural person, if the essential requirements of the statute are complied with.

4. Discussion by *Merrimon, C. J.,* as to the requisites of a judgment confessed under The Code.

THIS was a motion to vacate certain judgments, heard by *MacRae, J.,* at Greensboro, 6 November, 1886.

It appears that a cause in equity was pending in the Circuit Court of the United States in and for the Western District of North Carolina, wherein the Richmond and West Point Terminal Railway and Warehouse Company were the complainants, and the Danville, Mocksville

and Southwestern Railroad Company and others were defendants. In that cause, on 7 November, 1885, J. Turner Morehead was appointed receiver of the last named corporation, defendant, charged with authority and power to take into his possession and control all (309) its property, effects, etc.

On the same day, after the said appointment of the said receiver, the said defendant railroad company confessed two judgments in favor of the present plaintiff in the Superior Court of the county of Rockingham, purporting and intending to confess the same, as allowed and provided by the statute (The Code, secs. 570-572).

The following is a transcript of the record of the first of those judgments as it appears of record:

THOMAS R. SHARP *v.* DANVILLE, MOCKSVILLE, ETC., RAILROAD CO.

Filed 16 April, 1887.

Resolved by the board of directors of the Danville, Mocksville and Southwestern Railroad Company, That Secretary E. C. Winstanley be and he is hereby directed, for and in behalf of the said Danville, Mocksville and Southwestern Railroad Company, to confess judgment in the Superior Court of Rockingham County in favor of Thomas R. Sharp against said company in the sum of eight thousand one hundred and fifty-four dollars and forty-one cents ($8,154.41), found justly due unto him in his individual account above reported and approved; also, to confess judgment against said company in favor of Thomas R. Sharp in the sum of sixteen thousand eight hundred and sixty-seven dollars and sixty cents ($16,867.60), on account of his contingent liabilities, with interest on $8,017.60 thereof from 14 November, 1881, and on $4,600 thereof from 26 November, 1885.

Witness my hand and corporate seal of D., M. & S. W. R. R. Co., 7 November, 1885.

H. M. SHIVLER, *Vice-President.*

A true copy of original.

(310)

DANVILLE, MOCKSVILLE AND SOUTHWESTERN RAILROAD CO., *In account with* THOMAS R. SHARP, *by reason of contingent liabilities for and in behalf of said company.*

To individual endorsement of a draft in favor of Burnham, Parry, Williams & Co. for the sum of----------$ 8,017 60
accepted by Thomas R. Sharp, as President of said company, on 12 October, 1881, and payable on 14 November, 1881, and bearing interest from 14 November, 1881.

To individual endorsement of a draft of E. C. Winstanley, Secretary of D., M. & S. W. R. R. Co., in favor of Johnston & Cheek for money loaned, dated 24 October, 1885, and due and payable on 26 November, 1885 ---------- $4,600 00

To his individual liability as surety in seventeen conditional penal bonds, each in the sum of two hundred and fifty dollars, filed and signed by him as President of said company, and also signed by him as surety in seventeen several suits now pending in Superior Court of Rockingham County upon seventeen several petitions for *recordari* and *supersedeas* in matters of *J. Turner Morehead & Co. v. Danville, Mocksville and Southwestern Railroad Company*, as of record in said court may be fully seen, aggregating------- 4,250 00

$16,867 60

Duplicate original. THOMAS R. SHARP.

Subscribed and sworn to before me, this 7 November, 1885.
JONES W. BURTON, J. P.

STATE OF NORTH CAROLINA—Rockingham County.
Superior Court.

THOMAS R. SHARP, *Plaintiff, v.* THE DANVILLE, MOCKSVILLE AND SOUTHWESTERN RAILROAD COMPANY, *Defendant.*

The Danville, Mocksville and Southwestern Railroad Company, by E. C. Winstanley, Secretary of said company, being thereunto duly authorized by said company, hereby confesses judgment in favor of Thomas R. Sharp, the plaintiff above named, for sixteen thousand eight hundred and sixty-seven dollars and sixty cents, with interest on
(311) $8,017.60 thereof from 14 November, 1881, and $4,600 thereof from 26 November, 1885, until paid.

This confession of judgment is to secure the plaintiff against divers liabilities on behalf of the Danville, Mocksville and Southwestern Railroad Company, amounting, in the aggregate, exclusive of interest, to the principal sum above stated, the several liabilities arising upon the following facts, to wit:

1. The said Thomas R. Sharp, as President of said company, accepted the draft of Burnham, Parry, Williams & Co., in the sum of $8,016.35, and endorsed the same individually, of which the following is a copy, to wit:

"$8,016.35. PHILADELPHIA, 12 October, 1881.

"Thirty days after date, pay to the order of Thos. R. Sharp eight thousand and sixteen dollars and thirty-five cents, value received, and charge to account of "BURNHAM, PARRY, WILLIAMS & Co.

"To Thos. R. Sharp, Esq., President Danville, Mocksville and Southwestern Railway, No. 115 Broadway, New York."
(Endorsed, "Thos. R. Sharp.")

The consideration of said draft was the purchase-money for the railroad engine or locomotive, "Lilly C. Morehead," bought for use upon roadway of said company, and the same went to protest at the cost of $1.25, and on this draft the drawers have brought suit in the State of Virginia against the Danville, Mocksville and Southwestern Railroad Company, and the said Thomas R. Sharp individually, and have also brought suit in the State of North Carolina, which is now pending (coupled with an attachment of said Sharp's real estate in North Carolina) against the said Thomas R. Sharp individually, as endorser of said draft.

2. On or about 24 October, 1885, the said Thomas R. Sharp (312) became individually liable, by endorsement of a draft drawn by E. C. Winstanley, secretary of the said railroad company, drawn upon Thomas R. Sharp, president of said company, and by said Thomas R. Sharp individually endorsed, and thereafter passed to Johnston & Cheek, bankers, for full value, who are now the holders thereof. The consideration of said draft was money loaned by Johnston & Cheek upon said draft, so endorsed, for the use and benefit of said railroad company, and the same will become due and payable on 26 November, 1885, and the said Thomas R. Sharp will thereafter be under contingent liability to pay the same.

3. In the month of September, 1885, in seventeen suits now pending in the Superior Court of Rockingham County, upon petitions for *recordari* and *supersedeas* in the matter of J. Turner Morehead & Co. *v.* The Danville, Mocksville and Southwestern Railroad Company, the said Thomas R. Sharp become liable, as surety, to said company in seventeen penal bonds, each in the sum of two hundred and fifty dollars, required by the court to be filed by said company, the aggregate of which seventeen penal bonds is the sum of forty-two hundred and fifty dollars, as may be seen by reference to the records of the Superior Court of Rockingham County, in which said suits are pending, and the object of which petitions for *recordari* is to prevent the forced sale and sacrifice of the property of said company.

A statement of said Thomas R. Sharp's account against said company by reason of said contingent liability, duly sworn to, is hereto attached, and is hereby made a part of this statement, which said exhibit was, on 7 November, 1885, submitted to the board of directors of said company, and by them approved, as showing the amount of the said Thomas R. Sharp's contingent liability for and in behalf of said

company, and the said sum for which entry of judgment is
(313) hereby authorized is correct, and does not exceed the amount of said contingent liabilities.

Witness the signature of E. C. Winstanley, secretary of said company, and the corporate seal thereof, hereto affixed, under the specific authority of the board of directors of said company, duly granted by resolution, a certified copy whereof is herewith filed. This 7 November, 1885.

DANVILLE, MOCKSVILLE AND S. W. R. R. Co.,
By E. C. Winstanley, *Secretary.*

STATE OF NORTH CAROLINA—Rockingham County.

Before me, John T. Pannill, clerk of the Superior Court of Rockingham County, personally appeared E. C. Winstanley, secretary of the Danville, Mocksville and Southwestern Railroad Company, who, being duly sworn, maketh oath that he is the secretary of said company, and that the statement above signed by him is true.

This 7 November, 1885.

JOHN T. PANNILL, *C. S. C.*

STATE OF NORTH CAROLINA—Rockingham County.
Superior Court.

THOMAS R. SHARP, *Plaintiff, v.* THE DANVILLE, M. AND S. W. R. R. COMPANY, *Defendant.*

Judgment.

On filing the foregoing statement and confession, duly verified, together with the exhibits therein referred to, it is ordered and adjudged by the court that the plaintiff, Thos. R. Sharp, do recover against the defendant, the Danville, Mocksville and Southwestern Railroad Company, the sum of sixteen thousand eight hundred and sixty-seven dollars and sixty cents, with interest on $8,017.60 thereof from 14 No-
(314) vember, 1881, and on $4,600 thereof from 26 November, 1885, until paid, according to the terms of said confession, as a security for the plaintiff's contingent liability in said amount, together with $3 cost hereof. JOHN T. PANNILL, *C. S. C.*

This 7 November, 1885.

Resolved, by the board of directors of the Danville, Mocksville and Southwestern Railroad Company, that E. C. Winstanley, secretary, be and he is hereby, directed for and in behalf of the said Danville, Mocks-

ville and Southwestern Railroad Company, to confess judgment in the Superior Court of Rockingham County in favor of Thomas R. Sharp against said company in the sum of eight thousand one hundred and fifty-four dollars and forty-one cents ($8,154.41), found justly due unto him in his individual account above reported.

Witness my hand and corporate seal of D., M. and S. W. R. R. Co.

H. M. SHIVLER, *Vice-President.*

A true copy of original.

The record of the second of the judgments so confessed is similar in all respects, except as to the sums specified, the consideration thereof and the exhibit containing the statement of the account showing how the liability of the defendant arose.

The said receiver was specially authorized, by order of the said Circuit Court made in the cause named, to take such legal steps as his counsel might advise to "vacate, modify, set aside, or have declared null and void, or corrected, or enjoined in their collection," the said judgments and other like judgments.

Accordingly, the said receiver gave the plaintiff notice, whereof the following is a copy: (315)

NORTH CAROLINA—Rockingham County.

Superior Court.

THOMAS R. SHARP *v.* THE DANVILLE, MOCKSVILLE AND SOUTHWESTERN R. R. Co.

Judgment for $16,867.60, and costs, Nov., 1885. Motion to vacate.

THOMAS R. SHARP *v.* THE DANVILLE, MOCKSVILLE AND SOUTHWESTERN R. R. Co.

Judgment for $8,154.41 and costs, Nov., 1885. Motion to vacate.

THOMAS R. SHARP, ESQ.—Please take notice that, on Saturday, 30 October, 1886, at Winston, Forsyth County, before Hon. James C. MacRae, Judge, as receiver of the Danville, Mocksville and Southwestern Railroad Company, I will move to vacate the above entitled judgments for irregularity, illegality, fraud, and as void. 18 August, 1886.

J. TURNER MOREHEAD, *Receiver.*

Such motion was afterwards made, and the plaintiffs resisted the same, upon the ground, among others, that a like motion had been made before and denied by another judge, etc. It was insisted that the judgment was, in all respects, a regular and valid one, and not affected

by fraud, and that the same could not be attacked for fraud by motion in the action, etc.

At the hearing of the motion the court found the facts and gave judgment as follows:

"On 7 November, 1885, J. Turner Morehead was appointed receiver of the Danville, Mocksville and Southwestern Railroad Company by the Judge of the United States Circuit Court for the Western District of North Carolina, in a suit in equity therein pending, wherein
(316) the Richmond and West Point Terminal Railway and Warehouse Company was complainant, and the Danville, Mocksville and Southwestern Railroad Company, C. C. Sharp, J. P. Dillard, H. M. Shivler and Alex. Smith were defendants. The said individual defendants are directors in the defendant company. The order appointing the receiver was signed at 3 o'clock P. M. on the day aforesaid, a copy of which order is hereto attached.

The complainant filed an injunction bond, and on 9 November, 1885, the receiver filed his bond, which was approved, and took charge of the effects of defendant company.

After the hour of 3 o'clock P. M. on Saturday, 7 November, 1885, a meeting of the directors of the defendant company was held at Leaksville, N. C., at which meeting were present Thomas R. Sharp, E. C. Winstanley, H. M. Shivler, Alex. Smith and C. C. Sharp. No public notice had been given of said meeting. A resolution was passed at said meeting, authorizing E. C. Winstanley, the secretary of said company, to confess the judgments in favor of plaintiff. A copy of said resolution is attached to the judgments confessed, which are attached hereto.

The said Winstanley, secretary, with Thomas R. Sharp and others, proceeded to Wentworth, the county seat of Rockingham County, and the confessions of judgment were handed by said Winstanley to the clerk of Rockingham Superior Court, between the hours of 11 and 12 o'clock on the same night, in the office of Messrs. Mebane & Scott, attorneys at law, in Wentworth, near, but not in the courthouse, nor in the clerk's office; the said clerk was then and there present with the judgment docket of said county; and the said clerk at once entered the said confessions of judgment upon the judgment docket.

The affidavits failed to satisfy the court that said entries were made on the said docket after 12 o'clock P. M.

(317) Thomas R. Sharp absented himself from the meeting of directors during the consideration and passage of the resolution aforesaid.

Messrs. Mebane & Scott were counsel for defendant company.

Upon the foregoing facts found, it is considered that the said judgments are not irregular and contrary to the course of the court, and

expressly decline to consider any allegations of fraud in the confessions of judgment, as set out in the motions to vacate. The motion is denied, and judgment is rendered against J. Turner Morehead, receiver, for the costs of this motion."

J. Turner Morehead, receiver (having excepted), appealed to this Court.

J. C. Buxton and C. B. Watson for plaintiff.
P. B. Means for defendant.

MERRIMON, C. J. The record presents no question as to the right of the appellant to have possession and control, as receiver, of the property of the defendant corporation; nor as to the rights of the complainants in the cause in equity mentioned, pending in the Circuit Court of the United States, as against such defendant or its property; nor as to the authority of the last mentioned court to take jurisdiction and dispose of such property for proper purposes in the cause mentioned pending therein; nor as to how the judgment in this action, which the appellant seeks to have set aside or declared void, if it be valid, may affect adversely the complainants represented by the appellant, or any other persons. The motion of the appellant, if it be granted that he has a right to make it, raises no such question for our decision now. The judgments in question are final in their nature, and hence the motion is limited in its purpose and scope to the inquiry whether or not they are in any material respect irregular, and must, for irregularity, be set aside or declared void. It is well settled by many decisions (318) that final judgments cannot be attacked for fraud by motion in the cause, and that this can only be done by an independent action brought for the purpose, the object being to avoid confusion, and to require a cause of action so serious to be litigated by regular formal pleadings. Indeed, the right to have a final judgment set aside because of fraud, is, in a substantial sense, an independent cause of action, that should itself be the subject of a separate action.

It seems that the motions to set aside the judgments mentioned, were treated as consolidated and disposed of together, and they must be so treated here.

This is not an equitable motion of the class wherein it is the province of this Court to review the findings of fact in respect thereto, and the matters and things embraced by it, by the court below, nor can this Court go beyond its findings and hear evidence and find other facts. If further findings of fact should be deemed necessary, this Court might remand the case to the end the same might be made.

We are unable to discover in either of the judgments any *irregularity* such as affects its substance and validity. What particular powers were conferred upon the defendant corporation and its officers by its charter, do not appear; but it sufficiently appears that it was a business corporation, and, as such, under the general statutes of this State in respect to corporations, as well as general principles of law applicable, it might acquire and dispose of property, make and owe debts, sue and be sued. It was the duty of its directors to pay its debts and manage its general business matters—to bring necessary actions in its name —to vindicate its rights, and to defend actions brought against it. There is no reason, so far as appears, why the defendant might not confess a judgment in favor of its honest creditor, and, in possible cases, (319) it might be just, and promote its interests and convenience to do so.

Its directors, in meeting assembled, appointed and charged its special agent to confess the judgments in question in its name, in favor of the plaintiff therein. Nothing appears in the record to show that this might not be done in the orderly course of business, just as if it had been a natural person. The defendant could only appear and act by its agent in the way it did do.

The statute (The Code, sec. 570) prescribes that "a judgment by confession may be entered, without action, either in or out of term, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter." A distinguishing feature of such judgment is that it must be *confessed* in the way prescribed, and *entered* of record either in term-time by the judge, or out of term by the clerk acting for the court, and without action. It may be founded on a debt due, or one to come due, or to secure the party to whom it is given against contingent liability, or it may embrace both such debts and liability.

But it is not sufficient to simply confess and enter judgment. It is essential that the confession and entry shall have the additional requisites further prescribed by the statute (The Code, secs. 571-572), which are, that "a statement in writing must be made, signed by the defendant and verified by his oath to the following effect: 1. It must state the amount for which the judgment may be entered, and authorize the entry of the judgment therefor. 2. If it be for money due, or to become due, it must state concisely the facts out of which it arose, and must show that the sum confessed therefor is justly due, or to become due. 3. If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the

liability, and must show that the sum confessed therefor does not exceed the same. The statement may be filed with the clerk of (320) the Superior Court of the county in which the defendant resides, or, if he does not reside in the State, of some county in which he has property. The clerk shall endorse upon it and enter on his judgment docket a judgment of the court for the amount confessed, with three dollars costs, together with disbursements. The statement and affidavit, with the judgment endorsed, shall thenceforth become the judgment roll, etc. It is essential that these requirements shall be observed—certainly, substantially, in every respect. The judgment is given out of the ordinary course of procedure, but, nevertheless, it at once, when docketed, becomes a lien upon the judgment debtor's real property. The purpose of such particular requisites is to give assurance that the consideration underlying the judgment is fair and honest; that the judgment was so confessed bona fide; to point to the grounds of indebtedness of the debtor or the liability provided against, so that another creditor may scrutinize the honesty and good faith of the judgment and the debts for which it was given.

The judgments in question possess, substantially, all the requisites thus prescribed. The statement, in writing, of the first one mentioned is signed by the defendant, by its agent, and sworn to by him. It states, with particularity, the precise amount of the liability, and the grounds thereof, provided against; and the statement, as made fuller by a sworn exhibit of details, points to the grounds of the liability with such certainty and such detail as to enable a creditor who might scrutinize it to show, with reasonable effort, that it was not true, if, indeed, it were not so. As to the first draft mentioned, the consideration thereof is particularly specified, and it appears that the defendant got the benefit of it. As to the second draft, it appears that the money realized from it was for the use and benefit of the defendant. In addition, it was drawn by and on itself, and endorsed by the plaintiff. (321) As to the third ground of liability, it could not be mistaken. The facts stated point to it with such certainty as to make it easy to verify it.

The same may be said as to the second judgment. The second statement, aided by the sworn exhibit connected therewith, shows a detailed account of the dealings between the plaintiff and defendant—the balance due to him and the items of charge making up the whole. These supply the *data* to any creditor who might wish to contest the defendant's indebtedness to the plaintiff on the several accounts specified.

The statements were filed with the clerk of the Superior Court of the proper county. He entered the judgment confessed on each, and

also on his judgment docket. Such statement, with the entry of judgment thereon, made up the judgment roll, to be seen, examined and scrutinized by any person interested. The mere facts that the judgments were entered in the night time, and in the law office of counsel, near to the courthouse, for convenience, did not render them void or irregular. The clerk of the court, the proper officer, near to his office, having the proper judgment docket with him, received the statements and entered the judgments on that docket, and on the statements respectively. The judgments so confessed, the judgment docket and the judgment roll were next and ever thereafter in their proper places in the office and custody of the clerk, and thus the requirements of the law were, in all material respects, observed. *McAden v. Hooker,* 74 N. C., 24; *Davidson v. Alexander,* 84 N. C., 621; *Davenport v. Leary,* 95 N. C., 203.

The statute prescribes the method and order to be observed in confessing judgments without action. That method and order was, in all material respects, observed as to the judgments in question, and (322) we so declare. It may be they were affected with fraud, but any question in that respect is not now before us. The court below properly declined to consider the allegations of fraud and the evidence tending to prove the same and the contrary.

Judgment affirmed.

Cited: Johnston v. R. R., post, 322; *Nimocks v. Shingle Co.,* 110 N. C., 23; *Uzzle v. Vinson,* 111 N. C., 140; *Hill v. Lumber Co.,* 113 N. C., 180; *Smith v. Smith,* 117 N. C., 351; *Moody v. Wike,* 170 N. C., 544; *Fowler v. Fowler,* 190 N. C., 541.

JOHN M. JOHNSTON ET AL. v. THE DANVILLE, MOCKSVILLE AND SOUTHWESTERN RAILROAD COMPANY.

J. W. Graham for plaintiff.
P. B. Means for defendant.

MERRIMON, C. J. This case is, in all material respects, like that of *Sharp v. Danville, Mocksville and Southwestern Railroad Company, ante,* 308, and must be governed by it.

Judgment affirmed.

(323)

J. F. GRAVES, ADMINISTRATOR, v. M. B. HINES ET AL.

Certiorari—Uncontroverted Facts—Dispute of Counsel—Laches—Excusable Neglect—Appeal Bond.

1. Where there is controversy between counsel in regard to oral agreements by which legal rights are waived, this Court will not determine them; and in an application for *certiorari*, unless enough uncontroverted facts appear, the Court will not grant the writ.
2. But when a party is deprived of his right of appeal without his *laches*, he is entitled to a *certiorari* as a substitute for an appeal; and also when he has been misled by statements of the adverse party, and there has been mistake, inadvertence, surprise or excusable neglect; but the appellant must show due diligence on his part.
3. Where it appears, from the undenied facts, that there was a reasonable misapprehension on the part of appellant, a *certiorari* will be granted.
4. The petitioner stated that he employed counsel, and was informed by him that time was given to perfect his appeal, and on this account he omitted to perfect it in time. The plaintiff appellee admitted that petitioner "understood he was to have time to perfect the appeal": *Held*, in such case, the writ of *certiorari* should be granted.
5. The same cause that excused failure to perfect the appeal excused the failure to file appeal bond. But undertakings on appeal are now governed by the Act of 1889, ch. 135.

THIS was an application to the Superior Court of SURRY County by the plaintiff, administrator of A. Hines, deceased, to sell real property of the decedent to make assets to pay debts, and heard on appeal from an order of the clerk, granting license to sell, etc., before *Gilmer, J.*, at November Term, 1889, of said court.

There was a judgment for the plaintiff, and the defendants appealed to this Court, but failed to perfect their appeal within the time limited by law, and this is an application for a writ of *certiorari* as a substitute therefor.

Affidavits of counsel on both sides are filed, and counsel for (324) plaintiff and defendants do not agree in regard to the question as to time being granted to perfect the appeal.

R. L. Haymore for plaintiff.
John Devereux, Jr., for petitioner.

DAVIS, J. This Court has often held that where there are controverted facts between counsel in regard to oral agreements or understandings by which there is an alleged waiver of legal rights, it will not pass upon the conflicting affidavits; and if, in applications for a *certiorari*, based upon such oral agreements, the appellant is not en-

titled to the writ upon the uncontroverted facts, it will be denied. But in *Skinner v. Maxwell,* 67 N. C., 257, it is said that where a party is deprived of the right of appeal, "without his *laches,* he is entitled to a *certiorari* as a substitute for an appeal." And it has been frequently held since, that while the general rule is that this Court will not grant writs of *certiorari* where the statutory requirements have not been complied with, yet where there has been a waiver by written agreement, or by an undenied oral agreement, the writ will be granted. It is also held that within the spirit of the provision in section 274 of The Code, in regard to "mistake, inadvertence, surprise or excusable neglect," the writ will issue when the appellant has been misled by the adverse party. *Parker v. R. R.,* 84 N. C., 119; *Commissioners v. Steamship Co.,* 98 N. C., 163, and cases cited; *Williamson v. Boykin,* 99 N. C., 238. In the last cited case it is said: "The writ of *certiorari,* as a substitute for an appeal lost, as alleged in this case, will be granted only when the petitioner shows that he has been diligent, and there has been no *laches* on his part in respect to his appeal, and further, that his failure to take and perfect the same was occasioned by some act or misleading representation on the part of the opposing party, or some other
(325) person or cause in some way connected with it, and not within his control."

Are there any undenied facts in the present case to show that the petitioner intended to take an appeal, and that his failure to perfect it was the result of a reasonable and excusable misapprehension in consequence of what passed between him and the appellee, and between his counsel and counsel of the appellee? We think there were.

While counsel for the appellee "denies any agreement to extend the time or to waive his legal rights," the purpose of the defendant to appeal is admitted by him, and there was much conversation that he cannot remember, and he himself said "he had no doubt that Mr. Porter Graves (counsel for appellant) was honest in thinking he had time to perfect his appeal," but he (counsel for appellee) "was not to blame for such belief." But, as has been said, if the right of appellee to the writ depended solely upon the oral statements of counsel, in which they differ as to their recollections, the counsel for appellee denying that there was any waiver, the writ would be denied, but there are uncontroverted facts as to what transpired between the plaintiff himself and the defendant, guardian *ad litem,* well calculated to mislead him.

The petitioner, whose judicial duties did not permit his personal presence at court when the case was tried, among other things, states in his verified petition:

"That your petitioner was not himself personally present at court, being absent in the discharge of his official duties; that he returned

home on the evening next following the adjournment of court, intending to perfect an appeal to the Supreme Court in case the decision should be adverse to the interests of his wards, and upon reaching his home he was informed by his counsel, in the presence and hearing of the plaintiff, that the decision of the Superior Court had been adverse to the interests of his wards; that an appeal had been prayed, and that, by consent, time had been given to perfect the appeal by (326) filing the bond and making out a statement of the case, and the plaintiff, as affiant understood him, admitted this to be true."

Being thus induced to believe that time had been granted for perfecting the appeal, the defendant omitted to perfect it at that time and returned to his circuit.

During the latter part of December, the petitioner called upon his counsel to prepare the statement of case on appeal, and was informed that no judgment had been recorded, and thereupon his counsel went out, saying he would "go to the office of R. L. Haymore, attorney for the plaintiff, and get the papers," and soon returned with them, and found therewith a paper purporting to be a judgment, signed by John A. Gilmer, judge. Counsel for your petitioner then prepared a case on appeal for the Supreme Court, and immediately went out to serve it upon the said R. L. Haymore, and returned soon after and stated that said attorney refused to accept service, on the ground that it was too late—that the right of appeal had been lost. Thereupon, petitioner requested the plaintiff to go with him and his attorney to the office of plaintiff's attorney, R. L. Haymore, to see about the matter, and, after meeting in his office, Mr. R. L. Haymore said that the judgment had been signed by Judge Gilmer at Mt. Airy after the adjournment of the court; that it had not been filed in the office of the clerk of the Superior Court, but had all the time been in his (Haymore's) possession.

There was further conversation, in which S. P. Graves, attorney for the defendant, stated his recollection of what had occurred between himself and R. L. Haymore, attorney for the plaintiff, which had induced him to believe that time had been given by plaintiff's attorney to perfect the appeal, and counsel for plaintiff said in reply: "There was no direct agreement on my part to give time, but I have no doubt Mr. Porter Graves understood that he was to have time (327) to perfect the appeal." The plaintiff said: "I am administrator and want to do what is right. Mr. Haymore is my counsel, and he represents some of the creditors, and, unless he so advises me, I will not allow the defendant to perfect his appeal, although I believe the defendant acted under the belief that time had been given to perfect it."

The judgment was rendered at the November Term, 1889. It is not denied that the petitioner, who was not present when the judgment was

rendered, "returned home on the evening next following the adjournment of court, intending to perfect an appeal," notice of which had been duly given, and that he omitted to perfect it at that time and returned to his circuit in consequence of what passed between him and his counsel and the plaintiff. Can it be doubted that but for what then transpired between the parties the appeal would have been then perfected? The petitioner was clearly misled, and returned to his circuit and failed to perfect his appeal, thinking, and reasonably thinking, without any *laches* or neglect of his own, that time was given to perfect the appeal, and that he could do so at the close of his circuit in December, in ample time for the February Term, 1890, of this Court. It has been frequently held that, under such circumstances, the writ would be granted. *Commissioners v. Steamship Co., supra,* and cases cited.

But counsel for appellee says "the defendants failed to file an appeal bond within ten days, as by law required; indeed, no bond was ever filed by them—no excuse given for not doing so"; and he insists that, for this failure, the writ should be denied, and for this he cites *Wade v. New Bern,* 72 N. C., 498, and *Bowen v. Fox,* 99 N. C., 127.

The same causes that would entitle a party to a *certiorari* for failing to perfect the appeal would apply to a failure to file the undertaking on appeal. This was clearly admitted in *Wade v. New Bern, supra.*

But counsel was not advertent to the fact that the cases cited by (328) him were prior to the Act of 1889, ch. 135, in relation to undertakings on appeal to the Supreme Court, by which the undertaking in this case is governed, and the necessary deposit has been made as authorized by that act.

The prayer of the petitioner is granted, and the writ of *certiorari* will be issued.

Cited: S. v. Price, 110 N. C., 602; *Sondley v. Asheville,* 112 N. C., 695; *Willis v. R. R.,* 119 N. C., 719.

CHANIE ASHBY v. JAMES H. PAGE.

Apprentices, Care and Custody of—Clerk of Court—The Code—Indigent Apprentices.

1. When, upon appeal from the clerk's refusal to have the infant daughter of the petitioner apprenticed to her husband, and from order apprenticing the child to another, the court below affirmed the order of the clerk, upon

the grounds that the defendant had had the child in his care and custody for several years, and had raised her up to her present age (eleven years), and still desired to keep her, and that the defendant was, and the husband of the petitioner was *not* a suitable person to bind the child to: *Held* to be error.

2. The statute, ch. 169, Acts of 1889, "in relation to indigent and other apprentices," does not confer jurisdiction upon the clerk of the court, under the facts of this case.

3. It does not appear that the child is a proper person to be bound out under either of the five cases mentioned.

4. The mother, if a suitable person, is entitled to the care and custody of the child, even though there be others more suitable.

THIS is an appeal from a judgment of *Gilmer, J.*, rendered at November Term, 1889, of the Superior Court of STOKES County, affirming the judgment of the clerk of the Superior Court, refusing to grant the application of the petitioner to have her infant daughter, (329) Mary E. M. Calhoun, aged eleven years and five months, apprenticed to her husband, John H. Ashby, and apprenticing said infant to defendant.

The petition was filed 6 May, 1889.

Upon the hearing of the petition before the clerk, John H. Page filed an answer, setting forth:

1. That he has had the care and custody of said Mary E. M. Calhoun for the last several years, and has raised her to the present age, and now objects to surrendering her to any person.

2. That said John Ashby, under the circumstances, would not be a suitable person to bind said child to.

3. That said James Page hereby applies to have said child apprenticed to him, and thinks, under the circumstances, he ought to be entitled to her, which he hopes to be able to show.

Afterwards, the clerk rendered the following judgment: "This cause coming on for a hearing, and after a full investigation of the matter, and having all the evidence in said cause, and considering the same, I decline to apprentice or bind said Mary E. M. Calhoun to John Ashby.

"I further find that the child has a good home with James H. Page, and, therefore, think him to be the most suitable person to receive and care for said child. I therefore apprentice her to him. It is further adjudged that each party pay their own costs."

From this judgment the "plaintiff appealed to the Superior Court, and his Honor, upon the hearing before him, rendered judgment in the defendant's favor, affirming the judgment of the Superior Court clerk. His Honor found only the facts set forth in the judgment."

From this judgment the plaintiffs appealed to the Supreme Court and assigned as errors—

(330) 1. That, upon the facts, the custody of the infant should have been awarded to the said John H. Ashby.

2. Upon the facts admitted in the pleadings, and those found in the judgment, the child should, in law and justice, have been delivered to the petitioner as a matter of right, or its custody bestowed upon the said James H. Ashby, as requested by her in her petition.

R. B. Glenn for plaintiff.

C. B. Watson for defendant.

DAVIS, J. The judgment of the court below seems to have been based upon the assumption that it was within the discretion of the court to apprentice the child to "the most suitable person to raise and care" for her, and provide for her "a good home," for these are the only facts found. This is a misapprehension of the law.

Chapter 169 of the Acts of 1889, "in relation to indigent and other apprentices" (by which the present case is governed), authorizes the clerk to apprentice (1) "All orphans whose estates are of so small value that no person will educate and maintain them for the benefit thereof; (2) all infants whose fathers have deserted their families and been absent six months; (3) any poor child who is, or may be, chargeable to the county, or who shall beg alms; (4) any child who has no father, and the mother is of bad character, or suffers her children to grow up in habits of idleness, without any visible means of obtaining an honest livelihood; (5) all infants whose parents do not habitually employ their time in some honest, industrious occupation."

The only facts found are set out in the judgment, and they do not bring Mary E. M. Calhoun within any one of the five clauses mentioned in the statute, and it does not appear from them that she is a proper subject to be bound out at all. If the mother be a suitable per-

(331) son, and the child does not come within any of the clauses mentioned, she is entitled to its custody, even though some other may be "more suitable." *Mitchell v. Mitchell,* 67 N. C., 307.

Error.

Cited: S. c., 108 N. C., 7; *Newsome v. Bunch,* 144 N. C., 17; *In re Jones,* 153 N. C., 314.

JOHN A. McLAURIN, ADMINISTRATOR, v. JOHN A. McLAURIN ET AL.

Special Proceedings—Real Estate—Assets—Final Decree—Motion in the Cause—Removal of Administrator—Jurisdictional Functions of Clerk—Irregularities.

1. Where, in special proceedings upon petition to sell lands for assets, there had been an order of sale, sale had been made, duly reported and confirmed, and the commissioner authorized to make title to the purchaser: *Held*, that this was a final decree.
2. Such decree will not be set aside upon motion in the cause, it not appearing that there was any substantial irregularity, but must be attacked in an independent action regularly constituted for this purpose.
3. It is improper to join a motion to remove an administrator to such a motion. The clerk, on questions of removal, exercises a jurisdictional function as clerk, while the other is a special authority conferred upon him by statute.
4. Final judgments may be set aside upon irregularities shown on motion in the cause made in apt time.

THIS was a motion in special proceedings, heard upon appeal from the judgment of the clerk of the Superior Court at Fall Term, 1889, of CUMBERLAND Superior Court, before *MacRae, J.*

The special proceeding was brought by the plaintiff administrator to obtain a license to sell lands of his intestate to make assets to pay debts of the latter. The heirs at law of the intestate were regularly made parties defendant. The petition alleged, particularly, that the personal assets were insufficient to pay the debts of the intestate. (332) The court made an order directing a sale of the land, for cash, by the plaintiff, as commissioner and administrator. The land was sold by him in pursuance of the order, and he made report that he had sold the same for cash, and that it was sold for a fair price. Thereafter, the court, on 9 March, 1889, made an order, of which the following is a copy:

"This cause coming on to be heard, and it appearing that the sale was made in pursuance of the order heretofore made, after due advertisement, as per report of John A. McLaurin, commissioner; and it being made to appear from proper evidence that the land brought a fair price, and no objection having been filed within the time prescribed by law, now, on motion, it is adjudged and decreed that the report of John A. McLaurin, commissioner, and the sale of the lands as therein reported, be in all respects confirmed; and the said McLaurin, commissioner, is authorized and directed to make title to the purchaser or purchasers upon payment of the purchase money."

Afterwards, on 31 August, 1889, one of the defendants—the appellant—moved to set aside the order next above recited, and other interlocutory orders preceding it, for suggested irregularities, for fraud on the part of the plaintiff administrator in procuring such order, and also to remove the plaintiff from his office as administrator. He supported his motion by his affidavit, in which he set forth fully the principal grounds thereof.

The plaintiff moved to dismiss the motion on the grounds: First, for that the same charges fraud, and this court has no jurisdiction; second, for that the sale has been duly reported and confirmed, and if the defendant M. E. McLaurin (the appellant) desires to attack the same, it can only be done by an independent action; and third, because two separate and distinct causes of action have been improperly joined.

(333) The court (the clerk) refused to dismiss the appellant's motion, and the plaintiff appealed to the judge, who reversed the order of the clerk, and directed that the motion of the appellant be dismissed, etc., basing his judgment upon the grounds: "First, that there had been a final judgment in the proceedings to sell the lands for assets, and the said proceedings are no longer pending; that the defendant, M. E. McLaurin, seeks to have the sale and order of confirmation set aside upon the ground of fraud—this can only be accomplished by an independent action, and not by a motion in the cause; second, that the motion to remove the administrator, of which the clerk has jurisdiction, is improperly joined with the proceeding to vacate the sale and confirmation thereof."

From this judgment the complaining defendant, having excepted, appealed to this Court.

No counsel for plaintiff.
T. H. Sutton for defendants.

MERRIMON, C. J., after stating the case: The special proceeding in this case is in the Superior Court, and the clerk thereof, in making the orders complained of, was acting as, and for, that court, and not exercising his own jurisdictional functions, as he might do in matters of probate and other matters as to which he has special jurisdiction conferred by the statute (The Code, secs. 102-116). Neither the clerk, acting for the court in vacation, nor the court—judge in term-time—had authority in the special proceeding to remove the administrator. Separate appropriate application for such removal should have been made to the clerk, exercising his jurisdictional authority as pointed out in *Edwards v. Cobb,* 95 N. C., 4, and the cases there cited. The court,

therefore, properly refused to entertain the motion to remove the plaintiff administrator.

The judgment complained of, and the proceedings leading to (334) and underlying it, might be set aside upon proper application of a party within a reasonable time, for any material irregularity therein, although the special proceeding be ended. And if such proceeding be not ended, any proceeding, order or judgment thereof affected by fraud, might, upon proper application therein, be declared void, and set aside on that account. It would be otherwise, however, as to such fraud, if the proceeding were ended. In that case the fraudulent judgment could be attacked only by a separate, independent action. This is settled by many decisions. *Peterson v. Vann,* 83 N. C., 118; *England v. Garner,* 84 N. C., 212; *Thompson v. Shamwell,* 89 N. C., 283; *Williamson v. Hartman,* 92 N. C., 236; *Fowler v. Poor,* 93 N. C., 466; *Burgess v. Kirby,* 94 N. C., 575; *Syme v. Trice,* 96 N. C., 243; *Mock v. Coggin,* 101 N. C., 366.

It does not appear that there was any irregularity affecting materially the substance of this special proceeding. It was brought, and, so far as appears, conducted as prescribed by the statute applicable, and according to the course and practice of the court. The court, therefore, properly declined to set the judgment aside for irregularity.

But the appellant's counsel earnestly contended on the argument here that the special proceeding is not ended by a final judgment therein, and therefore, the appellant should be allowed, by a motion or petition in the cause, to attack the order of sale, the sale and the judgment confirming the same, for the alleged fraud of the plaintiff, as specified in the affidavit produced in support of his motion. We think this contention not well founded. The order of sale, the sale of the land, the report thereof to the court, and the judgment confirming the same, settled, disposed of, and concluded the subject-matter of the special proceeding—nothing material remained to be done but to enforce the final judgment. All the proper parties being before the court, its purpose was to grant a license to the plaintiff to sell the land specified of the intestate to make assets to pay debts of the latter. The (335) license, in the course of orderly procedure, was granted, the sale was made and confirmed, and the commissioner directed to make title. That was the orderly end—the conclusion of the matter to be litigated, considered and determined.

A final judgment in an action or special proceeding, does not imply, or intend, that no further motion, order, judgment or other appropriate proceeding shall not be made and had to enforce it. It implies that the cause of action—the subject-matter of litigation—as to its merits, has

been litigated, heard, considered, settled, determined and concluded by the court having jurisdiction of the parties and the cause of action. Hence, it was said, in *Fleming v. Roberts,* 84 N. C., 532: "But, aside from the unambiguous terms in which the determination of the cause is expressed, where a decree decides that the whole merits of a cause without any reservation for further directions for the future judgment of the court, that constitutes a final decree; and after it has been pronounced, the cause is at an end, and no further hearing can be had." *Latta v. Vickers,* 82 N. C., 501; *Peterson v. Vann,* 83 N. C., 118; *Syme v. Trice,* 96 N. C., 243; *Smith v. Fort,* 105 N. C., 446.

The rule of practice is that a final judgment affected adversely by irregularity in the course of action, may be set aside by a simple motion in the cause, if made within a reasonable time; but after final judgment, although the action be not ended, for the purpose of enforcing and giving effect to the same it can be attacked for fraud only by an independent action. Irregularity in actions is ordinarily simple and may usually be readily disposed of by mere motion, but to attack a final judgment is very serious and attended generally with considerable complication of facts, and should be litigated by proper pleadings in an action brought for the purpose. Two or three cases may be found (336) in which it was held that a final judgment might be attacked for fraud by a motion in the cause, but the prevailing rule of practice is as stated above, as the cases cited, and others not cited, abundantly show. It may be added, that, in some cases, it is difficult to determine when the judgment is final, and this has given rise to some conflict of decisions. In the present case, however, it is clear that the judgment confirming the sale of the land was final, although some possible motion or further action might be taken to give it effect. It is quite as clear that the appellant's cause of complaint is that the sale of land was fraudulent, and the judgment confirming the same was procured by the fraud of the plaintiff. The remedy is by an independent action and not by a motion.

Judgment affirmed.

Cited: Bost v. Lassiter, 105 N. C., 497; *Carter v. Rountree,* 109 N. C., 30; *Everett v. Reynolds,* 114 N. C., 368; *Smith v. Gray,* 116 N. C., 314; *Murray v. Southerland,* 125 N. C., 177; *Tuttle v. Tuttle,* 146 N. C., 492; *Hall v. Artis,* 186 N. C., 107.

M. A. McEACHIN ET AL. v. DUGALD STEWART.

Trustee—Conversion—Mortgage—Fraud—Cause of Action—Demurrer —Pleadings—Cumulative Remedies.

1. Where the defendant, a clerk of the Superior Court, being charged by order of court with the investment of a fund for the benefit of certain parties, loaned it to his brother upon a third mortgage, and took the money back in payment of a debt due him by his brother on a prior mortgage: *Held*, that in equity the fund could be followed into his hands.
2. When, in addition to the above facts, it was alleged that the defendant caused the mortgage to be foreclosed, and, in effect, bought at the sale at a sum less than sufficient to pay the first two mortgages: *Held*, there were sufficient allegations to raise an issue of fraud, and that they constituted a good cause of action.
3. When pleadings are substantially sufficient, a demurrer will not be sustained.
4. The existence of other remedies against the defendant, as in this case, does not impair the one chosen.

THIS was a civil action, tried at Fall Term, 1889, of RICH- (337) MOND Superior Court, before *Shipp, J.*

In a special proceeding lately pending in the Superior Court of the county of Richmond, brought to compel partition of the lands therein specified, the court, among other things, adjudged that a certain fund of $500 belonged to the plaintiffs, and directed that the same be safely invested for their benefit, as alleged and explained in the complaint in this action, the material parts whereof are as follows:

The plaintiffs, complaining of the defendants, allege:

1. That the plaintiff M. A. McEachin is the mother of the other plaintiffs, except John B. McNeill, who intermarried with his co-plaintiff Sallie F., daughter of plaintiff M. A., before the commencement of this action.

3. That on account of the interest of said Margaret A. McEachin in said land, it being a life-estate, and on account of the interest of her children therein, her coplaintiffs in this suit, their interest being "in fee" after the falling in of the "life-estate," such proceedings were thereupon had in said partition suit, instituted in the Superior Court of Richmond County as aforesaid, and entitled as aforesaid, as that at the Spring Term, 1878, of the Superior Court of Richmond County, an order was made directing Dugald Stewart, who was then clerk of the Superior Court of Richmond County, and defendant herein, to invest said sum of five hundred dollars. The said sum of five hundred dollars,

charged for equality of partition, has been paid into the hands of Dugald Stewart, clerk of the Superior Court for Richmond County. It was ordered by the court that the said Dugald Stewart, clerk of the Superior Court, invest either in real estate or United States bonds said sum in some safe securities, and receive and pay over the interest
(338) annually to the said Margaret Ann McEachin during her life, and after her death to such of her children as may be living at the time of her death. All orders previously made in reference to the investment of this fund in conflict with this order were revoked.

4. That by virtue of, and under said order, said defendant, Dugald Stewart, then clerk of the Superior Court of Richmond County, invested said sum of five hundred dollars in a mortgage on lands set out therein, situate in Richmond County, North Carolina, the mortgagor therein, A. Stewart, being a brother of said defendant, Dugald Stewart. The said mortgage bore the date 24 March, 1880, and was recorded in Richmond County 17 May, 1880.

5. That before that day, viz., on 2 November, 1877, said Angus Stewart (brother of defendant Dugald Stewart), and wife Elizabeth A., executed and delivered their bond and mortgage for $748.50, to secure that amount of money to one James C. McEachin, the said mortgage conveying the same land set out and conveyed in mortgage of 24 March, 1880, referred to in article four of this complaint, this being the prior incumbrance on the said land.

6. That on 1 November, 1878, the said A. Stewart (brother of Dugald Stewart, defendant herein) and his wife Elizabeth A., executed and delivered their mortgage deed to Dugald Stewart, defendant herein, for the consideration of one thousand dollars, as set out therein, the said mortgage conveying the same lands set out in the mortgages above referred to in this complaint.

Plaintiffs, further complaining, say: That they are informed and believe, and therefore they aver, that the said five hundred dollars, ordered by the court to be invested, was paid on the note and mortgage held by said J. C. McEachin against Angus Stewart and wife, which was a first lien by said defendant, Dugald Stewart, said sum being paid on said mortgage of 24 March, 1880, in fraud of the rights of
(339) plaintiffs, and in violation of the trust imposed by order of the court.

8. That a suit was instituted in the Superior Court of Richmond County, on the ..... day of ....., 188...., wherein E. A. Stewart, wife of Angus Stewart, who had before that time deceased, and others, his heirs, were plaintiffs, and J. C. McEachin, Dugald Stewart *et al.*, de-

fendants, and thereupon such proceedings were had as that at September Term, 1886, of the Superior Court of Richmond County, an order was made confirming the report of a commissioner who had been appointed to make sale of the lands incumbered by the mortgages herein set out, the said proceedings being in the nature of a foreclosure suit.

Plaintiffs further state that the purchase money arising from said sale was insufficient to pay any portion of the five hundred dollars secured by said mortgage, and that the whole of it was applied to the two prior mortgages, herein set out, less costs, as plaintiffs are informed and believe.

9. Plaintiffs, further complaining of the defendant Dugald Stewart, allege that the purchaser at the commissioner's sale of said lands was John W. Cole, whose bid was $200, and which said sale was confirmed, and that said Cole was directed and instructed to bid at said sale by the defendant Dugald Stewart, and acted in the said transaction and sale as the agent and was the agent of said defendant Stewart, to buy the land so mortgaged for Stewart, as plaintiffs are informed and believe.

10. The plaintiffs were not parties to said foreclosure proceedings, and that they were wronged and defrauded by said Dugald Stewart in purchasing the trust property at the commissioner's sale for his own benefit, to the prejudice of the $500 investment mortgage held in trust by him for these plaintiffs, and by his payment of $500 to James C. McEachin on 24 March, 1880; and, further complaining, plaintiffs state that this action of Stewart, in making the investment of the (340) $500, as is herein set out, and his payment of the $500 as above stated, and in his purchasing at the aforesaid sale, was without their consent or agreement.

12. That after the confirmation of the sale of the mortgaged premises herein set out, the purchase at said sale by John W. Cole, the title to said property, by order of the court, was made to said John W. Cole, who immediately conveyed same to Dugald Stewart, the real purchaser at said sale, as they are advised and believe, who now holds and claims same under said deed.

Wherefore, plaintiffs demand judgment against said defendant, Stewart:

1. That he be ordered to pay into the office of the clerk of this court $500, with the interest due thereon from the date of the last payment of interest, which was on the ..... day of ....., 188.....

2. That the lands set out in the mortgage exhibits hereto attached be charged with the $500 paid on the James C. McEachin mortgage by said

D. Stewart on 24 March, 1880, and that the plaintiffs be subrogated to the lien of James C. McEachin on said lands in the hands of Dugald Stewart to the extent that said McEachin's mortgage was paid by plaintiff's money, and with the interest thereon since the last payment of interest; for costs, and for such other relief as is appropriate.

The defendant Dugald Stewart demurred to the complaint, and assigned grounds of demurrer as follows:

"1. That the complaint does not state facts sufficient to constitute a cause of action, because the complaint does not state that the said D. Stewart, in making the investment of the money of plaintiffs, as stated in the complaint, acted imprudently nor that the said Stewart did not exercise due care and diligence in making said investment, nor that the security taken by him for the loan of plaintiffs' money was at
(341) the time it was taken insufficient or inadequate, nor that it became insufficient or inadequate by the negligence or want of due care on the part of said Stewart.

"2. That plaintiffs allege that said Stewart defrauded them, without alleging any facts constituting the fraud.

"3. The plaintiffs allege that said Stewart bought at the sale of the lands by his agent Cole in fraud of the rights of plaintiffs, without alleging in what the fraud consisted, and without alleging any facts showing how plaintiffs were injured or defrauded.

"4. That, as far as appears from the complaint, the defendant Stewart has not committed any breach of trust, or any act injurious to the plaintiffs' rights.

"5. That the complaint does not allege that D. Stewart is insolvent, or that the sureties on his official bond are insolvent.

"6. That the plaintiffs' remedy, if they have any, must be against D. Stewart or by action on his official bond, and the court cannot charge the land with the payment of the debt."

The court sustained the demurrer, and the plaintiffs, having excepted, appealed.

T. A. McNeill for plaintiffs.

J. D. Shaw, P. D. Walker and A. Burwell for defendants.

MERRIMON, C. J. For the present purpose the allegations of the complaint must be accepted as true. It would be better if they were in some respects fuller, more explicit and orderly than they are; but the court can certainly see by the complaint, taken as a whole, that a cause of action is alleged with sufficient certainty to enable it to give the judgment demanded, or some other appropriate judgment. Moreover,

it gives the defendant such information in regard to the cause of action alleged as will enable him to make any defense he may (342) have. If, in some possible respect, he may desire a more explicit allegation, he may ask the court to require it to be made. When a pleading is substantially sufficient, it should be upheld. While the rights of parties in pleading should be carefully recognized and protected, merely captious and vexatious objections should not be tolerated, much less encouraged. It is better and just to meet the merits of the matter in litigation as promptly as practicable.

It is alleged, in substance, in the complaint, that the court, having control of five hundred dollars belonging to the plaintiffs, by proper order, directed the appellant defendant, as clerk of the court, to "invest either in real estate or United States bonds, said sum, or in some safe securities, and receive and pay over the interest," etc.; that he did not observe this order and so invest the money; that, on the contrary, he fraudulently, and for his own purposes and benefit, loaned the money to his brother, taking a third mortgage of a tract of land as security therefor, he having a second mortgage of the same land to secure a debt of his own, and using the money of the plaintiffs to discharge, in large part, the first mortgage debt in favor of his second mortgage; that afterwards he procured his own mortgage to be foreclosed, purchasing the land under the judgment of foreclosure, through his agent, at a price much less than sufficient to pay his own mortgage debt, the mortgagor being his brother, and insolvent, whereby the plaintiffs were injured, etc.

The facts stated informally, but sufficiently in detail, imply more than mere evidence of fraud—taken in connection with the nature of the cause of action, the duty of the appellant under the order directing him to invest the money, the allegations of the tenth paragraph of the complaint, they imply a charge of fraud against the defendant appellant, although such fraud is not in terms in the orderly (343) connection, formally alleged.

The grounds of demurrer assigned are not sustained by what appears and fails to appear in the complaint. It is alleged, largely in terms, and by the strongest implication, that the appellee did act, not only improvidently, but dishonestly in his own interest in purporting to make the investment. The facts constituting the alleged fraud—that appellee purchased the land in fraud of the rights of the plaintiffs, and was false to the trust with which he was charged—are stated informally, much in detail. The court can readily see them and determine their legal import and application.

No doubt the plaintiffs might have another or other remedy than that they are now prosecuting. But if the allegations of the complaint are well founded, and this clearly appears, they have the right to follow the fund and charge the land embraced by the mortgages mentioned with the money due them, they sustaining, in effect, the relation of first mortgagees to it because through, and by means of, the alleged fraud of the appellee, their money was used to relieve the land of the first mortgage for his benefit. This rests upon the well settled principle of equity, that when the trust money can be clearly traced, a court of equity will charge a trust upon the land in which it has been invested in favor of the person entitled beneficially to the money. The *cestui que trust* is not bound to thus follow the fund; he may do so. *Freeman v. Cook,* 6 Ired. Eq., 373; *Bank v. Simonton,* 86 N. C., 187; *Murray v. Lylburn,* 2 John., Ch. R., 441; *Oliver v. Peate,* 3 How. (U. S.), 333; *May v. LeClaire,* 11 Wall., 217; 2 Story Eq. Jur., sec. 1210; Ad. Eq., 143.

The demurrer, for the purpose of the pleading, admits the facts as alleged in the complaint. What we have said is based upon the supposition that the facts as alleged are true, but it may turn out that they are not.

(344) There is error. The judgment must be reversed, and judgment entered overruling the demurrer, with leave to the defendant appellee to answer. To that end, let this opinion be certified to the Superior Court. It is so ordered.

Error.

Cited: McEachern v. Stewart, 114 N. C., 372; *Blackmore v. Winders,* 144 N. C., 216; *Bank v. Duffy,* 156 N. C., 87.

A. C. AVERY, EXECUTOR, v. J. R. PRITCHARD ET AL.

Perfecting Appeal—Dismissal—Failure to Print—Call of the District—Motion.

1. Where a case upon appeal was settled and filed in the clerk's office on the first day of November, 1889, and the transcript on appeal docketed 30 November in the Supreme Court, the call of cases of the district being on 2 December, a motion for dismissal made by appellee for failure to print should be granted.

2. An appeal from a judgment rendered before the commencement of the term of this Court must be docketed at such term before the conclusion of the call of the district.

3. There is no requirement, as a prerequisite for perfecting appeals, that the term at which the judgment was rendered should end ten days before the commencement of the term of this Court. The head-note in *Gregory v. Hobbs*, which so indicates, is misleading.

4. The law favors promptness and diligence in sending up appeals, and, when docketed in time, appeals stand for argument even in cases tried below during the same term of the Supreme Court (Rule 5), though the rule allows the appeal to be taken to the next.

(AVERY, J., did not sit.)

THIS was a civil action, tried at September Term, 1889, of MITCHELL Superior Court, before *Philips, J.*

The facts of this case sufficiently appear in the opinion.

J. B. Batchelor and John Devereux, Jr., for plaintiff.
George V. Strong for defendants.

CLARK, J. This cause was tried at September Term, 1889, (345) of Mitchell Superior Court, which began 9 September, 1889, and adjourned on 21 September. The Fall Term of this Court began on 30 September, 1889. The "case on appeal" was settled by the judge and filed in the office of the clerk of the Superior Court 1 November. The transcript on appeal was docketed in this Court 30 November, and the call of causes from the Tenth Judicial District, to which this case belonged, began on 2 December. This appeal was reached regularly in its order 3 December, and was dismissed, on motion of appellee, for failure to have printed the parts of the record required by Rules of this Court, 28 and 29.

The necessity for this rule, and the authority of the Court to make it, have been often affirmed. The Court will not reiterate what has been so often said. The subject has been lately considered in *Horton v. Green*, 104 N. C., 400, to which we merely refer.

The case having been tried at a term of the court held before the commencement of the Fall Term of this Court, the transcript on appeal was required to be docketed before the close of the call of causes from that district. If not docketed by that time, the appellee would have had the right to docket and dismiss. Rule 17 of this Court. The appellee not only had the right to require the transcript on appeal to be docketed in such time, under penalty of dismissal, but to have it in such plight, as to printing the record, that the Court, under the rules, could permit it to be argued when reached.

The appellant insists, however, that, as the term of court at which the cause was tried expired within ten days before the beginning of the

Fall Term of this Court, the appeal was not required to be docketed at said term, and relies upon *Gregory v. Hobbs,* 92 N. C., 39.

(346) The requirement is explicit that an appeal from a judgment rendered before the commencement of a term of this Court must be docketed at such term before the conclusion of the call of the district to which it belongs. The case cited does not, as contended by appellant, alter this by permitting the appeal to be taken to the second term of the Supreme Court held after judgment rendered, when the first term of this Court begins within ten days after the trial. The head-note does so indicate, but it is misleading. It lays down an exception to a rule as the rule itself. That case was from the First District. The Court held that, as the statutory ten days allowed for perfecting an appeal by filing a bond had not expired when that district was called, this was a good excuse for non-compliance with the requirement to docket the case at that term. But, in the case now before us, the statutory time for perfecting the appeal had expired before the district was called and the transcript on appeal had been docketed as required.

It appears from affidavit filed by appellee, and not denied, that the counsel for appellant was in attendance on this Court during the call of said district, and left before this case was reached, saying his client had not furnished money to print the record, and he could not resist the dismissal of the appeal. The appellant offers no affidavit that he had furnished the money for such purpose, or had taken any steps whatever to have the record printed. No cause to reinstate is shown. It is a case of very gross negligence, at the least, if not a wilful and intentional disregard of the rules of this Court.

Even had the cause been tried below during a term of this Court, the appellant here would not be entitled to this relief. While such cases are not required to be docketed till the term of this Court which begins next after such judgment is rendered, the law not only favors, but exacts, promptness and diligence in sending up and prosecuting appeals. The Code, sec. 550 (as amended by chapter 161, Acts 1889), requires

(347) appellant to serve his case on appeal in ten days, and the appellee is allowed five days to serve countercase. The appellant is required "immediately" to request the judge to settle the case, who shall appoint a time and place, which time shall not be more than twenty days from the receipt of such request. Section 551 requires the clerk of the Superior Court to send up the transcript to this Court within twenty days after the "case on appeal" has been filed in his office. If, by reason of compliance with these provisions of the statute, "the transcript on appeal, in a case tried during a term of this Court,

is docketed at such term before the perusal of the district to which it belongs, it stands for argument, in its regular order, at that term." Rule 5 of the Rules of Court.

Motion denied.

Cited: Porter v. R. R., post, 479; *Sondley v. Asheville,* 110 N. C., 90; *Stainback v. Harris,* 119 N. C., 108; *Critz v. Sparger,* 121 N. C., 284; *Caldwell v. Wilson, ibid.,* 424; *Clegg v. R. R.,* 132 N. C., 293.

THE UNION NATIONAL BANK OF CHICAGO v. J. W. MILLER ET AL.

Telegram—Attachment—Complete Control—Acceptance—Judge's Charge.

1. To a telegram offering to sell certain goods, a reply was made naming the terms of acceptance, and adding: "Must have reply early tomorrow." The reply closing the sale came and was delivered late in the afternoon, and after a levy of attachment had been made upon the goods. The court below held that the contract was complete when the telegram was sent from Chicago, and that the title to the property passed before the conversion of attachment, and so charged the jury: *Held,* to be error, it not appearing that the telegram was sent "early" in the day.
2. As to whether the time of *receiving* or the time of *sending* the telegram should govern, *quære?*
3. When a definite time is named by the proposer for the acceptance of his proposition, it comes to an end of itself if not accepted within that time.

THIS was a civil action for the value of property, tried at the (348) Fall Term, 1889, of MECKLENBURG Superior Court, before *Connor, J.*

The facts sufficient for understanding the case are as follows:

Gregg, Garvey & Co., of Chicago, sent from that place, 25 November, 1888, the following telegram to John VanLandingham: "Wire best offer for sacked middlings No. 2324, now at Charlotte." To which VanLandingham replied, 26 November: "Nineteen dollars per ton; must have reply early tomorrow." Gregg, Garvey & Co. answered also by telegram, 27 November: "Offer accepted." This was received at Charlotte at 4:29 p.m., and delivered at 5:34 p.m.

The middlings in question had been previously shipped to Charlotte by Gregg, Garvey & Co. to their own order, but intended for John W. Miller & Co., upon whom they drew a draft, endorsed in blank, which they sold to the plaintiff, a bank doing business in Chicago. Miller &

Co. did not pay the draft. The goods were attached on 27 November, after the last telegram from Gregg, Garvey & Co. was sent, but before it was received.

The other facts sufficiently appear in the opinion.

P. D. Walker for plaintiff.
C. W. Tillett for defendant.

SHEPHERD, J. The only question necessary to be considered in disposing of this appeal involves the correctness of his Honor's instruction, that the title to the property had, by reason of the telegraphic correspondence, passed out of the plaintiff and into VanLandingham at the time of the levy of the attachment.

The property was in Charlotte in the possession of a common carrier, and on 26 November, 1888, VanLandingham made the following (349) offer by telegraph to the plaintiff's agent at Chicago:

"CHARLOTTE, N. C., 26 November, 1888.

To Gregg, Garvey & Co.:

Nineteen dollars per ton. Must have reply early tomorrow.

JNO. VANLANDINGHAM."

On the next day at 5:34 P. M. VanLandingham received a telegram from the said agents accepting the offer. This latter telegram was sent from Chicago before, but was not received by VanLandingham until after the levy of the attachment.

His Honor held that the contract was complete when the telegram was sent from Chicago, and the title to the property having passed to VanLandingham before the alleged conversion, the plaintiff could not recover.

In the cases of *Creek v. Cowan,* 64 N. C., 743, and *Ober v. Smith,* 78 N. C., 313, it was held that where there was a delivery to a carrier in pursuance of an "unconditional and specific order" the contract was complete, but it has never been distinctly decided in this State whether, in the absence of such a delivery of the property, the mere dispatching of an acceptance by post or telegraph has the effect of consummating a contract at the time of such dispatching. Upon this point the authorities are conflicting. It is, however, unnecessary to decide the question in this case, for, granting the affirmative of the proposition, we are of the opinion that under the peculiar terms of this correspondence, and in view of the testimony, the court was not warranted in charging the jury that the title vested in VanLandingham at the time the tele-

gram was sent. It does not appear that it was sent early in the (350) day, according to the terms of the offer, and it was incumbent on the defendant to have shown this fact before he could avail himself of the principle contended for.

"In our law the effect of naming a definite time in the proposal is simply negative and for the proposer's benefit; that is, it operates as a warning that an acceptance will not be received after the lapse of the time named. In fact, the proposal so limited *comes to an end* itself at the end of that time, and there is nothing for the other party to accept." Pollock Cont., 9; *Larmon v. Jordan,* 56 Ill., 204; *R. R. v. Bartlett,* 3 Cush., 224; *Mactiers, Admr., v. Frith,* 6 Wend., 103; *Cheny v. Cook,* 7 Wis., 413.

The principle is well illustrated by the following extract from the opinion of the Court in *Maclay v. Harvey,* 90 Ill., 525: "It was said by the Lord Chancellor, in *Dunlap v. Higgins* (1st House of Lords Cases, 387), that where an individual makes an offer by post, stipulating for, or by the nature of the business, having the right to expect an answer by return of post, the offer can only endure for a limited time, and the making of it is accompanied by an implied stipulation that the answer shall be sent by return of post. If that implied stipulation is not satisfied, the person making the offer is released from it. When a person seeks to acquire a right, he is bound to act with a degree of strictness, such as may not be required where he is only endeavoring to excuse himself from a liability." This is regarded as a leading case on the question of acceptance of contract by letter, and the language quoted we regard as a clear and accurate statement of the law as applicable to the present case. It is clear here that the nature of the business demanded a prompt answer, and the words, "you will confer a favor by giving me your answer by return mail," do, in effect, "stipulate" for an answer by "return mail." The same principles apply to correspondence by telegraph. *Trevor v. Wood,* 36 N. Y., 306.

Under this view of the law, which is well sustained both by (351) reason and authority, the requirements of the offerer, Van-Landingham, "that he must have a reply early tomorrow," cannot be regarded otherwise than as a stipulation for an acceptance within that time, and as the defendant has not shown a compliance with such stipulation, it must follow that there was error on the part of his Honor in charging the jury that the mere sending of the acceptance before the levy operated to transfer the title. The offer was limited to early in the day. The acceptance was not received until late in the evening. Even conceding that the contract would be complete from the sending

of the dispatch, there is, as we have said, no testimony to show that it was sent within the time limited by the offer.

The title, therefore, did not pass. Benj. on Sales (3 Am. Ed.), 48, note. For these reasons, we are of the opinion that there should be a new trial.

Error.

R. B. McGEE v. W. P. CRAVEN.

Contract for Sale of Land, Written and Verbal—Deed—Purchase-money—Consideration—Charge.

1. In an action to recover the balance of purchase-money due on land, the issue was as to whether plaintiff agreed to remit a part of the purchase-money if there should be fewer than the given number of acres: *Held*, that the court below properly refused to admit testimony to show the *value* of the land.
2. Where, in a contract for the sale of land, a deed passed conveying a specified number of acres, and the maker agreed, verbally, at the time of its execution, that he would make good any deficiency in the acreage: *Held*, such agreement was an inducement to the contract, and was a good defense, *pro tanto*, against the payment of the purchase-money.
3. This agreement to make good the *quantity* of land was not such as is required to be put in writing, under The Code, sec. 1554.
4. A contract respecting land may be part *verbal* and part in writing, unless the writing, by its terms, purports to embrace all the contract.

(352) THIS was a civil action, tried at Fall Term, 1889, of MECKLENBURG Superior Court, before *Connor, J.*

The plaintiff brought this action to recover $300 due by note, less $68.25, balance of the purchase-money of a tract of land sold and conveyed by him to the defendant some time before the bringing of the action.

The defendant admitted the purchase of the land by him, the execution of the deed therefor, and the execution of the note, but he alleged as a defense "that the plaintiff agreed to sell to the defendant a tract of land containing 111 acres for $900; that a deed was made and duly executed, which was supposed to contain 111 acres, and delivered to the defendant; that, at the time it was delivered, it was agreed and understood between the plaintiff and defendant that the land was to be surveyed, and that all the purchase-money should not be paid until the land was surveyed to ascertain how many acres were in said tract," etc.

The answer was amended, without objection, so that it further alleged "that, after the execution and delivery of the deed, and before the

due-bill or note in question was delivered, and before any part of the purchase-money had been paid, the plaintiff agreed with the defendant that the land in question should be surveyed, and, if there should turn out to be a less number of acres than 111 acres therein, that plaintiff would make it good to the defendant in the settlement of the purchase-money."

The court submitted these issues to the jury:

1. "Was it agreed between the plaintiff and defendant, before payment of the purchase-money, that the land should be surveyed, and that if there was less than one hundred and eleven acres, (353) plaintiff would make the deficiency good to the defendant?

2. "How many acres were there in the tract?

3. "What amount, if any, is plaintiff due defendant on account thereof?"

The evidence produced on the trial was, in material respects, very conflicting. The defendant testified, in part, as follows: "Some time about August, 1888, plaintiff met me on the place; asked me if I wanted to buy it, and asked $1,000 for it; he said it was 111 acres; I told him I would give $900; he said he would see me again, and afterwards said he would take $900; I said 'all right'; about the first of November I came to town, saw Mr. Clarkson and told him I wanted $500; he asked me how much land I had, and I told him 111 acres; he said I could get it; plaintiff afterwards went with me to Clarkson's office, and said he would bring old deed to get a description of the land; plaintiff brought his deed, which called for one hundred acres, and said he had sold off a part; Mr. Clarkson drew up the deed from plaintiff to me and the mortgage I gave for the $500; Mr. Clarkson called McGee's attention to his deed, calling for 100 acres, and McGee explained it by saying that the land was not run when the deed was made; said the original deed contained 267 acres, and parts had been sold off; Mr. Clarkson said, 'You had better have the land run'; we agreed to do so; Mr. Clarkson gave me the check; I asked McGee if it did not run out right if he would make it right; he said that he would; this was before I paid him the money; in a week or so we had the survey made; the surveyor did not give us the figures that day; we made an arrangement by which the surveyor was to leave the plot at Mr. Clarkson's office; I offered to pay the balance, and he objected; the number of acres was an inducement to make the purchase."

The plaintiff proposed to prove by one witness the value of (354) the land. Upon objection, the court rejected the proposed evidence, and the plaintiff excepted.

His Honor charged the jury that, unless there was an express agreement between the parties before payment of the purchase-money that,

if there was less than 111 acres, plaintiff would make the deficiency good to the defendant, they should answer the first issue No. That in arriving at a conclusion whether there was such an agreement, the jury should consider the whole testimony, and all the circumstances of the case, and if they should believe, by a preponderance of the evidence, that plaintiff did agree, before the purchase-money was paid to him, to make good to defendant a deficiency in the number of acres, they should answer the first issue Yes.

The jury answered the first issue Yes; the second issue 82½; the third issue $230.85.

Motion for a judgment *non obstante veredicto* by plaintiff. Motion overruled.

There was judgment for the plaintiff for a small balance found to be in his favor, and he, having excepted, appealed to this Court.

H. W. Harris (by brief) and G. F. Bason for plaintiff.
H. C. Jones and C. W. Tillett for defendant.

MERRIMON, C. J. The first exception is groundless, because the evidence proposed and rejected was irrelevant. The defendant's alleged claim did not depend upon the value of the land. Nor was it pertinent and proper to prove that the land was worth more than the price the defendant paid, or agreed to pay, for it, with a view to prove that the plaintiff did not agree to make good any deficiency in the quantity of the land embraced by the deed. In this view, the evidence (355) would only lay the foundation for a possible inference—an argument, a conjecture, adverse to the defendant—it would not legitimately prove a material fact.

The defendant alleged in the answer, substantial ground of defense, though not with such clearness and directness as he might have done. The court could see its nature, scope and purpose; the plaintiff could put it in question; it could be litigated, and the court determine and administer the right as it might appear to be. Upon application of the plaintiff, or *ex mero motu*, the court might have required the defendant to make his allegations more definite.

The defense alleged was, in substance and effect, that the plaintiff contracted to sell to the defendant a tract of land, designated, containing one hundred and eleven acres, for the price specified; that in this connection, and as part of the contract of sale, he agreed, at the time the deed of conveyance was executed by him, that if the tract of land did not contain the number of acres mentioned, he would account to the defendant for the deficiency—"make it good to the defendant in the settlement of the purchase-money"—the deficiency, if any, to be ascer-

tained by a proper survey. The amendment to the answer was scarcely necessary. It only served to make more specific the allegation that the agreement as to any deficiency in the quantity of land relied upon as a defense was distinctly made and understood by the parties at the time the deed was executed, and before the purchase-money was paid. Its purpose was to help the allegation that the agreement relied on was a part of the contract of sale, not set forth in the deed, nor put in writing. That contract, in its scope and purpose, had reference to and embraced the land—the quantity, the price paid for it, the deed of conveyance, the agreement as to any deficiency in quantity, the payment at once of part of the purchase-money, and the note for the balance thereof. These things made up its whole, and the defendant alleges the agreement as to the deficiency as a defense. The (356) agreement so, and, as alleged, was supported by the consideration of the contract of sale—that recited in the deed—because it was a constituent part of that contract, and contemplated by it. The defendant clearly did not intend to allege an agreement separate, distinct and apart from the contract of sale of land.

No objection was made to the issues submitted to the jury. They were treated as sufficient to settle the material facts. As we have said, the evidence was very conflicting, but there was evidence tending to prove the defendant's alleged defense, and it was the province of the jury to determine its weight. The court below, in the exercise of a sound discretion, might have set the verdict of the jury aside, if it deemed it against the weight of the evidence, but this Court has no such authority.

The statute (The Code, sec. 1554) did not require the agreement as to the quantity of land embraced by the contract of sale, or by the deed of conveyance, to be in writing. And such agreement may be part of a contract of sale of land not put in writing, because a contract may be partly and in some respects put in writing, and as to other parts and in other respects merely verbal. It would be otherwise, however, if the contract in writing, by its terms or nature, embraced the whole contract. *Manning v. Jones,* Busb., 368; *Sherrill v. Hagan,* 92 N. C., 345; *Michael v. Foil,* 100 N. C., 178; *Twidy v. Saunderson,* 9 Ired., 5; *Braswell v. Pope,* 82 N. C., 57; *Parker v. Morrill,* 98 N. C., 232.

Judgment affirmed.

Cited: Currie v. Hawkins, 118 N. C., 595; *Quin v. Sexton,* 125 N. C., 447, 452; *Brown v. Hobbs,* 147 N. C., 77; *Stern v. Benbow,* 151 N. C., 462; *Buie v. Kennedy,* 164 N. C., 297; *Henofer v. Realty Co.,* 178 N. C., 585; *Duffy v. Phipps,* 180 N. C., 314; *Green v. Harshaw,* 187 N. C., 222.

(357)

GEORGE THOMPSON v. ROSA B. SMITH ET AL.

Married Women—Written Contract of Husband—Separate Estate—Charge—Privy Examination.

1. A writing signed by a married woman, with the consent of her husband in writing, expressly charging her statutory personal estate, is good without any beneficial consideration coming to her.
2. But she cannot bind her statutory separate real estate by any contract unless her privy examination is taken.
3. This case is governed by that of *Farthing v. Shields*, decided at this term of the Court.

THIS was a civil action, tried before *Connor, J.*, at August Term, 1889, of MECKLENBURG Superior Court.

The parties waived a jury, and the court found the facts.

It was admitted that the defendant, Rosa B. Smith, a *feme covert*, with her husband, executed the note described in the complaint, at the time therein set forth, and that she had, at the time the judgment hereinafter referred to was docketed, and still has, real estate in this county.

The plaintiff introduced in evidence the judgment docket of this Court, in which is docketed a judgment in favor of plaintiff against the defendants and of which the following is a copy:

"Geo. Thompson
v.
S. P. Smith,
Rosa B. Smith.

Judg't June 27, 1887.
Princ.....$169.98
Int..... 44.19
$214.17
Costs..... 2.85

Transcript from magistrate's judgment, filed and docketed 28 June, 1887.

This judgment satisfied in full by note. This 1 July, 1887.

GEORGE THOMPSON,
By Hugh W. Harris, Attorney."

(358) The defendants offered to prove by a witness that the debt for which the judgment was given was not the debt of Rosa B. Smith, but of her husband. That the consideration of the note sued on was the same debt. His Honor excluded this testimony upon objection by the plaintiff, and the defendants excepted.

The defendants contended that the separate *real* estate of the *feme* defendant, even if the debt was her own, could not be charged with the payment of the debt due by a contract or note, such as the one set out in the complaint, but could only be charged as provided in the statute, that is, by deed of herself and husband with her privy examination. His Honor was of a contrary opinion, and held that her separate estate could be charged by such a contract or note as that set out in the complaint. To this ruling the defendants excepted. Rule for new trial discharged.

The court gave judgment for the plaintiff, as set forth in the record, and defendants excepted: (1) Because the court excluded the testimony offered by defendant; (2) because the court held that the separate real estate of the *feme* defendant was chargeable with the payment of the debt described in the complaint.

Defendants appealed to the Supreme Court.

H. W. Harris (by brief) for plaintiff.
P. D. Walker, for defendants.

SHEPHERD, J. The object of this action is to charge the statutory separate real estate of the *feme* defendant by reason of an undertaking in the nature of an executory contract executed by her with the written consent of her husband. The writing expressly charges the separate estate, and this would undoubtedly be good as to her statutory separate personal estate, even without any "beneficial consideration." *Flaum v. Wallace,* 103 N. C., 296.

But, as the complaint alleges that the *feme* defendant has only (359) real estate, the case falls within the decision of *Farthing v. Shields, ante,* 289, in which it is held that even where there is a beneficial consideration and an express charge, a married woman cannot bind her statutory separate real estate by any undertaking in the nature of a contract without privy examination. This ruling renders it unnecessary for us to discuss the several views presented by the plaintiff's counsel in his very able and elaborate brief.

Reversed.

Cited: Bank v. Howell, 118 N. C., 274.

JOHN McMILLAN ET AL. v. WILLIAM GAMBILL.

Action to Recover Land—Adverse Possession—Color of Title—Grant—Survey—Entry—Verbal Conveyance.

1. An entry was made in the entry-taker's office in Wilkes County in 1798, of lands, and they were surveyed, by virtue of a warrant issuing therefrom, in 1799. The county of Ashe, embracing the lands in question, was formed in 1800. A grant was issued in 1801 for these lands upon the said survey and entry: *Held*, such grant was not void, and was admissible in evidence to show title out of the State.

2. A., the plaintiff in an action to recover land from B., the defendant, both being heirs at law of one M., claimed under a deed from M.'s administrator to his father, and showed exclusive possession in himself and father for twenty-five or thirty years. The defendant claimed under one P., who bought, orally, of plaintiff's father, and went into possession under verbal arbitration, and that plaintiff and defendant were tenants in common: *Held*, (1) that the deed from the administrator was color of title; (2) that twenty years adverse and exclusive possession would protect against claims of tenants in common; (3) that the time between 20 May, 1861, and 1 January, 1870, should not be counted.

3. The defendant will not be allowed, for the first time in this Court, to raise questions as to whether plaintiff offered sufficient evidence to go to the jury to show the sufficiency of his possession.

(360) THIS was a civil action for recovery of land, tried before *Clark, J.*, and a jury, at Fall Term, 1888, of ASHE Superior Court.

Plaintiff introduced in support of his title, and to show title out of the State, a grant from the State to Martin Gambill for 900 acres of land in Wilkes County, entered in 1798, surveyed in 1799, and granted in January, 1801, which said grant described the land (following the description in the entry and survey) as lying in Wilkes County, from which Ashe was formed in 1800. It was in proof that said land covered the *locus in quo* within its boundaries. The defendant asked the court to exclude the grant as void. This was refused, and defendant excepted.

Plaintiff then introduced the will of Martin Gambill and deed from his administrator to plaintiff's father, James McMillan, in 1814, for the land in controversy. The plaintiff introduced evidence that his father and himself had been in sole and exclusive possession of said land, under said deed, at least twenty-five or thirty-five years within knowledge of witnesses still living.

The defendant introduced evidence that one Pugh, claiming to have bought, orally, the land from plaintiff's father, and being in possession

of it, had submitted his claim and defendant's verbally to arbitration, and it being awarded to defendant, Pugh had surrendered possession to defendant, who still holds it. No written instrument was offered to show title in Pugh, and defendant did not claim his possession was protected or ripened by lapse of time. It was admitted that plaintiff and defendant were both grandchildren and heirs at law of Martin Gambill.

The defendant asked the court to charge that the deed made by Martin Gambill, administrator, was void, and that plaintiff and defendant were tenants in common, and plaintiff could not recover, and if Pugh bought verbally from plaintiff's father, defendant was entitled to a notice to quit. The court told the jury that the deed of Martin Gambill, administrator, was color of title, and that if the plain- (361) tiff, and those under whom he claimed, had held the land solely, exclusively and adversely to all others for more than twenty years consecutively, that it would protect them against the claims of tenants in common, there being no suspension of statute by reason of coverture or infancy shown; that in making out the twenty years, the time between 20 May, 1861, and 1 January, 1870, was not to be counted; that if plaintiffs had acquired title by twenty years consecutive possession, it could only be divested by twenty years adverse possession by defendant, or by seven years possession under color of title.

Exception by defendant. Verdict for plaintiff. Judgment. Appeal by defendant.

J. N. Holding for plaintiff.
T. F. Davidson and W. C. Fields for defendant.

AVERY, J., after stating the facts: The formation of the county of Ashe, in the year 1800, did not destroy the validity of an entry covering land within the boundaries of said county, but made in the entry-taker's office of Wilkes County in 1798, and surveyed by virtue of a warrant issuing from said office in 1799; nor is a grant that issued for said land upon said survey and entry in January, 1801, void. The grant was admissible, and was sufficient, if located so as to include within its boundaries the disputed land (as to which there was no controversy), to show the title out of the State.

His Honor refused to charge the jury that a deed made by the administrator of Martin Gambill was void for all purposes, and, upon his refusal, rests the only remaining exception. Being a deed in form, it purported to pass the fee, and was unquestionably color of title. *Ellington v. Ellington,* 103 N. C., 54; *Avent v. Arrington,* 105 N. C., 377. The jury were properly instructed that, (362)

though it was shown that the State had issued a grant to Martin Gambill for the land in controversy, the plaintiff must have shown continuous adverse possession, exclusive of the time elapsing between 20 May, 1861, and 1 January, 1870, under the deed from the administrator, in order to entitle him to recover the land against the defendant, who was tenant in common with him. *Page v. Branch,* 97 N. C., 97; *Breeden v. McLaurin,* 98 N. C., 307. The exception raises only the question whether the deed was available as color of title to ripen the plaintiff's possession, if undisturbed, open, continuous and adverse for twenty years.

His Honor was not put on notice to send up all of the testimony bearing upon the length of the occupancy by plaintiff under his deed, and the defendant will not be allowed, under the rules, and the construction given to the law by this Court, to raise the question here for the first time, that there was not sufficient evidence to go to the jury to prove such possession. *McKinnon v. Morrison,* 104 N. C., 354.

There is no error.

Affirmed.

Cited: Long v. Rankin, 108 N. C., 337; *S. v. Harris,* 120 N. C., 578; *Wyman v. Taylor,* 124 N. C., 432.

J. M. COLLINGWOOD v. A. H. BROWN, ET AL.

Lis Pendens—Common Law—Notice—Deed—Registration—Subsequent Purchasers—Judgment—Parties.

1. B. commenced an action for recovery of land, in the Superior Court. Complaint and answer were filed, and judgment was obtained declaring B. the owner in fee. Previous to the commencement of the action, the defendant had executed a deed to one C., which was not recorded until after the filing of the complaint and answer: *Held,* that the judgment rendered thereon took priority over the unrecorded deed.

2. The filing of the complaint and answer describing the property and putting in issue the title to the land, and substantially containing all the requisites of a *lis pendens,* was a sufficient *lis pendens* under our statute.

3. The statute prescribes that a *lis pendens* shall be as effectual against subsequent purchasers as if they were made parties—and this, although plaintiffs had actual notice of their unrecorded deeds.

4. The title of such purchasers begins, as against the party who has taken the benefit of his purchase, only from the date of registration.

5. The common-law rule of *lis pendens* requiring, as it does, every one to take notice of what passes in a court of justice, would be effectual, as notice, in several counties, and is modified by our statute, which makes it effectual in the county where the land lies.

THIS was a civil action, tried at the Fall Term, 1889, of GASTON Superior Court, before *Connor, J.* (363)

The facts are sufficiently stated in the opinion.

R. W. Sandifer, W. A. Hoke and R. McBrayer for plaintiff.
G. F. Bason and Jones & Tillett for defendants.

SHEPHERD, J. Under the view which we have taken in this case, it will be unnecessary to consider several very interesting questions, which were argued with much ability by the plaintiff's counsel. One point alone will be sufficient to dispose of the appeal.

G. F. Bason, under whom the plaintiff claims, commenced an action in the Superior Court of Gaston County on 7 April, 1880, against the King's Mountain Mining Company for the recovery of the land in question, and filed his complaint on 28 April, 1880. An answer was filed by A. G. Curtin, president of said company, on 21 June, 1880, and on 27 April, 1885, a judgment was rendered declaring the plaintiff, Bason, the owner in fee of the said land. Previous to the commencement of the said action, to wit, on 25 November, 1879, the defendant therein had conveyed the land to the said A. G. Curtin, in trust, (364) to secure certain indebtedness of the said defendant company, but the deed was not registered until 20 December, 1880. The plaintiff claims by virtue of a sale made under this deed.

Neither he nor the trustee was made a party to the said action.

The question, therefore, is whether such a trustee, whose deed is executed by a party litigant prior to, but registered subsequent to, an action for the recovery of the land conveyed therein, is concluded by a judgment in such action.

It is provided by The Code, sec. 229, that in an action affecting the title to real property, the plaintiff may, at the time of filing his complaint, or at any time afterwards, or a defendant, when he sets up affirmative relief at the time of filing his answer, or at any time afterwards, may file, with the clerk of each county in which the property is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action and the description of the property affected thereby, and that every person "whose conveyance or incumbrance is subsequently executed or subsequently registered shall

be deemed a subsequent purchaser or incumbrancer, and shall be bound by all proceedings, taken after the filing of such notice, *to the same extent as if he were made a party to the action.*" It is very clear that our case falls within the above provisions, for, as the trustee had no title as against third persons at the time of *lis pendens,* it must follow that if he had been made a party his unrecorded deed could not have availed him.

The case of *Lamont v. Cheshire,* 65 N. Y., 31, cited by the plaintiff, cannot help him. It is true that the decision was made under a statute similar to ours, but as the statute binds only to the same *extent* as if the incumbrancer, or grantee, had been made a party to the action, and as the plaintiff, Lamont, had actual notice of the unrecorded (365) deed, it was held that, under the laws of New York, he must take subject to the same. The doctrine of actual notice in such a case does not obtain in North Carolina. *Todd v. Outlaw,* 79 N. C., 235, and the authority cited can, therefore, have no application to the question before us.

(1) The plaintiff, however, contends that The Code, sec. 229, does not apply, because the formal notice therein required was not filed, and for the further reason that "our courts have intimated that the statute only applies to foreign countries." In *Rollins v. Henry,* 78 N. C., 352; *Badger v. Daniel,* 77 N. C., 251; *Todd v. Outlaw,* 79 N. C., 235, and *Spencer v. Credle,* 102 N. C., 68, also *Dancy v. Duncan,* 96 N. C., 111, cited by the plaintiff, the lands were situated in the counties where the actions were pending, and all that the courts decided was that if, in such cases, the pleadings sufficiently indicated the property and the character of the litigation, the rule *lis pendens* would operate. It is insisted in this case that because the notice was not filed, the common law, and not the statutory rule of *lis pendens,* applies, and that there is a distinction between the two in that the former does not operate upon prior unrecorded incumbrances.

Conceding, for the argument, that the common-law rule applies, we are not prepared to recognize the distinction contended for.

It is true that the antecedent equities are not affected by the rule, but the interest of a trustee or mortgagee under an unrecorded deed is not an equity in this sense, and this is so even where there is actual notice. *Todd v. Outlaw, supra.* The title in such cases, as we have said, takes effect as against third persons only from registration, and we are of the opinion that only from that time can such a trustee or mortgagee be considered a purchaser under the rule. Such is the ruling in *Norton v. Birge,* 35 Conn., 250, which is approved by Mr. Bennett in his work on "Lis Pendens."

It is conceded that there is some conflict of authority upon (366) the subject, but it is believed that the contrary decisions are influenced in some of the states by the doctrine that actual notice of an unregistered incumbrance constitutes an equity, and that for this reason the rule does not apply. We have seen that this doctrine does not prevail, as a general rule, in this State, and any reasoning founded upon it must necessarily be fallacious.

We do not deem it necessary, however, to enter into an elaborate discussion of the various decisions upon the question, but will content ourselves with quoting the language of Mr. Bennett (section 302), whose conclusion, we think, is more in harmony with the spirit of our registry laws as construed by this Court. He says that, until the deed is recorded, "it is as though no conveyance were made. By the registry laws, it only becomes effective by filing for record or registration. If, at the time it is so filed for record, there is a pending suit, the holder of such a deed previously withheld from the record is a *pendente lite* purchaser. He stands upon no better ground than he would have occupied if his deed were executed at the moment of its recording. The question is whether, at *the time the law determines lis pendens commences,* it had become effective upon the property involved. If the recording laws make the deed void as to such claimant before record, the *lis pendens* had become effective upon the property. This is the substance of the ruling in both the cases of *Norton v. Birge,* 35 Conn., 250, and *Hoyt v. Jones,* 31 Wis., 397, and the reasoning of those courts, as well as that of Justice *Dickey* (in *Grant v. Bennett,* 96 Ill., 513) seems to me unanswerable."

In view of the fact that Curtin, the trustee, had actual notice of the suit and filed an answer therein as the president of the King's Mountain Mining Company, the remarks of *Chief Justice Dixon,* in *Hoyt v. Jones, supra,* are peculiarly appropriate. If owners will omit to record their deeds, and will keep their titles concealed, hoping thereby to bring others into difficulty and peril, it is time they were (367) made to understand that the blow intended for the title of another may recoil upon and break and destroy their own."

This case also presents a striking illustration of one of the purposes of the rule, which is to put an end to the litigation and to give due effect to the judgments of the courts. If the rule did not apply here, Curtin, by withholding his deed from the record, would have two opportunities of contesting Bason's title, or, in the words of *Pearson, C. J.,* he could "take two bites at the same cherry."

We are of the opinion, however, that, as to real property, there is but one rule of *lis pendens* in North Carolina, and that the provisions

of The Code (sec. 229) are a substitute for the common-law rule. When the Court held, in the cases cited, that it was not necessary to file a formal notice of *lis pendens* when the action was pending in the county in which the land was situated, we do not understand that it intimated that two rules of *lis pendens,* varying in their extent and operation, prevailed in this State.

As *Bynum, J.,* in *Todd v. Outlaw, supra,* very justly remarks: "It would seem that the purpose of our statute was to assimilate the law of *lis pendens* to the registration laws and the docketing of judgments, and to produce consistency and certainty in the doctrine of constructive notice." This consistency can be secured by holding, as we do, that where the action is brought in the county where the land is situated, and the pleadings contain "the names of the parties, the object of the action, and the description of the property to be affected in that county," that this is a substantial compliance with The Code, sec. 229, as to the filing of notice, and puts in operation all of the provisions of the statute. There is no incongruity in thus holding, as the statute simply provides that the notice shall be filed with the clerk, and the place of filing would naturally be with the pleadings in the action.

(368) A contrary holding would produce much confusion and inconsistency, as, for example, under the common-law rule, if the real estate to be affected by the judgment or decree were situated in several counties, it would all be bound by the *lis pendens* arising from the pendency of a suit in the county in which only a part of it lies, since "all persons are supposed to be attentive to what passes in courts of justice" (3 Atk., 392); whereas the plain purpose of the statute was to modify the rule so as to require notice in all counties where the real estate is situated.

Again, it is hardly probable, in view of the legislation in England and many of the United States, dictated by the demands of public convenience and necessity and commerce, that this important statute was only to apply in those rare instances where suits affecting real property were brought in counties in which the land was not situated.

The rule of *lis pendens* is often regarded as harsh in its operations, but it is universally admitted to be based upon public policy imperatively demanded by a necessity which can be met and overcome in no other manner. Freeman on Judgments, 191. Where, however, its rigors may be softened, and at the same time its advantages preserved, it is the duty of the Legislature to act, as it has done in this State, for the protection of purchasers and subsequent incumbrances.

3. The plaintiff further contends that even if the statutory rule applies, he is not concluded, as the complaint in the action against the

King's Mountain Mining Company only alleged that the plaintiff, Bason, was entitled to the possession, and that as the deed in trust was recorded before the complaint was amended so as to charge ownership, there was no *lis pendens* as to the title until that time. There would be great force in this position *(Harkey v. Houston,* 65 N. C., 137), but for the answer of the defendant company, which was filed before the recording of the deed, and which put the title to the property in issue. *Falls v. Gamble,* 66 N. C., 455.

Our conclusion, therefore, is, that the plaintiff is concluded (369) by the judgment in the action of *Bason v. The King's Mountain Mining Company,* and that for this reason he is not entitled to recover.

Affirmed.

Cited: Williams v. Kerr, 113 N. C., 311; *Arrington v. Arrington,* 114 N. C., 156; *Puryear v. Sanford,* 124 N. C., 282; *Bird v. Gilliam,* 125 N. C., 78; *Harris v. Davenport,* 132 N. C., 701; *Morgan v. Bostic, ibid.,* 751; *Timber Co. v. Wilson,* 151 N. C., 157; *Jones v. Williams,* 155 N. C., 184; *Simmons v. Fleming,* 157 N. C., 391; *Culbreth v. Hall,* 159 N. C., 592; *Dalrymple v. Cole,* 181 N. C., 288.

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*J. W. MERRIMON v. COMMISSIONERS OF HENDERSON COUNTY.

Costs in Criminal Proceedings—Justice's Court—Frivolous and Malicious Prosecutions—Costs of Witnesses—The Code, Secs. 895, 3756.

In brief, the law as to costs in criminal cases before a justice is: (1) If the defendant is convicted he is taxed with the costs; (2) if defendant is acquitted, or proceedings dismissed, the complainant is taxed with the costs, if the prosecution is adjudged frivolous or malicious, and may be imprisoned for nonpayment thereof; (3) if the prosecution fails, and is not adjudged frivolous or malicious, no costs are taxable; (4) when the justice has final jurisdiction, if defendant is convicted and appeals to the Superior Court, this is a case "commenced" before the justice, and is governed by sec. 895, and the county is not liable for costs in either court; (5) when the justice has not final jurisdiction, if the evidence is sufficient to bind the defendant over to the Superior Court, the costs, including those of the justice's court, are adjudicated by the Superior Court.

*MERRIMON, C. J., did not sit.

THIS was a civil action, tried at the Spring Term, 1889, of HENDERSON Superior Court, before *Brown, J.*

The case came up by appeal from a justice's court overruling defendant's demurrer, and giving judgment for plaintiff. The Superior Court sustained the ruling of the magistrate, and gave judgment for plaintiff.

The defendant appealed.

(370) The complaint alleges that the defendant's county is indebted to him in the sum of $13.95 and interest, by virtue of divers cost bills due him as justice of the peace in criminal proceedings held before him, in which there were no prosecutors whatever, the affidavits upon which the warrants were issued having been made by the sheriff of the county in two years, and all in cases terminated in his court.

Defendants demurred, for that the complaint did not state a cause of action.

S. V. Pickens for plaintiff.
W. A. Smith for defendant.

CLARK, J. The Code, sec. 895, is as follows: "The party convicted in a criminal action, or proceeding, before a justice, shall always be adjudged to pay the costs, and, if the party charged shall be acquitted, the complainant shall be adjudged to pay the costs; and may be imprisoned for the nonpayment thereof if the justice shall adjudge that the prosecution was frivolous or malicious. *But in no action, or proceeding, commenced or tried in the court of a justice of the peace, shall the county be liable to pay any costs.*" The last paragraph of this section is decisive of the plaintiff's claim. The right to costs, as against the county, even of a witness for his attendance, is not inherent, but is acquired by virtue of the statute law. No *quantum meruit* could be maintained by him, nor by any officer for fees. The statute not only does not give the plaintiff a claim against the county for his fees, but expressly exempts it from any liability therefor.

Prior to 1868, justices of the peace received no fees in any case, but served *pro honore*. By the change then introduced, fees were allowed them. By chapter 92, Acts 1879, the Legislature restored the former practice to the extent of taking away the fees in criminal cases tried or commenced before the justice, except where the defendant is

(371) convicted and sentenced to pay costs, or the prosecution is adjudged frivolous or malicious, and the complainant is adjudged to pay them. The semicolon improperly used in section 895 is calculated to mislead by conveying the impression that the complainant is to be taxed with the costs in every case in which the defendant is not convicted. Reference to section 3756 shows that such is not the case, for it is there provided that "no prosecutor or complainant shall pay any costs, unless the justice shall find the prosecution frivolous or ma-

licious." Omitting the semicolon, section 895, construed in connection with section 3756, means that the defendant shall pay the costs, if the prosecution is adjudged frivolous or malicious, and he may be imprisoned if they are not paid. There is no hardship imposed on a justice by this. The Code, secs. 1133 and 1134, requires the justice, before issuing a warrant, to examine the complainant on oath. Even in cases where a party, in the emergency mentioned in sections 1124, 1125 and 1126, is arrested without warrant, section 1130 requires that he shall be brought immediately before a magistrate, who, *on proper proof,* shall issue his warrant. If the justice shall comply with the statute, by carefully examining the complainant, on oath, before issuing his warrant, few cases would arise in which he would not have judgment for his fees, either from the evidence proving sufficient to convict or bind over the defendant, or from it being demonstrated that the complainant should be taxed with the costs for instituting a malicious or frivolous prosecution. In the very few cases in which judgment, in justice, should not be granted either against the defendant or the prosecutor, it was deemed better that the justice should serve his country as his predecessors did of yore, *pro honore,* than subject the public to the abuses liable to result, and which experience showed did result, from taxing the county with the costs in every case which any magistrate, on insufficient grounds, should see fit to investigate. The last paragraph of section 895 is also intended, evidently, to cut off claims against the county in cases where the defendant, convicted before a jus- (372) tice, is discharged as an insolvent.

As to those cases in which the magistrate, after investigation, binds the defendant over to court, we do not understand that the word "commenced" applies to them. Section 895 applies only to cases finally disposed of before the justice, i. e., either by convicting the defendant or acquitting him for want of sufficient evidence to bind over or convict. The word "commenced" applies to cases of which the justice has final jurisdiction, but which are carried by appeal to the Superior Court. Such cases are still governed by section 895, and the costs in neither court can be taxed against the county. They must be taxed, if at all, against the defendant or the prosecutor. When the defendant is bound over to court, upon a preliminary examination, the case becomes a proceeding of the Superior Court, and costs, including costs in the justice's court for the preliminary investigation, are governed by The Code, sec. 733, *et sequitur,* relative to costs in the Superior Court. Section 736, in regard to the justice making out bills of costs in cases in which the county is liable, and the reference in section 739 to payment by the county of justices' fees has reference to such cases only. The extent

to which the county is liable for costs in cases disposed of in the Superior Court was decided in *S. v. Massey,* 104 N. C., 877.

The fact that the warrant here was issued on complaint of the sheriff makes no difference. He stands on no different footing from any other complainant. He must make oath and be examined as to the complaint like any other. If the prosecution fails, he, just as any other complainant, will be taxed with the costs, if the prosecution should be adjudged frivolous or malicious, and is liable to imprisonment for nonpayment.

If such judgment is improperly made, the prosecutor has the
(373) protection of having the finding reviewed, on appeal to the Superior Court. *S. v. Hamilton, post,* 660.

What we have said applies equally to the fees of witnesses attending before the justice, in cases finally disposed of before him by final judgment, or by a refusal to bind over. Until Acts of 1883, ch. 86, witnesses before the justice in criminal cases received no compensation, and now, in conformity to section 895, they are only allowed pay in criminal cases by judgment against the defendant, if convicted, or against the complainant, if taxed with the costs, when the prosecution is found frivolous or malicious. The Code, sec. 3756. In brief, the law as to costs in criminal cases before a justice is: 1. If the defendant is convicted he is taxed with the costs. 2. If defendant is acquitted, or proceedings dismissed, the complainant is taxed with the costs, if the prosecution is adjudged frivolous or malicious, and may be imprisoned for nonpayment thereof. 3. If the prosecution fails, and is not adjudged frivolous or malicious, no costs are taxable. 4. When the justice has final jurisdiction, if defendant is convicted and appeals to the Superior Court, this is a case "commenced" before the justice, and it is governed by section 895, and the county is not liable for costs in either court. 5. When the justice has not final jurisdiction, if the evidence is sufficient to bind the defendant over to the Superior Court, the costs, including those of the justice's court, are adjudicated by the Superior Court.

The demurrer should have been sustained.

Error.

Cited: S. v. Shuffler, 119 N. C., 868; *Guilford v. Comrs.,* 120 N. C., 27; *S. v. Morgan, ibid.,* 565; *Clerk's Office v. Comrs.,* 121 N. C., 30; *Garner v. Worth,* 122 N. C., 255; *S. v. Hicks,* 124 N. C., 838; *S. v. Butts,* 134 N. C., 608.

(374)

JOSIAH HODGES v. C. W. HODGES.

Evidence—Hearsay—Infant—Deed—Ante Litem Motam—New Trial.

1. It was material to inquire, in a civil action to recover land, if one H. was an infant at the time she executed a certain deed in 1862. To prove she was not, plaintiff offered evidence of one who heard his mother say that H. was born in 1845. It was not shown that the declarations were made *ante litem motam*, or that the person making them was dead: *Held*, that such evidence was not admissible, and its admission entitles the party injured to a new trial.

2. Where these preliminary facts (if facts) are not shown, specific objection is not required—mere general objection is sufficient.

THIS was a civil action for the recovery of real property tried at the August Term, 1889, of MECKLENBURG Superior Court before *Connor, J.*

C. W. Tillett for plaintiff.
P. D. Walker for defendant.

SHEPHERD, J. It became material on the trial of this action to ascertain whether Mrs. M. A. Hodges was an infant when she executed the deed of July, 1862.

For the purpose of proving that she was under the age of twenty-one years at that time the plaintiff introduced D. C. Pharr, who testified that he had heard his mother say that the said M. A. Hodges was born in 1845. This was objected to, and the objection being overruled the defendant excepted.

The rule which admits such hearsay declarations is clearly defined by the authorities, and it is well settled that, as preliminary to their admission, it must be affirmatively shown that they were made *ante litem motam.*

"It is necessary that they should have been made, not only without any view of benefiting the person making them, but also without a view of benefiting any other." *Morgan v. Purnell,* 4 (375) Hawks, 95.

In the above case the declarations of Mrs. Morgan were rejected because it was not shown when they were made, *Henderson, J.,* saying that "for aught that appears to the contrary, they might have been made on that very day on which her deposition was taken, and with a view to this contest. . . . At all events, it does not appear to have been made *ante litem motam.*" Best's Principles Ev., 476, and notes. It was not shown, in our case, when the declarations were made,

and it was, therefore, error on the part of the court in receiving them. Another requirement is, that the declarant must be dead. 1 Greenleaf Ev., 103-104; *Moffit v. Witherspoon,* 10 Ired., 185; *Clements v. Hunt,* 1 Jones, 400; Best's Principles Ev., 476.

This fact should have been shown before the witness was permitted to testify as to the declaration, and it was not necessary that the defendant should have assigned his objection specifically. The general objection was sufficient. *S. v. Wilkerson,* 103 N. C., 337.

Not only did the plaintiff fail to show that the declarant was dead, but it appeared from the cross-examination that she was in fact living.

For these reasons there should be a new trial.

Cited: S. v. Parker, post, 712; *Fleming v. Sexton,* 172 N. C., 256; *Bowman v. Howard,* 182 N. C., 665.

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(376)

ALABAMA COFFIN, W. F. COFFIN ET AL. v. G. A. COOK.

Action to Recover Land—Special Proceeding—Guardian ad litem—Service on Infants—Irregularities—Motion.

1. In an action for the recovery of the possession of land, defendant, in support of his title, offered in evidence a special proceeding and order for sale of land for assets and deed thereunder, to which plaintiff objected because it did not appear that the guardian *ad litem* appointed for the *feme* plaintiff, who was a party to the proceeding, was served with summons, or appeared or filed any answer. Summons was served upon the infant according to law: *Held,* there was not such irregularities as made the proceeding void.

2. At most, such proceedings were only voidable, and could not be attacked collaterally except for fraud or by motion in the cause when made in apt time.

3. The fact that the purchase money was not paid until three months after sale, and that deed was not made directly to the bidder in accordance with the order of sale, but to a third party, who advanced the money for him, were not such as the plaintiff (the petitioner) could complain of, after the lapse of years, even though it might have been the duty of the Court, if these facts had thus appeared, to have set aside the sale.

4. When the executor, in this case, exercised a power conferred by an order of the Court in the execution of the deed, but failed to recite therein the source of his authority, the implication is that he exercised the power so conferred.

COFFIN *v.* COOK.

THIS was a civil action, tried at Fall Term, 1889, of MECKLENBURG Superior Court, before *Connor, J.*, for the possession of some land.

The facts are set out in the opinion.

E. T. Cansler (by brief), A. Burwell and P. D. Walker for plaintiff.
C. W. Tillett for defendant.

MERRIMON, C. J. The plaintiffs showed apparent title to the land described in the complaint. The defendant relied upon the validity and sufficiency of orders and the judgment in a special proceeding, wherein the *feme* plaintiffs were parties defendant, to sell this land to make assets to pay debts of the testator therein named. (377) He contends that the proceeding mentioned was valid, and at the sale therein of the land he purchased it, paid the purchase-money and obtained a deed of conveyance therefor under and in pursuance of an order of the court sufficient to put the title to it in him.

The plaintiffs insist "that said special proceedings are void, for that no summons was served on H. K. Reid, guardian *ad litem* of the *feme* plaintiffs, who were infant defendants in said special proceeding, and that said guardian did not appear or answer in said special proceeding, and further, that no notice of the motion to appoint said guardian was served on said infants."

It appears from the record of the special proceeding that the *feme* plaintiffs were defendants therein—one of the age of six and the other of four years; that "notice issued to" them, and that W. K. Reid was appointed *guardian ad litem* for them. It does not appear affirmatively that he was served with process, nor that he answered for his wards. It does appear from the record that a summons was issued for them and others, and that the sheriff returned the same as to them as follows: "Executed 25 August, 1870, by delivering a copy to Alabama and Teresa Downs, who are infants"; and he also returned that he had served the same by delivering a copy "to Nancy Downs, mother of Alabama and Teresa Downs, who are infants." Such service was made as prescribed by the statute (The Code, sec. 217, par. 2), declaring how service of summons shall be made on minors. Regularly, the guardian *ad litem* should have been served with summons and a copy of the complaint (The Code, sec. 181), and he should have made answer for the infant defendants named. This was not done, so far as appears. There was, hence, possible irregularity. The presumption, however, is that the guardian was regularly appointed, and that he took notice (378) of his appointment, nothing to the contrary appearing in the record.

But such irregularity, if it existed, did not render the special proceedings, or the orders, judgment and other proceeding therein void. The court obtained jurisdiction by virtue of the service of process—the summons. The infant defendants were before the court, and the presumption is in favor of the sufficiency and validity of what was done in the course of the proceeding. At most, the orders and judgment were only voidable, and they could not be attacked collaterally; this could be done only by proper motion in the proceeding, except that the same might be attacked for fraud by an independent action brought for that purpose. *England v. Garner,* 90 N. C., 197; *Hare v. Holloman,* 94 N. C., 14; *Sumner v. Sessoms,* 94 N. C., 371; *Syme v. Trice,* 96 N. C., 243; *Tyson v. Belcher,* 102 N. C., 112.

On the trial it was admitted that the petitioner (executor), in the special proceeding mentioned, sold the land therein specified—that now in controversy—in pursuance of the order of sale therein; that before the day of sale, the defendant had expressed his willingness to bid $5.50 *per acre* for the land; that on the day of sale, he was not present at the sale; that the petitioner requested one J. M. Beavers to bid that price for the land, and he did; that the sale so made was reported; that no part of the purchase-money was paid that day, or at the time of the order for confirming the sale; that said Beavers never made any assignment of his bid, and his was the only bid; that on the day of the sale defendant had notice that he had so bid for the land at the petitioner's request, and that no part of the purchase-money had been paid; that about three months after the sale, the petitioner notified the defendant that he must pay the purchase-money; that an arrangement was then made in pursuance of which John T. Downs advanced the money and took a deed from the petitioner, with the under-
(379) standing that he would convey the land to the defendant upon the payment to him of the money he so advanced; that the defendant afterwards so paid the money and took title for the land from said Downs; that the money so paid to the petitioner was applied to the discharge of the debts of the testator mentioned in the special proceeding; that the defendant paid the petitioner rents for the land until Downs took the deed therefor.

The jury found, by their verdict, that the said Beavers bid off the land for the defendant, and that the price bid therefor was a fair price for it on the day of the sale.

The order of sale directed that the land be sold, one-half of the price bid to be paid at once, the balance to be due at six months, secured by bond and security. The petitioner reported the sale to the court, and that the purchaser had complied with the terms. Affidavits were filed

stating that the land sold for a fair price. Thereupon, the court confirmed the sale, and directed the petitioner "to collect the money when due and make title to the purchaser."

The plaintiffs insisted, secondly, that in view of the facts thus appearing, the sale, the order confirming the same, and the deed executed by the petitioner in pursuance thereof, were void, or, at all events, voidable, in the discretion of the *feme* plaintiffs.

We think this contention rests upon no substantial foundation. There was some irregularity—want of good faith on the part of the petitioner as to the report of the sale of the land, and some delay in the payment of the purchase-money, but not to such extent as to prejudice materially the rights of any party interested. If the pertinent facts, as they now appear, had been made to appear to the court shortly after the making of the order confirming the sale, it might, perhaps, have set it aside and ordered a resale; but it certainly would not do so after the money had been paid and applied to the payment of the debts of the testator of the petitioner, and after the lapse of years. The (380) property was sold, after due notice, at fair, open sale; it brought a fair price; the price was, after some delay, paid and the money duly applied. The mere facts that the petitioner suggested to the defendant that he buy the land, that defendant said he would bid the price mentioned, that in his absence on the day of sale the petitioner requested a third person to bid the price named for the defendant, not for himself, were not, of themselves fraudulent. They could not, in their natures, necessarily affect the plaintiffs or any person interested adversely. The petitioner did not buy—he was not to share in the purchase or to be benefited in any way—his purpose was to sell the land for the purposes contemplated by the law; the land brought a fair price; it does not appear, it is not suggested, that it was worth or would have brought more but for the facts complained of.

The person who made the bid for the land was not the purchaser—the defendant was. It was not essential that the bidder should know who was the purchaser, if the latter was known to the seller. Nor could the fact that sale was reported as that of the bidder prejudice the defendant. Certainly it could not if the bidder did not interfere; and he did not.

The arrangement by which Downs took the title temporarily, and paid the purchase-money for the benefit of the defendant, did not at all concern the plaintiffs. The purchaser at the sale—the defendant—having paid the purchase-money, might direct the petitioner to convey the title to Downs, or such person as he might indicate. In that case, the right to have the title, or to direct it to be made to some particular

person, was that of the purchaser. *Smith v. Kelley,* 3 Murph., 507; *Ward v. Lowndes,* 96 N. C., 381, and cases there cited.

It is further contended that the deed from the petitioner to Downs does not recite or sufficiently refer to the order by virtue of which (381) he executed the same, and, therefore it is inoperative, and did not pass the title to the land. This ground of contention is not tenable. The special proceeding brought by the petitioner as executor of James B. Griffith, deceased, and all the orders and the judgment therein are so specifically entitled. The deed so describes the petitioner, and he purports and professes to exercise authority and power, as such executor, to make the deed. The implication of law is, that he exercises such authority as he might properly exercise as such executor, and the deed contemplates and relates to such authority, the order in the proceeding directing him to collect the purchase-money, when due, and make title to the purchaser. If it appears that the power is exercised, that is sufficient without formal recitals. Such recitals are convenient and useful in most cases, as showing the purpose more certainly to exercise the power, and they serve as well to point to evidence of it. Indeed, in some cases recitals are, in some measure and for some purposes, evidence.

Judgment affirmed.

Cited: Rackley v. Roberts, 147 N. C., 205; *Phillips v. Denton,* 158 N. C., 304; *Harris v. Bennett,* 160 N. C., 344; *Dudley v. Tyson,* 167 N. C., 70.

A. M. WILHELM v. ISAAC BURLEYSON AND WIFE.

Deed—Evidence—Probate—Prayer for Instructions—Objection in Apt Time—Riparian Ownership.

1. In an action involving the title to land, objection to the introduction of a deed as evidence will not be sustained unless the probate is defective.
2. Question in regard to it may be raised after its introduction by prayers for instruction.
3. The defendant objected to the introduction of a deed by plaintiff without stating his grounds. The plaintiff introduced other evidence tending still further to validate the deed. Defendant did not ask any instruction as to the effect and character of the deed: *Held,* he cannot for the first time in this Court raise objection that the deed was only evidence of color of title, or that it could not be considered at all.

4. In 1845 a creek ran through the lands of one A., but was not a boundary. In 1858 the creek was made a dividing line, in part, between two of his heirs. The question in an issue of title between those claiming under them was, whether the creek changed its bed after the division: *Held*, that evidence of where the creek ran in 1845 was not evidence of where it ran in 1858. Only the changes which occurred since the division in 1858 were material.

5. Admission of such evidence was calculated to mislead the jury, and there should be a new trial upon the issues involved.

6. Where there was an issue of damages for erecting a dam upon the bank of a creek, so that the water "eddied" and overflowed plaintiff's land on the other side, it appeared that the plaintiff had also previously erected a dam which caused the defendant to have to erect one for the protection of his land, the court charged the jury: "While it is true a riparian owner may erect bulwarks to protect his property from injury by the stream, he can only do so when, by the exercise of reasonable care, it can be done without injury to others:" *Held*, to be error.

7. The defendant stands in a better condition in this respect than if he had taken the *initiative* and built his dam first, and if his dam was necessary to protect him, and caused plaintiff injury, he is not liable.

THIS was a civil action, tried at February Special Term, 1887, (382) of the Superior Court of CABARRUS County, before *Boykin, J.*

The plaintiff declared upon these causes of action as follows:

1. That he is the owner of the following described tract of land, situate in this county, viz.: Beginning at two white oaks on White's line, near the creek; runs thence with the line south 7 east 68½ poles to a stake; then north 74 east 68 poles to a red oak (W. Bost's heirs' corner); then north 7 east with a lane 34 poles to a stone; then south 65 east 54 poles to an ironwood on the bank of the (383) creek (Bost's heirs' corner); then north 62 east 20 poles with the creek to a stake in the creek; then south 72 east 15 poles to a stake (Allen Bost's corner); then north 21 west 36 poles to a persimmon (Allen Bost's other corner, in an old field); then north 52½ west 32½ poles to a stone in the road (A. Bost's corner); then north 81½ west 10½ poles to the center of a spring (Bost's corner); then north 45 east 4 poles to a locust grub (A. Bost's corner); then north 46 west 20 poles to a stake on the bank of a gully; then south 63 west 45½ poles to a sycamore on the bank of the creek; thence with the meanderings of the creek 68 poles to the beginning.

2. That, on or about ..... day of ....., 1881, the defendant wrongfully entered upon said tract of land, and upon the north bank of the creek erected a dam, or placed obstructions, so that the water in said creek was diverted, in times of freshet or high water, from the channel of the creek, and, in consequence of said dam, or obstructions

overflowed and greatly damaged plaintiff's lands on the south side of said creek, to wit, to the amount of five hundred dollars.

For a second cause of action, plaintiff alleges:

1. That he is the owner of the tract of land described in paragraph one of his first cause of action.

2. That on or about ..... day of ....., 1881, the defendant wrongfully entered upon the said tract, cut down the timber, trod down the grass, and other wrongs did to the said tract of land, greatly to plaintiff's injury, to wit, to the amount of one hundred dollars.

For a third cause of action plaintiff alleges:

1. That he is the owner of the tract of land described in paragraph one of his first cause of action.

(384) 2. That, on or about the ..... day of ....., 1881, the defendant erected on the north bank of the creek known as "North Anderson's Creek," a wall and other obstructions, so that in times of freshet or high water, in consequence of said wall and obstructions, the water of said creek was caused to overflow and flood the lands of plaintiff lying on the south side of said creek, to his great damage, to wit, five hundred dollars.

Wherefore, plaintiff demands judgment for five hundred dollars, his first cause of action; for one hundred dollars, his second cause of action, and for five hundred dollars, his third cause of action, and for costs.

The following are the issues submitted to the jury and the answers thereto:

1. Did the defendant, in 1881, enter unlawfully on the plaintiff's lands described in the complaint, and cut and destroy timber thereon, as alleged in the complaint? Ans. Yes.

2. What damages, if any, has the plaintiff sustained thereby? Ans. Twenty-five dollars.

3. Did the defendant, in 1881, unlawfully build a wall and other obstructions on the north side of Anderson's Creek, as alleged in the third cause of action, whereby the water of Anderson's Creek was caused to overflow the plaintiff's land, as alleged in the third cause of action? Ans. Yes.

4. What damage, if any, has the plaintiff sustained thereby? Ans. Forty dollars.

The plaintiff offered several deeds as evidence of title, which are not necessary to mention. Among the number was one from R. W. Allison, clerk and master, to Allen Boyer. The defendant objected to the introduction without stating the grounds of objection, and the plaintiff offered certain records of the Court of Equity tending to show that the deed was executed under a decree of said court. It does not appear

that the defendant subsequently asked any instruction, or in any way elicited the opinion of the court as to the effect of the record, or whether the deed from Allison was considered as color of (385) title or as a link in the plaintiff's chain of title.

One Stowe was introduced as a witness, and testified, in substance, that he was present at the survey of the Andrew Carriker land; that the channel of the creek at that time was the red line on the diagram. He also testified as to the ownership of the land before the same was owned by Andrew Carriker and David N. McEachern.

He was cross-examined by the defense as to the location of the old channel, and the extent of time of his knowledge thereof.

To contradict said witness, defendant's counsel procured from the office of the register of deeds a certain deed from Seneca Turner to John W. Morgan, and was proceeding to read the contents of the same, when the plaintiff's counsel demanded information as to the nature of said instrument, which was given.

There was objection by plaintiff, and thereupon the defendant introduced the said deed in evidence. This deed conveys land described in the complaint, and is made a part of this case, and bears date 1 February, 1836.

Thereafter, said witness Stowe was permitted to testify as to the location of the channel in 1845, prior to the possession of the common ancestor. Certain witnesses for the plaintiff had testified that the channel of the creek had changed. Witness for the defense had testified that the channel remained as it was thirty or forty years ago.

The defendant objected to this evidence of the witness Stowe. Objection overruled, and defendant excepts.

The other material facts are stated in the opinion of the Court.

From the judgment in favor of plaintiff, the defendant appealed.

W. G. Means (by brief) for plaintiff. (386)
P. B. Means for defendant.

AVERY, J., after stating the facts: An objection to the introduction of a deed, offered as evidence, will not be sustained as a rule, unless the probate is defective and the reading of it is resisted on that ground. *Vickers v. Leigh,* 104 N. C., 248.

After its admission the parties can raise any question that may be pertinent, by prayers for instruction to the jury in reference to its character or weight as evidence of title. It is true that the plaintiff seems to have offered certain records, so soon as the objection was made. But the defendant did not request the court so far as the record in-

forms us to tell the jury that the deed should be considered only as color of title, or that it was not to be considered at all. We find no copy of the deed in the record, nor does it appear what instruction was asked or given to the jury upon the subject of title.

There was no exception that put the judge below on notice to send up the deed, or so much of the charge as related to title, and it would be manifestly unjust, as well as in violation of established rules, to follow counsel in the line of discussion adopted and decide questions raised for the first time in this Court.

"It became material to locate the old channel of the creek or branch meandering through the disputed lands for the purpose of establishing boundaries." Such is the language of the statement of the case on appeal. But it appears from the testimony and exhibits that prior to the year 1858, and back to the year 1840, the land on both sides of the creek belonged to Andrew Carriker. David McEachern conveyed to Andrew Carriker on 28 February, 1840. There was a partition of the lands of Andrew Carriker in 1858, and it is admitted that the plaintiff is the owner of lot No. 1 and the defendant of lot No. 2, as set (387) apart to his heirs in that proceeding. The two lots mentioned call for running with the creek sixty-four poles from a certain sycamore to a white oak. The first cause of action depends upon the location of this dividing line between the two tracts. It is clear that the bed of the creek, as it ran in the year 1858, was the boundary line at the time of the division of the land. The whole of the stream between the two corners mentioned had belonged to Carriker, the common source of title, before the partition. Since the creek was first constituted a dividing line, it may be that its course between two points has changed slowly, and by imperceptible degrees, so as to give one or the other of the riparian proprietors the benefit of accretions, or there may have been a sudden and very apparent change or no alteration in the channel at all since the year 1858, in either of which contingencies last mentioned, the original dividing line would remain where it was first located. *Halsey v. McCormick,* 18 N. Y., 147; *Mulry v. Norton,* 100 N. Y., 424; *County of St. Clair v. Livingston,* 23 Wall., 46; *The Mayor of New Orleans v. The United States,* 10 Peters, 662; *Spigener v. Cooner,* 64 Am. Dec., 755; Gould on Waters, sec. 155; *Gernish v. Clough,* 48 N. H., 9 (97 Am. Dec., 561); *Lynch v. Allen,* 4 Dev. & Bat., 62.

It was clearly incompetent to admit testimony tending to show where the creek ran in the year 1845, when Andrew Carriker owned the land on both sides and it was not a boundary. *Jones v. Johnston,* 18 Howard, 150. It was first made a dividing line between two shares in the

allotment of the lands of Carriker in 1858, and it was material only to know where the bed of the creek *then* ran, and if any changes had since occurred, when and how they were made, whether slowly and imperceptibly or suddenly and sensibly, whether brought about by natural or artificial agencies. Andrew Carriker might have diverted the channel of the creek on his own land, so far as we can tell, between the year 1845 and his death, just prior to 1858, or there (388) may have been a very considerable change in its course, produced by natural causes between the year 1845 and the time when it was adopted as a dividing line by the commissioners appointed to make the partition. Proof of the location of the stream in 1845 was not competent evidence to show where it ran in 1858, when it first became a boundary line. *Lynch v. Allen, supra.* It is a matter of common observation, that the channels of branches and small streams (and this is called in the statement a branch or small creek) are easily and frequently changed, and cannot be considered permanent landmarks. *Hurley v. Morgan,* 1 Dev. & Bat., 425. We have no information from which we can form an accurate opinion as to the exact size of the stream. The testimony was calculated to mislead the jury in determining the location of the dividing line, and there must be a new trial as to the first and second issues.

The third cause of action is predicted upon the concession that the defendant was the owner of the land upon which he built the wall, but constructed it so that he damaged the plaintiff by unlawfully causing an overflow of the latter's land. The defendant requested the court in instruct the jury, among other things, as follows:

"2. If the jury believe that the defendant only erected a dam of sufficient size to protect his own lands from the ill effects of the dam which was erected by Wilhelm on the south side of the creek, the plaintiff is not entitled to a verdict."

The court gave the second instruction, modified, as follows:

"While it is true that a riparian owner may erect bulwarks to protect his property from injury by the stream, yet he can only do so when, by the exercise of reasonable care, it can be done without injury to others.

There was error in adding the qualifying clause to the instruction asked. It is true, as a general rule, that a riparian pro- (389) prietor of land is restricted in the management of his property by the maxim, *"Sic utere tuo ut alienum non laedas,"* and cannot, therefore, take the initiative and construct a dam on a stream that will cause the water to overflow and injure the land of his neighbor, that may lie opposite or above his own premises, either when the water is at its usual height or in an ordinary freshet, or that so obstructs its

flow as to prevent the land of the other riparian owner from being properly drained. *Pugh v. Wheeler,* 2 Dev. & Bat., 50; *Johnstone v. Roane,* 3 Jones, 523; *Burnett v. Nicholson,* 86 N. C., 99; *Cagle v. Parker,* 97 N. C., 271.

But it seems that in this case the plaintiff first constructed a dam on the south side of the creek, and the defendant subsequently built one on the north side lower down. The defendant contended that he was forced to put up his dam to protect his land from overflow caused by the erection of that above by plaintiff, and offered evidence to sustain his contention, and to show that it protected his own, while it did not cause injury to the plaintiff's land. On the other hand, the plaintiff rested his demand for damage upon the evidence tending to show that the defendant's dam caused the water to *"eddy,"* and "that much more water in an ordinary freshet would thereby overflow" the former's lands. We think that the court erred in refusing to give instruction asked, and numbered 2, either in words or substance, and without the misleading addition appended to it.

If the defendant's evidence was sufficient to satisfy the jury that the plaintiff first built a wall on his side of the creek, and thereby caused the water to overflow the defendant's land on the other side, and lower down, the defendant had a right to build a dam on the north bank to stop the overflow brought about in that way, and if, in effecting that object, it became necessary to obstruct the flow of water in the
(390) creek, and cause it to *"eddy"* so as in freshets to flood more of plaintiff's land than had previously been covered in freshets, the defendant was not answerable in damages for such additional overflow. *Avery v. The Empre Woolen Co.,* 82 N. Y., 582; *Nield v. L. & N. W. R. R. Co.,* 10 Tan. Rep., 4; Gould on Waters, sec. 159.

If one riparian owner divert the water by a structure on his own bank, and drive it into the field of his neighbor on the opposite side, so as to force the latter to erect a wall to stop the water-break, the former cannot maintain an action for damages if the wall put up for the protection of the latter cause the water to "eddy," or, in time of freshets, to overflow another part of the former's land. There is a want of clearness—indeed, some confusion—in the discussion that we find in the authorities of the liability of riparian proprietors incurred in erecting levees on their own land and on the bank of a stream. It may be that distinctions will hereafter be drawn between the rights and liabilities of the owner, when the structure is in the nature of a levee intended for the protection of his own fields, and those of one who erects a wall, extending wholly or partially across the stream, so as to obstruct its natural flow, perceptibly, even when it is not swollen.

Under the instruction given by the court, though the jury might have thought Burleyson's dam absolutely necessary to protect his land against the overflow produced by the previous building by Wilhelm of one on the opposite bank of the creek, they were, nevertheless, bound to find the issue in favor of the plaintiff if they believed from the evidence that Burleyson's dam caused the water to break over at another point and flood Wilhelm's land. There was error also in the instruction given, for which the verdict upon the issues raised by the pleadings as to the third cause of action should have been set aside, and there must be a new trial as to all of the issues.

Error. New trial.

Cited: Adams v. R. R., 110 N. C., 330; *Everett v. Newton,* 118 N. C., 921; *Clark v. Guano Co.,* 144 N. C., 76; *Geddie v. Williams,* 189 N. C., 338.

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(391)

J. G. ROBERTS ET AL. v. A. D. ALLMAN ET AL.

Summons—Irregularity in Return Term—Time of Filing Complaint—Counsel—Judgment by Default.

1. Summons was returned at November Term, 1883, of the Superior Court. Complaint was not filed until near the end of the term of four weeks. At the Fall Term, 1884, judgment by default, for want of an answer, was entered and reference ordered. Defendants and their counsel appeared before the referee in March, 1887, and from time to time until ____ May, 1887, on which day counsel, who had not previously appeared for them, moved to dismiss the proceeding on account of irrigularity in the manner of obtaining judgment. Upon the denial of this motion, one was made before the Court to set aside the judgment upon the additional ground that it was a surprise: *Held,* (1) that the court below properly refused this motion; (2) defendants did not exercise due diligence in seeking relief.

2. Where complaint is filed after the return term, it stands on file during the first three days of the next succeeding term, and judgment by default for want of answer at that term may be rendered.

3. Summons "to appear before the judge of the Superior Court at the court to be held for the county of Buncombe, at the courthouse in Asheville, on the third Monday after the ______ Monday of November," it being the only court for that part of the year, is not irregular.

4. A general appearance, even before the referee, cures all antecedent irregularity.

5. Defendants having been personally served with summons, could not seek relief on the ground of excusable neglect, except by motion made in twelve months from the rendition of the judgment.

6. It is not enough that parties to a suit should engage counsel and leave it entirely in his charge. They should, in addition to this, give to it that amount of attention which a man of ordinary prudence usually gives to his important business.

APPEAL from *Graves, J.*, at June Term, 1887, BUNCOMBE Superior Court.

The summons in this case directed the defendants "to appear
(392) before the judge of the Superior Court at the court to be held for the county of Buncombe at the courthouse in Asheville, on the third Monday after the ..... Monday of November." The summons was issued 2 July, 1883, and was served personally on the defendants on 15 October. The term of the court began 17 November, and was a four-weeks term. It was the only court then provided by law for that part of the year elapsing after the issuing of the summons in July. The complaint was verified and filed 13 December, 1883, during the last week of the term. At Fall Term, 1884, judgment by default for want of an answer was entered and a reference ordered to state an account. Before the referee, some of the parties attended on 19 March, 1887, and the case was continued; on 9 April, 1887, the defendants were present in person and by counsel, and case was continued, and by consent of both parties was set for 18 May, 1887. On that day, counsel for defendants, who was not the counsel who had before represented them in the cause, asked to be allowed to enter a special appearance and dismiss the proceeding for the reason "that the judgment in this case is irregular in that it is by default, the complaint not having been filed until 13 December, 1883, when the summons was returned on the third Monday in November, 1883." This motion was refused. The referee proceeded to state the account and made his report to June Term, 1887. At that term the defendants, upon notice given 23 May, 1887, moved to set aside the judgment rendered at November Term, 1884, upon the ground that it was "irregular, having been taken contrary to course and practice of the courts, and for the further cause it is a surprise to the defendants and oppressive to them." In support of this motion, they filed an affidavit in which they allege "that after the service of the summons upon them, and before the court to which the same could have been returnable, that is if the summonses could be construed to
(393) have been returnable to the third Monday in November next, affiant employed M. E. Carter, Esq., to attend to the suit for them; that their said counsel assured them that the plaintiffs could not

interfere with their settlement, which is referred to in affidavit of John Allman, and that he would attend to the same for them; that they were satisfied their defense would be properly made, and, resting under said assurance, gave the matter no further attention; that it was currently reported after that that the plaintiffs had abandoned their action, and they heard no more of the same until they were notified of the taking of the account by Thomas A. Jones, Esq., when, to their surprise, they were informed that a judgment had been rendered against them." The court declined to set aside the judgment, and defendants appealed.

T. F. Davidson for plaintiffs.
G. A. Shuford for defendants.

CLARK, J. We discover nothing to constitute this an irregular judgment. The defendants might have moved at November Term, 1883, to dismiss the action for failure to file the complaint within the first three days of the term. The Code, 206. This was not done. Even if the complaint had been filed after the close of that term, it would have been on file during the first three days of next term, and the judgment by default might have been then rendered if no answer were filed at that term. In fact, it was not taken until November Term, 1884.

Nor was the summons irregular. It was evidently intended for Fall Term, 1883, and defendants could not have been misled by it. In truth, their affidavit says they employed counsel to represent them at that term. Besides, "a general appearance to an action cures all antecedent irregularity in the process (as here by attending before the referee), and places defendant upon the same ground as if he had been personally served with process." *Wheeler v. Cobb,* 75 N. C., 21, (394) and cases cited. The defendants, however, were in fact served with a summons, and were bound to take notice of all subsequent proceedings. *Stancill v. Gay,* 92 N. C., 455.

While an irregular judgment will be set aside upon motion within any reasonable time, this will only be done when the irregularity complained of is so serious in its nature as to render the judgment void, or seriously injure and prejudice the moving party *(Williamson v. Hartman,* 92 N. C., 236), and not unless the moving party has exercised due diligence in seeking relief. *Stancill v. Gay, supra.* Here the irregularity, if any, was not of a serious nature, and defendants have shown no diligence in seeking relief.

Nor should the judgment have been set aside for excusable neglect. The summons having been personally served, a motion upon that ground could only be made within one year after the rendition of the judgment. The Code, sec. 274; *McLean v. McLean,* 84 N. C., 366. The grounds

assigned in the affidavit in this case would have been insufficient, even had the motion been made within one year after judgment. *Whitson v. R. R.*, 95 N. C., 385; *Henry v. Clayton*, 85 N. C., 371. "A defendant does not abandon all care of his case when he has engaged counsel to look after it," yet this seems to be what defendant did, according to their own showing. They failed "to give that amount of attention to the case which a man of ordinary prudence usually gives to his important business." *Sluder v. Rollins*, 76 N. C., 271.

Per Curiam. No error.

Cited: Williams v. R. R., 110 N. C., 481; *Bank v. Rhinehart*, 112 N. C., 775; *Davison v. Land Co.*, 118 N. C., 370; *Piercy v. Watson, ibid.*, 978; *Caldwell v. Wilson*, 121 N. C., 453; *Vick v. Baker*, 122 N. C., 100; *Manning v. R. R., ibid.*, 828; *Norton v. McLaurin*, 125 N. C., 190; *Pepper v. Clegg*, 132 N. C., 315; *Osborne v. Leach*, 133 N. C., 431; *Harris v. Bennett*, 160 N. C., 342; *McLeod v. Gooch*, 162 N. C., 126; *School v. Peirce*, 163 N. C., 427; *Luther v. Comrs.*, 164 N. C., 245; *Hyder v. R. R.*, 167 N. C., 586; *Pierce v. Eller, ibid.*, 675; *Allen v. McPherson*, 168 N. C., 437; *Gaylord v. Berry*, 169 N. C., 736; *Ollis v. Proffitt*, 174 N. C., 676; *Cahoon v. Brinkley*, 176 N. C., 8; *Alexander v. Cedar Works*, 177 N. C., 538; *Gordon v. Gas Co.*, 178 N. C., 438; *Jernigan v. Jernigan*, 179 N. C., 240; *Bargain House v. Jefferson*, 180 N. C., 33; *Howard v. Speight, ibid.*, 655; *Hatch v. R. R.*, 183 N. C., 628; *Electric Co. v. Light Plant*, 185 N. C., 537; *Gaster v. Thomas*, 188 N. C., 350; *McCollum v. Stack, ibid.*, 465; *Hill v. Hotel Co., ibid.*, 590; *Lumber Co. v. Chair Co.*, 190 N. C., 438; *McGuire v. Lumber Co., ibid.*, 809; *Foster v. Allison Corporation*, 191 N. C., 173, 175.

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(395)

JOHN ELLIS v. A. S. HARRIS.

Action to Recover Land—Locating Boundaries—Payment of Taxes—Declarations Against Interest—Competent Testimony—Possession—Deed—Quantity Conveyed.

1. The payment of taxes *ante litem motam* is some evidence to go to a jury upon an issue of title to land.

2. In an action to recover land, declarations made by one in possession as to what he owned being against his interest and the interest of the party offering them in evidence, and previous to the sale by the sheriff who executed the deed under which the party claims, are competent.

3. So, declarations made by one in possession while engaged in running a survey, being explanatory of his possession and against his interest, are competent.

4. Such testimony is likewise competent to contradict what other witnesses have said relative to the same matter.

5. A deed sets forth the boundaries of land, and the testimony locates them; when the latter is conflicting, the jury must pass upon its weight.

6. The plaintiff must recover on the strength of his own title. It is not necessary that the defendant should show title.

7. When the boundaries of land are established and known, the number of acres called for by the deed is immaterial to determine quantity conveyed; but when the question is one of locating the boundaries, the number of acres may then be considered, in connection with other testimony, to ascertain what is the land covered by the deed.

8. It cannot be contended that an action is for *possession* only, the land having been taken by force, when the pleadings distinctly raise the issue of title.

THIS was an action for the recovery of land, tried before *Connor, J.*, at April Term, 1889, of FRANKLIN Superior Court.

The facts are stated in the opinion.

F. S. Spruill, J. B. Batchelor and John Devereux, Jr., for (396) *plaintiff.*

C. M. Cooke for defendant.

AVERY, J. The plaintiff claimed through a deed from Bennett Gay, administrator of James Burgess, to William Crowder, dated 17 January, 1859, and immediately under a deed dated 5 June, 1869, from E. A. Gupton, sheriff of Franklin County, to the plaintiff, reciting a sale by virtue of executions against Willie Crowder. The defendant insisted that plaintiff's deed did not cover the land in controversy, and as evidence of title in himself, offered the record of a special proceeding and a deed from W. H. Spencer, administrator of J. B. Mann, reciting a sale to make assets, in accordance with a decree in said special proceeding, and also introduced evidence tending to show that the calls of said deed included the land in dispute.

The plaintiff testifies that he was present at the sale of the land of Willie Crowder by the sheriff, in the year 1869, and bought the land of said Crowder, including the reversionary interest in the portion occupied as dower by the widow of James Burgess, who remained in possession of that portion of the land till her death in the year 1884, when he took and retained possession of it till the defendant entered by force and expelled him, in the year 1884.

On the cross-examination of the plaintiff, the defendant's counsel were permitted to ask him how many acres of land were conveyed by the deed of the sheriff, and he answered, 828. He then stated, in response to a question (plaintiff objecting), that he gave in for taxation 1,100 acres of land, after his purchase at sheriff's sale, and before he sold 172 acres off his tract. The plaintiff excepted. At a subsequent stage of the trial, plaintiff was recalled, and explained that he listed the dower land for taxation first in 1885, the widow having paid tax on it previously, and that he had listed for taxation in 1871, 922
(397) acres, including 90 acres bought from Spencer, administrator.

It is true that in *Thornburg v. Mastin,* 93 N. C., 258, the Court said: "Any one, supposing he has a claim upon the land of another, may list it and pay the tax upon it, but that would be very slight, if any, evidence tending to establish his title."

In the case of *Ruffin v. Overby,* 88 N. C., 369, it had been previously held that paying tax on land, without actual possession, would not perfect a colorable title. But in the case of *Austin v. King,* 97 N. C., 339, *Justice Davis,* delivering the opinion of the Court, settles the question by laying down the rule that the payment of taxes by a party *ante litem motam* is his act as distinguished from his declaration in reference to the land, and is some evidence to be weighed by the jury in passing upon the issue involving title. This principle disposes of the first, third, seventh and ninth exceptions.

The plaintiff then offered in evidence a deed from N. Patterson to James Burgess, executed in 1845, and a deed from Alfred Burgess to James Burgess, executed in the year 1846, in which the lands conveyed are described by metes and bounds, and as 419 acres on Tar River. The plaintiff also introduced the record of the petition of the widow of James Burgess for dower, showing a decree making an allotment to her by metes and bounds.

W. N. Fuller then testified, on behalf of the plaintiff, that he surveyed the Burgess tract of land and very nearly located it by the deeds, and that he also had the survey made when the dower was allotted. The plaintiff then "proved (as set forth in the statement) that James Burgess owned this land and resided on it from 1845 until his death, and owned no other land in Franklin County, and that Willie Crowder died in 1870-71, and was plaintiff's brother-in-law." This statement comprehends all of the material evidence for plaintiff, and, as instruc-
(398) tion was asked predicated upon all of the testimony, it is necessary to know what it was.

The land conveyed in the sheriff's deed to plaintiff (executed 1869) was described therein as "eight hundred and twenty-seven acres of land adjoining the lands of J. B. Mann (deceased), Mrs. Jane Wilder, Gaston

Wilder and others, containing, by estimation, eight hundred and twenty-seven acres, more or less." The descriptive clause in the administrator's deed to Crowder in 1859 is as follows, to wit: "All that tract or parcel of land belonging to the estate of James Burgess, deceased, lying on Tar River, adjoining lands of the said Willie Crowder, Dr. Joseph B. Mann and others, and supposed to contain four hundred and nineteen acres, except the life-estate of Lucy Ann Burgess, the widow of James Burgess, in that portion of said land assigned to her as dower, the meaning and intent of this deed being to convey to the said Willie Crowder absolutely the whole of the said land not covered by the widow's dower, to vest in possession immediately, and to convey that portion covered by the widow's dower, to vest in possession at the death of said widow."

The sheriff (Gupton) testified that he levied on and sold Crowder's land under a description given by him in 1869, and also referred to the tax list for description; that he sold all of the interest of Crowder in the land described in the deed, but said nothing at the time about dower.

Calvin Benton testified for the defendant that the dower tract did not adjoin the lands of Mrs. Jane Wilder or Gaston Wilder, nor did it join the Mann land till Mann bought the Burgess land.

The defendant offered to prove the declarations of Crowder while in possession of the land conveyed to him by Gray, administrator of Burgess, characterizing his possession, but stated that he did not know whether it was before or after the sale by the sheriff; that it was after Mann's death, in 1865 (he thought it was in 1870 or 1871), (399) but that at the time Ellis, the plaintiff, was not living on the land, but was living somewhere else. The court then admitted the declaration, and the plaintiff excepted.

The witness testified as follows: "Crowder showed me a pine near a hogpen; I saw the chopped line; he said it ran from a hedge-row in a straight line to the river. The land was worth five or six dollars per acre. I heard plaintiff (Ellis) say that he owned all of the interest Willie Crowder had in the land that he (Crowder) owned. I have lived in that neighborhood forty-five years. I knew Dr. Mann. I helped to lay off the dower. Mann had possession of all the Burgess land, except the dower, from the time of the sale by Gray, the administrator. Dr. Perry had possession of part after Mann's death."

On cross-examination, witness said: "Dr. Mann was not in possession of the widow's dower. I do not mean that Dr. Mann was in possession of all of it. The large part was in possession of Crowder."

It is evident, therefore, that his Honor found that the declarations were made by Crowder, while he was in possession, before the sale by the sheriff, and when it was against his interest to admit that he held

less land than the plaintiff now claims under a deed for all of his interest. So that if it be conceded that, by locating the line as marked, from the hedge-row to the river, and adopting the pine as a corner, it would have been against his (Crowder's) interest to surrender all outside of that line, the testimony was not incompetent. *Headen v. Womack,* 88 N. C., 468; *Jones v. Henry,* 84 N. C., 320; *Clifton v. Fort,* 98 N. C., 173; *Magee v. Blankenship,* 95 N. C., 563.

Badger Stallings, a witness for the defendant, testified as follows: "I know Willie Crowder and knew when the land in controversy was sold. Before the sale I saw Dr. Mann, Willie Crowder and Joe
(400) Bridgers, the surveyor, running the line between Crowder and Dr. Mann's. Crowder then told me he had a straight line to the road. The line ran through the dower."

The foregoing testimony was excepted to also. The declaration was clearly one made by Crowder in explanation of the character and extent of his possession, and being against his interest was unquestionably competent.

The witness was permitted to testify further (plaintiff objecting) as follows: "I heard John Ellis say that he did not claim any of the dower except the nine acres until he and Dr. Harris got to arguing about it, when he found, by his papers, that he had a good title to the whole of it."

When the plaintiff (Ellis) was cross-examined, he said: "When Widow Burgess died, I made claim to the land."

He (defendant) was then permitted (his counsel objecting) to ask him as to his declarations, and in response to the question he said: "I did not say that I had no interest in the dower except the ten acres. I did not say so to Mr. Robert Moore, nor to any one."

The testimony objected to on both occasions was competent to contradict Ellis, and to show that, in fact, he did not claim the whole of the dower land.

The exception growing out of the testimony of the witness Wilder is governed by the same principle to which we have adverted in discussing the exception to the evidence of Calvin Benton and of Badger Stallings, and the authorities already cited sustain the judge in overruling the plaintiff's objection.

It was not error in the court to refuse to instruct the jury that the plaintiff was entitled to recover upon the whole of the testimony, or any of the different phases if it suggested by the instruction asked by the plaintiff, which was as follows:

(401) 1. The deeds shown in evidence show that Willie Crowder was the owner of the Burgess tract of land, including the rever-

sion in the dower after the widow's death, and there is no evidence that any other person had any legal title to any part of said tract of land.

This instruction was not given, and the plaintiff excepted.

2. The jury cannot consider the declarations of Crowder or Ellis as affecting the title of either Crowder or Ellis to said land, and there is no evidence which can be considered by the jury to show that the said Crowder, up to the sheriff's sale, and Ellis after the sheriff's sale, did not have the title to said land, including the part in controversy in this action.

This instruction was not given, and the plaintiff excepted.

3. There is no evidence that Dr. Mann ever had any title to any part of the land in controversy, and the deed to the defendant conveys no title to any part of the land in controversy.

This instruction was not given, and the plaintiff excepted.

4. If the jury believe the testimony of the witnesses, they will find the first issue in favor of the plaintiff.

This instruction was not given, and the plaintiff excepted.

5. If the jury believe the evidence of the plaintiff, Ellis, and the witness, Gupton, they will find the first issue in favor of the plaintiff.

This instruction was not given, and the plaintiff excepted.

The deeds set forth the boundaries of land, but it is the testimony that locates them. In this case, the conflict arising out of contradictory evidence as to the extent of the plaintiff's land, whether it included the whole of the dower, or the lines should be so run as to exclude ten acres, covering the land on which the alleged trespass was committed, could be settled only by the jury.

If the declarations of Crowder and Ellis were competent, as we have held they were, then the jury could consider the testimony as to what they or either said in reference to the location of the line (402) for what they deemed it worth, as tending to show whether the land in controversy was sold by the sheriff, and was covered by plaintiff's deed from him. The plaintiff could recover only on the strength of his own title, and if the land was not embraced within the boundaries of his deed from the sheriff, he was not the owner, and, in that event, it was immaterial whether the administrator's deed included the disputed territory or not.

It would have been error in the court to predicate its instruction upon the supposed truth of the testimony of one or more witnesses of the plaintiff, as asked, when the testimony of Benton, Stallings, Wilder and the defendant, tended to contradict it, and when there was some conflict between the evidence of the plaintiff and Gupton, the witnesses mentioned.

We see no error in the charge of the court of which the plaintiff can justly complain. A review of the charge will show that it was even more favorable to the plaintiff than was requisite, in restricting the jury to the purposes for which they could consider certain testimony mentioned.

The court charged the jury as follows:

The plaintiff contends that the deed made by the sheriff in 1869 conveys the land in controversy, being that part of the Burgess land known as the dower. The defendant denies this averment, and says that the description in the deed does not cover or include the dower. Your verdict will depend upon the view which, upon the whole testimony, you may take of this question. As a matter of law I charge you that all of the interest which Willie Crowder had in the land described in the deed passed to the plaintiff. It is for you to say what land was sold, and is described in the sheriff's deed. (Plaintiff excepted to this part of the charge.)

The evidence of the declarations of Willie Crowder in regard to the settlement of a lien, etc., is not admitted for the purpose of
(403) showing title, and you should not consider it for that purpose; but it is proper for your consideration as bearing upon the question as to what land the sheriff sold. The sheriff swears that he obtained a description of the land for the purpose of making a levy from Willie Crowder; that he also consulted the tax books. The testimony of the witnesses in regard to the possession of the land is admitted for the same purpose. The testimony in regard to the declarations of Ellis, after the death of the widow, is admitted for the same purpose, so the tax lists, etc. (To this part of the charge plaintiff excepted.)

The testimony of the acts, conduct and declarations of Willie Crowder and John Ellis are not admitted for the purpose of affecting the title of Crowder, but to aid you in determining what land was levied upon and sold by the sheriff. In this same connection you may consider the testimony in regard to the description given by Crowder to Gupton, sheriff, for the purpose of enabling him to make levy. (This part of the charge was excepted to by the plaintiff.)

When the boundaries of a tract of land are established and known, the quantity or number of acres called for by the deed is immaterial, and could not affect the boundaries; but when the boundaries are unknown—not established—and the jury are charged with the duty of locating the land, the number of acres called for may be considered by them, in connection with other testimony, in ascertaining what land is in fact covered by the deed. (The plaintiff excepted to this part of the charge.)

Counsel in the argument contended that the plaintiff was entitled to recover because this was an action for possession only, and the plaintiff had testified that defendant expelled him from the land by force, in the year 1884. Upon referring to the record, we find that the pleadings distinctly raise the question of title, and that the court submitted issues involving the ownership, wrongful possession and damage, without objection. It is needless to add that the testimony tended, (404) on the one hand, to establish, and on the other, to disprove that the title to the land in controversy was in plaintiff.

Affirmed.

Cited: Ruffin v. Overby, 105 N. C., 86; *Boyden v. Hagaman,* 169 N. C., 203; *Byrd v. Spruce Co.,* 170 N. C., 434.

W. S. LAY v. THE RICHMOND AND DANVILLE RAILROAD CO.

Damages—Contributory Negligence—Proximate Cause—Judge's Charge—Trespass—Crossing.

1. In an action against a railroad for injury of a horse, plaintiff showed that the horse had fallen on defendant's track at a foot-crossing on account of getting his foot hung by a defectively driven spike, and that before he could get him off he was struck by defendant's dump-car, in charge of its agents, who were called on to stop more than a hundred yards away, the court charged the jury that though the plaintiff may have been negligent in entering defendant's track, said negligence was not the approximate cause of the injury complained of, and they should respond to the second issue, No: *Held* to be error.
2. The issue of contributory negligence ought not to have been withdrawn from the jury. For aught that appears, the plaintiff might have had reason to apprehend injury to his horse at that place, and, if so, it was negligence to take him over it.
3. The trespass, if admitted, does not prevent a recovery if defendant, by ordinary care, could have avoided the injury.
4. When the question of contributory negligence arises at all, the better practice is to submit a separate issue upon it.

THIS was a civil action, tried at Spring Term, 1890, of the Superior Court of GASTON County, before *Philips, J.*

The plaintiff demanded $200 for injuries to a horse, which he alleged was injured by the negligence of the defendant, and which was denied by the defendant, as set out in the pleadings, all of (405) which, with the issues submitted to the jury, appear in record.

Plaintiff offered himself as a witness, and swore: "In November, 1887, I was riding my horse across defendant's railroad track. When he reached the last rail in the direction in which I was going, he set his foot down so as to catch the toe of his shoe between the rail and the spike driven there for the purpose of holding the rail down. This spike was not driven home. I could put my hand between it and the tie. The horse got hung in this way, and fell over on the outside of the track, his body being on the outside, and his foot caught, as described, on the inside of the track. I went to the house of my brother (Rufus Lay) to get him to help me get the horse up. This was about one and a half miles from Gastonia, in the direction of Charlotte. My brother and I tried to pull the horse up so as to loose him, but could not. I heard the dump coming from towards Charlotte. My brother ran thirteen or fourteen yards beyond a private crossing, about ninety-seven yards from the horse, towards the dump. I myself ran about thirty yards in the direction the dump was coming; then I had to get off the track, out of the way of the dump. I said, 'Men, do not run over my horse,' and beckoned to them to stop. Baber, the sectionmaster, and six hands were on the dump. I hallooed, 'Men, for God sake, don't run over my horse!' After the dump ran over the horse, he got up. The dump ran about fifteen yards and stopped. I heard brother ahead of me hallooing at them. He ran up the railroad and hallooed, 'Stop! a horse is on the track.' They made no check until they ran over the horse. They were running at high speed. The track was level for a quarter of a mile where the horse was. They could have stopped from where Rufus met them, and could have stopped from where I was before they got to the horse. They made no attempt to stop. I was traveling a private road that crossed the railroad. This road (406) had been used as a private way ever since I was a boy, thirty years or more before the railroad was ever built, and has been kept up across the railroad since it was built. I could run my hand under the spike. The horse caught his shoe between the spike and the rail. The wheels mashed the bones and cut the leaders. I kept him from November until the next August. I let Clemmer have him and he died. He could not do a day's work after the accident. I did all I could to cure him. He had been a good horse and I did not want to kill him. John Craig told me to kill him. Craig was a man of large experience with horses. I had the horse in the stable for four months. He was worth, at the time of the accident, $100. After he got hurt he was not worth anything—a dead expense. I got an old mule for him, and he died. The horse cost me at least $50 in board and attendance. The mule I got for him was worth $5. I did not want to kill my horse, and I got the mule to get clear of the horse."

Cross-examined.—"Lovell is the first station out from Gastonia. The dump was coming from Lovell, going into Gastonia. It was dusky-dark, after sundown. There was no bridge across the road where my horse fell. There was a bridge at a private crossing about sixty-five yards from there, but the railroad had never built a bridge at the place where my horse got hung. The place where I was crossing was a foot-path, and there had never been any bridge across the road there. The horse's foot was caught between the spike and the rail. The horse fell over outside of the track into the ditch. The horse was not down more than ten or fifteen minutes. The dump ran ten or fifteen steps beyond the horse and then stopped. All of them got off it and looked at the horse. I tried to work the horse in the summer, but his foot was turned up so I could not."

Redirect.—"The road was straight from where Rufus was to the horse. You could see up the road."

Here plaintiff rested.

The defendant offered in evidence: (407)

1. The date of the summons in this cause, dated 4 August, 1888.

2. The complaint, showing the accident in November, 1887.

James Baber: "I was on the dump-car; we were running fast, twelve or fourteen miles an hour, trying to get into Gastonia before the freight train pulled out from there for Charlotte. It was dark when the horse was struck; was about fifty yards from the crossing. I knew this, because I counted the rails. It was five rails from the crossing, and the rails are thirty feet long. The first man I saw was about that crossing, and he was hollering, 'Stop!' This was Rufus Lay. I had been hollered at to stop so much by people who wanted to get a ride that I paid no attention. It was down grade from the bridge to the horse. We were running twelve or fourteen miles an hour. Next I saw W. S. Lay, who was hollering also, and we then put on the brakes. We thought something was the matter when we saw the second man. I was then employed on the road. I am not now. I have been off about eighteen months."

Cross-examined.—"My brother, Jack Baber, was the boss, and he ordered the brakes on. Bob Quinn was at the brake, Jack Baber whistled for the brakes to be put on. I do not know that I had seen the horse until I was on it. I heard the whistle before we rolled over the horse. I never was stopped by Rufe or W. S. Lay before. I had been on the road about eighteen months. I did not see the first man we passed, and did not know W. S. Lay until we had passed him. I was acquainted with both of them."

Redirect.—"Jack Baber had been on the road about two years."

John Baldwin swore that he was also on the dump, and told about the same story as Baber, and that he had been off the road about eighteen months.

(408) Bob Quinn was also on the dump, and swore about the same as Baber and Baldwin, and said further that he had "never been waved down by Rufus Lay before, but had been waved down by W. S. Lay; he waved us down to get a ride and Baber made him get off."

Defendant closed.

Plaintiff then offered Rufus Lay, a brother of plaintiff, who swore as follows: "I met the dump ninety-seven steps from where the horse was lying; it was thirty-two steps beyond the bridge. The horse was sixty-five steps from the bridge. I ran and hollered to Baber that a horse was hung on the track. It was in two hundred yards of my house. I hollered at the top of my voice and waved both hands, and said, 'Mr. Baber, a horse is hung on the track; don't run over him.' I hollered loud enough to be heard half a mile. W. S. Lay and I tried to get the horse off the track. I was at the horse when I heard the dump coming. I was in front of my brother, and did not see him signal to stop."

The defendant, among other prayers for instructions, asked the following:

1. Defendant owed no duty to plaintiff or to the public to erect and maintain a crossing that would be safe for horseback travellers at the point where plaintiff says he attempted to cross its track.

This prayer was given.

2. Therefore, in attempting to cross the track where he did, plaintiff was a mere trespasser, and took upon himself all the risks incident to such attempt, and defendant is not liable for any injury caused by the fall of the horse.

The court gave this charge, but added to it, "But the defendant would be liable for any injury caused to the horse after it had fallen, if it could have been avoided by ordinary care."

3. If the jury believe from the evidence that the horse was necessarily injured by the fall, plaintiff could not recover, because

(409) he has offered no evidence as to the extent of such injury, nor as to the value of the horse after the fall and before he was run over by the dump.

This prayer was refused.

4. Defendant is entitled to nothing for the keeping and doctoring his horse, when he shows, by his own evidence, that the advice of Veterinary Surgeon Craig, to whom he applied for advice, was to shoot the horse at once.

This prayer was refused.

(The remainder of the charge is incorporated in the opinion of the court.)

Defendant excepted to this charge.

The jury returned a verdict as set out in the record.

Defendant moved for a new trial. Motion denied. Appeal by defendant.

No counsel for plaintiff.
G. F. Bason for defendant.

AVERY, J., after stating the facts: The judge closed his charge to the jury in the following words: "The court further charges the jury that the burden of showing contributory negligence is on the defendant, and, before the jury can find the second issue in the affirmative, they must be satisfied that the negligence of the plaintiff was the proximate cause of the injury complained of; and the court instructs the jury, upon the evidence in this case, that, though the plaintiff may have been negligent in entering upon the track of the defendant, said negligence was not the approximate cause of the injury complained of, and the second issue should be answered, No."

There was error in withdrawing the issue involving contributory negligence from the jury, or telling them to respond to it, "No." If the plaintiff attempted to ride a horse across the track at a point other than a crossing, and the condition of the road at the place was such that he had any reason to apprehend injury to the animal (410) in the attempt to pass over, it was negligence to take it upon the road at all. We have no *data* upon which to form an opinion other than the fact that the horse was actually injured, and we could not safely determine the question of negligence solely from the fact of injury ensuing. Nor do we concede the soundness of the position that the plaintiff could not, in any event, recover, because he was a trespasser in attempting to pass at a place other than a crossing. If the facts in reference to the safety of the point selected as a passway were in dispute, the jury should have been left to respond, with suitable instruction, to the second issue. 2 Wood's R. L., sec. 418, p. 1550.

The trespass, if admitted, does not prevent a recovery, if the defendant, by ordinary care, could have avoided the injury. 3 Wood's R. L., sec. 417, p. 1546, note 137; *Bullock v. R. R.*, 105 N. C., 180.

While it was not essential that there should have been another issue, this case illustrates the importance of adopting the suggestion of this Court in *McAdoo v. R. R.*, 105 N. C., 140, of submitting to the jury by a separate issue, where it arises, the question, whether the defendant,

notwithstanding the contributory negligence of the plaintiff, could, by the exercise of ordinary care, have avoided the injury. In instructing the jury as to such an issue, some of the points discussed in the case of *Bullock v. R. R.*, 105 N. C., 180, would necessarily arise, but were not referred to by his Honor except in stating, in a previous part of his charge, the abstract principle. If the jury had found, in response to another issue, that, notwithstanding plaintiff's negligence, the defendant could have avoided the injury by the exercise of ordinary care, the finding of the second issue would have been immaterial. The judge, in effect, however, decided upon the evidence that the negligence of the plaintiff was not, but that of the defendant was, the proximate
(411) cause of the injury, without leaving the jury to determine whether the defendant, after he ascertained or had reason to believe, or, by proper watchfulness, might have discovered that the horse was fastened upon the track, could, by the use of the appliances at his command, have avoided running his dump-car over it. He might have submitted such instruction and applied it to the first issue, but more clearly and readily to an additional one, such as we have suggested.

There was error, for which a new trial must be granted.

Error.

Cited: Deans v. R. R., 107 N. C., 690; *Braswell v. Johnston*, 108 N. C., 152; *Emry v. R. R.*, 109 N. C., 611; *Norwood v. R. R.*, 111 N. C., 241.

W. P. ROBERTS ET AL. v. RICHMOND PRESTON.

Boundary—Evidence—Right of Owner to Enter Upon Land—Action of Trespass.

1. A deed, made in 1863, and under which defendant claimed, described the land as "beginning on the sound, at a ditch." The plaintiff contended that this beginning was at A, where a ditch enters the sound; the defendant contended that it was at F, where there is now no ditch. A surveyor testified that he had surveyed the line claimed by defendant; that if a ditch had entered the sound at F in 1863, it would be hard to distinguish it now; that he had located F as the beginning corner, by deed to adjoining tract. There was evidence that there was a ditch along the line F, H; that it approached within eighty yards of F, where a swamp intervened; that said ditch seemed to have been cut for a drain, but was not now visible at F; that nails in certain gate-posts and trees, marking a line

of water-fence, were found in 1887, running from the marsh to the sound, in line with the ditch: *Held*, that there was sufficient evidence to warrant the finding of the jury that the beginning point was at F.

2. The owner of land has the right to enter peaceably on it as against an occupant having no title or right of possession; and, having so entered, may put any person in possession of the land, or any part of it, under him, and may do with it whatever he may lawfully do with his own property.

3. A person in wrongful possession of land cannot maintain trespass against the lawful owner, having entered peaceably, or against those in possession under him.

THIS was a civil action, tried before *Boykin, J.*, at Spring (412) Term, 1889, of the Superior Court of CHOWAN County.

The purpose of this action is to recover damages for alleged trespasses of the defendant on the land specified in the complaint.

The following is so much of the case settled on appeal as need be reported:

Both parties claim the land in controversy under Mills Roberts, who owned two contiguous farms, shown on the map and designated "Long Lane" and "Long Beach."

In 1863, by deed, Mills Roberts sold part of said land to Merriman & Hughes. The land so sold afterwards became the property of one Hettrick. It was agreed on the trial that defendant Preston, by contract, had succeeded to all his rights to enter and cut the timber on the land conveyed in the deed to Merriman & Hughes. It was likewise agreed that if the *locus in quo* did not belong to the plaintiffs, it was the property of Hettrick when he entered into the contract with the defendant.

All the land comprising the said two farms, except that part sold to Merriman & Hughes, upon the death of Mills Roberts, descended to the plaintiffs, his heirs at law.

One question in dispute was, What is the eastern boundary of the land sold to Merriman & Hughes?

The plaintiffs insist that it is represented by the broken line, *A, B, C, D, E*. The defendant that it is represented by the dotted line, *F, G, H, K, L, N*. Between these two lines, it is alleged, the trespass was committed.

The plaintiffs introduced evidence tending to show that there was a ditch from A to B. There was evidence on the part of the defendant to the effect that there was a ditch from an old gatepost to a point near F; that it approached within eighty yards of that point, F, when a swamp, that may have obscured the line of the ditch as it for- (413) merly ran, intervened; that there was also a sandbar, caused by

the ebb and flow of the tide, immediately upon the sound; that the ditch aforesaid seemed to have been cut for a drain, but was not now visible at F; that nails in certain posts of a gate and trees marked, marking a line of water-fence, were found when a survey was made, under order of the court, in this cause in 1887, running from the edge of the marsh to the sound in line with the ditch. There was a gully at F, through which the water flowed from the sound into the marsh, and again from the marsh to the sound.

There was evidence tending to show that the only ditch *now* opening into the sound is at A, which is near a brick-kiln, and at a point near Long Beach Fishery. One of the calls in the deed from Roberts to Merriman & Hughes is "up the swamp to the Roberts-Benbury line." Much of the evidence introduced was with the view of locating the original "Benbury" line. To establish the line plaintiffs introduced the deed of Richard B. Benbury, under whom Mills Roberts claimed, dated in 1843, conveying to Alexander Cheshire part of his land, afterwards known as "Long Beach"; also deed of Alexander Cheshire to James Norcom, Jr., in 1844, conveying same land. The will of Richard Benbury was also put in evidence, it having been probated in 1844, under certain proceedings, duly introduced, the heirs of Mills Roberts became the purchasers of the remaining lands of Richard B. Benbury.

One Winslow, a surveyor, testified that he was familiar with the land in dispute, and had surveyed the line claimed by defendants from the sound at F to the Edenton road; that he knew the marsh between F and where the ditch along the line F H is plainly visible near the sound; that if a ditch had ever entered the sound at F, through the swamp or marsh in 1864, it would be hard to distinguish it now. He testi-
(414) fied that he found a gum and cypress at F in 1877, and that the stumps are there now. There were two gate-posts on line F H. He says: "F H is the Roberts-Benbury line." He further testified that he had located F as the beginning called for in the deed to Merriman & Hughes by certain surveys made under deed for adjoining tracts, and by the above named deed itself.

Dr. Leary testified that he was born on a farm adjoining the lands in disputue. Joseph C. Benbury owned "Long Lane" farm then. E H was then known as the line; there was a road and a gate on line F H; there was a ditch along line F H, which was the dividing line. Richard Benbury owned "Long Lane" after Joseph C. Benbury's death. The Cheshire fishery field is between A, B, G, F; that the line N F was the western boundary of the Roberts-Benbury farm, and that the Cheshire fishery field had never been a part of the Roberts-Benbury farm.

M. H. Hughes testified that if the land within the lines A, B, G, F was the Cheshire fishery field, then F G would necessarily be the extreme western ditch on the Roberts-Benbury farm.

There was evidence tending to show that the gate opening into the Cheshire fishery field was on the line F, G, H, and that this line is the dividing line between the Roberts-Benbury farm and Cheshire fishery field.

The plaintiffs admitted that the Cheshire fishery field, wherever located, was included within the boundaries of the deed from Mills Roberts to Merriman & Hughes. It was admitted that there was no ditch between A B and F G, running towards the sound.

One Spruill testified that, on one occasion, Mills Roberts, the owner of "Long Lane," abused him for pushing down the fence on line F, G, H, and stated to him that this was the dividing line between "Long Lane" and the "Cheshire fishery" field.

The defendant contended that it was immaterial whether the (415) ditch at F was now visible or not, arguing that in every respect, except its emptying into the sound, the description of the deed was met, and insisting that time, and the ebb and flow of the tides, and the consequent deepening of the marsh, had destroyed it.

The plaintiffs requested the court to charge the jury that "in locating the line of the land conveyed by Mills Roberts to Merriman & Hughes, under whom defendant claims, the jury must begin on the sound at a ditch, and that a ditch seventy-five yards from the sound, separated from it by a swamp and sandbar, will not satisfy the beginning called for in that deed." The court refused, and instructed the jury "that, to ascertain the beginning in that deed, they must locate a ditch on the sound in 1863, not now, according to the calls and descriptions of the said deed, having due regard to the other objects referred to therein by way of identifying the said beginning; and if it should be found that there is not now a ditch at F, the jury must determine," said the court, "as above instructed, whether there was such ditch surrounded by objects conforming to those mentioned in the deed in 1863, which has been destroyed by the lapse of time, or the ebb and flow of the tides erecting the sandbar and changing the bed of the swamp through which the said ditch is claimed to have run."

Plaintiffs excepted, because, as they insisted, there was no evidence that there had ever been any ditch at F.

There was evidence that, from 1863 to the beginning of this suit, Mills Roberts, and those under whom he claimed, were in the actual possession of certain parts of the *locus in quo,* a part of the time in possession of the entire tract between *A, B, G, F,* cultivating the same, and exercising numerous acts of ownership over it. Some weeks before

the entry of the defendant Preston, Hettrick had entered upon the land and taken possession. This was in May, 1887, according
(416) to his evidence, and before Preston built his tramway and prepared his lumber yard. He testified that he entered, posted the land, and cut timber on it before the entry of Preston, claiming title under his deed therefor. He said that when he entered, the land was not cultivated, or used in any way by any one, except a small part was used by a tenant, or tenants, of plaintiffs, around their houses which they occupied.

Preston testified that when he entered upon the land, Hettrick was in possession, claiming the same, had timber cut thereon at the time, and that he, Preston, cut timber thereon, Hettrick having full knowledge thereof. He further testified that he constructed a tramway thereon after his entry, and that one Rooks, who had become plaintiffs' tenant prior to Hettrick's entry, gave him permission to run his tramway through his, Rooks', enclosure. This was denied by Rooks, who continued his possession as aforesaid until after the bringing of this suit.

The plaintiffs requested the court to charge the jury as follows:

1. Whether plaintiffs have proven title or not to the land in controversy, yet if they were in the actual possession of the land, or any part of it, and the defendant, while they were there in possession of the land, entered upon the land so in their possession, and built a tramway or cut down trees without the plaintiffs' permission, he was guilty of trespass, as charged in the complaint, and the first issue must be found Yes. This was given by the court, with the qualification, unless the jury find from the evidence that at the time of Preston's entry, Hettrick was the owner of said land, had previously entered thereon, and taken possession thereof, and was at the time of Preston's entry in actual possession, and had authorized Preston to enter, in which event the response would be No. Plaintiffs excepted.

(417) 4. If the plaintiffs had the actual possession by themselves, or their tenants, of the land upon which the alleged trespasses were committed, Hettrick had no right, although he was the owner of the land, to commit the trespasses alleged. The going upon the land by Hettrick, while thus in possession of plaintiffs, without their consent, and posting the same, or cutting down trees, was not such a possession as ousted plaintiffs' possession, or empowered Hettrick to authorize the said act of Preston.

The court charged the jury as follows:

"If the plaintiffs had the actual possession by themselves, or their tenants, of the land upon which the alleged trespasses were committed, Hettrick had no right, although he was the owner of the land, to au-

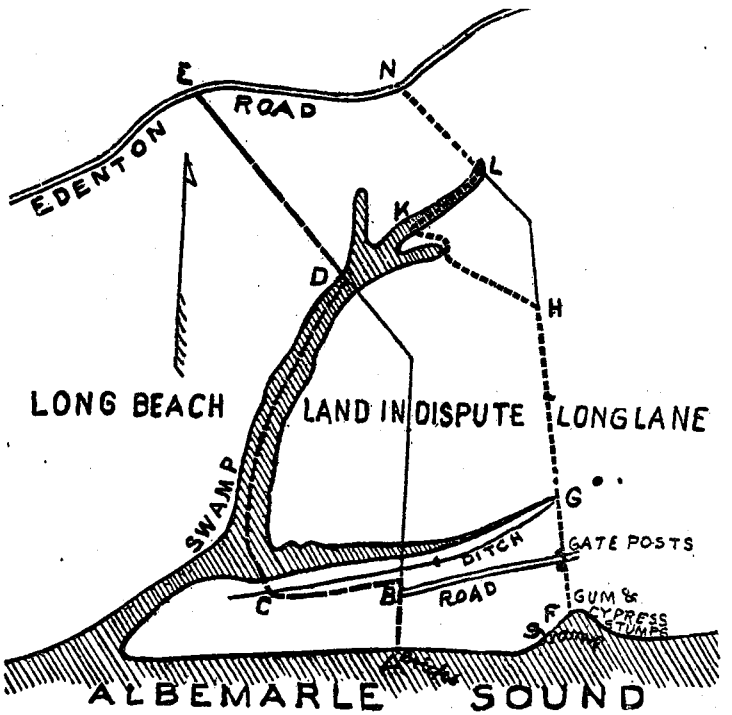
thorize defendant Preston to commit the acts alleged, unless, prior to Preston's entry, Hettrick had gone on said land and was occupying the same, under his claim of title, at the time Preston so entered, and authorized the entry. But if Hettrick should be found to be the owner of the *locus in quo,* and was in the actual possession of the same under his claim of title, engaged in cutting timber, after having posted the same, when defendant Preston entered, and authorized the said entry and acts, plaintiffs cannot recover." Plaintiffs excepted.

The court charged the jury, also:

1. That the owner of land, or any one under his direction, after possession has been acquired by the said owner, has the right to enter peaceably on it, as against an occupant without title or right to the possession.

2. That when the owner of land enters upon it for the purpose of taking possession, his possession and title unite, and he cannot be sued as a trespasser by a person who is on the land having no title or right of possession. Plaintiff excepted.

The following is a diagram of the premises in question: (418)



There was a verdict and judgment thereupon for the defendant, and the plaintiff, having excepted, appealed to this Court.

W. D. Pruden for plaintiffs.
C. M. Busbee and W. M. Bond (by brief) for defendant.

MERRIMON, C. J., after stating the facts: The plaintiffs claim as the heirs of Mills Roberts, deceased, and defendant justifies by virtue of a deed executed by him on 18 September, 1863, to W. H. Hughes
(419) and another, which specified and described the land thereby conveyed as "beginning *on the sound at a ditch* in said Roberts-Benberry farm; thence up the ditch to the fence; thence along the fence outside to the edge of the swamp; thence up the swamp to said Roberts-Benberry line," etc. The land is further described "as a certain tract or parcel of land and the Long Beach fishery, on Albemarle sound," etc. The evidence went to show that there is a ditch entering the sound at "A" on the diagram, and the plaintiffs contend that the beginning corner mentioned in the deed is there. The defendant contends that the beginning corner is at "F," on the diagram; that there was a ditch there in 1863, at the time the deed mentioned was executed. The plaintiff insisted that there was no evidence to go to the jury to prove that fact, and the court held otherwise, and we think properly.

The testimony of the witnesses, Winston, Leary and Hughes, all taken together, certainly tended to prove that a ditch probably was at the point on the sound designated as "F" on the diagram. And this is strengthened in that, as stated in the case settled, "there was evidence on the part of the defendant to the effect that there was a ditch from an old gate-post to a point near 'F'; that it approached within eighty yards of that point, 'F,' when a swamp, that may have obscured the line of the ditch as it formerly ran, intervened; that there was also a sand-bar, caused by the ebb and flow of the tide, immediately upon the sound; that the ditch aforesaid seemed to have been cut for a drain, but was not now visible at 'F'; that nails in certain posts of a gate and trees, marking a line of water-fence, were found when a survey was made, under order of the court in this cause in 1887, running from the edge of the marsh *to the sound, in line with the ditch.* There was a gully at 'F,' through which the water flowed from the sound into the marsh, and again from the marsh to the sound." Such evidence, taken in all its reasonable bearings, certainly pointed, with no little
(420) force, to a ditch at "F," in 1863. It was evidence for the purpose of proving that a ditch was there then, to go to the jury, and it was their province to determine its weight and what inference

they would draw from it as a whole, in respect to the material descriptive fact in question.

There was evidence going to prove that Hettrick, under whom the defendant claims and justifies, had title to the land in question at and before the time of the alleged trespasses, and that he then had actual possession and control thereof, and that while he was so in possession, he allowed the defendant to cut timber, and do other things complained of on the land. There was also evidence to the contrary.

Unquestionably, the owner of land having the right of possession may peaceably enter upon it, while another person, who has no right, has previously taken, and has, possession thereof. When the lawful owner thus enters and takes possession, the possession extends to the whole tract unless a person is in the wrongful possession of some part, in which case, his wrongful possession is confined to the part of which he has actual possession. When the lawful owner thus takes possession, the law favors and helps him in the assertion of his right. Thus he has perfect title, and he may do whatever he may lawfully do with his own property. He cannot be treated as a trespasser in such case. He may put his agents and servants in possession of the land, or any part of it, under him, and may authorize other persons to cut timber, construct roads, and do other things on his land, and have the right to ingress, egress and regress. Nor can the person having such wrongful possession maintain trespass in such case against the lawful owner, or those in possession under him, or cutting timber, and doing other like things on the land by his permission or direction. This is so, because he goes into and has possession of right. *Ring v. King,* 4 Dev. & Bat., 164; *Tredwell v. Reddick,* 1 Ired., 56; *Everett v. Smith,* Busb., 303; *White v. Cooper,* 8 Jones, 48; *Gadsby v. Dyer,* 91 N. C., 311; (421) *Logan v. Fitzgerald,* 92 N. C., 644; *Gaylord v. Respass, ibid.,* 553; *Nixon v. Williams,* 95 N. C., 103.

The court, therefore, properly declined to give the jury instructions as specially demanded by the plaintiffs, without modification. The conflicting evidence presented the case before the jury in two distinct aspects: one favorable to the plaintiffs, the other favorable to the defendant. As to that favorable to the former, the instructions given were quite as favorable as they were entitled to have. The court properly went further, and gave instructions as to the aspect favorable to the defendant. It would have been error not to have done so. Nor do we, for reasons already stated, perceive any error in the instructions so given. As we have seen, there was evidence of title to the land in controversy in Hettrick; that he had possession of the land, and that he authorized the defendant to cut the timber, etc. If this was true, the

plaintiffs could not recover. It was in the province of the jury, under instructions from the court, to determine the issues of fact.

What we have said disposes of all the exceptions.

Judgment affirmed.

Cited: Faulk v. Thornton, 108 N. C., 319.

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(422)

I. A. JARRATT, ADMINISTRATOR OF ISAAC JARRATT, v. JOHN C. LYNCH, ADMINISTRATOR OF ELIZABETH LYNCH.

Administrator de bonis non—Settlement of Estate—Collateral Attack on Judgment—Evidence.

1. It is the duty of an administrator *d. b. n.* to complete the settlement of his intestate's estate, and the distributees must look to him for settlement.
2. Where an administrator *d. b. n.* brought suit against the administrator of the former administrator for a settlement of the estate, which suit was settled by a compromise judgment and the amount recovered duly distributed: *Held,* in an action by the administrator of the former administrator upon a bond given to him by one of the distributees for certain personal property purchased at his administrator's sale, and with which his estate had been charged in the settlement with the administrator *d. b. n.*, that the judgment in said suit could not be attacked in this action; that, upon the testimony, there was no evidence of fraud to go to the jury, and that the plaintiff was entitled to recover.
3. The admission of the contents of a letter written by an attorney is no ground for a new trial, when there is afterwards evidence as to the same fact, substantially, as that contained in the letter, especially when it does not appear that the defendant was prejudiced.

THIS was a civil action, tried before *Connor, J.,* at Fall Term, 1888, of YADKIN Superior Court.

W. W. Long and Isaac Jarratt were administrators on the estate of L. Lynch, and Isaac Jarratt, as surviving administrator, took from Elizabeth Lynch, for personal property purchased at the sale of the said L. Lynch, the bond of $448.25 declared on, and was charged with the amount of the sale of said personal property, including that for which said bond was given, in the account and settlement in the suit brought by P. A. Wilson, administrator *de bonis non* of L. Lynch, against I. A. Jarratt, administrator of Isaac Jarratt, former administrator of L. Lynch, referred to below.

Elizabeth Lynch was the widow and one of the distributees of (423) the said Lynch, and died, in 1877, without paying said bond, and defendant was appointed her administrator.

Isaac Jarratt died in 1880, not having closed up the administration of the estate of L. Lynch, and the plaintiff qualified as his administrator.

P. A. Wilson was appointed and qualified as administrator *de bonis non* of L. Lynch, and brought suit against the said I. A. Jarratt, administrator of Isaac Jarratt, for an account and settlement of the estate of L. Lynch, in the hands of the former administrators, W. W. Long and Isaac Jarratt, and Isaac Jarratt, surviving administrator, and the cause was referred to I. N. Vestal, as referee, to take and state an account, and the records in the case show an account to have been taken and stated, and report made in favor of P. A. Wilson, administrator *de bonis non* of L. Lynch, for $2,500, and at Spring Term, 1884, of Yadkin Superior Court, the following judgment was signed by *Gilmer, J.*:

"This cause coming on to be heard before his Honor, John A. Gilmer, judge presiding at Spring Term, 1884, of the Superior Court of Yadkin County, upon the report of I. N. Vestal, referee, and it appearing to the court that no exceptions have been filed to the report:

"It is, therefore, on motion of counsel for the plaintiff, ordered and adjudged that the said report be in all things confirmed, and that the plaintiff recover of the defendant, I. A. Jarratt, administrator of Isaac Jarratt, deceased, the sum of $2,500 and the cost of this action, to be taxed by the clerk of this court, including the sum of $25, as an allowance to I. N. Vestal, referee, for taking and stating this said account."

The plaintiff introduced the following evidence, viz.:

1. The notes described in the complaint. The execution of the (424) notes sued on was admitted by the defendant on the trial.

2. The judgment docket, page 141, showing judgment copied above, and also the judgment roll containing record of the above action, entitled "P. A. Wilson, administrator *de bonis non* of Larkin Lynch, *v.* I. A. Jarratt, administrator of Isaac Jarratt, deceased, and others," and showing that the referee charged the defendant with the sales of the personal property of Larkin Lynch.

3. Cyrus B. Watson, witness for plaintiff, testified: "I was attorney for P. A. Wilson, administrator *de bonis non* of Larkin Lynch, *v.* I. A. Jarratt, administrator of Isaac Jarratt, former administrator of Larkin Lynch. W. B. Glenn and A. E. Holton, Esqs., were also counsel for Wilson with me. Defendant J. C. Lynch was one of the distributees of Larkin Lynch, and he and the other distributees of Larkin Lynch agreed to assist the administrator *de bonis non* in getting up evidence

and otherwise, and Wilson, administrator *de bonis non* of Larkin Lynch, was to bring suit and pay them a certain part of the recovery. Wilson and Gray and others held large judgments against Larkin Lynch's estate—more than ever satisfied. This suit was brought by P. A. Wilson, administrator *de bonis non* of Larkin Lynch, *v.* I. A. Jarratt, administrator of Isaac Jarratt, former administrator of Larkin Lynch; and the parties met two or three times to hear evidence, but, on account of the long lapse of time since Larkin Lynch's death, the death of W. W. Long and Isaac Jarratt, both the former administrators of Larkin Lynch, and the death of many witnesses, great difficulty was experienced in taking the account on both sides, and the suit was compromised and settled, pending the taking the account, by I. A. Jarratt, administrator, paying to the plaintiff $2,500, in full settlement of all claims against Isaac Jarratt, former administrator of Larkin
(425) Lynch. Wilson, administrator *de bonis non,* was to have a judgment for $1,400 against one William A. Joyce, in name of Parratt, administrator of Lynch."

This judgment was afterwards collected by Wilson, administrator.

The receipt for the $2,500, dated 4 June, 1884, was shown to and read by Mr. Watson to the jury. The $2,500 thus collected by Wilson, administrator, was paid out by him; the part due defendant J. C. Lynch and the other distributees was paid to them, and their receipts taken for the same. The settlement was fair and honest, and witness considered it a good compromise for Wilson, administrator, and the Lynch distributees. Defendant J. C. Lynch and some of the others were present when the settlement was agreed upon, and all have since approved and ratified it and received some of the money.

Mr. Watson was shown and allowed, after objection by defendant, to read a letter written by him to J. C. Lynch, dated 12 September, 1884. Exception by defendant.

Defendant then introduced the following evidence:

P. A. Wilson, witness for defendant, testified: "I knew nothing of the notes in suit. Mr. J. C. Lynch told me of them, either before or after the compromise. I was the administrator *de bonis non* of Larkin Lynch. I had great difficulty in getting evidence. The suit by me against I. A. Jarratt, administrator of Isaac Jarratt, former administrator of L. Lynch, was compromised, by which I got $2,500 and the Joyce judgment. I paid out the money. Paid defendant and the other distributees of Larkin Lynch their part, and took receipts from all of them. I make no claim on these notes.

"Messrs. Watson & Glenn and Mr. Holton were my counsel. The compromise was fair and honest, and I thought was an advantageous one for me."

The defendant and some of the other Lynch heirs were (426) present and agreed to the compromise, and all of them have received and receipted for their part of the money. By which compromise, settlement, judgment and payments, plaintiff alleges he became the owner of the $448.25, as the administrator of the said Isaac Jarratt. And there was no dispute at the trial as to the ownership of the other note, it being made payable to the said Isaac Jarratt individually.

His Honor intimated that he would instruct the jury that there was no evidence of fraud; that it was the duty of the administrator *de bonis non* to complete the settlement of Lynch's estate, and his distributees must look to Wilson, administrator *de bonis non,* for settlement, and defendant could not attack the judgment in this action; whereupon, in deference to his Honor's opinion, defendant's counsel declined to introduce any other testimony, and the court instructed the jury to answer the issue in the affirmative.

There was a verdict and judgment for the plaintiff, from which the defendant appealed.

E. L. Gaither and D. M. Furches for plaintiff.
No counsel contra.

SHEPHERD, J. We were not favored with an argument by the appellant, but we have carefully perused the record and are unable to find any error.

His Honor was clearly right in intimating that he would instruct the jury that there was no evidence of fraud; that it was the duty of the administrator *de bonis non* to complete the settlement of Lynch's estate; that his distributees must look to Wilson, administrator *de bonis non,* for settlement, and that defendant could not attack the judgment in this action.

The exception to the witness Watson being permitted to testify to the contents of the letter written by him as the attorney of Wilson, to J. C. Lynch, is no ground for a new trial; as Wilson was afterwards placed upon the stand by the defendant, and testified substan- (427) tially to the same fact, to wit, that he made no claim upon the notes.

Granting that the ruling was erroneous, we cannot see how the defendant was, or might have been prejudiced thereby, and this must appear in order to justify the intervention of this Court.

No error.

J. A. HARTNESS, ASSIGNEE, v. D. WALLACE ET AL.

Partnership—Misapplication of Partnership Funds by One Partner—Payment of Individual Indebtedness with Partnership Funds—Jurisdiction.

1. One partner has no right, without the consent of his copartners, to apply the funds, or other effects of the partnership, to the payment of debts, contracts or obligations binding upon himself individually, and with which the partnership has no connection.

2. Where one partner, in discharge of his individual indebtedness, and without the knowledge or consent of his copartner, transferred to W., by endorsement in the firm name, a note belonging to the firm and past due, the partnership receiving no benefit, and being, at the time, insolvent, and the note was afterwards paid by the obliger to W.: *Held*, in an action by the assignee of the firm against W. to collect the amount paid him, that the plaintiff was entitled to recover.

3. In such case, the amount sued for being less than two hundred dollars, a justice of the peace has jurisdiction of the action.

THIS was a civil action, commenced before a justice of the peace and carried by appeal to the February Term, 1889, of IREDELL Superior Court, and tried before *Shipp, J.*

(428) By consent a jury trial was waived, and his Honor found the facts as follows:

1. The firm of Connelly & Deitz consisted of one J. B. Connelly and M. J. Deitz, and was organized eight or ten years ago, and continued in the business of buying and selling wagons and buggies until the assignment made by said firm to the plaintiff J. A. Hartness, in the month of August, 1888.

2. That on 27 June, 1888, M. D. Hobbs purchased from Connelly & Deitz one buggy for the sum of $85, and gave his promissory note for said amount, bearing 8 per cent interest per annum, one day after date, and payable to Connelly & Deitz.

3. That on 3 July, 1888, the said note was transferred and assigned to Wallace Bros., the defendants, by J. B. Connelly, one of the partners of the firm of Connelly & Deitz, in part payment of the individual indebtedness of said J. B. Connelly to Wallace Bros., by writing across the back of said note "Connelly & Deitz." That said transfer or assignment was made without the knowledge or consent of the said M. J. Deitz, and that said firm of Connelly & Deitz, or the said Deitz, has never received any benefit on account of said note.

4. That on 16 August, 1888, the said M. D. Hobbs paid to the said Wallace Bros., the defendants, the full amount of the principal of said

note, viz., $85, and the accrued interest thereon, viz., $1, total $86, which was prior to the general assignment of Connelly & Deitz.

5. That at the time the said note was transferred by J. B. Connelly to Wallace Bros., the firm of Connelly & Deitz was insolvent and was insolvent six months before the assignment, but it was not known to the public at large until this assignment on 24 August, 1888.

6. That on 24 August, 1888, Connelly & Deitz made a deed of trust or assignment to the plaintiff J. A. Hartness, and conveyed to him certain personal property and all the choses in action that belonged to said firm, in trust to sell said property and collect the debts (429) due the firm for the use and benefit of the creditors of said firm and that the assets turned over to the plaintiff as assignee aforesaid were much less than the amount of debts due and owing by said firm.

7. That J. B. Connelly and M. J. Deitz were each the owner of one-half interest in said firm.

8. That J. B. Connelly failed and made an assignment for the benefit of his creditors on 11 August, 1888.

9. That the defendants knew of the existence of the firm of Connelly & Deitz, and of the business they carried on.

The above are the facts found by consent.

Upon the facts so found his Honor rendered the following judgment:

"Upon this finding of facts I am of opinion that the plaintiff is entitled to judgment. It is considered that he recover the sum of eighty-five dollars ($85) and interest, and the costs, to be taxed by the clerk."

The defendants having excepted, appealed.

C. H. Armfield (by brief) for plaintiff.
L. C. Caldwell for defendants.

MERRIMON, C. J. The contention that the action involves and requires an account and settlement of the partnership matters and business mentioned, and, therefore the court of a justice of the peace had not jurisdiction of the subject-matter of the action, is unfounded. The firm mentioned, by its deed of assignment, conveyed to the plaintiff "certain personal property and all the choses in action that belonged to the firm, in trust to sell said property and collect the debts due the firm for the use and benefit of the creditors." etc. The sole purpose of the action is to collect (recover) a sum of money less than two hundred dollars, the amount of a note due the partnership so (430) assigned to the plaintiff and collected by the defendants under claim and color of ownership thereof. If the note so collected by the defendants belonged to the partnership at the time the deed of assign-

ment was executed, it passed to the plaintiff. If, before or after that time, they so collected the money due upon it, as they did, the plaintiff could maintain this action, because, in that case, the money was so collected by them for the firm and the plaintiff as assignee, and the action is brought to recover a sum within the jurisdiction of a justice of the peace. And the plaintiff could maintain the action in his own name. The statute (The Code, secs. 177, 179) provides that, "the real party in interest" must sue in his own name, except that "a trustee of an express trust (as in this case) may sue without joining with him the person for whose benefit the action is prosecuted." *Abrams v. Cureton,* 74 N. C., 523; *Alexander v. Wriston,* 81 N. C., 191; *Wynne v. Heck,* 92 N. C., 414.

It is very clear that one partner has no right, without the consent of his copartners, to use, devote or apply the funds, securities or other effects of the partnership to the payment or discharge of debts, contracts or obligations binding upon himself individually, and with which the partnership has no connection. Such use of such securities would be, not simply a misapplication thereof, but as well a fraud upon the partnership, participated in by the partner so misapplying the same, and also his creditor, if the latter had notice of such misapplication, and he would be presumed to have such notice, though he might show the contrary if he could. That the securities belong to the partnership, or appear to belong to it, puts the creditor of the individual partner on notice of its rights. Hence, in Story on Partnership, sec. 132, it is said: "In such cases the creditor, dealing with the partner, and knowing the circumstances, will be deemed to act *mala fide,* and in fraud of the partnership, and the transaction by which the funds, securities (431) and other effects of the partnership had been obtained, will be treated as a nullity." Hence, also, it is said in Collyer on Partnership, sec. 496, "But a series of decisions has shown that if the separate creditors of a partner take a partnership security towards the discharge of his separate debt, the fact alone, unless explained by particular circumstances, is conclusive evidence to charge the creditor with fraud, or with gross negligence amounting to fraud; and, consequently, that the firm is not bound by such transaction." Also, in 3 Kents' Com., 42, it is said, "But if partnership security be taken from one partner, without the previous knowledge and consent of the others, for a debt which the creditor knew at the time was the private debt of the particular partner, it would be a fraudulent transaction, and clearly void in respect to the partnership," etc.

In *Cotton v. Evans,* 1 Dev. & Bat. Eq., 295, *Ruffin, C. J.,* said: "I admit, therefore, that the cases cited, and numerous others establish,

that if a separate creditor take from his debtor a partnership security for his debt, the fact alone is conclusive evidence of fraud and vitiates the security. I use the term fraud, because I consider it embracing not only actual collusion, but what has been called gross negligence, in reference to this subject; though, it seems to me, that the fault of the creditor is not so much one of *laches,* as of positive wrong, in gaining a security which he must know his debtor ought not to give, nor, consequently, to be taken. This is certainly of itself a fraud." And afterwards, in *Weed v. Richardson,* 2 Dev. & Bat., 535, he said: "It is now well settled at law that it is *prima facie* fraudulent for a creditor of one of the firm to take from him the security of the firm; for it is a security which the creditor knows his separate debtor ought not to give without the consent of the firm, and, therefore, he cannot honestly take." *Wharton v. Woodburn,* 4 Dev. & Bat., 507; *Troy v. Carter,* 3 Ired., 238; *Abpt v. Miller,* 5 Jones, 32; *Ross v. Henderson,* 77 N. C., 170; *Dale v. Halsey,* 16 John., 34; *Rogers v. Batchelor,* (432) 12 Pet., 229.

The note here in question was due and payable to Connelly & Deitz, partners, and past due. Connelly, of this partnership, without the knowledge or consent of his copartner, transferred it by endorsement in the firm name of the defendants, in payment of his own individual debt due to them, and the firm never received any benefit of the same. The defendants knew, or ought to have known, that Connelly had no right to misapply a note due to the firm, and they had no right to receive it in payment of his debt due them.

No question (though it was contended to the contrary) whether in law or equity, as to any interest Connelly might have had in the property of the partnership is presented, because the latter was insolvent at and before the time the defendants so obtained the note, which they afterwards collected. Nor can any question as to the effect of the endorsement of the note arise. It was past due when endorsed, and moreover, the defendants were not holders without notice of the misapplication of the note as a security belonging to the partnership.

Judgment affirmed.

Cited: Lance v. Butler, 135 N. C., 423.

(433)

M. MILLHISER ET AL. v. CHARLES F. BALSLEY.

Motion to Vacate Attachment—When Court to Set Out Findings of Fact—Findings of Fact Not Reviewable.

1. The facts found by the court below upon a motion to vacate a warrant of attachment are not reviewable in this Court.
2. It is not necessary that the court below should set forth in its judgment upon a motion to vacate a warrant of attachment, the findings of fact upon which the judgment is based, unless it is claimed that the court erred in applying the law to the facts as found. In such case, it is the duty of the court to set out the findings of fact.
3. Sec. 417 of The Code is not applicable to a motion to vacate a warrant of attachment.

MOTION to vacate warrant of attachment, heard by consent before *Gilmer, J.*, at Chambers in Greensboro, on 12 December, 1889. Action pending in DAVIDSON Superior Court.

The facts sufficiently appear in the opinion.

From the judgment vacating the attachment, plaintiffs appealed.

E. E. Raper for plaintiffs.
C. B. Watson for defendant.

MERRIMON, C. J. This is a motion to vacate the warrant of attachment in this action, and the following is a copy of the material part of the case settled on appeal:

"Plaintiff's original affidavit charged 'a fraudulent disposition of property, and intended fraudulent transfer of property, and a concealment of the person to avoid the service of process.' Plaintiff also offered a great number of affidavits in testimony to establish the truth of the charge. Defendant, in support of his motion, offered his own
(434) affidavit, and a large number of other affidavits, tending to contradict the affidavits of the plaintiff. His Honor, after hearing all the affidavits and the argument of counsel, found from the evidence that the defendant had not assigned, disposed of or secreted his property with intent to defraud his creditors, as alleged; that he was not about to do so, as alleged, and that he had not concealed himself to avoid the service of process, with like intent, and accordingly rendered the judgment vacating the attachment, as appears in the record proper.

"From the judgment of his Honor, the plaintiffs appealed to the Supreme Court, and assigned as error the failure of the judge to find the facts in the judgment signed by him.

"The clerk will send up with the transcript copies of all the affidavits."

It was unnecessary to send up the affidavits and other evidence. They serve no purpose here. This is a case at law, and this Court cannot, therefore, review the findings of fact by the court below. There was no suggestion that there was no evidence to support a particular finding of fact.

The plaintiff's exception seems to be founded upon the supposition that the findings of fact and conclusions of law arising thereupon in hearing the motion to vacate the warrant of attachment in question, should have been governed by the statute (The Code, sec. 417), which prescribes that, "upon the trial of a question of fact by the court, its decision shall be given in writing, and shall contain a statement of the facts found, and the conclusions of law, separately; and upon the trial of an issue of law, the decision shall be made in the same manner, stating the conclusions of law," etc. This provision is not intended to have such application. It is part of a chapter of The Code which prescribes the method of "Trial by the Court," and has reference to a trial and disposition of the action upon its principal merits, as presented by the pleadings. It does not apply to the trial and determination of questions of fact and law arising incidentally in the course (435) of the action, particularly in granting or refusing provisional remedies, and like matters and things. Such questions are generally presented summarily by motion, and disposed of by the court in like manner.

It was not necessary, in this case, that the court should specifically, or at all, set forth in the judgment vacating the warrant of attachment its findings of fact on which the same was founded. The statute does not so require, and to do so, would more or less encumber the record without serving any necessary or useful purpose, unless a party should desire to assign error.

In this and like cases, it is the province of the judge in the court below to hear the evidence, usually produced before him in the form of affidavits, find the facts and apply the law arising thereupon. *Pasour v. Lineberger*, 90 N. C., 159, and the cases there cited. If a party should complain that the court erred in so applying the law, then he should assign error and ask the court to state its findings of the material facts in the record, so that he might have the benefit of his exceptions, on appeal to this Court. In that case, it would be error if the court should fail or refuse to so state its findings of fact, and the law arising upon the same.

Such practice affords the complaining party reasonable opportunity to have errors of law, arising in the disposition of incidental and ancil-

lary matters in the action, corrected by this Court, while, in very many cases, it lessens the labor of the court below, expedites proceedings in the action and saves costs.

Affirmed.

Cited: Holden v. Purefoy, 108 N. C., 167; *Carter v. Rountree,* 109 N. C., 31; *Parker v. McPhail,* 112 N. C., 505; *Delafield v. Construction Co.,* 115 N. C., 24; *Whitehead v. Hale,* 118 N. C., 604; *Club v. Thomas,* 120 N. C., 335; *Avery v. Stewart,* 134 N. C., 293; *Parker v. Ins. Co.,* 143 N. C., 342; *Stokes v. Cogdell,* 153 N. C., 182; *State's Prison v. Hoffman,* 159 N. C., 568; *Lumber Co. v. Buhmann,* 160 N. C., 386; *Grain Co. v. Feed Co.,* 179 N. C., 656.

(436)

S. D. JONES ET AL. v. THE COMMISSIONERS OF MOORE COUNTY.

Prohibitory Statute—Description of Locality—Issuance of License by Board of County Commissioners—Discretion—Mandamus.

1. Where an act of the General Assembly prohibited the sale of intoxicating liquors within two miles of Sanford M. E. Church, and at the date of the ratification of the act, there was a building intended for and known as the Sanford M. E. Church, although not completed, in which services have since been held: *Held*, that the words "Sanford M. E. Church" are descriptive of the point from which the two-mile radius is to be measured and the validity of the act is not conditional upon the building being actually used as a church.

2. The issuance of a license to sell liquor by a board of county commissioners is a matter of discretion, and a *mandamus* will not issue to compel them to do so, it not being alleged and shown that their refusal to grant a license was arbitrary.

THIS was an application for a mandamus to compel the commissioners of Moore County to issue to the plaintiffs license to sell spirituous liquors in the town of Sanford, in said county, by the measure less than a quart, heard before *Bynum, J.,* at the Spring Term, 1890, of the Superior Court of Moore County, upon the following facts, which were agreed upon by the parties, to wit:

1. That the town of Sanford has been duly incorporated by the General Assembly of North Carolina. (Acts 1873-74, ch. 76.)

2. That it has a mayor, board of commissioners, constable, and police force.

3. That it has no licensed barrooms or saloons within the corporate limits.

4. That the sale of spirituous liquors, wines or medicated bitters, or any liquors or substances, by whatever name it may be called, which produces, or may produce, intoxication, is prohibited within two miles of Sanford M. E. Church, in Moore County, by the Acts (437) of 1889, ch. 362, sec. 1, ratified 11 March, 1889.

5. That at the time of the ratification of said act a church building intended for divine worship had been commenced in the corporate limits of Sanford by the trustees of the M. E. Church, South, but it was not then completed. No services had been held in it, nor had it been dedicated. Said building had a roof and tower and a floor, and was weatherboarded, but the door, shutters and window-sash were not in. It was situated upon a lot conveyed to the trustees of the M. E. Church, South, on 28 March, 1888, for the purpose of erecting thereon a church, and said building was intended for and recognized and known as the Sanford M. E. Church, although it was not completed, and was in process of erection. That services have since been held in said church, and is now recognized and known as the Sanford M. E. Church.

6. That said church is about 300 yards from the point where the plaintiffs propose to locate their place of business.

7. That the defendants in the exercise of their discretion have refused to grant to the plaintiffs leave and license to retail spirituous, vinous and malt liquors, or either of them, at their place of business in Sanford, although requested to do so.

8. That they were furnished with evidence of the good moral character of the plaintiffs.

9. That at the time of the ratification of said act, there was no licensed saloon in Moore County.

Upon the foregoing facts, the court, being of opinion that the plaintiffs were not entitled to the *mandamus* asked for, gave judgment dismissing the petition, from which the plaintiffs appealed.

W. E. Murchison for plaintiffs. (438)
W. J. Adams for defendant.

CLARK, J. Chapter 362, Acts 1889, prohibited the sale of intoxicating liquors within two miles of Sanford M. E. Church, in Moore County. The case on appeal states that at the date of the ratification of the act there was a "building intended for and known as the Sanford M. E. Church, although it was not completed, and was in process of erection. Services have since been held in said church, and it is now recognized and known as the Sanford M. E. Church."

The words "Sanford M. E. Church" are descriptive of the point from which the two-mile radius is to be measured, and the validity or con-

tinuance of the act was not made conditional upon the building being actually used as a church. *S. v. Eaves, post,* 752, and *S. v. Patterson,* 98 N. C., 666. There being a building at the date of the passage of the act *known and recognized* as the Sanford M. E. Church, the defendants were prohibited from issuing license to sell liquor within two miles thereof. The Code, sec. 707, par. 25.

This case differs from *S. v. Midgett,* 85 N. C., 538. There the act prohibited the sale of liquor within a certain distance of any *church* in Hyde County. It was held that this did not apply to an academy in which preaching was occasionally had, but which was not known and recognized as a church. Besides, the defendants having refused to issue plaintiff a license, as a matter of discretion, and it not being alleged and shown that such exercise of discretion was arbitrary, a *mandamus* could not issue. *Muller v. Comrs.,* 89 N. C., 171.

No error.

Cited: Comrs. v. Comrs., 107 N. C., 336.

(439)

JOHN Y. STOKES ET AL. v. THE DEPARTMENT OF AGRICULTURE.

Sale of Fertilizers—Purchase Out of State for Sole Use of Purchaser—Non-Liability to Seizure.

1. The Code, sec. 2190, prohibits the sale or offering for sale *in this State* of fertilizers until the manufacturer or person importing the same shall obtain a license; it does not prohibit the *use* of them in this State, or the purchase of them in another state to be used for fertilizing purposes by the purchaser himself in this State.

2. Where S., acting for himself and others, resident farmers of this State, ordered from a nonresident manufacturer a number of bags of fertilizer, a given number being ordered for each purchaser, and the same were shipped in separate parcels addressed to the different purchasers, respectively, and separate bills sent to each purchaser, and S., in ordering, acted without compensation, and as an act of courtesy to the other purchasers: *Held,* that the transaction did not come within the inhibition of section 2190 of The Code, and the goods were not liable to seizure at the instance of the Department of Agriculture.

THIS was a controversy submitted without action, under The Code, sec. 507, tried before *Armfield, J.,* at July Term, 1889, of the Superior Court of ROCKINGHAM County.

The following is a copy of so much of the case submitted as need be reported:

"1. John Y. Stokes, for himself, and at the instance and request of several persons (plaintiffs herein all belonging to the Farmers' Alliance, but some members of one and some of another Alliance), all residents and farmers in the county and State aforesaid, in the spring of 1889 sent on orders for himself and each of said persons for sixty (60) bags of dissolved bone, to be used in the making of a tobacco fertilizer known as Courts' Formula; and in the orders made, a given number of bags was ordered for himself and a given number of bags for each of said persons, and these bags were so ordered from Wm. Davison & Co., of Baltimore, Md., who were the manufacturers of said goods in that State.

"2. Said Stokes, for himself and the said persons, at the same time as ordering the dissolved bone aforesaid, made orders for (440) himself and the said persons for five (5) tons of Boss Fertilizer, four (4) tons of which said Stokes ordered for himself, and the other ton for some one or more of said persons, all ordered from said Davison & Co., of Baltimore, who were manufacturers thereof, both of which were for their own individual use, as aforesaid.

"3. In ordering said dissolved bone and Boss Fertilizer, the said Stokes acted for himself to the extent set forth above, and for said persons to the extent above set forth as to them, and without any compensation paid or agreed to be paid by them, or any other person, in the way of commissions, reward, or otherwise, but simply and solely in reference to his neighbors as an act of kindness and courtesy to them; and said Stokes in ordering the same made the orders for himself and each of said persons distinctly and separately, indicating therein how much to each, and to whom to be sent, and on whose credit.

"4. Davison & Co., in pursuance of said orders, in May last, shipped the said dissolved bone and Boss Fertilizer by railroad to Reidsville in parcels, one parcel addressed to Stokes and tagged, and sent also bill for same made out against him, and so likewise the other parcels came addressed to each of said persons—addressed to them separately and tagged separately—and likewise bills were sent against each one for his separate debt.

"5. On the arrival of said articles at Reidsville, the said persons ordering the goods aforesaid, including the said Stokes, all attended at Reidsville prepared with wagons and their money to pay for same and take the same to their respective homes, and then and there the same were seized at the instance of the Inspector of the Agricultural Department for nonpayment of license tax required of manufacturers and importers of fertilizers into North Carolina.

(441) "6. On the seizure of said goods, said Stokes and the said persons—the season of the year being at hand when they must have and use said goods in and about their projected crops of tobacco—agreed with the Agricultural Department that $307 was the value of the goods seized as aforesaid, of which amount $145 represented the dissolved bone, and $162 represented the Boss Fertilizer, and that each person present who had ordered the same might pay the value of the shipment to him, making in the aggregate the $307 as aforesaid, into the hands of H. R. Scott as depositee, to be held by him subject to a judicial determination as to the liability of the goods to be seized as aforesaid, and thereupon the money was contributed by each person for his order, and the same, amounting to $307, was paid into the hands of said Scott, where it now is.

"Upon the foregoing facts, it is insisted, on the part of the plaintiffs that, in law, the said goods were liable to no seizure or other demand on the part of the Agricultural Department, and if there be such State law that the same is unconstitutional and void, as being in violation of interstate commerce.

"The court gave judgment in favor of the plaintiffs, and the defendant, having excepted, appealed to this Court."

Reid & Reid and Dillard & King filed a brief for plaintiffs.
C. B. Watson and J. C. Buxton for defendant.

MERRIMON, C. J. We are of opinion that the court below correctly interpreted the statutory provision, under and by virtue of which the defendant claimed authority to seize by its agents the property of the plaintiffs in question. In pertinent respects it (The Code, sec. 2190) provides that "no manipulated guanos, super-phosphate or other commercial fertilizers shall be sold, or offered for sale, *in this State*, until the manufacturer or person importing the same shall first obtain
(442) a license therefor from the Treasurer of the State, for which shall be paid a privilege tax of five hundred dollars *per annum* for each separate brand or quality. Any person, corporation or company who shall violate this chapter, or who shall sell, or offer for sale, any such fertilizer, contrary to the provision above set forth, shall be guilty of a misdemeanor. And all fertilizers so sold, or offered for sale shall be subject to seizure and condemnation," etc. It must be observed that the inhibition of this provision is clearly expressed in plain terms, and extends only to the *sale* of such fertilizers and the offering them for *sale in this State*, without first having obtained a license so to do as prescribed. It does not extend to the *use* of them in this State, or the

purchase of them in another state to be used for fertilizing purposes by the purchaser himself in this State. The terms employed in the section of the statute recited above and in every section of the chapter, pertinent of which it is a part, unmistakably imply and refer to the *sale* of such fertilizer, and in the offering of them for sale in this State. Nothing appears by terms or by reasonable implication in the statute that at all forbids the mere use of them, or the purchase of them in another State to be used by the purchaser himself. Indeed, the statute (The Code, sec. 2203) seems to contemplate that farmers and others may so purchase them. It provides that "any farmer or other person who may buy *without the State* any commercial fertilizer on which the privilege tax of five hundred dollars has been paid, shall be required to report all such purchases to the register of deeds of his county," etc. It thus appears that the Legislature did not intend to forbid such purchases. This clause of the statute is peculiar. Why it specifies such purchases of fertilizers, on which the license tax has been paid, and requires the same to be reported does not appear. The provision seems to be imperfect, and, as it appears, serves no practical purpose.
It is brought forward in The Code as part of the statute (Acts (443) 1876-77, ch. 274, sec. 20), but the latter statute required farmers and others making such purchases in another State to pay "the privilege tax of fifty cents *per ton* as required of dealers." This requirement is omitted from the statute as it now prevails. Why this is so, as we have said, does not appear. It seems that the purpose at first was to encourage farmers and others to patronize such dealers in fertilizers as had paid the license tax. But whatever may have been the purpose of the statutory provision last above recited, it goes to show that it was expected that farmers and others might make purchases of fertilizer for their own use in other states.

In the case before us the plaintiffs did not severally or collectively sell, or offer for sale, in this State, their fertilizer seized by the defendant's agents. They purchased the same in the State of Maryland, to be used by them respectively in this State, not for resale, but upon their farms. This, for the reasons above stated, they might in good faith do.

It is not alleged or suggested that the plaintiffs, or any of them, sought in any way or respect to evade the statute cited. If they had done so, the case would be very different. One of them could not buy fertilizers in another state to resell the same to the others in this State, nor could one of them be the agent of a nonresident dealer in such goods, to sell to farmers and others in this State. Each of them could buy such fertilizers by himself, or in good faith by his agent, in another State, for his own use only in this State. All arrangements and devices

to evade the statute are violations of it. If the defendant's agents had reason to believe that the plaintiffs, in the purchases they made, acted in bad faith—evasively—they should have so alleged and proved. So far as appears, they acted in good faith and did what they had a right to do.

(444) It was said on the argument, that if plaintiffs could so purchase fertilizers in another state and bring them into this State for their own use, the statute would not serve, in great measure, the purposes contemplated by it. If it be granted that this is so, the Legislature alone can provide the remedy. Certainly this Court cannot. The purpose of the statute, as expressed in it, is too clear, it seems to us, to admit of question.

What we have said disposes of the case, and we neeed not advert to other serious questions raised by the assignments of error, and discussed on the argument.

Judgment affirmed.

N. M. DOBBIN v. GEORGE W. REX.

Charge on Land for Equality of Partition—Not Discharged by Execution of Note—Sale Under Vend. Ex.—Parties—Statute of Limitations.

1. A charge upon land for equality of partition is not discharged by the execution of a note for the same. The land remains the primary debtor.
2. A party to a proceeding in which a *venditioni exponas* is issued to sell land to pay a charge resting on it for equality of partition cannot contest the validity of a sale made under such *vend. ex.*
3. A party acquiring land on which a charge rests for equality of partition takes the same *cum onere*, and the statute of limitations cannot avail him as against a purchaser at a sale made under a *venditioni exponas*, duly ordered in the partition proceedings.

THIS was an action to recover land, tried before *Merrimon, J.*, at August Term, 1889, of the Superior Court of ROWAN County.

The plaintiff introduced in evidence a deed from the sheriff (445) of Rowan County to the plaintiff, executed 18 May, 1888, conveying to the plaintiff the lands mentioned and described in the complaint, said deed having been duly probated and registered. The plaintiff then offered in evidence a report of commissioners who divided the land of Hugh Dobbin, deceased, among his heirs at law, by which

the lands mentioned and described in the complaint, lot No. 3, was set apart to Polly E. Dobbin, and for equality of division was to pay to the heirs of J. E. Dobbin, to whom was set apart lot No. 1, the sum of $158.34½; lot No. 4, set off to Polly E. Dobbin, was to pay to said lot No. 1, $73.69. The plaintiff then introduced a *venditioni exponas,* under which the sheriff acted in making the sale of the lands to the plaintiff, and then showed in evidence the entire record of the partition proceedings in the cause of Hugh A. Dobbin and others, *ex parte,* by which it appeared that by a judgment of the Superior Court of Rowan County, it was declared that the sums charged upon lots Nos. 3 and 4 in favor of lot No. 1, as aforesaid, were liens upon lots 3 and 4, and that *vend. ex.* was ordered to be issued to sell said lots Nos. 3 and 4. The defendants, as will appear by said records, were parties to said partition proceedings, and to the judgment declaring said lien. The defendant showed in evidence the will of Hugh Dobbin, and then introduced as a witness the defendant, Geo. W. Rex, who testified that James and John Dobbin were dead; that they died intestate and without issue; that Nancy, Betsy and Polly Dobbin were daughters of Hugh Dobbin. The defendant then introduced the will of Betsy, or Elizabeth Dobbin, by which the land sued for was devised to Nancy and Polly, and the survivor of them, during their natural lives, with remainder to Elizabeth, daughter of Polly. Nancy Dobbin died in 1849; Polly died since the war. The defendant also put in evidence the will of Nancy Dobbin, by which she devised her real estate to Elizabeth, wife of George W. Rex. The defendant then introduced a deed from (446) Polly Dobbin to Elizabeth Rex, his late wife, conveying to her the land in dispute. The defendant married in January, 1850, and has been in possession of the land in dispute ever since that date. After the deed of Polly Dobbin to his, defendant's, wife he continued in possession of the land under that deed to the present time. Defendant also offered in evidence a judgment rendered upon a note given by Polly Dobbin for the amount of money which had been charged upon the lands assigned to Polly Dobbin by the commissioners in the partition proceedings aforesaid, and insisted that the effect of this note and judgment was to relieve the land in dispute of the lien. There was no evidence that said judgment had ever been paid. The defendant also insisted that the deed from Polly Dobbin to his late wife, Elizabeth, was color of title, and that his possession under said deed was adverse, open, notorious and continuous for a period of more than seven years, before the bringing of this action.

It was admitted by all parties that the title to the land was out of the State.

The court was of the opinion that the defendant was concluded and estopped by the proceedings before *Judge Gilmer* in the partition case of Hugh A. Dobbin and others, *ex parte,* and instructed the jury that, taking the plaintiff's evidence to be true, he was entitled to recover.

The defendant did not controvert the plaintiff's evidence, but excepted to the ruling of the court upon the note given by Polly Dobbin and the judgment thereon, and upon his plea of the statute of limitations.

There was a verdict and judgment for the plaintiff, from which the defendant appealed.

T. F. Klutz for plaintiff. (Craig & Clement filed a brief.)
L. S. Overman for defendant.

(447) SHEPHERD, J. 1. The contention of the defendant that the charge for owelty was discharged by the execution of a note for the same is without merit.

In *Jones v. Sherrard,* 2 D. & B. Eq., 179, it was decided that in such cases the land is the debtor and the sole debtor, and that if a note is given by the owner to secure the charge, the land continues to be the primary debtor, and the note is only regarded as a collateral security.

Even if this were not so, the defendant could not now avail himself of such a defense, as he was a party to the motion in which it was adjudged, at November Term, 1883, of the Superior Court of Rowan County, that a *venditioni exponas* issue to sell the land for the payment of the said charge.

2. Neither can the statute of limitations avail the defendant. He claims under Polly Dobbin and took the land *cum onere. Ruffin v. Cox,* 71 N. C., 253. The judgment in 1883 declared that the charge still existed, and under that judgment there was a sale at which the plaintiff purchased. It is plain that there is no error in the ruling of his Honor.

No error.

Cited: Herman v. Watts, 107 N. C., 651; *In re Walker, ibid.,* 342; *Powell v. Weatherington,* 124 N. C., 41; *Wilson v. Lumber Co.,* 131 N. C., 167; *Smith Ex parte,* 134 N. C., 497.

(448)

N. H. GODWIN ET AL. v. HINTON MONDS ET AL.

Irregular Service of Summons—Service in Another County—Acceptance of Service.

Where a summons issuing from the Superior Court of one county is served by an officer of such county on the defendant in another county, the defendant at the time stating to the officer that he would accept service, and to mark the summons served, which the officer did: *Held*, that such service was irregular, and a judgment rendered thereon will be set aside.

THIS was a motion to set aside a judgment rendered at May Term, 1888, of CUMBERLAND Superior Court, heard before *MacRae, J.*, at December (Special) Term, 1889, of said court.

The facts found by the court were as follows:

"This motion to set aside judgment rendered herein at May Term, 1888, coming on to be heard, and being heard, the court finds the following facts:

"That the summons herein was returnable to May Term, 1888, and was served on the defendants, M. W. and K. E. Barefoot, by the deputy sheriff of Cumberland County; that when said service was made these defendants were in the county of Harnett; that the said deputy told them of this, and stated that he would send the summons back, and that the sheriff of Harnett County would serve it on them; that the said defendants said that it was not necessary, and told the deputy to mark it served, and that they would accept service in that way; that they would be at Cumberland court, and that they were looking for this suit and would be there; that said deputy returned the summons as duly served; there was no written acceptance of service; and this was all that passed between the said defendants and the deputy; that thereafter the said defendants employed counsel to defend their interests in this case, and paid him a fee, and that said counsel prom- (449) ised to keep them informed in all respects and to defend their interests; that thereupon they left this matter entirely in the hands of their counsel, who was a nonresident of Cumberland County; that defendant, M. W. Barefoot, and the said attorney were present at May Term, 1888, of said court, and left before the judgment was taken; that a verified complaint was filed on the second day of said term; that the defendants were ignorant men, not versed in the law, and gave themselves no further concern about the case, because said attorney had promised to keep them fully informed on all necessary points; that no answer or bond was filed, nor does it appear that the attorney entered any appearance whatever; that defendants had no notice of the judgment until August, 1888.

"That, upon an examination of the affidavits and exhibits, the defendants have apparently a meritorious defense. The court adjudged that no proper service was made on the said defendants, and that the service does not appear to have been waived by the appearance of defendants or their counsel; that the neglect of said defendants, if there was any neglect, was excusable, and the judgment a surprise to them; that the judgment as to M. W. Barefoot and K. E. Barefoot be set aside, a sufficient bond, in the sum of five hundred dollars, having been given in October, 1888, conditioned upon payment to plaintiffs of any sum which they may recover of said defendants for rents, future or past, damages or costs in this action.

"The restraining order heretofore granted shall be continued, and the plaintiffs, their agents or attorneys, are forbidden to do any act in connection with the land, the subject of the controversy in this action, that will injure or annoy the defendants during the pendency of this suit.

"The defendants, M. W. Barefoot and K. E. Barefoot, are allowed until Monday, the first day of January Term, 1890, to file their
(450) answer and defense bond, after which the action will stand for trial upon the docket of this court."

The plaintiffs excepted and appealed.

T. H. Sutton, W. E. Murchison and N. W. Ray for plaintiffs.
H. McD. Robinson and R. P. Buxton for defendants.

MERRIMON, C. J. To say the least, the judgment set aside in this action was irregular and voidable. The summons therein was not served upon the defendants by an officer in a way required, authorized or recognized by the law, nor did the defendants voluntarily go into court and subject themselves to its jurisdiction. The sheriff of the county of Cumberland had no authority in cases like this to serve process outside of that county. Hence, what his deputy said to the defendants in the county of Harnett, and they said to him, as to the summons, went for naught; this did not make service of the summons at all in contemplation of law, and the defendants were not bound to take notice of and act upon it as defendants in the action. Their merely verbal "acceptance" of service was too uncertain, indefinite and imperfect to serve the purposes of the law. Parties can be compelled to come into court only in the way prescribed by law. They might have "accepted" service in writing, and this would have been treated as "the written admission of" service as contemplated by the statute (The Code, sec, 228, par. 3). *Bank v. Wilson,* 80 N. C., 200; *Nicholson v. Cox,* 83 N. C., 44. Service admitted in writing is sufficient. The defendant in that case

will not be allowed to deny that he has been served with process, and the writing makes a permanent memorial of the fact as part of the record. It is necessary that the evidence of the service of process shall be stable and permanent.

The return of the sheriff by his deputy, that he had served (451) the summons, was not conclusive. It was competent for the defendants to show, as they did, that there had not been lawful service; and when the court found the fact, it not only had authority to do so, but it was its duty to set the judgment aside because of irregularity, as it did do. It might have been questioned whether the court could detain the defendants in court, but they did not except and appeal, and no question in that respect is before us.

There is no error. The judgment was proper. To the end, that further proceedings may be had in the action according to law, let this opinion be certified to the Superior Court.

No error.

W. A. BROWN ET AL. v. ROBINSON BROWN.

Cherokee Lands—Grants—Treaties with the Indians—Holston Line—Act of Legislature—Boundaries—Color of Title—Evidence—Bond for Title—Possession.

1. By an act passed in North Carolina in 1777, it was made lawful for any citizen of the State "to enter any lands not granted before 4 July, 1776, which have accrued or shall accrue to this State by treaty or conquest." An act passed in 1783 reserved to the Cherokee Indians certain lands, and forbade entry or survey, making void all grants issued thereon. By a treaty made in 1791, all Indian titles east of the "Holston Treaty Line" were extinguished: *Held*, (1) that the Legislature had the right to fix and declare the boundaries of this line without affecting the rights of third parties interested; (2) the State cannot, without a breach of faith, question such location of boundaries; (3) nor private individuals claiming under it; (4) the State has fixed and declared such boundaries: (5) the Holston line was ascertained and made certain by the Meigs and Freeman survey; (6) a grant of land by the State, depending for its validity upon the location of the boundaries so fixed and declared, is good.

2. A witness called to prove the declaration of an aged man, then dead, is not rendered incompetent because his wife claimed land under the grant.

3. A deed is good to show color of title, though improperly admitted to registration.

4. When the record shows that the execution of a deed was duly acknowledged before a judge of the Superior Court in 1860, and it was properly regis-

tered in obedience to this fiat, but it did not appear in which of two counties, Haywood or Jackson, and that there was a certificate of registration in Jackson County, dated October, 1882: *Held*, the deed was properly registered.

5. A will directed: "And in relation to the 'speculation lands,' it is my will and desire that the sale shall continue under the management of my executors as though I was living": *Held*, the lands being identified, the executors had a right to sell.

6. One J. went into possession of a tract of land in 1873, under a bond for title, which he assigned to plaintiffs, who took in 1874, and continued until 1881 or 1882, deed being made to them in 1875, conveying to them by metes and bounds. The possession of both was adverse and continuous: *Held*, title was good against all persons but the State.

(452) CIVIL ACTION, to recover land in Jackson County, removed for trial to MACON County, and tried before *Clark, J.*, at Fall Term, 1889, of the Superior Court of said county.

The facts are stated in the opinion.

M. E. Carter and T. F. Davidson for plaintiff.

G. H. Smathers for defendant.

DAVIS, J. The plaintiffs claim title through a chain of conveyances, the first link in which is a grant from the State to David Allison, dated November 29, 1796, but having failed, under the ruling of the court below, by reason of defective links in the chain, to connect themselves with this grant, they rely upon seven years' possession, under colorable title, and the grant of David Allison is only relied upon to take title out of the State.

(453) The defendant relies upon a grant from the State, issued 2 February, 1882. The action was instituted at Fall Term, 1882, of the Superior Court of Jackson County.

The record contains numerous exceptions, most of them relating to alleged defects in the grant from the State to David Allison and to the various intermediate conveyances offered in evidence; but as the objections to the validity of the Allison grant "on its face" are withdrawn, and the exceptions taken on the trial in regard to the intermediate conveyances are rendered immaterial by the ruling of his Honor that there were "breaks in the plaintiff's chain of title, and that plaintiffs had to rely on seven years' possession," we need only consider the exceptions which relate to the sufficiency of the Allison grant to take the title to the land in controversy out of the State, and if so, to the plaintiff's claim of seven years' possession under colorable title.

By an act passed in 1783, reserving to the "Cherokee Indians and their nation forever," certain lands bounded and described therein, it

is, among other things, declared that "no person shall enter and survey any land within the bounds so set apart," under a penalty of fifty pounds for every such entry; and it is further declared that "all entries and grants thereupon, if any should be made, shall be utterly void." There are numerous other acts and provisions relating to the Cherokee lands to be found in chapter 10, sec. 2346 *et seq.*, of The Code. It is insisted that the Allison grant is of land within the Indian boundary, and is void under the Act of 1783.

By an act passed in 1777, chapter 114 (1 Potter's Rev., 274), it is made lawful "for any person who is, or shall hereafter become, a citizen of this State," etc., to enter any lands which have not been granted, etc., before 4 July, 1776, "which have accrued, or shall accrue, to this State by treaty or conquest," etc. The Cherokee lands were, by the Act of 1783, reserved to the Cherokee Indians and their nation (454) forever, and it is declared that all grants of such lands shall be "utterly void." The treaty of Holston was made 2 July, 1791, and extinguished the Indian title thus reserved to all land east of the Holston treaty line. Whether this treaty had the effect *ipso facto* to open the land in question to entry and grant, as any other land acquired by treaty or conquest, or whether, as no act has been passed repealing, in express terms, the Act of 1783, it was, by implication, repealed by chapter 42, sec. 1 of the Revised Statutes, The Code, sec. 2751, or by the Act of 1852, The Code, sec. 2465 *et seq.*, we need not consider; nor, so far as the case before us is concerned, need we consider the questions so elaborately and ably discussed by Mr. Smathers, in his learned brief, relating to the several treaties with the Indians and the Holston boundary line, for (certainly and unquestionably before the rights of any third parties intervened) it was in the power of the Legislature to fix and declare where the boundary line (in regard to which dispute existed) was; and whatever might be its effect upon rights that may previously have accrued, the State itself could not, without breach of faith, thereafter question the location, nor can any one claiming under the State by a subsequent grant be heard to question it. Has the State so ascertained and fixed the boundary line?

The Act of 1819 (The Code, sec. 2350, *et seq.)* provides "the manner in which lands lately acquired by treaty from the Cherokee Indians shall be disposed of." The lands thus referred to are those to which the Indian title had been recently extinguished by the treaty of 8 April, 1816, and 27 February, 1819, and lay west of the Meigs and Freeman line, and, if the position insisted upon by the defendant be correct, no provision was made after 1791 for the disposition of the lands lying between the lines insisted upon by him as the true Holston treaty line and the Meigs and Freeman line; but assuming that the true treaty

(455) line was as run and fixed by the Meigs and Freeman survey, made after the treaty, which left the location of the line a subject of dispute (and this seems clearly to have been the understanding of the Legislature), then the lands east of the Holston treaty line, fixed and made certain by the Meigs and Freeman line, had already been subjected to entry and grant, and leave no room to suppose that the Legislature was inexplicably negligent of its duty in regard to the disposition of the large area of land belonging to the State. The treaty of Holston, made 2 July, 1791, extinguished the Indian title to "all lands lying to the right" (east) of the Holston treaty line, and it seems clearly to have been the early legislative understanding that this line was fixed and made certain by the Meigs and Freeman line, and this has been sanctioned by the Acts of 1889, ch. 234. *Lattimer v. Potest,* 14 Peters, 4, so far from conflicting with this view, we think sustains it.

That case decides, in conformity with many previous adjudications, that entries and grants of land within the limits of the Indian territory, before the Indian title was extinguished, are void, but the action grew out of the uncertainty as to the Indian boundary line, and the Court distinctly recognizes the power of the parties to the treaty to determine any dispute touching boundary lines, and designate where they are. And in *Patterson v. Jenks,* 2 Peters, 216, the Court, in reference to a treaty with the Creek Nation in Georgia, declares that, "if the State of Georgia has construed this treaty by any subsequent acts manifesting her understanding of it, we should not hesitate to adopt that construction in this case." In that case the "bill of exceptions" contained no fact which would show that Georgia had adopted the construction of the treaty which would establish the boundary claimed. Afterwards, in *Lattimer v. Potest, supra, Justice Catron,* in his concurring opinion, quoting *Patterson v. Jenks,* that plainly recognized the right of (456) North Carolina to construe the Holston treaty for herself, and settle the boundary, and the line so settled would be adopted, but the bill of exceptions in that case, as in the case from Georgia, set forth no fact from which it could be seen that North Carolina had manifested "her understanding of it," and there is no judicial opinion, we think, in conflict with this. Many lines were run, and at different times, between the Indians and the whites, and it is said: "The truth is not open to question that the Holston treaty line never was ascertained southeast of the Iron Mountain, . . . and the United States having ceased to have any interest in its ascertainment after the treaty of Tellico (1796) was made, North Carolina had a right to ascertain and settle it for herself, according to some construction of the treaty of 1791, and by which her grantees would be bound if so settled," etc. But we need not pursue this branch of the subject by reviewing the

authorities, nor need we consider whether, from the surveys and maps contained in the scientific report of J. W. Powell, director of the bureau of ethnology to the government, the Holston treaty line can be ascertained with mathematical certainty, and has become a question of law and science, instead of a question of fact for the jury, for we regard the question as settled by this Court, 103 N. C., 221, where, citing the Act of 1794 (1 Potter's Rev., ch. 422), it is said: "By 'all the lands in this State lying to the eastward,' etc., is meant all the lands of this State, not specially devoted to some particular purpose, and the implication intended was that they be subject to entry and survey, just as were the lands mentioned in the statute amended," etc. And again it is said: "The statute (Acts 1809, Potter's Rev., ch. 774), seems to imply that the lands so acquired had, therefore, been subject to entry and grant, etc., and it was certainly understood among the people and the authorities of the State, that, after 1794, the lands thus acquired from the Indians were subject to entry and grant."

The Meigs and Freeman line ascertained and fixed the hitherto (457) uncertain line of boundary between the State and the Indians, and the line thus settled, so far as the State or any one claiming under it is concerned, ought not to be reopened. It does not change the Holston or any other Indian treaty line, but the State had a right for itself and all claiming under it, to say and settle where the true boundary line was, and this having been done by the Act of 1809, the question should be at rest.

We think it settled in this case (103 N. C., 221), that the Allison grant was valid to convey the State's title to the lands embraced therein lying east, and not west, of the Meigs and Freeman line, and this disposes of the several exceptions, without specifying them in detail, based upon the alleged invalidity of that grant.

We think that Mr. Lusk was not rendered incompetent as a witness to testify to the declarations of an aged man, now dead, as to a corner tree of the Allison grant, by reason of the fact that his wife claimed land under that grant; but the jury having found as a fact that the land in question was not on the south or west of the Meigs and Freeman line (in fact, we believe it is conceded to be east of the Meigs and Freeman line), it becomes immaterial, and the only remaining question is, have the plaintiffs, and those under whom they claim, had seven years' possession under colorable title?

The plaintiffs offered in evidence a deed from J. B. Sawyer, clerk and master in equity of Buncombe County, dated 22 December, 1859, to James R. Love, and executed in pursuance of a decree of the Court of Equity of said county, in certain proceedings had therein between

James Gudger and others, plaintiffs, and James R. Love and others, defendants. The admission of this deed was objected to upon the ground that said deed had been improperly admitted to regis-
(458) tration in the counties of Haywood and Jackson without any order of the probate court of said counties.

This objection was overruled, and the defendant excepted.

The record shows that the execution of the deed was duly acknowledged by the grantor before James W. Osborne, a judge of the Superior Court of law, on 13 October, 1860, and, in obedience to this *fiat,* was properly registered 7 November, 1860, but whether in Jackson or Haywood County does not appear from the record. There is also a certificate of registration in Jackson County, dated 16 October, 1882.

We think the deed was properly registered. *Sellers v. Sellers,* 98 N. C., 13.

In any event, whether properly registered or not, it was good as color of title, and the objection was properly overruled. *Davis v. Higgins,* 91 N. C., 382.

The plaintiffs then offered in evidence a certified copy of the will of James R. Love. This was objected to upon the grounds: 1. "That no authority was conferred by the said will upon the executors of said Love to sell any lands, the terms of the same being too vague and uncertain to give such authority; and 2, that the same is irrelevant." The objection was overruled, and the defendant excepted.

James R. Love, by his will, a copy of which is sent with the record, directs: "And in relation to the 'speculation lands,' it is my will and desire that the sale shall continue under the management of my executors as though I was living," etc.

It was in evidence that the lands in controversy were a part of the lands known as the "speculation lands," and the executors under the will had authority to sell, and the objections were properly overruled.

The plaintiffs then offered in evidence a deed from the executors of James R. Love to them, dated 28 October, 1875, covering the land in dispute. This was objected to as irrelevant. The objection
(459) was overruled, and defendant excepted.

This is the deed under which the plaintiffs directly claim, and we are unable to see any ground upon which the objection can be maintained.

It was in evidence that one Javan Davis took possession of the land in controversy under a bond for title in March, 1873, built a house thereon, and cultivated the land; that he assigned his bond for title to W. A. Brown (one of the plaintiffs); that Brown took possession under this assignment in 1874, and continued in actual possession until

1882; that on 28 October, 1875, the executor of James R. Love executed a deed to the plaintiffs (a copy of which is sent with the record), conveying the land in question by metes and bounds. There was evidence on behalf of defendant that he took possession in March, 1881.

The court instructed the jury "that, if they find that Javan Davis went into possession of the *locus in quo* in 1873 under bond to make title from the executors of James R. Love, his possession was Love's possession and under Love's color of title; and if he had continuous and adverse possession up to time of assignment of bond for title to plaintiffs, and plaintiffs then took and held continuously adverse possession up to March, 1881, when defendant claimed that he took possession, then plaintiffs and those under whom they claim had more than seven years possession, and would have title against everybody except the State."

The court explained the nature of the possession required to the jury, and told them that the burden was on the plaintiffs to prove it.

There is no error in this charge of which the defendant can complain.

The possession of Javan Davis and his assignee under bond for title was the possession of the vendor, under whom they claim, until the purchase-money was paid, and the possession of part of the (460) tract within the metes and bounds set out was the possession of the entire tract.

A tenant, though he may lease a small and definite boundary in a large tract of land, holds possession for his lessor, and his possession enures to the benefit of the lessor as to the whole of the land covered by the deed under which he claims title. *Ruffin v. Overby, ante,* 78, and cases there cited.

A vendee in possession under a contract of purchase is in privity with his vendor, and is entitled to have the time when he held possession under his vendor added to that after receiving his deed in determining whether colorable title was matured into a perfect title by possession. The possession of the plaintiffs under contract for title was, up to the time of the execution of the contract and taking of the deed, the possession of their vendors, and enured to the benefit of the vendees just as if they were tenants of the particular tract of land contracted to be sold, and after the deed to them the possession under color continued. So that, if, from the time that actual possession was taken by Javan Davis under the executors of Love, in whom was color of title, there was continuous possession, the colorable title of plaintiffs and those under whom they held was ripened into perfect title. *Avent v. Arrington,* 105 N. C., 377, and authorities cited.

Affirmed.

Cited: Gilchrist v. Middleton, 107 N. C., 679; *Wool v. Saunders,* 108 N. C., 746; *S. v. Boyce,* 109 N. C., 756; *Lewis v. Roper, ibid.,* 20; *Jarvis v. Vanderford,* 116 N. C., 152; *Neal v. Nelson,* 117 N. C., 403; *Bond v. Beverly,* 152 N. C., 62; *Land and Timber Co. v. Kinsland,* 154 N. C., 81; *Power Corp. v. Power Co.,* 168 N. C., 222; *Knight v. Lumber Co., ibid.,* 454; *Brown v. Smathers,* 188 N. C., 172.

(461)

H. T. RUMBOUGH v. THE SOUTHERN IMPROVEMENT COMPANY.

Foreign Corporations — Accepted Drafts — Specific Allegations and Denials—Code Pleading—Evidence—Contracts of Corporations.

1. In an action upon an accepted draft there was a specific allegation in the complaint stating definitely certain matters and facts, to which the response in the answer was, "The allegations of the sixth paragraph of the complaint are untrue in manner and form as therein stated": *Held,* that this was not sufficient denial under The Code.
2. Denials and admissions and statements of facts should be positive and unequivocal—not argumentative or evasive.
3. Our statute (The Code, sec. 683), requiring that "every contract of every corporation by which a liability may be incurred by the company exceeding $100 shall be in writing and either under the common seal of the corporation or signed by some officer of the company authorized thereto," does not apply to contracts of foreign corporations.
4. When, in an action upon a draft accepted by the vice-president and general manager of a foreign corporation, the plaintiff offered to show that he was, at the time of acceptance, *acting* as such officer, and had authority from the company to accept drafts: *Held,* that the court below erred in excluding such testimony.

THIS ACTION, tried at November Term, 1889, of MADISON Superior Court, before *Whitaker, J.,* was brought to recover of the defendant corporation a certain amount alleged to be due upon a bill of exchange in the following words and figures, to wit:

"$950.

"Ninety days after date, pay to the order of H. T. Rumbough, Esq., for account of J. H. Rumbough, nine hundred and fifty dollars.

W. E. WATKINS.

"To Southern Improvement Co., No. 2 Wall, N. Y."

(462) "Accepted. Payable at First National Bank, New York.

"SOUTHERN IMPROVEMENT CO.,

"By W. E. Watkins."

Upon the reading of the pleadings, plaintiff's counsel asked his Honor to declare the fifth section of the answer responsive to the sixth section of the complaint, to be in law, no denial.

This his Honor declined to do, and plaintiff excepted.

The plaintiff then offered to introduce in evidence a draft or bill of exchange, in the words and figures as hereinbefore stated.

The defendant objected to the introduction of this draft, or bill of exchange, insisting, besides other reasons given, that the pleadings, by allegation of complaint and failure of denial thereof in answer, showed the defendant to be a corporation, and that the alleged accepted draft was for more than one hundred dollars, and such alleged acceptance was not under seal of defendant corporation, and was not signed by one purporting or proved to be an officer of such corporation.

His Honor found as facts that the defendant was, as shown by the pleadings, a corporation, and the alleged draft claimed by the plaintiff to have been accepted was for more than one hundred dollars, was not under seal of defendant, and was not signed by one purporting or shown to be an officer of defendant corporation, and sustained the objection, with an explanation then given that his ruling was based upon what, up to that time, had appeared. Plaintiff excepted.

The plaintiff then introduced himself as a witness, and offered to testify that W. E. Watkins, at the date of this acceptance, was the vice-president and general manager of the defendant corporation, and, as such, had authority from the corporation to accept this draft.

The court declined to permit this, and the plaintiff excepted. (463)

The plaintiff then offered to testify that W. E. Watkins, at the time of the acceptance of this draft, was the general manager and lawful agent of the defendant corporation, and was acting as such.

His Honor declined to permit this, and the plaintiff excepted.

The plaintiff offered to testify that, at the time of the acceptance of said draft, W. E. Watkins was in the full control and management of the property of the defendant corporation in the State of North Carolina.

His Honor declined to permit this, and plaintiff excepted.

By consent, plaintiff then took a nonsuit, with the understanding that the defendant might thereafter, in this action, if a new trial should be given, prosecute its counterclaim, as to which it thereupon took a nonsuit.

The complaint, among other things, alleged as follows:

"6. That the said W. E. Watkins was the general manager and lawful agent of the defendant, the Southern Improvement Company, in the conduct of its business in the said county of Madison, and was fully

authorized and empowered by the defendant to draw said bill of exchange and to accept the same, as hereinbefore alleged."

The only part of the answer responsive to this allegation is as follows:

"5. That the allegations of the sixth paragraph of the complaint are untrue in manner and form as therein alleged."

The plaintiff having suffered judgment of nonsuit, assigned error, and appealed.

G. A. Shuford for plaintiff.
E. C. Smith for defendant.

(464) MERRIMON, C. J. Regularly, the pleadings in an action should be settled before the trial begins. Hence, the plaintiff should have made objection to the sufficiency of the answer before the jury were empaneled. It seems that it was made afterwards, but the court entertained the motion, as it might do in the exercise of its discretion, and denied the same.

We think the answer to the sixth paragraph of the complaint was insufficient, and clearly not a compliance with the statutory provision (The Code, sec. 243), nor did it serve the purpose of The Code method of procedure. The provision just cited prescribes that "the answer of the defendant must contain 'a general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof, sufficient to form a belief.'" Such denial may be general—that is that the allegation is not true; or it must be specific—that is, that it is true in some respects, but not true in others, as specified. It should also embrace "any knowledge or information thereof (that is, the allegation of the complaint) sufficient to form a belief" in respect thereto. The purpose is to require the defendant frankly to deny the truth of the allegations of the complaint, if he can, or, if he cannot, then to admit the truth of them, or to specifically admit the truth of them, so far as they are true within his knowledge, and deny the truth of the same in particular respects, so far as he may be warranted in doing so by the facts; and he is further required to state such knowledge and information as he may have as to the allegations sufficient to form a belief. Such denials, admissions and statements of facts should be direct, positive and unequivocal—not argumentative and evasive. The object of answer is to raise necessary issues of fact and law, and to ascertain the facts as to the allegations of the complaint within the knowledge of the defendant, and
(465) thus avoid, as far as practicable, controversy, delay and expense, and facilitate the administration of justice in the action.

The answer of the present defendant, in the respect complained of, was neither frank nor sufficient. It was "that the allegations of the sixth paragraph of the complaint are untrue in manner and form as therein alleged." The clear implication from this was, that the allegations were in some respects, in some way, to some extent true. It was bound to answer in what "manner and form," in what respects, and to what extent, they were true, and also to state what knowledge or information it had in respect thereto sufficient to form a belief. The allegations were in respect to such matters and things as the defendant, through its proper officers and agents, must have had full knowledge of. The court should have required the defendant, upon such terms as it might have deemed just, to answer the allegations by a proper denial or admission, or have stricken out the insufficient one. Pleading is not a mere game—an artifice—a mere trial of skill—it is serious and earnest, and the law will effectuate the purposes contemplated by it. *Flack v. Dawson,* 69 N. C., 42; *Schehan v. Malone,* 71 N. C., 400; *Heyer v. Beatty,* 76 N. C., 28; *Durden v. Simmons,* 84 N. C., 555; *Gas Machine Co. v. Manufacturing Co.,* 91 N. C., 74.

The defendant was a foreign corporation and hence the statute (The Code, sec. 683) requiring "every contract of every corporation, by which a liability may be incurred by the company exceeding one hundred dollars, shall be in writing, and either under the common seal of the corporation or signed by some officer of the company authorized thereto," does not apply to or embrace it. This plainly appears from the statute (The Code, secs. 663-701) and its purposes, and particularly from section 701 thereof, and as well from the nature of the matter. The Legislature of this State has not undertaken to regulate (466) by statute the powers and methods of business of foreign corporations, nor to prescribe how their contracts shall be executed. So far as we can see, general principles of law applicable to corporations, such as the defendant, apply to it in this action. The court, therefore erred, in applying the statute last cited to the bill sued upon. It was very certainly competent for the plaintiff to prove on the trial, by parol testimony, that W. E. Watkins was the vice-president of the defendant; that he was appointed; that he generally acted as such officer; that he had general charge and management of the defendant's business in this State; that he had authority, general or special, to accept the bill in question in the name of the defendant; to prove that in so accepting the bill for the defendant he acted as its agent or vice-president, although he did not sign his name officially or as agent. The evidence tendered by the plaintiff and rejected was competent and material, and the court should have received it. *Turnpike Co. v. McCarson,* 1 D. & B., 306; *Lewis v. Railroad,* 95 N. C., 179; *Mechanics Bank v. Bank of Colum-*

bia, 5 Wheaton, 326; Ang. & Ames on Corp., sec. 294; Abb. Tr. Ev., ch. 3, par. 35; *Id.,* par. 43.

There is error. The judgment of nonsuit must be set aside and further steps taken in the action according to law.

Error.

Cited: Curtis v. Piedmont Co., 109 N. C., 405; *Early v. Early,* 134 N. C., 259; *Fountain v. Lumber Co.,* 161 N. C., 38.

(467)

W. S. HILLIARD, GUARDIAN, v. F. F. ORAM ET AL.

Premature Appeal—Interlocutory Judgment—Exceptions.

1. When the court sets aside a verdict as to one issue, and enters an interlocutory judgment as to the other, the proper course of the party injured is to note an exception and go on to the trial of the remaining issue, so that the whole appeal may be considered at once.
2. Appeal from such interlocutory judgment, and at such stage of the proceeding, is premature and will be dismissed.

THIS was a civil action, tried at the Spring Term, 1887, of JACKSON Superior Court, before *Graves, J.*

E. C. Smith and J. B. Batchelor for plaintiff.
George A. Shuford for defendants.

CLARK, J. The court, on motion of defendants, set aside the verdict upon one of the issues, on the ground that it was against the weight of the evidence, and directed a new trial on that issue. The court refused plaintiff judgment for recovery of the land sued for, upon the issues found, and entered an interlocutory judgment. The appeal of the defendants is premature. They should have noted their exception, and after the trial is completed by a finding upon the other issue and a final judgment, an appeal will lie. The Court here will not try causes by "piece-meal." This has often been decided. *University v. Bank,* 92 N. C., 651; *Hicks v. Gooch,* 93 N. C., 112; *Hailey v. Gray,* 93 N. C., 195; *Blackwell v. McCaine,* 105 N. C., 460, and *Wallace v. Douglas, ibid.,* 42, and cases there cited.

Appeal dismissed.

Cited: Emry v. Parker, 111 N. C., 267; *Myers v. Stafford,* 114 N. C., 233; *Benton v. Collins,* 121 N. C., 66; *Billings v. Observer,* 150 N. C., 542.

(468)

H. A. BUNDRICK ET AL. v. JOHN P. HAYGOOD ET AL.

Nuncupative Wills—Statutory Requirements—Witnesses—Last Illness.

1. A nuncupative will must be proved on the oath of at least two credible witnesses present at the making thereof, who state that they were specially required to bear witness by the testator himself. It must have been made in his last sickness, in his own habitation, or in one where he had been resident for at least ten days previous, unless he died on a journey or from home.
2. The statutory requisites must be strictly complied with in all material respects.
3. Where a woman in her last illness, without expressing any purpose to make a will, in terms, said she wanted to give to her sister certain articles of personal property, and called her to her bedside and gave them to her, in the presence of two other persons, but did not call them, or either of them, to witness the transaction: *Held*, that this did not constitute a nuncupative will.

THIS was a civil action, tried before *Phillips, J.*, Spring Term, 1890, MECKLENBURG Superior Court.

The alleged *nuncupative* will of Rebecca Annie Haygood *was proven by the witnesses thereof* before the clerk of the Superior Court in the county of Mecklenburg. Notice in that respect was given, and such proceedings were had as brought the matter of the proof of such will into the Superior Court of that county. The latter court gave judgment therein, from which parties interested in opposition to the supposed will appealed to this Court, and the appeal was heard and determined here at September Term, 1888. *Haygood Will Case,* 101 N. C., 574.

Afterwards a *caveat* to the probate of such will was entered, and in the course of procedure in such matters, an issue *devisavit vel non* as to the paper-writing propounded as the will of the alleged testator was tried in said Superior Court. There was a verdict of the jury declaring that the paper-writing was not such will, and the court (469) gave judgment accordingly. The propounders, having excepted, appealed to this Court.

The following is a copy of so much of the case settled on appeal as need be reported here:

"For the purpose of establishing the will, the propounders, at the suggestion of counsel for *caveators* to have the cause tried, offered in evidence the *ex parte* affidavit of Mamie Dawkins used in the original

proceeding for probate of the alleged will before the clerk, and the *caveators* admitted the same as competent evidence. The affidavit is as follows:

"Mamie Dawkins, being duly sworn, deposes and says: 'I knew Rebecca Haygood, and waited on her during her last sickness. She died at her own house, in the city of Charlotte, on or about 25 September, 1887. Early on the morning of the day before her death, I was giving her some water, and she called for Miss Ella. I told her that it was too soon for Miss Ella to come up. I asked her who else she wanted to see. She said her sister Catherine Bundrick. Said she wanted to give her sister all her things she had, except a little plunder for Will. At this time I stepped into the other room, and her breakfast was brought in during my absence. When Ella Parnella came in, I was in the room, and walked to the door to get some fresh air. Ella Parnella went directly to the bed, and I, standing at the door, heard all the conversation that passed between them. She (the sick woman) said, "I want to see my sister Catherine Bundrick; I want her to have my things that are in here, except what I give Will; she lives twelve miles from Winnsboro." She had told me on Friday that she never expected to get well. This all occurred during her last sickness, at her own habitation, where she had been residing some three or four months.

She was of sound and disposing mind and memory. I think
(470) she was over forty years old, and she was not under any restraint or duress.'

"Ella Biggs, a witness for propounders, testified as follows: 'I lived close to Mrs. Haygood. She sent for me Saturday morning. She died Sunday, after 12 o'clock noon. She sent Henry Johnston after me. I went to her bed. She said I was a long time coming. I asked her what she wanted. She said she wanted to see her sister Catherine Bundrick, and she said she wanted her to have what was in the room. I asked here if she wanted to see her children, and she shook her head and said no more about it. She was right sick at that time. She had her right mind at the time of this conversation. Sometimes she had her right mind, and sometimes she didn't. She had very high fever. She said Catherine was her sister. Her children didn't live with her, as I know of. I lived near her four months. Mamie Dawkins was standing in the same room, at a door, as far from the bed as from here to the stove-pipe (about thirty-five feet).'

"Cross-examined: 'Mamie Dawkins was in the door opening into an adjoining room, sort of a shed. The room where the bed was, was very large. I consider what she said to me her will, but I don't know what it is, nor whether she did. She didn't call anybody else to witness it as I heard. She didn't ask me to witness it. I don't remember telling Mr.

Maxwell that she was not in her right mind. She had typhoid fever. When I entered the room her breakfast was in a chair beside the bed. She would not eat it. She looked pretty pert when I went to her. I stayed about an hour, and I did not go again until next day, when she was dying. She would lie and sleep most of the time. At times she was delirious. I heard her speak of her son. I never saw her children. While I was talking with the sick woman Mamie Dawkins came out of the shed-room and stood at the door. I didn't know that Mamie Dawkins heard what Mrs. Haygood said to me.' "

The propounders asked the court to instruct the jury that, (471) if they believe the evidence, they must find the issue submitted to them in favor of the propounders of the will.

His Honor charged the jury that there was no evidence introduced to establish a will made by Rebecca Annie Haygood, and instructed the jury to find the issue in favor of the *caveators.*

The propounders excepted to the refusal of his Honor to give the instructions prayed for by them, and also the instructions as given.

G. E. Wilson and Clarkson & Dula (by brief) for plaintiff.
P. D. Walker, A. Burwell and C. Dowd for defendant.

MERRIMON, C. J. The court below decided that the evidence of the two witnesses produced on the trial to prove the making of the *nuncupative* will of the alleged testatrix was not evidence for that purpose, and we cannot hesitate to concur in that decision.

The statute (The Code, sec. 2148), prescribing how wills shall be proven, among other things, provides as follows: "Wills and testaments must be admitted to probate only in the following manner: . . . 3. In case of a nuncupative will, on the oath of at least two credible witnesses present at the making thereof, who state they were specially required to bear witness thereto by the testator himself. It must also be proved that such nuncupative will was made in the testator's last sickness, in his own habitation, or where he had been previously resident for at least ten days, unless he died on a journey or from home," etc.

The requisites of this statutory provision must be strictly complied with and observed, in all material respects, in order to prevent opportunity for fraudulent practices on the part of such persons as would be disposed to obtain undue advantage of persons in their (472) last sickness as to the final disposition of their property; and also to prevent mischiefs that might arise from the ignorance, misapprehension or dishonest purposes of persons called upon to be the witnesses of such wills. The purpose of such requisites is to prevent the fabrication of such wills; they are necessary, and it is essential to

observe them strictly. *Brown v. Brown,* 2 Murphey, 350; *Rankin v. Rankin,* 9 Ired., 156; *Wester v. Wester,* 5 Jones, 95; *Haden v. Bradshaw,* 1 Winst., 263; *Smith v. Smith,* 63 N. C., 637; Ired. on Ex'rs, 21.

The evidence of the witnesses of the alleged will accepted as true, did not prove a substantial compliance on the part of the supposed testatrix with the prescribed requisites that must be observed in making a nuncupative will. She should have expressed her purpose to make a will. Perhaps it was not necessary that she should do so in terms, but she should have done so in some certain way. She did not do so, unless by mere implication. She said she wanted to see her sister—naming her—wanted to give her sister all her things—wanted her to have them, but she did not say "I give her all my things—all my property," or "I will make a will and by it give my things to her," nor any like expression. It seems that she was anxious to see her sister, so that she might give her the property—the things—before she died.

But if she intended by what she said to dispose of her property, she should, to that end, have specially required at least two credible witnesses to bear witness that she had made her will—that she had so disposed of her property. But she did not specially, or at all, require the witnesses who testified, or either of them, to so bear witness. She did not say, in terms or effect, to these witnesses, "I want you—or I charge you—or I require you to bear witness that I give my property to my sister," naming her. She should have made the witnesses clearly sensible of the fact that she specially required them to so bear wit-
(473) ness, so that they might be charged to do so, and to the further end they might be able to so state when called upon to testify as such witnesses. The statute specially requires that they shall state that they were so required. One of these witnesses does not say or intimate that she was called upon to be a witness, or that she so regarded herself. She was the nurse, and what she heard was casual—her attention was not directed to what the supposed testatrix said by the latter, or any other person. The other witness said: "I considered what she said to me her will, but I don't know what it is, nor whether she did. She didn't call anybody else to witness it." The evidence was, we think, insufficient, in any reasonable view of it, to prove material and essential facts—only gave rise to vague conjecture.

Judgment affirmed.

Cited: Long v. Foust, 109 N. C., 119; *In re Garland Will,* 160 N. C., 558.

B. B. LENOIR ET AL. v. THE VALLEY RIVER MINING COMPANY.

Ejectment—Tenants in Common—Color of Title—Possession for Seven Years—Sale—Seizin—Action for an Undivided Interest.

1. In an action to recover land the plaintiff claimed as owner in fee. The defendant claimed as tenant in common with plaintiff of an undivided third. Plaintiff's evidence, sufficient to show ownership in fee in an undivided part of the land, tended also to show color of title and continuous possession of the whole land. Defendant also offered evidence tending to show color of title in an undivided third, and possession for more than seven years. This the court refused to receive, and instructed the jury that defendant had failed to offer any evidence of cotenancy: *Held* to be error.
2. The burden was upon the plaintiffs to show *sole title* in themselves, as alleged, and failing in this, the defendant had a right to remain in possession as tenant in common with them of the undivided one-third.
3. The *defendant* was not bound to show title as alleged—tenancy in common.
4. The action being adverse, and evidence introduced to show color of title in plaintiff, defendant was entitled to reply, and the exclusion of his evidence, which might have influenced the jury to decide for him, entitles him to a new trial.

THIS was a civil action, tried at Fall Term, 1888, of CHEROKEE Superior Court, before *Boykin, J.* (474)

The plaintiffs allege in their complaint that they are the owners in fee of the land specified therein; that the defendant is in possession thereof, and unlawfully withholds the same from them, etc. The defendant admits that the plaintiffs are part owners in fee of the land, but it alleges that it is the owner in fee of an undivided one-third part thereof, and is tenant in common with the plaintiffs; that it is lawfully in possession, and is willing that the plaintiffs shall be so in possession of the land with it.

On the trial, the plaintiffs showed title, conceded to be sufficient, as owners in fee of an undivided part of the land. They did not sue for the other like part owners thereof, nor did they produce evidence to show title for any part thereof in any person other than themselves. They produced evidence tending to show color of title and continuous possession of the whole land for more than seven years.

The defendant failed to show a regular chain of title to an undivided part of the land, but it put in evidence a deed of conveyance to it sufficient as color of title, dated 26 February, 1867, from W. N. Bilbo, purporting to convey the fee in an undivided third part thereof, and it further produced evidence tending to prove that it had had continuous

possession thereof, claiming under this deed from and after its
(475) date, until the time of the trial, and more than seven years.

It is assigned as error, that the court declined to consider, and excluded from the consideration of the jury, the defendant's claim as such part owner of the land, and instructed the jury "that the defendant had failed to offer any evidence of cotenancy."

There was a verdict and judgment for the plaintiffs, and defendant having excepted, appealed.

T. F. Davidson and G. A. Shuford for plaintiffs.
Ed. McCrady (by brief) and J. W. Cooper for defendant.

MERRIMON, C. J. It was admitted by the defendant that the plaintiffs were part owners of the land. But this admission did not entitle them to be let into possession of the whole thereof as sole owners, or for themselves and others who might claim to be part owners as against the defendant. As to the undivided one-third part claimed by it, the burden was on the plaintiffs to show title thereto in themselves, and failing in this, the defendant having possession, had the right to remain so, as tenant in common with the plaintiff as part owners only.

The plaintiffs alleged that they were sole owners of the land. When on the trial, they produced evidence of color of title and possession as to the undivided one-third part thereof claimed by the defendant that might imperil its right, it very certainly had the right to show title in itself as to the part claimed by it in any proper way it could. It might, as to the part claimed by it, show color of title, claim and possession under it within settled and visible bounds for more than seven years, and thus show title perfected in it. It must be observed that such controversy is not between the plaintiffs and defendant as to the part of the land in question as tenants in common. As to it, the parties
(476) plaintiff and defendant claim adversely to each other—not as tenants in common—and the purpose of the action is to settle and determine whether the plaintiffs are sole owners, as they claim to be. If it shall turn out that the defendant is sole owner, as claimed by it, then it will be tenant in common with the plaintiffs according to the respective rights of all the parties, and the rules of law applicable to such tenants will prevail.

Tenants in common have unity of possession, but they do not necessarily have unity in any other respect. Their respective estates, the quantity of them, the time when they begin and terminate, the character of their titles and the methods and means of proving them, may be very diverse. Each has his undivided part of and interest in the land. Hence, the recovery of one such tenant is not generally a re-

covery of all of them, nor does such recovery entitle him to take possession for all. Indeed, one such tenant may recover from another; one may be barred of his entry by the statute of limitations, and another not; the statute may run as to one, and not as to another. When one recovers, he is not entitled to be put in possession as if he were sole owner; he takes possession as to and to the extent and measure of his right of the whole, not knowing which particular part is his. Indeed, no particular part belongs to him exclusively.

A tenant in common may not be in the actual possession of the land with his cotenants, or at all. A stranger may go into possession of the land and remain so, claiming the undivided part of such tenant not in possession under color of title to it, and continue such claim and possession until he shall perfect a title to the same. There is nothing in the nature of such tenancy and ownership of real property that prevents title from arising and becoming perfect by color of title, claim and continuous possession under the same for seven years, as in cases of sole tenancy, except as to the cotenants themselves. *Holdfast* (477) *v. Shepard,* 9 Ired., 222; *Allen v. Salinger,* 103 N. C., 18; *Overcash v. Kitchie,* 89 N. C., 391, and cases there cited.

Hence, it was competent for the plaintiffs to prove such title as the last mentioned as to the undivided one-third part of the land claimed by the defendant. And for the like reasons, the defendant, a third party, had the right to show such title to that part as against the plaintiffs or other part owners of the land.

On the trial, the defendant showed sufficient color of title and produced and tendered evidence tending to prove its claim and the continuous possession of the land as to one undivided third part thereof for seven years and more. It may be that, if the court had submitted such evidence with appropriate instructions to the jury, they would have rendered a verdict in favor of the defendant. It was clearly entitled to have the evidence produced and pertinent evidence offered, but rejected, submitted to the jury with proper instruction from the court as to its purpose and application. But the court ignored the defendant's claim of title, and told the jury that it "had failed to offer any evidence of cotenancy," plainly implying that it had produced no evidence to prove title as claimed by it.

There is error. The defendant is entitled to a new trial, and we so adjudge.

Error.

Cited: Gilchrist v. Middleton, 107 N. C., 685; *Henning v. Warner,* 109 N. C., 411; *Moody v. Johnson,* 112 N. C., 814; *Lenoir v. Mining Co.,* 113 N. C., 519.

(478)

R. R. PORTER, ADMINISTRATOR, v. THE WESTERN NORTH CAROLINA RAILROAD COMPANY.

Docketing Appeals—Motion to Dismiss—Rules of the Court.

1. A case was tried at the August Term, 1889, of the Superior Court and docketed in the Supreme Court 14 April, 1890. The case was settled and filed in the Superior Court clerk's office in time for the transcript to have been docketed for appeal in this Court before the call of causes for that district: *Held*, the appeal must be dismissed; and this, though the appellee did not move to docket and dismiss during the week allotted for that district.

2. Discussion by CLARK, J., of the rules of appeal applicable in such cases.

THIS was a civil action, tried before *Clark, J.*, at Fall Term, 1889, of BUNCOMBE Superior Court.

The facts are set out in the opinion.

G. A. Shuford (by brief) for plaintiff.
D. Schenck and F. H. Busbee for defendant.

CLARK, J. This cause was tried at August Term, 1889, of Buncombe Superior Court, and the appeal was docketed here 14 April, 1890. The case on appeal was settled and filed in the clerk's office below, in time for the transcript on appeal to have been docketed here before the call of causes from that district was concluded at Fall Term, 1889. The appellant, however, insists that as the appellee did not move to docket and dismiss during the week allotted to that district, that the appeal, docketed at this term, cannot be dismissed, and relies upon *Barbee v. Green*, 91 N. C., 158; *Rollins v. Love*, 97 N. C., 210, and *Bryan v. Moring*, 99 N. C., 16. This is a misconception of the purport of those decisions. The rules in regard to the time in which appeals (479) should be docketed have been often construed, and the decisions may be summarized as follows:

1. Appeals in causes tried before the commencement of a term of this Court must be docketed at such term before the completion of the call of causes from the district to which they belong. Rule 5.

2. If not docketed before the call of causes from that district is concluded, the appellee may docket a certificate under Rule 17 and have the appeal dismissed.

3. If the appellant does not do this, and the appeal is docketed at such term of this Court which begins next after the trial below, but

after the perusal of the district to which it belongs, the appellee cannot then move to dismiss. *Bryan v. Moring,* and other cases above cited and relied on by the appellant. But the neglect of appellee to move to docket and dismiss extends no further, and if the appeal is docketed at a term of this Court after the one at which it is required to be filed, the appeal will be dismissed on motion.

4. Appeals taken from judgments rendered below during the progress of a term of this Court are not necessarily to be docketed at such term, but are in time if docketed at the first term of this Court *beginning* next after the trial below. If, by reason of observance of the statutory time allowed for settling cases on appeal, a cause is docketed here before the perusal of the district to which it belongs, at the same term of this Court which was in progress when the trial below was had, it stands regularly for trial. Rule 5. *Avery v. Pritchard, ante,* 344.

5. Appeals in criminal cases, and civil cases submitted upon printed arguments under Rule 10, are heard at the first term, even if docketed after the perusal of the district to which they belong.

6. If, by neglect of the judge, clerk, or cause other than neglect of the appellant, the "case on appeal" cannot be docketed at the term at which it is required to be filed, it is the duty of the appellant to docket the rest of the transcript at such term, and move for a (480) *certiorari,* or he will lose his appeal. *Pittman v. Kimberly,* 92 N. C., 562.

The appeal here not having been docketed at the first term of this Court which began after the trial below, must be dismissed.

Appeal dismissed.

Cited: Hinton v. Pritchard, 108 N. C., 413; *Johnston v. Whitehead,* 109 N. C., 209; *Sondley v. Asheville,* 110 N. C., 90; *Pipkin v. Green,* 112 N. C., 356; *Graham v. Edwards,* 114 N. C., 229; *Paine v. Cureton, ibid.,* 607; *S. v. Freeman, ibid.,* 873; *Causey v. Snow,* 116 N. C., 498; *Haynes v. Coward, ibid.,* 841; *S. v. Deyton,* 119 N. C., 882; *Guano Co. v. Hicks,* 120 N. C., 30; *Davison v. Land Co., ibid.,* 259; *Burrell v. Hughes, ibid.,* 278; *Caldwell v. Wilson,* 121 N. C., 424; *Barrus v. R. R., ibid.,* 50; *S. v. Telfair,* 139 N. C., 555; *Hewitt v. Beck,* 152 N. C., 758; *Mirror Co. v. Casualty Co.,* 157 N. C., 30; *Howard v. Speight,* 180 N. C., 654.

JESSE OWENS v. A. F. PAXTON.

Certiorari—New Trial—Appeal—Lost Papers.

When it appeared from the return of a judge to a *certiorari* that the answer had been lost, and his notes of the trial also, and that, in consequence, he was unable to make up or settle the case upon appeal, and there was no *laches* on the part of the appellant, a new trial will be granted.

THIS was a motion for a new trial, heard upon the return of the judge to a *certiorari*. The case was tried at Spring Term, 1888, of TRANSYLVANIA Superior Court, before *MacRae, J.*

No counsel for plaintiff.
T. F. Davidson and G. A. Shuford for defendants.

CLARK, J. To the *certiorari* in this case the judge returns that the amended answer has been lost, and his notes of the trial also, and that, in consequence, he is unable to make up or settle case on appeal. The appellant moves thereupon for a new trial. The loss of the amended answer of itself would not support this motion, as it might be supplied by proper proceedings. *Nichols v. Dunning,* 91 N. C., 4. Nor would the mere fact of the judge's inability to settle the case of itself be sufficient. *Simmons v. Andrews, ante,* 12. But it appears in
(481) addition, in this case, that there has been no *laches* on the part of the appellant.

Under such circumstances a new trial must be ordered. *Burton v. Green,* 94 N. C., 215; *Comrs. v. Steamship Co.,* 98 N. C., 165.

New trial.

Cited: Ritter v. Grimm, 114 N. C., 374; *McGowan v. Harris,* 120 N. C., 140; *S. v. Higgins,* 126 N. C., 1056; *S. v. Robinson,* 143 N. C., 624.

J. J. GUDGER ET AL. v. THE RICHMOND AND DANVILLE RAILROAD COMPANY.

Railroads—Right of Way—Corporation—Trespass—Betterments—Married Women—Damages—Statute of Limitations—Possession.

1. The defendant, a railroad company, using a right of way over plaintiff's lands, erected buildings thereon and used them for a dinner-house for travelers and for its employees, and after some time tore them down.

No proceedings for condemnation had been taken, other than the location and construction of the road by the company. More than two years elapsed after such location and construction before the buildings were torn down, and plaintiffs brought no action or other proceeding in this time to recover compensation for right of way, and defendant had made no effort to buy it. Some of the plaintiffs were married women and others minors: *Held*, that the direction of the court, in an action for damages to real estate, to return a verdict for the defendant upon these facts, was not error.

2. The defendant was not a trespasser, either when it erected or when it removed the buildings, and its using them for a dinner-house could not work a forfeiture of any portion of its right of way.

3. The plaintiffs have no right to claim betterments for buildings erected by the defendant on its own right of way, even though they were the owners of the land over which it extended.

4. The statute providing that it shall be presumed that the land over which the road may be constructed, together with 100 feet on either side thereof, has been granted by the owner, etc., *provided* he does not file petition for damages in two years, applies, though the defendant has not shown that it endeavored to purchase and failed to do so.

5. The statute excepts married women and minors only as to the *time* of filing petition for damages, they being allowed two years after disabilities removed.

6. More than two years having elapsed, after defendant went into possession of its right of way, before the bringing of this action, all plaintiffs not under disabilities are barred.

7. As to the parties laboring under disabilities, it ought to have appeared that they were so when the statute began to run.

CIVIL ACTION, tried before *Clark, J.*, at Fall Term, 1889, of (482) the Superior Court of MADISON County.

The plaintiffs allege that they are the owners in fee of the land mentioned in the complaint; that there was a dwelling-house situated thereon, and that the defendant unlawfully tore down and removed the same from said land, and this action is brought to recover damages therefor.

The parties (plaintiffs) are numerous, and the record contains a demurrer assigning as causes of demurrer a non-joinder of parties, a misjoinder of parties, and the failure to make the heirs of James Gudger parties. The demurrer seems not to have been passed upon, but we assume that it was waived or overruled, as there is an answer denying the allegations of the complaint, upon which issues were submitted.

The issues were—

1. Did defendant wrongfully tear down a house on plaintiff's land?

2. If so, what damage has plaintiff sustained?

There was a verdict adverse to the plaintiff, and a judgment, from which he appealed.

The following is the case on appeal:

"It was admitted that the plaintiff was the owner of the land (483) upon which the defendant had erected the building mentioned in the pleadings, and that said building stood on the right of way of the defendant company, and that it was erected and used for a dinner-house for the traveling public, and as a boarding-house for defendant's employees at Paint Rock, a transfer station of defendant. No proceedings for condemnation of said land have been taken by the defendant, other than the location and construction of the road by the Western North Carolina Railroad Company; plaintiff had brought no action or other proceeding to recover compensation for the taking of the land for right of way, and more than two years had elapsed from the location and construction of the said railroad before the removal of the house and the commencement of this action; defendant had made no effort to buy the right of way. Some of plaintiffs are married women and some are minors. It appears the defendant removed the building from the right of way when the said transfer station was changed, and used the same elsewhere for railroad purposes. Upon the above appearing to the court and jury, the court directed a verdict in favor of the defendant.

"Plaintiff moved for a new trial, assigning as error:

"1. That the defendant, not having shown that he had endeavored to purchase, and had failed to do so, the statute did not apply.

"2. That the house having been used for a dinner-house, such use was *ultra vires,* and defendant had forfeited that portion of his right of way.

"3. The married women and minors were not barred of their right to recover damage in this action for removing the house."

G. A. Shuford for plaintiff.

D. Schenck for defendant.

(484) DAVIS, J., after stating the facts: The building, for the removal of which damages are sought to be recovered, was erected by the defendant company on land included in its right of way. The defendant company was not a trespasser when it erected the building, nor was it a trespasser when it removed the building. "It was erected and used for a dinner-house for the traveling public, and as a boarding-house for defendant's employees," and not for the benefit of the plaintiffs, nor for the enhancement of the value of their land, and we are unable to see how the fact "that it had been used for a dinner-house" could work a forfeiture of any portion of defendant's right of way.

The defendant had a right to erect any building on its right of way necessary for its use and convenience in carrying on its business, and it had a right to remove it when its interest required it. *R. R. v. Deal,* 90 N. C., 110, and cases cited.

To allow the plaintiffs damages for improvements put by the defendant on its own right of way, would be reversing the law of betterments. It may be that if the plaintiffs themselves had erected improvements on the defendant's right of way, they would have been entitled to recover for betterments to the extent of the enhanced value of the land, if they had good reason to believe that they had a title to the premises *(R. R. v. McGaskill,* 98 N. C., 526), but in the present case the building was erected, not by them, or for their benefit, but by the defendant, on its own right of way, and it is difficult to conceive what interest the plaintiffs had in the building.

But it is said "that the defendant not having shown that he had endeavored to purchase and had failed to do so, the statute did not apply." The statute provides that "it shall be presumed that the land over which the road may be constructed, together with one hundred feet on each side thereof, has been granted by the owner, etc., provided he does not file a petition for damages in two years, but this is not to affect infants, *feme coverts,*" etc. (485)

It does not appear how or when the numerous plaintiffs acquired title to the land on which the defendant had erected the building, or that they, or any of them, were under disabilities when the statute began to run, but assuming that they were "married women and minors," this could only avail and protect them in the right to "file a petition for damages in two years" after disability.

The defendant was in possession of the right of way, the plaintiffs "had brought no action or other proceeding to recover compensation for the taking of the land for right of way," and, if the plaintiffs are not barred by reason of disabilities, they cannot maintain this action. They should have filed their petition for assessment of damages, as provided by law. *R. R. v. McCaskill,* 94 N. C., 746, and cases cited.

Affirmed.

Cited: Earnhardt v. R. R., 157 N. C., 365; *Abernathy v. R. R.,* 159 N. C., 343; *Coit v. Owenby,* 166 N. C., 139; *White v. Scott,* 178 N. C., 638.

THE FALLS OF NEUSE MANUFACTURING COMPANY v. THOMAS HENDRICKS.

Action to Recover Land—Executory Contract—Specific Performance—Possession—Bond for Title—Defective Deeds and Contracts—Memorandum in Writing—Parol Evidence to Connect Writings.

1. Possession of land under a bond for title is notice of the equities of which it is evidence.
2. A bond for title "for thirty acres of land, being a portion of a tract formerly owned by Reuben Deaver and known as the 'Deaver Tract,' adjoining the lands of one Murray and two other parties—naming them—beginning on a white oak, corner of the said Deaver and Murray land," it appearing also that it was, at most, only a portion of the Deaver tract, is very ambiguous, and *quære*, if it can be aided by *extrinsic* evidence?
3. Such defect is not remedied by a *subsequent* survey.
4. Defective deeds (where there is an evident mistake in running the lines), may be cured by survey made at the time of their execution and delivery. As to defective executory contents, *quære?*
5. When, in aid of such defective agreement a receipt is shown, it must be connected with the agreement by internal evidence, not by parol.
6. A receipt, "I have received of T. H. on his land where he now lives," certain sums of money named, is, of itself, without connection with other papers, a sufficient memorandum in writing under 29 Car., II, to warrant specific performance, if the land can be sufficiently identified by evidence *aliunde*.

(486) THIS was a civil action to recover land, tried at the August Term, 1889, of BUNCOMBE Superior Court, before *Clark, J.*

The plaintiffs introduced deeds conveying to them, and those under whom they claimed, the lands described in the complaint, in fee.

Defendant introduced the following paper-writing, recorded in 1871:

"I bind myself in the sum of six hundred dollars to make to Thomas Hendricks a good and sufficient deed for thirty acres of land, being a portion of a tract of land formerly owned by Reuben Deaver, and known as the Deaver tract, joining Hugh Johnson's, Wm. Johnson's and the Robert A. Murray place, beginning on a white oak, the corner of the said Deaver and Murray land, whenever he pays to me the just and full sum of six hundred dollars.

WILY KNIGHT. WM. L. HENRY.
1 January, 1867."

The plaintiffs objected to the introduction of this paper in evidence, but the court admitted it, and the plaintiffs excepted.

The defendant then introduced himself as a witness, and swore:

"I paid W. L. Henry for the land described in the bond for title, and went into possession when the bond was given." (Plaintiff objected to this testimony, which was admitted by the court, and plaintiff excepted.) (487)

Defendant further swore: "Some time during the year 1868, after the bond for the title was made to me by W. L. Henry, Bryson surveyed out the thirty acres and marked it. W. L. Henry was present at the time. The thirty acres described in the bond for title adjoins Wm. Johnson on the north, Hugh Johnson on the east, the Robert A. Murray place on the west, the balance of the 'Deaver tract' on the south. The 'Deaver tract' of land contains fifty-four acres, and is a little longer one way than the other. It is bounded on the north by the William Johnson land, on the east by the Hugh Johnson land, and on the south and west by the Robert A. Murray place."

The plaintiffs objected to the introduction of this evidence, but the court admitted it, and the plaintiffs excepted.

(At this point in the examination of the witness a plat was introduced, which is hereto attached, marked "C," and made a part of this statement of the case, and is to go with it to the Supreme Court.)

On cross-examination, the witness stated that the "Deaver tract" of land was correctly laid down upon the plat, and was joined by William Johnson on the north, Hugh Johnson on the east, and the Robert A. Murray place on the west and south, as is written on the same in ink.

The witness further swore that the southern line of the thirty acres claimed by him in his amended answer was not located or known until the land was surveyed, soon after the bond for title was made; and that they ran down the line of the Deaver land and the Hugh Johnson place southward a sufficient distance to make thirty acres, by running a straight line due west to the western line of the Deaver land, or east boundary line of the Robert A. Murray place, thence running back north on the line of the Murray land to the white oak; that W. L. Henry was present at the survey, and accepted it as the proper location of the land. (488)

The defendant then introduced W. L. Henry, who testified that the defendant paid him six hundred dollars for the land described in the bond for title; that he paid it in stock, a gold watch, and that witness owed the defendant some money, and the defendant returned witness' note, which was about one hundred dollars.

The defendant then offered in evidence said witness' receipt, the execution of which the witness acknowledged, and which is in words and figures as follows:

"I have received of T. Hendricks on his land where he now lives, one horse, $150; cattle, $100; one watch, $100; two-horse wagon and bed, 40 or 50 dollars, and possibly other payments, amounting in all to five hundred dollars. I only now remember the above items.
8 September, 1867. (Signed) WM. L. HENRY."

The plaintiff objected to the introduction of this receipt, but the objection was overruled, and the plaintiff excepted.

Witness then testified, without objection, that he had sold to defendant thirty acres, embracing the northern end of the Deaver tract, which he pointed out on the map to the jury; that the land was afterwards surveyed and marked off in the same spring, and the whole money paid before September, 1867.

That he was present, and that the sheriff gave notice, at the sale, of the defendant's bond for title.

Good Roberts, another witness for the defendant, testified that the land in dispute was covered by the sheriff's deed to the plaintiff; that he knew of the sale and bond for title to defendant Hendricks, before he sold to plaintiff; and that Judge Henry, one of the parties (489) from whom plaintiff bought, also knew of the same before he sold to the plaintiff, but Henry did not know of this until after sheriff's sale, but all parties knew of the defendant's possession at the time of the said sale, but did not know whether defendant was a tenant or not.

Rufus Miller testified for the plaintiff that he was present when the defendant bought the land from W. L. Henry, and that the receipt shown to W. L. Henry was correct, and that Hendricks, the defendant, went into immediate possession; that he was present when the survey was made by the plaintiff of the Sulphur Springs lands, and that Mr. Plumadore, the general agent for the plaintiff, disclaimed any interest in the land claimed by defendant, and the surveyor did not run around it; that Plumadore was the agent of the plaintiff and was in charge of this property, offering it for sale.

The plaintiff objected to any declaration of Plumadore as agent concerning the property. The objection was overruled and the court admitted the evidence, not as an estoppel, but as some evidence to give to the jury as to whether the plaintiff had notice of defendant's claim. The plaintiff excepted.

This witness testified upon cross-examination that the rental value of the land was about $32 per year, if rented, and the timber land was worth about $10 per acre.

W. L. Henry was introduced by the defendant, and he testified that Plumadore was the general agent of the plaintiff and had charge of their lands; that Plumadore said to witness that the plaintiff did not claim the land in dispute, and once had the suit taken out of court, but that the lawyers put it back.

The defendant, Hendricks, introduced in his own behalf, testified that Plumadore, the plaintiff's agent, since this suit commenced, offered to buy a part of the land in controversy from him, and stated to defendant that he had written to R. Y. McAden, who had (490) the principal management of the business of the plaintiff, the Falls of Neuse Manufacturing Company, and advised him to take the case out of court. (Admitted, not as evidence of any statement of McAden, but to show knowledge in Plumadore.)

Dr. Queen was introduced, and he testified that Plumadore told him that the plaintiff wanted to drop the suit, and it would have been dropped at the court previous, but the lawyers would not do it, because they wanted to sue Judge Henry on his warranty or bond to the plaintiff, and were forced to terminate this case before they could do so.

Newton Taylor also testified that the said Plumadore had proposed to swap other land to the defendant Hendricks for that in controversy in this case, and that he had asked him (witness) to see Hendricks, and make the trade for part of the land for him. Plumadore at the time stated that he was acting for the plaintiff, and wanted to make an exchange for the company. This, in substance, is the testimony from the notes of the court.

At the close of the testimony, it was admitted by both the plaintiff and defendant that the land in controversy was a part of the Deaver tracts, included in the sheriff's deed of 1 January, 1867, and that the sheriff's deed of 28 September, 1872, did not cover any part of either of these tracts, and was not in controversy.

Among other things, the court charged the jury that the description in the bond for title was such as could be made certain, and if they should find that W. L. Henry, under whom the parties, plaintiff and defendant, claimed, executed the said bond for title, and soon afterwards the defendant entered into possession, and, with W. L. Henry, immediately caused the land to be surveyed, as stated in the defendant's reply, and marked the boundary lines, and has remained in possession of said land, claiming it as his own, such possession would be a notice to all the world of the defendant's equity for title (491) against the said Henry, and if the plaintiffs purchased the said

land while the defendant was in possession so claiming it, it is fixed in law with such notice, and purchased subject to his equity.

That if they should find that the defendant paid the purchase-money to W. L. Henry for the land, he would be entitled in law to specific performance of his bond for title with Henry, and the plaintiff, being fixed with notice of his equity, purchased subject to such equity.

That the plaintiffs, having shown title in W. L. Henry, by his sheriff's deed, shifted the burden upon the defendant, and he must show, by a preponderance of proof, that he purchased the land in 1867 from W. L. Henry under the bond for title alleged, and that he caused the same to be surveyed, took possession and remained in possession, claiming the said land as his own at the time when the plaintiffs purchased.

To this charge the plaintiffs excepted.

E. C. Smith for plaintiff.

G. A. Shuford for defendant.

SHEPHERD, J. There can be on question but that the possession of the defendant was notice of any equities which existed in his favor. *Edwards v. Thompson,* 71 N. C., 177; *Tankard v. Tankard,* 84 N. C., 286.

But we think that his Honor erred in holding that the thirty acres mentioned in the agreement to convey had been sufficiently identified.

While the writing is very ambiguous in its terms, it is, perhaps, susceptible of being aided by extrinsic evidence. If, for instance, the testimony had shown that the particular thirty acres were known as the "Deaver tract," it would have been a sufficient identification to have warranted the instruction given by the court. So far from this (492) being the case, the defendant himself testified that the thirty acres were "the balance of the Deaver tract"; from which it must necessarily be inferred that the said tract was one out of which the thirty acres were to be taken. This feature, therefore, being eliminated from the case, there remains nothing by which the *locus in quo* can be located; for by reference to the plat it will be seen that, according to the description, it may be laid off in several different ways. *Blow v. Vaughan,* 105 N. C., 198, and the cases cited.

Nor is the defect remedied by the subsequent survey and the marking of the lines. It may well be doubted whether such acts can, under any circumstances, aid a defective description of an executory contract to convey land, where, as with us, the doctrine of part performance is entirely repudiated. The furthest the court has gone in this direction is in *Baxter v. Wilson,* 95 N. C., 137, where effect is given to the contemporaneous running and making of lines and the establishment of

corners for the purpose of correcting mistakes in the courses and distances called for in a deed, and by this means ascertaining the true intention of the grantor. This principle applies in cases where there is an evident mistake in the courses and distances given in the description, and not where, as in the present case, there is no such description at all. It could in no event avail the defendant, as the marking of the lines, etc., were not contemporaneous with the execution of the contract.

It is contended, however, that the agreement can be aided by the receipt given by W. L. Henry to the defendant in 1867. This would be so if the two papers could be connected without the aid of parol evidence. A valid contract, within the statute of frauds, "may be of one or many pieces of paper, provided the several pieces are so connected, physically or by internal reference, that there can be no uncertainty as to their meaning and effect when taken together. But (493) this connection cannot be shown by extrinsic evidence." *Mayer v. Adrian,* 77 N. C., 83.

Here there is no reference in either paper to the other, and they are entirely consistent with the idea that they relate to distinct and independent transactions. Although the receipt could not be so connected with the agreement, we are of the opinion that it was in itself a sufficient memorandum in writing to warrant specific performance, provided that the land could be specifically identified by evidence *aliunde.*

In *Farmer v. Batts,* 83 N. C., 387, the Court decreed specific performance upon the following receipt:

"Received of W. D. Turner $1,400 in full payment of one tract of land containing 193 acres, more or less, it being the interest in two shares adjoining the land of James Barnes, Eli Robbins and others. This 25 January, 1864."

This is substantially the same in its terms as ours, except that the payment is acknowledged to be in full. This difference does not alter its binding effect upon the vendor, as it is well settled with us that the consideration need not be set forth. *Miller v. Irvine,* 1 Dev. & Bat., 103; *Thornburg v. Masten,* 88 N. C., 293. To this effect also is *Gordon v. Collett,* 102 N. C., 532, where a simple receipt in part payment of a certain described lot of land was held sufficient. See, also, *Breaid v. Munger,* 88 N. C., 297.

These authorities, we think, fully sustain us in saying that the receipt is sufficient under 29 Chas. II.

No decree, however, for specific performance can be granted the defendant unless "his land where he now lives" (the descriptive words of the receipt) is fully identified by competent testimony. These words are clearly susceptible of being applied to a particular well-defined

tract of land—*id certum est, quod certum reddi potest*—and if
(494) the defendant can supply the requisite proof, he will be entitled to relief.

While the answer was sufficiently general (except, perhaps, as to the date of the contract) to have comprehended the receipt as a defense, this aspect of the case was not presented to the jury. The action seems to have been tried upon the agreement alone, and as we are of the opinion that there was error as to this, there must be a

New trial.

Cited: Deaver v. Jones, 119 N. C., 599; *Smith v. Fuller,* 152 N. C., 12; *Bateman v. Hopkins,* 157 N. C., 473; *Speed v. Perry,* 167 N. C., 126; *Stockard v. Warren,* 175 N. C., 286; *Lewis v. Murray,* 177 N. C., 20.

J. S. MOSSELLER v. W. T. S. DEAVER ET AL.

Forcible Entry—Trespass—Peaceable Possession—Charge of the Judge —Nominal Damages.

1. A. went into possession of land in 1884. In March, 1887, B. entered, after notice to A. to quit, but agreed A. should hold until October of that year. A. held until March, 1888, when B. entered and forcibly ejected him. In an action for damages for trespass, the court charged the jury that if A. was not B.'s tenant, the latter and those acting under him had a right to go on the premises and put A. out by force, if no more force was used than was necessary for that purpose: *Held,* that such charge was error.

2. Such forcible entry is opposed to public policy, and is made a criminal offense by statute.

3. The occupant can recover of the owner for forcible entry only such damages as accrued to him through injury to his person or property by the wrongful invasion thereof—nominal damages for the trespass, and exemplary damages when it is proper to allow them; not having the title, he cannot recover for injury to the land.

4. Exemplary damages are awarded if the unlawful act be done in a wanton and reckless manner.

5. Forcible entry upon the lands of another, who is in peaceable possession, is unlawful, and this without reference to the amount of force used.

(495) THIS was a civil action for damages for trespass, tried at August Term, 1889, of BUNCOMBE Superior Court, before *Clark, J.*

The facts are set out in the opinion.

T. F. Davidson for plaintiff.
M. E. Carter for defendants.

SHEPHERD, J. The plaintiff had been in possession of the strip of land in controversy from 1884 to March, 1888. Whether he entered under the defendant, Wilson, the owner, and terms under which he entered, are disputed questions. It is admitted, however, that in March, 1887, Wilson, after giving the plaintiff notice to quit, agreed that he should remain upon the land until the succeeding October. The plaintiff continued in possession until March, 1888, when, without any further notice, he was forcibly ejected by the *feme* defendant, Deaver, a negro, who was acting under the direction and authority of the said Wilson. The entry was made while the plaintiff was in the actual possession of his house, and in his presence, and was done under such circumstances as to constitute a forcible entry under the statute, if not indeed an indictable forcible trespass. His Honor charged the jury that if the plaintiff was not the tenant of Wilson, the latter, and those acting under him, "had the right to go there and put him out by force, if no more force was used than was necessary for that purpose." Under the circumstances of this case (the plaintiff not being a recent trespasser or intruder) we cannot approve of the instruction given, as it is not only opposed to the public policy, which requires the owner to use peaceful means or resort to the courts in order to regain his possession, but is directly contrary to a statute which condemns the violent act as a criminal offense.

In *Dustin v. Cowdry,* 23 Vt., 631, *Redfield, J.,* said: "We (496) entertain no doubt that such a principle of law . . . . did exist in England from the time of the Norman Conqueror until the Statute of 5, of Richard II, ch. 8, of Forcible Entry and Detainer, a period of nearly three hundred years . . . and it is certain, we think, that such a mode of reducing rights of action to possession is more suited to the turbulence and violence of those early times, when no man, whose head was of much importance to the State, felt secure of retaining it upon his shoulders for an hour, than to the quiet and order and general harmony of the nineteenth century. . . . But as men advanced towards equality, and claimed to have their rights respected and guaranteed to them, and more carefully defined, this state of law became intolerable and was among the first to be abrogated by Parliament." This was done by the Statute of 5, Richard II, which is substantially enacted in North Carolina (The Code, sec. 1028), and in many other states of this Union. "A contrary rule," says *Lawrence, J.,*

in *Reeder v. Purdy* (41 Ill., 279), befits only that condition of society in which the principle is recognized that—

> 'He may take who has the power;
> He may keep who can.'

If the right to use force be once admitted, it must necessarily follow, as a logical sequence, that so much may be used as shall be necessary to overcome resistance, even to the taking of human life."

Nearly all the authorities agree that such forcible entries on the part of the owner are unlawful, but there is a great diversity as to whether an action of trespass *quare clausum fregit* may be maintained, and also whether the defendant can justify under the plea of *liberum tenementum.*

(497) *Erskine, J.,* in *Newton v. Holland,* 39 E. C. L., 581, said that "it is remarkable that a question so likely to arise should never have been directly brought before any of the courts setting in Banc" until that case, which was tried in 1840; and it is also worthy of remark that *Ruffin, C. J.,* in *S. v. Whitfield,* 8 Ired., 317, regarded it as still an open question in North Carolina.

In the conflict of authorities, we must adopt that rule which, in our judgment, rests upon the sounder reason. This is so well expressed by the Court in *Reeder v. Purdy, supra,* that we will reproduce the language of the learned *Justice* who delivered the opinion. He says: "The reasoning upon which we rest our conclusion lies in the briefest compass, and is hardly more than a simple syllogism. The statute of forcible entry and detainer, not in terms, but by necessary construction, forbids a forcible entry, even by the owner, upon the actual possession of another. Such entry is, therefore, unlawful. If unlawful, it is a trespass, and an action for the trespass must necessarily lie. . . . Although the occupant may maintain trespass against the owner for a forcible entry, yet he can only recover such damages as have directly accrued to him from injuries done to his person or property through the wrongful invasion of his possession, and such exemplary damages as the jury may (under proper instructions) think proper to give. But a person having no title to the premises clearly cannot recover damages for any injury done to them by him who has the title." He may, however, says the Court, recover nominal damages in all cases of forcible entry and detainer, and this, in our opinion, is the correct view of the law. It is strongly sustained in *Newton v. Harland, supra,* though the point is not distinctly decided. In that case, *Bosonquet, J.,* agreeing with *Tindall, C. J.,* in holding that "if the act be expressly prohibited by statute, it must . . . be illegal and void." See, also,

Cooley on Torts, 323, 324. Our conclusion, therefore, is that (498) there having been a forcible entry upon the peaceable possession of the plaintiff, he is entitled to recover nominal damages for the trespass. He is also entitled to recover damages for any injury inflicted upon his person, his furniture, his tools, and even his house, if it is a fixture only. There may also be awarded exemplary damage, if the unlawful act be done in a wanton and reckless manner. The complaint alleges such injuries, and it was error on the part of the court in making the case turn upon the question whether the force used was necessary to the expulsion of the plaintiff, as we have seen that the forcible entry was unlawful, without reference to the amount of force necessary to effectuate the purpose of the plaintiff. We are also of the opinion that the incompetent collateral matter admitted by the court must have had a prejudicial effect against the plaintiff.

For the reasons given there must be a new trial.

Error.

Cited: S. v. Howell, 107 N. C., 840.

LARKIN SMITH, BY HIS NEXT FRIEND, v. C. H. SMITH.

Lunacy—Next Friends—Guardian—Comments of Counsel—Sworn Pleadings—Evidence.

1. Persons *non compos mentis* may sue by their next friend when they have no general or testamentary guardian.
2. In an action involving, among other things, the sanity of the plaintiff, his counsel, in addressing the jury, commented upon the failure of one of the defendants to answer the sworn complaint, which reflected upon his character. The complaint was not put in evidence: *Held*, that, upon objection by the other side, the court below erred in not stopping counsel.
3. When a party intends to use pleadings as evidence, he should put them in evidence—mere reading to the jury is not sufficient for this purpose.
4. Suggestions by SHEPHERD, J., as to trials where there are double issues.

THIS was a civil action, tried before *Armfield, J.,* at October (499) Term, 1889, of WAKE Superior Court.

The action was brought in the name of Larkin Smith, by his next friends, Ferrell and wife, Wiggs and wife, appointed such by the court, against Charles Smith. The summons was issued on 20 December,

1888; and after it was served on Charles Smith, to wit, on 26 February, 1889, Charles Smith took a power of attorney, already written, to Larkin Smith and procured his signature thereto—said power of attorney purported to appoint Messrs. Fuller & Snow and Batchelor & Devereaux, attorneys at law of the city of Raleigh and county of Wake, attorneys of the said Larkin Smith, and to empower and direct them to dismiss this action. At the last preceding term of the court Messrs. Fuller & Snow and Batchelor & Devereux presented this power of attorney of 26 February, 1889, to that court, and moved to dismiss the action; whereupon it was suggested to the court, by the counsel for the plaintiffs, that at the time of the execution of this power of attorney of 26 February, 1889, Larkin Smith was insane, and incapable of appointing an attorney in the cause, and the motion to dismiss was continued to this term.

When the case was called for trial at this October Term, 1889, Messrs. Fuller & Snow and Batchelor & Devereux renewed their motion to dismiss the action under their power of attorney, and under an affidavit.

The court overruled the motion, and Messrs. Fuller & Snow, who were in court and making the motion, excepted for the defendant Charles Smith, and also in the name of Larkin Smith.

(500) Messrs. Fuller & Snow then asked the court to hear the evidence as to the sanity of Larkin Smith, and himself decide as to the competency to execute the said power of attorney of 26 February, 1889. His Honor refused to do this, saying he would submit an issue upon this matter to the jury to enlighten the conscience of the court, and as the evidence upon this issue would involve much of the evidence raised by the pleadings in the case he would at the same time submit the issues raised by the pleadings. To this Messrs. Fuller & Snow excepted. Messrs. Fuller & Snow then tendered the following issue: "Was Larkin Smith, at the time of the execution of the power of attorney to Fuller & Snow and Batchelor & Devereux, on 26 February, 1889, a lunatic and incapable, from want of understanding, to manage his own affairs?" His Honor declined this issue, and submitted the issues found in the record to the jury. To this Messrs. Fuller & Snow excepted, on behalf of Charles Smith, and also of Larkin Smith.

On the trial E. P. Wiggs, one of the next friends of plaintiff, testified, after objection by Messrs. Fuller & Snow, that, before Larkin Smith was stricken with paralysis, and when he was in his right mind, he told witness that defendant Charles Smith was in the habit of drinking and running after bad women, and that he could not trust him with his business; Messrs. Fuller & Snow excepted. The same witness, after like objection, testified that the defendant Charles Smith told him that he

carried the power of attorney of 26 February, 1889, to Larkin Smith and got him to sign it, and further told him that he, Charles, could have this power of attorney undone whenever he wanted to. To this Messrs. Fuller & Snow excepted.

The same witness, after like objection, testified that defendant, Charles Smith, told him about 1 April, 1889, that Larkin Smith was not competent to attend to any business, and that in November, 1888, Charles Smith told him that Larkin Smith was then in such a condition that he, Charles, could not make any trade with him, (501) and that he, Charles, wanted the children all to meet, for Larkin was not competent to attend to any business. Messrs. Fuller & Snow excepted.

Mrs. A. L. Ferrell testified, after objection by Messrs. Fuller & Snow, that she did not believe, after being much with Larkin Smith, and observing his mental condition, that he had sufficient mental capacity to understand or know the effect of a power of attorney. Messrs. Fuller & Snow excepted.

This witness further testified, after like objection, that defendant told her the day after Larkin's wife died that he, Larkin, was not competent to attend to any business, and was the same as if he was dead. Messrs. Fuller & Snow excepted.

This witness, after like objection, further testified that Larkin Smith was mentally incapable of guarding himself against imposition or fraud.

One of the counsel for the plaintiff, in his address to the jury, spoke of the fact that the defendant, Charles Smith, had not answered the complaint in this action, and said that no doubt the reason that prevented him from doing so was the fact that the complaint was sworn to, and that the defendant could not safely answer many of the charges therein against him without committing perjury. Messrs. Fuller & Snow asked the court to stop the counsel. The court declined to do so, and they excepted, saying that the complaint had not been put in evidence. The court replied, which was the fact, that after the jury were impaneled the complaint had been read to them without objection on the part of the defendant.

The jury found the issues as set out in the record, and the court gave judgment as is therein set out. The counsel for the defendant entered a rule for a new trial, before judgment, which was dismissed. Messrs. Fuller & Snow appealed to the Supreme Court, both for Larkin Smith and for Charles Smith. (502)

J. H. Fleming for plaintiffs.

J. B. Batchelor, John Devereux, Jr., and E. C. Smith for defendant.

SHEPHERD, J. We do not concur with the defendant that the court had no power to submit the issues involving the mental capacity of Larkin Smith to execute the papers in controversy. There can be no question but that persons *non compos mentis* may sue by their next friend when they have no general or testamentary guardian (The Code, sec. 180); and "it is incident to the ordinary jurisdiction of a court having full chancery powers to inform its conscience by directing an issue upon the sanity of a party, not found a lunatic to be framed for a jury, when the question arises collaterally in an equitable proceeding, as, for instance, when it becomes necessary to determine the question of the sanity of the grantor in a deed upon a bill brought to set aside his conveyance upon the ground of his insanity." Busw. Insane, 55.

It is insisted by the defendant that no action can be brought until there has first been an inquisition of lunacy under chapter 37 of The Code, and for this position he relies upon the case of *Dowell v. Jacks,* 5 Jones' Eq., 417. In that case the plaintiff had been declared insane under an inquisition directed by the county court (Revised Code, ch. 57), and the plaintiff sued in equity to have the proceedings set aside, because of errors and irregularities, and also because she was, in fact, of sound mind. The court dismissed the bill, not because it had no jurisdiction to entertain suits brought by the next friend of a lunatic, who had not been legally declared to be such, but for the reason that the jurisdiction as to inquisitions of lunacy was exclusively in the county court. *Battle, J.,* in delivering the opinion, said that the effect (503) of the provisions of the Revised Code was "to confer upon the county courts original and exclusive jurisdiction to issue writs from time to time, as may be necessary for the purpose of ascertaining, by the inquisition of a jury, whether a party be an idiot or lunatic, or, if he had been once found to be a lunatic, whether he had become of sound mind again." The decision does not support the contention of defendant, and we think it well settled that where there has been no inquisition the lunatic may sue by next friend. The jurisdiction is expressly recognized and upheld by English Chancery Courts. See *Beall v. Smith,* L. R., 9, ch. 85, 91; *Jones v. Lloyd,* L. R., 18 Eq., 265, 274, 275. In the latter case *Jessell, M. R.,* said: "Can a suit be instituted by the lunatic, not found so by inquisition, by his next friend? I have no doubt it can. There is authority upon the subject, and it seems to me so distinct that I have no occasion really to refer to the reasons, for I think the cases of *Light v. Light,* 25 Beav., 248, and *Beall v. Smith,* L. R., 9, ch. 85, are such authorities; but, independently of the unreported case of *Fisher v. Melles,* where I know the point was discussed, and, independently of authority, let us look at the reason of the thing. If this were not the law, anybody might, at his will and pleasure, commit waste on a lunatic's

property, or do damage or serious injury and annoyance to him or his property without there being any remedy whatever." To the same effect is Busw. Insan., sec. 120, where it is said that "when a person is, in fact, insane, but has not been so adjudged by a competent tribunal, or placed in charge of a committee or guardian, the courts, whether of law or equity, have jurisdiction to entertain suits brought by one as the next friend of the insane person." These authorities are decisive against the defendant upon the question of jurisdiction.

We think, however, that there was error in permitting the counsel, after objection by the defendant, to comment upon the fact that the complaint was verified, and had not been answered by the (504) defendant. It is true that the complaint had been read to the jury after it was impaneled, but it was not formally put in evidence, and "such evidence," says the Court in *Smith v. Nimocks,* 94 N. C., 243, must be introduced on the trial at the proper time, and in the proper way. This is necessary, in order to afford the party to be affected adversely by it just opportunity to explain, modify or correct it. He might be able to show that the admissions or statements were made by inadvertence, mistake or misapprehension; and the law allows him reasonable and orderly opportunity to do so. It never tolerates undue advantage. *S. v. Whit,* 5 Jones, 224." So, in this case, the defendant should have had an opportunity of explaining his alleged failure to answer. For instance, he might have shown that he did not answer because of his reliance upon the power of attorney authorizing a dismissal of the action, or he might have shown other good and sufficient reasons. Besides, it does not appear that an answer was not, in fact, filed. None appears in the record, but the case speaks of "issues raised by the pleadings"; and such issues were submitted as if all the allegations of the complaint had been denied. This could only have been done by a verified answer; and, there being no conflict between the case and the record in this respect, we must construe them together and assume that the defendant did make a proper answer to the complaint. Taking it in either aspect, we think the remarks of the counsel, under the circumstances, must have been highly prejudicial to the defendant, and that the court should have promptly interfered when requested so to do. In the cases above cited it is said that while pleadings may be read to the jury, under direction of the court, in order that they may understand more clearly "the nature and scope of the issues," yet, where they are to be used as evidence, they should be formally introduced as such. As this case falls directly within the principles declared by the above decision, we must grant the defendant (505) a new trial.

This renders it unnecessary for us to pass upon the other exceptions. We will remark, however, that where "double issues" are submitted, as in this case, the court should carefully instruct the jury as to the applicability of the testimony to each of such issues, so that the testimony pertinent to one may not influence the finding as to the other. Where, from the nature of the case, the court can see that this cannot be successfully done, the preliminary issue should be tried first. Very little of the testimony in this case is sent up, but from what is in the record, it does not appear that the two issues could not have been tried together without prejudice to the rights of the parties, and, as the charge is not before us, we assume that his Honor gave all proper and necessary instructions. For the reasons given there must be a new trial.

Error.

Cited: *S. c.*, 108 N. C., 372; *Abbott v. Hancock*, 123 N. C., 102; *Page v. Ins. Co.*, 131 N. C., 116; *Mfg. Co. v. Steinmetz*, 133 N. C., 193.

J. H. LANNING v. THE COMMISSIONERS OF TRANSYLVANIA COUNTY.

Sheriff—County Commissioners—Note—Statute of Limitations—The Code—County Debt—Referee.

1. By order of the county commissioners in February, 1881, L., a sheriff, executed and delivered a note to one D. for the value of his services in building a courthouse and jail. Payments were made thereon by the sheriff and by the chairman of commissioners in March, 1882, and afterwards, the sheriff, under order of the commissioners to him as such, paid off the balance in full, but failed, as he alleged, to have it allowed to him in settlement with the commissioners: *Held*, that in an action by L. against the commissioners for such balance, it must appear that he presented his claim within two years after its maturity.

2. When the referee to whom the case was referred under The Code failed to find the facts upon which this statute of limitation can be determined, the case must be remanded.

3. It is not necessary, in such action, that the items of the account between the parties, should be stated in detail. The findings of fact as to the execution of the note, the payments thereon, the balance due, and the ownership thereof, are sufficient as to all questions involved, except the statute of limitations.

(506) CIVIL ACTION, tried before *Clark, J.*, at September Term, 1889, of the Superior Court of TRANSYLVANIA County.

The facts in this case are stated in the opinion.

G. A. Shuford for plaintiff.
T. F. Davidson for defendants.

DAVIS, J. The plaintiff was sheriff of Transylvania County, and alleges, in substance, that on 8 February, 1881, B. C. Lankford was the chairman of the board of county commissioners of the county, and as such, and in obedience to the order of the board, he executed and delivered to William T. Davis, contractor for building the courthouse and jail, a bond for $1,305.53, with interest from 8 February, 1881, being the balance due said Davis from the county for buildings said courthouse and jail; that, on 25 March, 1882, as sheriff, he paid $729.26 on said note, and B. C. Lankford, chairman of the board as aforesaid, paid $212.50, and nothing more was paid thereon, except that thereafter the plaintiff, by order of the board of county commissioners, "directed to him as sheriff of the county, paid off said bond and its interest, and, at the time of making his settlement with the county as sheriff, he overlooked the same and it was not allowed to him in settlement"; that, as soon as he discovered that the payment so made had not been allowed in his settlement, he immediately applied to the defendants in open session on 18 June, 1887, and demanded that his claim for the same be audited and allowed, which was re- (507) fused by the defendants; that there is due on said note, which was regularly assigned to him, the sum of $597.40, with interest on the $452.32 till paid, for which he demands judgment and for such other relief, etc.

The defendants answer, admitting the execution of the note, but substantially denying the other material allegations of the plaintiff. They say that the note has been paid in full, and that the plaintiff, "in his settlement with the county as sheriff, received full credit for the said note and interest." They admit that the plaintiff demanded that his claim be audited and allowed, as alleged, but that it was refused upon the ground that the same had already been paid in full. And for a further answer, they say "that the plaintiff ought not to have or maintain this action against them, because they say that the bond mentioned in the complaint was not presented to the chairman of the board of county commissioners of Transylvania County within two years after the maturity of said bond."

The action was commenced on 13 August, 1887, and was continued from term to term until Spring Term, 1889, when an order of reference theretofore made to C. M. Page, Esq., was set aside, and it was referred, by consent, to Kope Elias, Esq., under The Code.

At ..... Term, 1889, the referee filed the following report:

"1. I find as a fact that the note sued upon was duly executed by those having authority.

"2. I find as a fact that defendants made payments thereon.

"3. I find as a fact that the note sued on by the plaintiff is the property of the plaintiff, and the amount sued for as balance due
(508) thereon is due and unpaid, and that the plaintiff is entitled to recover a judgment of the defendants for said amount.

"4. I find as a fact that the plaintiff never presented the note sued on to the defendants for payment, after the same was assigned to him, till 18 June, 1887, and that payment was refused by the defendants. I find as a conclusion of law that section 756 of The Code, pleaded in bar of the recovery of the plaintiff's claim, is no bar to the plaintiff's recovery, for the reason that the note sued upon was presented to the defendants and recognized by them, and that the defendants paid one Posey, agent of Davis, the obligee, a payment thereon *within two years* of the *maturity* of the *same.*

"Again, I find as a conclusion of law, had the assignor of plaintiff failed to present the note sued on within two years, the defendants' plea would avail nothing. See *Wharton v. Commissioners of Currituck,* 82 N. C., 11, where the Court says, in construing section 756, what it means: 'that the object of the act being to enable the municipal bodies mentioned to make a record of their valid outstanding obligations and to separate them from the spurious and illegal, *it did not apply* to a valid debt of the *existence* and *character* of which the corporate authorities had *actual notice.*' The defendants knew of the existence of the note sued on, the character and amount thereof, and for what purpose it was given.

"I therefore direct judgment to be entered for $597.40, with interest on $452.32, at six per cent., from 13 August, 1887, till paid.

"I respectfully report my findings of facts and conclusions of law with the testimony in the cause. K. ELIAS, *Referee.*"

To this report the defendant filed the following exceptions:

(509) "1. That the referee does not state the items of account between the parties in his report, nor does he show at what time the plaintiff made his final settlement with the defendants as sheriff and tax collector, and what amount he then received credit for.

"2. The referee does not find the facts upon the issue raised by the pleadings, viz.: Was the amount paid by the plaintiff as sheriff on the bond mentioned in the complaint allowed to him in his settlement with the defendants?

"3. The referee errs in his findings of fact that the note sued on is the property of the plaintiff, because the complaint alleges that the plaintiff, as sheriff and tax collector for Transylvania County, paid off the note for and by request of the defendants.

"4. The referee errs in his finding of fact, that the plaintiff's claim was presented to the defendants for payment within two years from its maturity.

"5. The referee errs in his conclusion of law, that it was not necessary, under section 756 of The Code, for the plaintiff to present his claim for settlement within two years after the bond mentioned in the complaint had been paid off by him as sheriff and tax collector.

"6. The referee errs in his conclusion of law, that the plaintiff's claim is not barred by section 756 of The Code.

"7. The referee errs in his conclusion, that the plaintiffs' claim is not barred by the statute of limitations."

Upon the hearing, his Honor overruled all the defendant's exceptions, and gave judgment for the plaintiff.

The plaintiff, substantially, alleges that, by the direction of the board of county commissioners, he paid on the note referred to the sum mentioned in the complaint, and that in his settlement as sheriff with them the amount so paid was overlooked, and credit for it was not included and allowed him in said settlement, and that as soon as he discerned that it had not been allowed, he applied to them for pay- (510) ment, which was refused.

The defendants admit the execution of the note and the plaintiff's demand, but they deny the other allegations, and they also rely upon the statute (The Code, sec. 756) as a bar to plaintiff's demand.

The matters in controversy are, in substance:

1. Did the plaintiff pay the balance due on the note mentioned in the complaint?

2. If so, was the amount so paid by him allowed and credited to him in the settlement referred to?

3. And if not, was the demand to have it allowed made within the time allowed by law?

To answer these questions, it was not necessary that the referee should state, in detail, the items of account between the parties, and the finding of facts that the note was duly executed, etc., that payments thereon were made by the defendants, and that the balance due and unpaid is the property of the plaintiff, may be fairly taken and construed as determining the first and second in favor of the plaintiff; but there are no findings of fact upon which the third, in regard to the statute of limitations, can be determined. It is enacted (The Code,

sec. 756) that: "All claims against the several counties . . . of this State, whether by *bond* or otherwise, shall be presented to the board of county commissioners . . . within two years after the maturity of such claims, or the holders of such claims shall be forever barred from a recovery thereof."

This is a statute of limitation, and such claims against the county should be presented within two years "after maturity." *Royster v. Commissioners,* 98 N. C., 148; *Moore v. Commissioners,* 87 N. C., 215. But, as was said in the latter case, which was of a nature similar to this, the statute does not apply to a claim "constituted as the plaintiff's is."

(511) The purpose of this action is, in effect, to correct a mistake, and, following The Code, sec. 155, sub-sec. 9, as amended by the Act of 1889, ch. 269, it should be brought within the time limited, after discovery of the facts constituting the mistake.

No facts are found by the referee that will determine this. The finding, that it was presented on 18 June, 1887, and that the defendants made a payment to "one Posey, agent of Davis, the obligee, *within two years of the maturity* of the same," does not show that it was presented within two years *after* the payment thereon to Posey, or *after* the mistake was discerned. The material question here is, Was the action brought within two years after the discovery of the mistake?

In a reference under The Code the referee must report the evidence, his findings of fact thereon and his conclusions of law. Upon exceptions filed, the judge below reviews the findings of fact as well as conclusions of law, but the findings of fact are not reviewable by this Court, except in cases where it is alleged that there is *no evidence* to support the finding of fact, but if there is any evidence, the finding of fact below is conclusive. *Barcroft v. Roberts,* 91 N. C., 363; *Cooper v. Middleton,* 94 N. C., 86; *Usry v. Suit,* 91 N. C., 406; *Reaves v. Davis,* 99 N. C., 425, and cases cited.

The evidence taken by the referee is sent with the record. This should only be done when it is needed, and to the extent needed, to enable the Court to pass upon the question, when raised, as to whether there is any evidence, in which event alone can this Court review it, and the cause must be remanded, to the end that facts may be found upon which the question of the statute of limitations may be determined.

Error.

Cited: Osborne v. Wilkes, 108 N. C., 675; *Foushee v. Beckwith,* 119 N. C., 180; *Board of Education v. Greenville,* 132 N. C., 5.

(512)

THOMAS WOOD v. W. H. WHEELER ET AL.

Married Women—Contract—Consent of Husband—Privy Examination—Purchase-money—Foreclosure.

1. Where a *feme covert* executed a bond and mortgage without the consent of her husband and without privy examination, the consideration being for land purchased: *Held*, to be error in rendering a judgment on the bond and decreeing foreclosure.

2. If the agreement was that a properly executed mortgage was to be given concurrently with the execution of the deed for the land, the *feme covert* would not be allowed to retain the land without paying the consideration. Where, in such a case, the *feme covert* offers to surrender the land, and prays for an account of the rents, and profits, and the purchase-money paid: *Held*, that the court should have ordered such account to be taken, in order that the equities might be adjusted between the parties.

3. The transfer of such a bond could be nothing more than an equitable assignment of the right to have the property subjected to the payment of the debt, and the assignee must, therefore, be made a party.

THIS was a civil action, tried at the March Term, 1890, of TRANSYLVANIA Superior Court, before *Connor, J.*

The plaintiff was assignee of one A. C. Williams, of a purchase-money note due for land and secured by a mortgage thereon, executed about the same time, or shortly thereafter. The note and mortgage were executed by defendant, Sallie P. Wheeler, then and since wife of defendant, W. H. Wheeler, without the joinder or consent in writing of her said husband, and the mortgage proved and recorded without the privy examination of the wife.

Shortly after the execution of the note and mortgage in 1885, the defendants went into possession of the land and so continued until the bringing of this action, enjoying the rents and profits thereof. The purchase was for the use and benefit of the wife.

The action was upon the note and for foreclosure. (513)

The defendants alleged for defense, failure of title as to part of the land, and breach of the covenants of warranty, etc., and the insolvency of the warrantor and the failure of consideration, the coverture of the wife, want of husband's consent in writing to the contract, and failure to have her privy examination to the deed.

Defendants offered to reconvey the land and account for rents and profits if plaintiff would repay purchase-money with interest.

At the trial the court adjudged that plaintiff recover upon the note; that the mortgage was void, but that the judgment be enforced against

the wife's separate estate—the land mortgaged to Williams—and that the consideration therefor was purchase-money, and was for the benefit of the wife's separate estate.

From this judgment defendants appealed.

No counsel for plaintiff.
G. A. Shuford for defendant.

SHEPHERD, J. The bond and mortgage are both void. Neither was executed with the written assent of the husband, and the latter was unaccompanied by privy examination.

Although the bond was given for a beneficial consideration, it could not be enforced in equity as an engagement, in the nature of a contract, as it does not fall within any of the exceptions of The Code, sec. 1826, which dispenses with the requirement of the written assent of the husband. *Farthing v. Shields, ante,* 289.

Although the mortgage is void, and cannot be enforced as such, still if the agreement was that it should be executed concurrently with the deed, the *feme* defendant would not be permitted to retain the land without paying the consideration. This is the principle of *Wal-*
(514) *ker v. Brooks,* 99 N. C., 207; *Boyd v. Turpin,* 94 N. C., 137; *Burns v. McGregor,* 90 N. C., 222, and other cases.

In our case, the *feme* defendant elects to repudiate the transaction, and offers to restore the property, together with the rents and profits. There seems to have been no fraud upon her part, and in the adjustment of the equities she stands upon the same footing as an infant who disaffirms a contract and offers to restore the consideration in its original "plight and condition."

There was, therefore, error in the judgment of the court below. It should have made a decree looking alone to the placing of the parties in *statu quo,* and to this end an account should have been taken of the rents and profits and the amount of the purchase-money paid. It is also necessary that Williams, the grantor, should be made a party.

The bond being void, its transfer by Williams to the plaintiff amounted only to an equitable assignment of the former's right to subject the property to the payment of the balance of the purchase-money. As the effect of the rescission is to revest the property in Williams, it must follow that the equity of the plaintiff must be worked out under and through him.

Error.

Cited: S. c., 111 N. C., 234, 235; *McCaskill v. McKinnon,* 121 N. C., 223; *Cox v. Boyden,* 153 N. C., 527.

(515)

JOSIAH G. ALLEN v. THE WILMINGTON AND WELDON RAILROAD.

Petition to Rehear—Exceptions—Record—Fraud—Practice—Deed—Cancellation — Issues — Exceptions — Damages — Compensation —Judgment.

1. The rule of practice is that points not raised by exceptions will not be entertained when presented for the first time in the Supreme Court.

2. In an action to declare void a deed obtained upon false representations, which were a part of the consideration for making it, the plaintiff sought also damages for subsequent injury to the land contained therein: *Held*, such action could be maintained, and this, though it was not commenced until two years after the discovery of the fraud and after the plaintiff had accepted money in compensation for certain other injuries resulting at the same time and from the same operations.

3. In the new trial of such action, one of the issues was—"7. Did the defendant, after adopting the line upon which the road was constructed across plaintiff's land, pay the plaintiff one hundred dollars, and thereby induce plaintiff to let the water out of his millpond for thirty days, in order that the said pond might be crossed, as it was, by a trestle, instead of building cribs in the waters?" To which the jury responded "Yes." Defendant excepted to the holding of the court below, that this payment did not amount to a *parol* grant of the right of way. It was not alleged, and it did not appear, that plaintiff intended, by accepting such payment, to ratify the deed which had been obtained by fraud: *Held*, (1) that the holding of the court below was not error; *Held*, (2) that such exception raised no valid objection to the judgment setting aside the deed for fraud, and giving certain damages for injuries to the land embraced therein; *Held*, (3) that petition to rehear upon such case presented will not be granted.

THIS is an application of the defendant therein to rehear the case of *Allen v. W. & W. R. R. Co.*, 102 N. C., 381, decided at the February Term, 1889. In that case, the late *Chief Justice Smith*, delivering the opinion of the Court, among other things, said: "There is no difficulty, then, in prosecuting the action, so far as it proposes (516) to put the conveyance out of the way, and seek damages for subsequent injury, unless it be in the plaintiff's own inaction to make objection when he found a new line had been adopted by the defendant, and accepted compensation for letting the water out of his pond to enable the company to go on with the work and expend largely in constructing the road. This point has been strongly urged in the argument, but as no exception of the kind is shown in the record, it cannot now be entertained, whatever may have been its force if taken in apt time. The judgment following the verdict, which affirms the allega-

tions as to the influences brought to bear upon the plaintiff in inducing the making of the deed, will remain undisturbed."

It is alleged in the petition that what is thus said is erroneous; that the appellant in that case did except in such respect in the way and manner following—that is to say, the court on the trial submitted to the jury an issue in these words:

"7. Did the defendant, after adopting the line upon which the road was constructed across plaintiff's land, pay the plaintiff one hundred dollars, and thereby induce plaintiff to let the water out of his mill-pond for thirty days, in order that the said pond might be crossed, as it was, by a trestle, instead of building cribs in the water?"

By consent of the parties, the jury responded to this issue, "Yes."

In respect to the issue and the response thereto just mentioned, the court below said and held as follows:

"The response to the fourth issue, 'Nothing,' and the seventh issue, 'Yes,' were entered by consent. Counsel for defendant contended that the finding upon the seventh issue amounted to a finding in law; that the defendant had a license from plaintiff to construct the road as it was built over his land for the consideration paid to plaintiff,
(517) one hundred dollars, and excepted to the ruling of the court that it did not amount to a parol grant of right of way."

To this decision, the appellant excepted in these words:

"14. The defendant excepts to the holding of his Honor that the payment of the $100 did not amount to a parol grant of right of way."

The petition further alleges error in the decision of this Court, complained of as follows:

"That upon the hearing of the said action, on appeal, in the Supreme Court, this defendant's counsel urged that the conduct of the plaintiff, in accepting from this defendant one hundred dollars, and, in consideration thereof, drawing off the water of his mill-pond for the purpose of facilitating the construction of the railroad along the new route, which construction was the fraud of which he complained, was such an acquiescence in that fraud as, in a court of equity, would debar him from any relief against it. But this Court refused to consider the point, and said, through his Honor, the *Chief Justice,* who delivered its opinion: 'This point has been strongly urged in the argument, but as no exception of the kind is shown in the record, it cannot now be entertained, whatever may have been its force if taken in apt time. The judgment following the verdict, which affirms the allegations as to the influences brought to bear upon the plaintiff in inducing the making of the deed, will remain undisturbed'—as appears by the record of said action now here.

"Your petitioner humbly suggests to your Honors that in the refusal of this Court to entertain the said point for the reason alleged here was error. That the fact on which the point was based appears upon the face of the record proper, to wit, in the verdict of the jury; and whenever error so appears, it is the practice of the Court to take notice of it, whether it be urged by way of exception or not; that by The Code, sec. 957, it is provided that, 'in every case the Court may (518) render such sentence, judgment and decree as, on inspection of the whole record, it shall appear to them ought, in law, to be rendered thereon.' And your petitioner shows that in the case of *Thornton v. Brady,* 100 N. C., 38, this Court held that, 'as to the essential parts of the record, the Court will *ex mero motu,* take notice of errors apparent in it, correct it and enter such judgment as in law ought to be rendered. . . . If what it must necessarily see in the record of the action is erroneous, it will correct the error, although it be not assigned.' And in *Godwin v. Monds,* 101 N. C., 356, the Court say: "It was contended on the argument that the plaintiffs did not except and assign as error that the judge heard the motion and gave judgment in the county of Anson. That is so; but it does not appear upon the face of the record, in some way, as it should do, that the court had authority to give the judgment, and, therefore, the objection might be taken here, in the absence of any formal exception or assignment of error.'

"And your petitioner shows that these cases escaped the notice of its counsel, and they were not cited, nor in any manner brought to the attention of the Court in the argument here.

"And your petitioner further shows that if this honorable Court had entertained and considered the said point, it would have been called upon to decide that the judgment of the court below avoiding the said deed was erroneous; for your petitioner is advised that it is settled in the law of North Carolina that when a party, with full knowledge of all the material facts, freely does what amounts to a recognition of a transaction or conveyance as existing, or acts in a manner inconsistent with its repudiation, there is acquiescence and the transaction or conveyance, although originally impeachable, becomes unim- (519) peachable in equity."

C. M. Busbee for plaintiff.

A. W. Haywood and George Davis for defendant.

MERRIMON, C. J. The error assigned in the action which the petitioner asks to have reheard as to the refusal of the court to instruct the jury that the plaintiff had granted to the defendant by parol license the right of way, in the view the court took of the case, became immaterial,

and it was not necessary to decide the question raised in that respect. The court had jurisdiction for the purpose of deciding the question, and incidental questions as to the validity of the deed in question; it did not have jurisdiction as to the matter of damages.

It is not alleged that error was assigned in the *case settled on appeal,* in that the court refused or neglected to instruct the jury that the plaintiff ratified and waived objection to the deed by accepting one hundred dollars from the defendant, as the jury found he did do, in response to the seventh issue submitted to them. The court was not asked to give any instruction in that respect, nor did it do so, so far as appears.

But the learned counsel of the petitioner contends that it was the duty of this Court, without any assignment of error, to look through the record and render such judgment as ought, in law, to be given; and inasmuch as it appeared by the record that the defendant did, "after adopting the line upon which the road was constructed across the plaintiff's land, pay the plaintiff one hundred dollars, and thereby induce plaintiff to let the water out of his millpond for thirty days, in order that the said pond might be crossed, as it was, by a trestle instead of building cribs in the water," it ought to have held that such payment, notwithstanding the fraud of the defendant in procuring the deed, was a ratification thereof and a waiver of all objection to it, and given judgment accordingly for the defendant. This contention is founded upon a misapprehension of what the record contains, and a failure to notice material matters not embraced by it.

(520) The plaintiff alleged in his complaint that the deed was obtained from him by the fraud of the defendant and its agents. The defendant in its answer simply broadly denied the allegation of fraud—it was not alleged, in terms or by implication therein, that the plaintiff had in any way ratified the deed or waived his right to have it declared void for fraud, nor was any such defense in any way set up on the trial, at any time in the court below, so far as appears. It alleged in its answer, as a separate defense, "that upon the location and construction of the present line of said road across the plaintiff's lands, the plaintiff demanded and received from the defendant the sum of one hundred dollars for the license and privilege of constructing said road on the line as located. And the defendant pleads the same as a defense to this action." The seventh issue recited above was raised by this allegation and the denial thereof. The response to it was entered by consent, for the purpose of raising the question as to the grant of a license to locate the road on the line on which it was constructed. The fact so found is an isolated one, and the finding is, that the money was paid for the purpose specified therein. It may be that such payment of the money

was not intended or understood by either party to be a ratification of the deed, or a waiver of objection to it; indeed, the circumstances and the fair implications from the record strongly suggest the contrary. It may be that the plaintiff, seeing that the defendant had located and was constructing its road, as he and it believed it had the right to do by virtue of its charter, and without reference to the deed, accepted the money for, and only for, that consideration and purpose specified in the finding of the jury. If so, surely it could not reasonably or justly be contended, much less held by the court, to be a waiver of objection to the fraudulent deed, or the right of the plaintiff to damages. Courts of equity, when, in possible cases courts of law cannot, will uphold fair dealings between parties, and enforce equitable rights grow- (521) ing out of them; but they will not, in such cases, prevent a party from asserting his just rights.

It was not alleged or contended in the pleadings in the court below that the plaintiff ratified, or intended to ratify, the fraudulent deed complained of. The acceptance of the money specified for the purpose and under the circumstances specified in the finding of the jury, did not, of itself, necessarily imply a ratification of that deed by the plaintiff, nor does it appear that the plaintiff or the defendant intended that it should be treated as a ratification of it. The judgment complained of was not inconsistent with so much of the record as preceded it, and it was such as the law allowed and required upon such record. This Court was, therefore, warranted in saying that no exception was made in the respect mentioned, and in declaring that there was no error in so much of the judgment as had reference to the deed. The petition must, hence, be dismissed.

SHEPHERD, J., *dissenting*: The plaintiff executed a deed to the defendant for a general right of way over his lands, and this action is brought for the purpose of having the deed canceled upon the ground that it was procured by the false representation of the defendant's agent. The fraud found by the jury consisted in the false representation that the defendant would build its road upon a certain line which had been surveyed and located, and was then understood and designated between the parties, and that the defendant abandoned the said route and built its road upon an entirely new and more objectionable one. The fraud having been in the treaty, and not in the *factum*, the deed was not void, but voidable, and could only be set aside by the decree of a court of equity. The plaintiff could confirm it either expressly or by conduct, and until actually set aside, it was an effective and operative conveyance, vesting a general right of way in the defendant. (522)

Logan v. Simmons, 1 D. & B., 13; *Canoy v. Troutman,* 7 Ired., 157; 2 Pom. Eq., 964; Pollock Cont., 506; Bispham's Eq., 472.

"Canceling an executed conveyance is the exertion of a most extraordinary power in courts of equity, and when asked for on any ground it will not be granted unless the ground for its exercise most clearly appears." Bispham's Eq., 475. "When a party desires to rescind, on the ground of fraud or mistake, he must, upon the discovery of the facts, at once announce his intention and adhere to it. He is not permitted to play fast and loose." Bispham's Eq., 259. "He must not only act promptly upon the first discovery of the fraud, if fraud be the cause assigned for the rescission asked for, but he must act decidedly." *Knight v. Houghtalling,* 85 N. C., 31. "He must do so at the earliest practical moment after the discovery of the cheat. That is the time to make his election, and it must be done promptly and unreservedly. He must not hesitate, nor can he be allowed to deal with the subject-matter of the contract and afterwards rescind it." Chitty Cont., 408 *et seq.; Mason v. Bovet,* 1 Denio, 69; Kerr on Fraud and Mis., 127; Pollock Cont., 511; *Swain v. Seamens,* 9 Wall., 250.

Applying these familiar principles of equity to this case, it is difficult to understand how the plaintiff is entitled to relief.

The record shows that the defendant commenced building its road on the plaintiff's land in December, 1885. The plaintiff not only had notice, but he actually assisted the defendant in constructing the road upon the new route, by drawing off the water from his millpond, in order to facilitate the work. For this, he received the sum of one hundred dollars. And now after the road has been completed, and about two years after the discovery of the fraud and his confirmatory acts, he asks a court of equity to set aside the deed and expose the defendant to a suit for damages for doing the very thing which he helped it to do. It seems to me that the bare statement of such
(523) a proposition ought to shock the conscience of a court of equity and effectually bar its doors against relief.

The principle which denies relief in such a case is so plain that it is hardly necessary to cite any authority in its support; but as it seems to be drawn in question by the disposition of this appeal, the following extracts are submitted:

2 Pom. Eq., sec. 897: "If, after discovering the untruth of the representation he, the plaintiff, conducts himself with reference to the transaction as though it were still binding, he thereby waives all benefit of, and relief from, the misrepresentations."

Big. Frauds, 184: "It is well established that if a party, with knowledge that a fraud has been perpetrated upon him in a particular transaction, confirm the transaction by making new agreements or engage-

ments respecting it, or by retaining or using the subject of it after knowledge, or otherwise recognize it as binding, he thereby waives the right to treat it as invalid and abandons his right to rescind."

And see 2 Pom. Eq., sec. 965, p. 499.

Humphreys v. Finch, 97 N. C., 308: "It is established doctrine that whenever an act is done or statement made by a party which cannot be contradicted without fraud on his part and injury to others whose conduct has been influenced by the act or admission, the character of an estoppel will attach to what otherwise would be mere matter of evidence."

In addition to these authorities, we have the strong intimation of *Chief Justice Smith* in this very case, 102 N. C., 381, and it can hardly be doubted that he would have declined any relief had he thought that the effect of the confirmatory acts of the plaintiff was presented by the exceptions. He was inadvertent to the decisions in *Thornton v. Brady,* 100 N. C., 38; *Godwin v. Monds,* 101 N. C., 356, and other cases in which it is held that, "as to the essential parts of the record, the Court will, *ex mero motu,* take notice of errors apparent in it, and enter such judgment as in law ought to be rendered. . . . If what it must necessarily see in the record of the action is erroneous, it (524) will correct the error, although it be not assigned."

It now seems to be conceded that this difficulty about the absence of exceptions is out of the way, but it is said that the ratifying acts of the plaintiff were pleaded only as a license and not as an estoppel. It matters not what has been pleaded, these acts are found by the jury, and they stand as a part of the record, and upon such a record (which we are bound to inspect), I am unwilling to agree that any relief can be granted. Such strictness in pleading is not consistent with the liberal rules heretofore acted upon by this Court. The fact of the plaintiff having assisted in the location of the road was, however, set forth in the answer, and this fact being found, it, in my opinion, presented an insuperable barrier to the plaintiffs' action, and this without regard to whether it was pleaded as a license or an estoppel, or whether its legal effect was pleaded at all. Under The Code it is well settled that the Court renders judgment upon the facts found, irrespective of the prayer for relief or the technical rules of pleading.

Apart from this, however, I deny that it was necessary for the defendant to have specially pleaded the ratifying acts of the plaintiff. In cases like the present, it is the duty of the plaintiff to show all of the circumstances entitling him to such extraordinary relief, and in this case it was absolutely necessary that he should have explained his long delay and inconsistent conduct. This he has utterly failed to do, but it is suggested that he may have acted under the supposition that

the defendant had entered by virtue of the provisions of its charter. To this it may be answered that a Court of Equity does not go out of its way to imagine an excuse for the inconsistent conduct of one who is seeking its aid, and especially is this true when the plaintiff himself does not pretend to explain his conduct upon such a ground,
(525) and which ground, as a matter of law, did not and could not exist.

At the time of the entry, the defendant had a conveyance of a general right of way. It is presumed to have entered under it. *Ryan v. Martin,* 91 N. C., 465; *Graybeal v. Davis,* 95 N. C., 508. Until that conveyance had been disaffirmed and set aside, it could not have entered under the right of eminent domain, *conventio vincit legem.* This right under the charter does not arise until there is a failure to agree with the owner. Pearce on Railroads, 1881; 1 Redfield, 65, *et seq.* See, also, the original opinion in this case, 102 N. C., 381.

The estopping conduct of the plaintiff having been pleaded by the defendant and found as a fact by the jury, and this fact being entirely unexplained, I am of the opinion that we erred in granting the relief prayed for, and that the petition to rehear should be granted.

AVERY, J., concurring: Adhering to a course of action adopted, perhaps, without sufficient reason, I did not sit on the argument of this case because I had tried it in the Superior Court. But, as three other members of the Court have concurred in the opinion filed by the *Chief Justice,* I feel that it is not only my privilege but my duty to express my concurrence in the conclusion of the Court, especially when it rests upon the broad ground that the exception on which the defendant company relies in support of the petition, if taken in apt time and in the prescribed mode, does not entitle it to a rehearing, because there was no error in the ruling of the court below.

The plaintiff asked the court to cancel a deed made by him to defendant for the right of way through his farm, and for damage done to him in the construction of the defendant's road by a different route over his premises. Upon the finding of the jury, in the exercise of their exclusive right, that the defendant company surveyed and
(526) marked, by stakes, a line through the plaintiff's fields, and, by fraudulently inducing him to believe that its road would be built along the line so marked, procured the execution by him of the deed in question, this Court affirmed so much of the judgment of the court below as declared the deed fraudulent and void, but reversed so much of said judgment as provided for the recovery of damages for right of way, as distinguished from damages recoverable under the statute (The Code, sec. 1975) for failure to construct cattle guards and cross-

ings (102 N. C., 281). If we accept the finding of the jury, as this Court is bound to do, without question, we cannot hesitate to admit and declare as an abstract proposition that the fraud has been properly proven and the plaintiff's right to the remedy of cancellation established. *Hall v. Pickering,* 40 Me., 548; *Barlow v. Railroad,* 29 Ia., 276; *Douglass v. N. Y. & E. Railroad Co.,* Clarke's Ch. (N. Y.), 174; *Taylor v. Cedar Rapids & St. Paul Railroad Co.,* 25 Ia., 371; *Tinkhorn v. Erie Railroad Co.,* 53 Barb. (N. Y.), 393.

It does not appear in this Court that any instruction was asked as to the *quantum* of proof necessary in showing the fraud. If, therefore, there was any force in the suggestion of counsel upon this point, the argument is not applicable to the facts of this case. Whatever measure of proof was required by law, we must assume that it was offered in order to lead the jury to the conclusion reached by them.

It is not necessary to cite authority to sustain the propositions:

1. That the defendant company could have proceeded, under section 16 of its charter, and chapter 49 of The Code, to appropriate the right of way and build its road upon the very line upon which it is now located, without notice to the plaintiff leaving him to initiate proceedings to obtain damage, or lose his right to do so by the lapse of time. *Allen v. R. R.,* 102 N. C., 381. (527)

2. That notwithstanding the fact that it had procured the execution of the deed to the right of way through the fraudulent representations of its agents, the company could have proceeded, even while a suit brought for the cancellation of the deed was pending, without notice to plaintiffs, to build the road where it is now located on his premises, and he would have had no right to retard the work of construction and no remedy in damages except by a proceeding under the section of the charter referred to.

3. That if the defendant had not procured the execution of the fraudulent and voidable deed, the plaintiff might have maintained his action, if he had proceeded in the way prescribed by law and brought it in the proper jurisdiction, even despite the plea of the statute of limitations interposed against him.

4. That if no such deed had been executed, and the defendant had entered upon the land of the plaintiff and had begun, as it did, to construct its road, the mere act of accepting one hundred dollars for letting off the mill pond and losing the tolls for a season, in order to enable the defendant to cross at less expense, by means of a trestle instead of by building coffer dams, would not have operated to stop the plaintiff from claiming damage for digging up or covering up the rich and productive soil at other points.

The statute of frauds would be a nullity if unwary landowners could be so easily and inexpensively entrapped into some act or admission that would enable a corporation to acquire an easement in their land at one-fifth of its value as assessed by the jury. A parol license to enter and build the road even would have been revocable, and would not have operated to pass title. *Hitfield v. Central Railroad Company,* 29 N. J. L., 571; *Miller v. Railroad,* 6 Hill (N. Y.), 61; *R. R. v. R. R.,* 104 N. C., 658.

It has been held, too, that when such license is revoked, the license has no remaining right growing out of it except that of entering (528) upon the premises for the purpose of removing any personal property placed by him on the land while operating there by leave of the owner. *VanNess v. Packard,* 2 Peters', 143; *Barnes v. Barnes,* 6 Vt., 388.

The proposition contended for by counsel, therefore, if sustained, would establish the startling doctrine, that because the defendant's agents had practiced a fraud upon the plaintiff, and he had chosen not to bring his suit to annul the transaction until near the close of the statutory period allowed him, a court of equity would either curtail the limit of his right to bring his action, as expressly defined by law, or hold that his conduct in receiving compensation for the temporary loss of the tolls of his mills operated to estop him from claiming damages for the injury to his land by making excavations and fills upon it, because he had not notified the perpetrators of the fraud, immediately or within a reasonable time, that he would invoke the aid of a court of equity, and did not, accordingly, begin this action. The defendant cannot show any act of the plaintiff that amounted to an unequivocal acquiescence in the conveyance of the right of way, or that was inconsistent with his allegation that he was defrauded by misrepresentations as to the location of the line, or that could have reasonably induced, and did induce, the defendant to make expenditures for which it cannot now be reimbursed, under the belief that the plaintiff recognized the validity of his deed as a conveyance of the right of way where the road was actually located on the plaintiff's land. The acceptance of one hundred dollars for diminishing the cost of construction by affording the corporation the opportunity to erect a trestle across the mill-pond, would have been entirely consistent with the assertion of a claim for damages, necessarily incident to the work of grading the road bed, if no deed had been executed and no proceedings for damages had been instituted when it was paid. The act was no more misleading (529) than would have been the selling by plaintiff to defendant of timber to construct the trestle. The plaintiff could not control the defendant as to the location or restrain it from prosecuting the

work on the line selected, and it would be hard measure if equity should leave him the choice of refusing a fair price for his timber or a large sum for temporarily stopping the operation of his mill, because the party with whom he was dealing had defrauded him and he had postponed—not unreasonably or beyond the statutory limit—invoking the power of the court to have the transaction declared fraudulent, null and void. The reason assigned for refusing relief to the injured plaintiff is, that the defendant company, which is presumed to have inspired the misrepresentations of its agents, and therefore to have had notice of the voidable character of the deed, was misled by the plaintiff's exercise of his lawful right in determining when he should bring his action. The corporation will not be allowed to shield itself from responsibility for a fraudulent act by invoking a principle that affords protection only to the innocent. If the deed made by the plaintiff had described specifically the first line surveyed, the company would still have been at liberty to waive their rights acquired under the deed and survey, locate and build upon their present line. How, then, could the plaintiff know whether the company claimed to be acting by virtue of the deed or under the provisions of their charter? He could not restrain its agents. He was not bound, as I conceive, by any principles of equity to treat them as alien enemies, or be concluded in the assertion of his rights because he gave them aid and comfort by selling them provisions, timber, or even affording them the opportunity to cross his pond on a trestle instead of a bridge.

It is not contended that the plaintiff confirmed his voidable deed, because that must have been done, if at all, by some "deliberate act, intended to renew and ratify a former transaction known (530) to be voidable." 2 Pom. Eq. Jur., sec. 965.

It is claimed by counsel that the conduct of plaintiff amounted to an acquiescence, on his part, in the validity of the claim of the defendant to the right of way, where the road was located on his land, under his voidable deed. The defendant seeks to bring himself within the principle applicable to one who "stands by and knowingly permits another to deal with the property as though it were his, or as though he were rightfully dealing with it, without interposing any objections, as by expending money upon it, making improvements, erecting buildings, and the like." 2 Pom. Eq. Jur., sec. 818. In such cases, in order to deprive the defrauded party of remedy in equity, the party against whom he asks relief, must be ignorant of the real condition, and not the person or corporation whose fraudulent conduct has cast a cloud upon it. *Ibid;* Story's Eq. Jur., sec. 1543. Such is the doctrine of acquiescence operating as an estoppel.

Where it has been held that the conduct of a person was such as to prevent him, in a court of conscience, from seeking a remedy to which he would have been entitled but for some act of his calculated to mislead his adversary, the ruling has rested on the maxims, that "He who seeks equity must do equity," and "He who comes into equity, must come with clean hands." 2 Pom. Eq. Jur., sec. 815.

The jury have found that the hands of the defendant were stained by fraud, of which the plaintiff was the victim. This Court cannot pervert the benign principles of equity so as to reverse that finding and fasten the fraud upon the party found to be innocent by those empowered by law to ascertain the facts. This doctrine operates by analogy to the principle governing estoppel, and is often spoken of by law writers as a form of *quasi* estoppel. 2 Pom. Eq. Jur., sec. 817.

(531)

In *DeBussche v. Alt,* 8 Ch. Div., 286, *Thesiger, L. J.,* crystalized the principle as follows:

"If a person having a right and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing, and who might have otherwise abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. . . . But when once the act is completed without any knowledge or assent upon the part of the person whose right is infringed, the matter is to be determined upon very different legal considerations. A right of action has been vested in him, which, at all events, as a general rule, cannot be divested without accord and satisfaction or release under seal. *Mere submission* to the injury for any time *short of the period limited* by statute for the enforcement of the right of action, cannot take away such right, although under the name of *laches* it may afford a ground for refusing relief under some peculiar circumstances, and it is clear that even an express promise by the person injured, that he would not take any legal proceedings to redress the injury done him, could not by itself constitute a bar to such proceedings, for the promise would be without consideration, and therefore not binding." *Ibid.* See, also, *Duke of Leeds v. Earl of Amherst,* 2 Phil. Ch. Div., 117.

Applying to the principles to this case, we find that, though the deed was voidable at the instance of the plaintiff, the entry by the defendant upon his land was not, therefore, an infringement of his rights. Until he had actually begun to construct his road on a different line from that first surveyed, shown to plaintiff in order to procure the execution of the deed, the plaintiff had no cause of action. The defendant company might, until then, and the plaintiff was bound to assume, that

it would locate its road in good faith according to the promises made by its agents. After the work had begun, and his cause of action had arisen, the institution of a suit in the Superior Court to (532) annul the deed, and contemporaneously of a proceeding for the condemnation of the right of way and the assessment of damage in another jurisdiction, would not have retarded the work of construction for a moment, or have diminished the cost of building by a single dollar. Indeed, the act relied upon to show acquiescence on the part of plaintiff in the change of location, manifestly helped the company to save, instead of causing it to expend, money that it would not otherwise have paid for building.

The defendant had fraudulently induced the plaintiff to execute the deed, and was deemed to have known that a different line had been marked by stakes and shown to plaintiff, and ought, therefore, to have approached him if its purpose was to claim the right of way over the new line under the deed. Under the provisions of subsection 9 of section 155 of The Code, as amended by chapter 269 of the Laws of 1889, the plaintiff's right of action accrued on the discovery of the fraud (when he saw the defendant company engaged in constructing its line of road), and it was not barred by the lapse of time until three years after such discovery. I have not been able to discover any principle of equity that deprives the plaintiff of the right thus plainly given him by the letter of the statute.

The principle announced in *Knight v. Houghtalling,* 85 N. C., 31, which was cited in support of defendant's position, has, I think, no application to this case. The defendant was not induced, by the fraud or negligence of the plaintiff, or his failure to give notice of his purpose, to expend such an amount of money that it could not be put *in statu quo.* On the contrary, the right of action did not accrue until the defendant had carried out its original intent by actually entering upon, appropriating and commencing work upon the new line. An action brought after he surveyed, but before he occupied and began the construction of a new line, would have been dismissed, but a (533) suit instituted the day after in the Superior Court in term for the purpose of canceling the deed could be maintained if the fraud could be established, as it was, and could be followed by a proceeding under the charter to assess the value of the right of way. To deprive the plaintiff of this right, on the ground that he had condoned the defendant's fraudulent conduct and concluded himself as to his own right to damages because he did not cause a summons to issue against the company at the earliest possible moment after its purpose was made apparent by beginning the work of ditching, filling or excavation, would be to encourage iniquity under the guise of doing equity, to pervert

principles established by a court of conscience, so as to make them shield a party who is admitted to have done an unconscionable act. Whatever might be the opinion of an appellate court as to the weight of evidence, the findings of the jury cannot be reviewed by it. We must act upon the assumption that a fraud was perpetrated, and apply the principle of law accordingly. *Per curiam.*

Dismissed.

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CHARLES J. BONAPARTE v. WILLIAM M. CARTER ET AL.

Boundary—Beginning Corner—Natural Objects—Parol Evidence.

When the boundaries in a grant recited "Beginning on the side of Gallon Creek, at a small oak, corner John Edwards, thence," etc., *parol* evidence is admissible to show that the beginning point, "John Edwards' corner," is three hundred yards from the creek.

THIS was an action to recover land, tried at Fall Term, 1889, of MONTGOMERY Superior Court, before *Merrimon, J.*

Plaintiff introduced a grant from the State to James Nall for 300 acres, dated 7 June, 1799, and showed intermediate conveyances and descent of the land embraced in said Nall grant to himself, and offered evidence tending to locate the same, so as to cover the land in dispute, and showed the defendants in possession of a part of the lands embraced in the said Nall's grant, to wit, all of the part in dispute.

The defendants offered in evidence a grant to Humphrey Ballard, dated 11 October, 1783, for 193 acres, containing the following boundaries: "Beginning on the side of Gallon Creek at a small oak, corner John Edwards; thence north 200 poles to a pine between a post oak and pine; thence east 140 poles to a black oak, a line tree of Mark Bennett's; thence south 236 poles to a white oak, a corner of said Edwards; thence north 74° west 146 poles to the beginning."

The defendants, in attempting to locate this grant, offered parol testimony for the purpose of showing that the beginning corner of the said Ballard grant started at a point 300 yards distant from Island Creek (which it is agreed by counsel is the same as Gallon Creek), and defendant himself, being examined, states that Island Creek is a well-known creek with an average width of 12 feet, having in many places bottom but no swamp lands; that the land on either side is roll-
(535) ing; that the point at No. 1, as contended for in the Ballard grant, is about 300 yards from the creek; that opposite No. 1,

in the direction of the creek, is a hillside running down to the creek; that on the east side of the creek, and between the creek and No. 1 on plat, there is plenty of white oak trees, and more than any other kind. There are two bluffs. Above the bluffs it is cleared on both sides of the creek, and below the bluffs the bottoms are cleared on both sides of the creek.

Upon this statement of facts, and in apt time, plaintiff insisted that the defendant is confined to the bank of Island Creek for the beginning corner, and cannot locate a beginning corner 30 yards from the bank (or side).

The court declined so to rule, and the plaintiff excepted. The court ruled that the beginning corner is a small oak, corner of John Edwards, and that defendants might, if they could, show by parol that this corner is at No. 1 on the plat, which is admitted by defendants to be 300 yards from the bank of Island Creek.

Upon this ruling of the court, plaintiff submitted to a nonsuit, and appealed.

Geo. V. Strong, R. T. Gray, E. R. Stamps, H. B. Adams, D. Covington and J. D. Shaw (by brief) for plaintiff.

No counsel contra.

CLARK, J. The defendants offered in evidence a grant with the following boundaries: "Beginning on the side of Gallon Creek, at a small oak, corner John Edwards', thence," etc. In attempting to locate this grant, defendants offered parol evidence to show that this beginning corner was three hundred yards from the creek. Plaintiff insists that the defendants are confined to the bank of the creek for the beginning corner, and cannot locate it three hundred yards from the bank. The court ruled that the beginning corner is "a small oak, corner of John Edwards'," and that the defendants might, if they could, (536) show by parol that this corner is at No. 1 on the plat, which is admitted by the defendants to be three hundred yards from the bank of the creek. Upon the ruling of the court, plaintiff submitted to a nonsuit and appealed.

We think this ruling was correct. The side of the creek is not called for as a boundary, but merely as a description of the locality of the beginning point, which is "a small oak, John Edwards' corner." If that can be identified, an inaccuracy in the description of the locality will be disregarded. *What* is the beginning point is a matter of law, for the court to declare. This it did correctly. *Where* it is, is for the jury to say, and the court so held. The objection is, in effect, that the court did not hold that though "a small oak, John Edwards' corner,"

might be identified, it could not be held to be the beginning corner unless it stood on the bank of the creek.

This is not the case where two natural objects, a creek and a marked tree are both called for, and the question arises which shall govern. The case now presented is where a marked tree is described as located on the side of a creek. Inquiry is, which shall govern, the tree, as it is actually located, or as described to be located? The failure of the description may make it difficult to satisfy the jury that the tree claimed to be the "small oak, John Edwards' corner," is such. But if the evidence is sufficient to identify it, the inaccuracy in describing the locality as "on the side of the creek," when it is three hundred yards off, cannot be allowed to vitiate the grant. The exact point has never been decided in this State, but in *Murray v. Spencer,* 88 N. C., 357, the Court intimates that when a marked tree in the line of another tract is called for, the marked tree called for is identified, but is not in the line of the other tract, that the tree will be held the true corner, and the misdescription of it, as being in such other line, will be
(537) disregarded. And the point is expressly so held by *Judge Story* in *Cleveland v. Smith,* 2 Story, 278.

A case still more nearly in point is *Wilson v. Inloes,* 6 Gill (Md.), 121. It is there held that where the beginning corner is "a bounded (marked) tree by the side of a branch," the expression as to the branch is merely descriptive of the general locality of the tree, and not an imperative call locating the spot where the tree stood. The Court say: "The words 'by the side of the branch' are no identification of a particular spot where the tree must have stood. The commencement of the line at any one of ten thousand different spots by the branch side, at great distance from each other, would comply with such a description of the beginning. Such a rule would be productive of the greatest uncertainty."

If the "small oak, John Edwards' corner," is identified to the satisfaction of the jury, these definite words will not be controlled by the general and indefinite, and, it may be, inconsistent expression, "on the side of the creek."

No error.

Cited: Deaver v. Jones, 119 N. C., 599; *Clark v. Aldridge,* 162 N. C., 332; *Lumber Co. v. Bernhardt, ibid.,* 465; *Lumber Co. v. Lumber Co.,* 169 N. C., 92; *Power Co. v. Savage,* 170 N. C., 628; *Gray v. Coleman,* 171 N. C., 347.

JOHN HAGINS v. THE CAPE FEAR AND YADKIN VALLEY RAILWAY COMPANY.

Injury from Negligence of Fellow-servant—Action Against Master—Sufficiency of Complaint.

1. An employee injured by the negligence of a fellow-servant cannot recover damages of the common master.
2. A complaint which alleges that plaintiff was an employee of the defendant railway company, and was injured by the negligence of the engineer in charge of the locomotive, without any allegation that the engineer was incompetent, and that the company, with knowledge of that fact, retained him in service, does not set out a cause of action, and the action will be dismissed.

THIS was a civil action, tried at December Special Term, (538) 1889, of CUMBERLAND Superior Court, before *McRae, J.*

The material points of the complaint are as follows:

"2. That during the month of September, 1886, the said John Hagins, while in the employment of the defendants, received an injury, by which, and as a result therefrom, he lost his right hand and a part of his right arm.

"3. That the said injury occurred while in discharge of his duties in the employment of said company, and through the carelessness, willful and negligent act of the agent and servant of the defendant company in managing the locomotive engine of said company.

"4. That at the time of said injury, the locomotive engine was temporarily abandoned by the engineer in charge, and, with his consent and by his direction, was moved and operated by a boy, or lad, of inexperience and careless habits, who had free charge of the engine and steam appliances at night; who was incompetent, reckless, careless and negligent, which was the direct and proximate cause of the plaintiff's injury."

The plaintiff recovered judgment and the defendant appealed.

T. H. Sutton for plaintiff.
G. M. Rose for defendant.

CLARK, J. The complaint alleges that the plaintiff, an employee of the defendant, was injured by the negligence of the engineer in charge of the locomotive. The general rule is well settled that where an employee is injured by the negligence of a fellow-servant—and such was the relation between the plaintiff, a brakeman, and the engineer—the common master is not responsible. It is true that upon allegation and

proof that the servant was exposed to unusual and unreasonable risks, or that the master knowing that the servant causing the injury
(539) was unfit or incapable, employed or retained in employment such servant, there is an exception to the rule. But there is no such allegation here. The complaint sets out simply that one servant was injured by the negligence of his fellow, without any allegation of facts to take the case out of the application of the law arising on such state of facts. The complaint does not state facts sufficient to constitute a cause of action.

Action dismissed.

Cited: Hobbs v. R. R., 107 N. C., 2; *Chemical Co. v. Board of Agriculture,* 111 N. C., 137; *Joyner v. R. R.,* 112 N. C., 113; *Harper v. Pinkston, ibid.,* 276; *Nash v. Ferrabow,* 115 N. C., 305; *Mizzell v. Ruffin,* 118 N. C., 71; *Hines v. Vann, ibid.,* 7; *Rittenhouse v. R. R.,* 120 N. C., 548; *Pleasants v. R. R.,* 121 N. C., 495; *Olmstead v. Raleigh,* 130 N. C., 244; *Harris v. Quarry Co.,* 131 N. C., 556; *Thomason v. R. R.,* 142 N. C., 324; *Walters v. Lumber Co.,* 163 N. C., 541.

W. B. MARSH v. J. A. RICHARDSON.

Boundary—Evidence—Province of Jury—Practice—Special Instructions.

1. Where, in an action to recover land, the boundary line between plaintiff and defendant is in dispute, and the calls in defendant's deed are for certain natural objects, but there is a controversy as to their location, and there is testimony that at the time the plaintiff sold the land to defendant's grantor a line was surveyed and corner marked, which does not reach the object described in the deed, it is within the exclusive province of the jury to locate the disputed line.
2. Where defendant claims through *mesne* conveyances from plaintiff, it is competent to prove by plaintiff that at the time of his conveyance to defendant's grantor, a certain line was surveyed and a corner marked by him.
3. It is not error to decline to give an instruction asked after the close of the evidence.

THIS was a civil action for recovery of land, tried before *Clark, J.,* at February Term, 1889, of UNION County Superior Court.

(540) Plaintiff offered in evidence two deeds executed to himself by the widow and heirs at law of Urias Horn, deceased, bearing

dates, respectively, 1843, 1851, both of which deeds were duly recorded, and purport to convey in fee simple a tract of land as represented on the plat, by the boundaries 1, 2, 3, etc., to 14, and back to 1.

Plaintiff next offered in evidence:

1. Deed from plaintiff to J. A. Dunn, dated 1 January, 1869.

2. Deed from J. A. Dunn to J. A. Marsh, bearing same date.

3. Deed from J. A. Marsh to the defendant, dated 20 September, 1869.

The deed to Dunn and the deed to defendant (each conveying 94 acres) are identically the same as to description and quantity of land conveyed by them.

The only contention between the parties was as to what land these deeds covered. The plaintiff contended that the land conveyed by him was represented by the letters E F B A G I E. The *locus in quo* is represented by B A D C B.

The deed from J. A. Dunn to J. A. Marsh, as was admitted, covers the same land that was conveyed in said two deeds, and also some land lying south of the line A D G, and adjacent to said line. Defendant claimed the land in dispute only by virtue of said deeds.

Plaintiff offered evidence tending to show that the location of the western boundary of the land conveyed by him to Dunn was represented by the line C D. Defendant offered evidence in contradiction of same, and tending to show that the location of said western boundary was represented by line B A.

Plaintiff Marsh was introduced as witness in his own behalf. Defendant objected to witness testifying as to any transaction or communication between witness and J. A. Dunn, it being admitted that Dunn had died before the institution of this suit, and the court (541) announced that it would exclude all such testimony. Plaintiff testified, among other things, that when he sold the land to Dunn a survey was made, but only one line was run, and that line was from C to D; that witness marked said line with his pocket knife, and put a pine knot at D, and marked four pines as pointers at the point D. To this testimony defendant objected as being in violation of section 590 of The Code. The court ruled that witness had not testified as to any transaction between himself and Dunn. Objection overruled, and exception. Witness was not allowed to state on direct examination that Dunn was present at the survey, but defendant, on cross-examination of witness, elicited the fact. At the secret survey defendant was present, and asserted that C D was the correct line.

J. A. Marsh, grantee of Dunn and grantor of defendant, was introduced as witness for plaintiff, and testified that he was present at

the survey made at the time plaintiff deeded the land to Dunn. Defendant objected as violative of section 590 of The Code. Overruled. Exception.

Witness testified (defendant objecting) that, at the time of said survey, W. B. Marsh marked four or five pines with a knife at the point D, and also trees on and along the line C D; that no marks were made at A; that the line B A was not run, and that no line was run to A.

It was in evidence, and not contradicted, that defendant, a year or two before this suit, took possession of the *locus in quo,* and still holds possession thereof, and that plaintiff was for a long time before the trial in possession of all of the land included within the solid line, lying west and southwest of the line B A, and contiguous to said line.

Defendant was examined, and denied that at the secret survey he asserted that C D was the correct line, as W. B. Marsh had testified.

(542) The following issues were submitted:

1. Is plaintiff the owner and entitled to possession of the premises? Ans. Yes; from B to D, diagonally across.

2. Does defendant wrongfully withhold possession of the same? Ans. Yes; in part, from B to D.

3. What damage has plaintiff sustained? Ans. Five dollars.

The defendant asked the following special instructions:

1. Where the boundary named in a deed is, is a question of fact for the jury; and what it is, is a question of law for the court; and, therefore, the boundary of the land in dispute is that named in the deeds from W. B. Marsh to J. A. Dunn, and from said Dunn to J. A. Marsh, and from Marsh to the defendant. Where it is, must be found by the jury from the evidence.

2. In passing upon the question as to where the boundary is, it is the duty of the jury to give full force to every call in said deed, if can be, disregarding none, if not obliged to do so; and if any part of the description is to be disregarded, quantity, distance and course must give way in the order named.

3. If the jury should be of opinion that the description in the defendant's deed covers the land in dispute, they must so find, and the fact that a different line from that called for in the deed was actually run and intended by the parties can make no difference.

4. Even if the jury should find that the plaintiff and Dunn and J. A. Marsh begun their survey at 6 or 9, and ran to D, yet, if the description in the deed does not go along that line, but follows the line B A, the jury must adopt the latter line.

5. The jury should find that B is one of the corners called for in the defendant's deed, and that by running the course and distance of the next call, a point will be reached in an old field on the line B A by

as many as four pines, they will not be justified in changing this line, even though a different line may have been actually (543) run and intended before said deed was written.

6. If the jury should find that the defendant's deeds cover the land in dispute, they must so say, notwithstanding they may believe that the defendant may have said he was satisfied that D was the corner.

7. The fact that W. B. Marsh and J. A. Dunn ran a line, in the absence of proof of an agreement between them that the line run should be established as a boundary, is no proof that the true boundary of the land conveyed is from C to D, as claimed by plaintiff; that there is no proof of an agreement between Dunn and W. B. Marsh that the line C to D was established as a boundary line of the land conveyed by W. B. Marsh to Dunn, from Dunn to J. A. Marsh, and from J. A. Marsh to J. A. Richardson.

The court gave the 1st, 2d and 6th of these instructions, and refused the 3d, 4th and 5th, charging in lieu thereof the 3d section of headnote in *Baxter v. Wilson,* 95 N. C., 138. In lieu of the 3d, 4th and 5th instructions, the court also gave the following instructions:

1. As a general rule, natural objects called for in a deed will govern course and distance; but there are exceptions to the rule, one of which is, where it can be proved that a line was actually run and marked and a corner made, such line will be taken as the true one, although the deed calls for a natural object not reached by the said line; and if the jury believe from the evidence that the line C D was run and marked as a line, and a corner made and marked at the point D, they must find the line C D to be the true line, although it does not reach or touch the point described as "a stake by a P. O. and 2 pines," which the defendant claims to be the point B.

2. That if the jury believe that one of defendant's corners is at the point B, and that if the next corner called for in his deed is at the point D, it is the duty of the jury to find as a true line a (544) straight diagonal line running from B to D and intersecting the *locus in quo.*

The 7th instruction asked for by defendant was handed up after the charge began, and was not given.

To the instructions refused, and to those given by his Honor, defendant excepted.

There was a verdict for the plaintiff, and defendant filed the following bill of exceptions, upon which he moved for a new trial.

1. For error in the admission of the evidence of W. B. Marsh and James A. Marsh, as set forth in the 1st and 2d exceptions stated in the case on appeal.

2. For that his Honor erred in refusing the 3d, 4th, 5th and 7th instructions prayed for by defendant, and in giving those set forth above in lieu thereof.

3. For that the verdict as rendered is so vague, indefinite and uncertain that it cannot be told therefrom on which side of the line B D, the land they have found belongs to the plaintiff, is the quadrilateral, A B C D being the land described in the complaint and sued for in this action.

The exceptions were overruled, motion for new trial denied, and judgment rendered for the plaintiff.

(545) The defendant, having excepted, appealed.

The plate printed on opposite page is a diagram of the land in controversy:

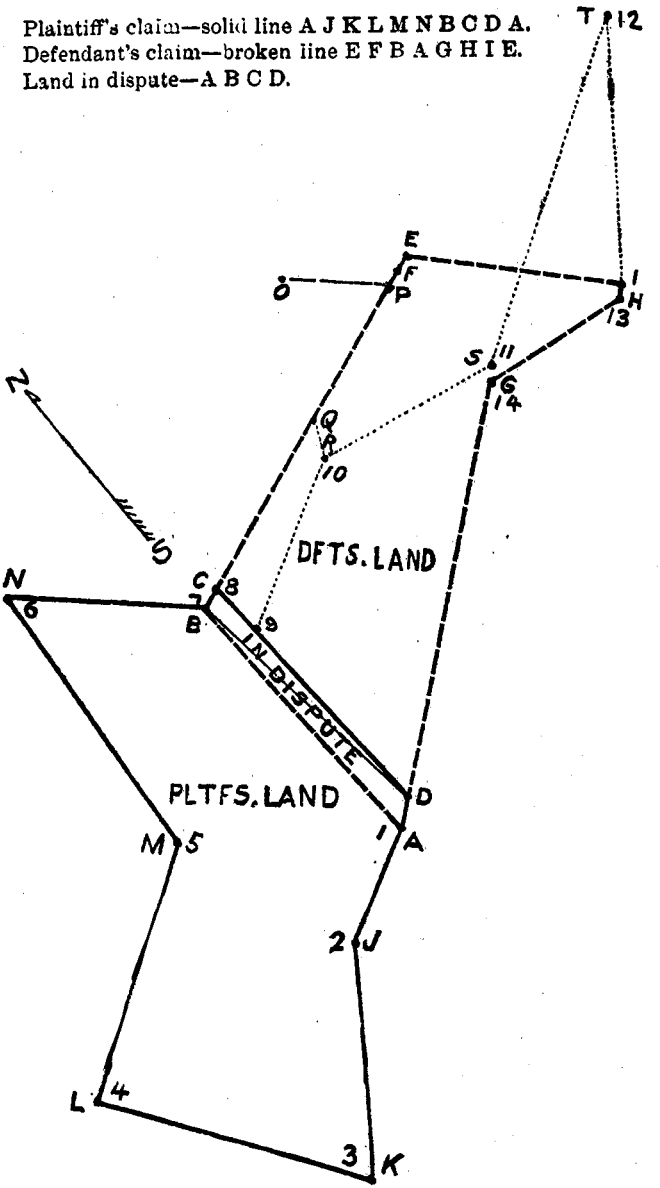
(546) *J. J. Vann for plaintiff.*
D. A. Covington for defendant.

AVERY, J., after stating the facts: The disputed territory is designated on the plot by the letters C B A D C, and the title to it depends upon the questions, whether the second call of the deed from plaintiff to J. A. Marsh, and that from the latter to defendant (the description in both being the same), terminates at C or B, and whether the third call in said deeds terminates at D or A. The material portion of the description in said deed was as follows, viz.:

"Beginning at a stake by a post oak at the end of a lane, C. Rogers' corner; thence with his line south 75 west one chain and 80 links to a stake by two pines and two post oaks, a corner of the lands of Susan Marsh" (admitted by the parties to be a point represented on the plot by F); "thence with a line of said lands south 67½ west forty chains and 90 links to a stake by a post oak and two pines" (either at C or A, according as the contention of the plaintiff or defendant might be sustained by the jury); "thence south 1 east thirty chains to a stake by four pines in an old field" (located, as plaintiff contends, at D, or, as defendant contends, at A).

The defendant assigned as error in the charge, especially the fact that in lieu of the 3d, 4th and 5th paragraphs of instruction asked, the court gave those numbered 1 and 2.

The abstract rule laid down by the court in the first paragraph of the instruction given (embodying a part of the syllabus in *Baxter v. Wilson,* 95 N. C., 137) is not erroneous; but, in so far as the application of it made by the court to the facts of this case, is susceptible of the construction that even if the jury should reach the conclusion that the true location of the "stake by the post oak and two pines" was at B, they


Plaintiff's claim—solid line A J K L M N B C D A.
Defendant's claim—broken line E F B A G H I E.
Land in dispute—A B C D.
T
12
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must be controlled by the survey made in view of the conveyance (if the plaintiff's witness was worthy of credit), and find that said
(547) corner was at C, we do not concur with the court below. But as the jury actually found that the corner was at B, it is evident that they were not misled in the only way in which the objectionable instruction was calculated to misguide them, and therefore the defendant cannot ask to have the verdict set aside on account of an error that did not injure him.

There was testimony tending to support the contention of both parties by locating the third corner either at C or B, and the fourth corner called for in defendant's deed, either at A or D. So that the jury were at liberty, in the exercise of their exclusive right, to locate the disputed line from C to D, or from B to A, or to adopt either of the diagonal lines that may be designated on the plot as C A or B D, and they did find that B D was the true southern boundary, thus dividing the land in controversy and making the defendant's possession as to one-half of it wrongful.

The defendant claimed through three *mesne* conveyances from the plaintiff:

1. A deed from plaintiff to J. A. Dunn.
2. A deed from Dunn to J. A. Marsh.
3. A deed from J. A. Marsh to the defendant.

The plaintiff, as a witness in his own behalf, was allowed to testify that at the time of the sale to Dunn, "a survey was made, but only one line was run, and that line was run from C to D," and that was marked by him at the time, and he also then put up a pine knot and marked four pines as pointers at D.

The defendant objected on the ground that the testimony was rendered incompetent by The Code, sec. 590, and excepted to the refusal of the court to sustain said objection.

Subsequently, on the cross-examination of the same witness, the fact was developed that J. A. Dunn (who had died before the trial) was present at said survey.

(548) Said J. A. Marsh was also examined, and his testimony, after similar objection, was substantially the same as that of plaintiff, and, in addition, that no line was then run from B to A. We do not consider that the evidence of either was justly amenable to the objection made, because there was no proof offered of a transaction or communication with J. A. Dunn. *March v. Verble,* 79 N. C., 19; *Isenhour v. Isenhour,* 64 N. C., 641. *Brower v. Hughes,* 64 N. C., 642. The evil intended to be prohibited by section 590, was that of allowing an interested witness to testify as to a transaction or communication between himself and a person who was dead, and whose testimony as to the

same transaction had not been offered in the shape of a deposition or declarations in relation to the same matter. Neither of the witnesses, in fact, spoke of a transaction with Dunn, but of an independent fact. We must infer from the circumstances that others, perhaps many living persons, were present at the survey besides the two examined, and that the witnesses could have been contradicted if they did not tell the truth. We do not think that defendant's exception comes within the mischief intended to be obviated by the statute. *Leggett v. Glover,* 71 N. C., 211; *Peacock v. Stott,* 90 N. C., 518.

It was conceded on argument that error could not be assigned for failure to charge as requested in paragraph seven of the instruction asked by defendant, which was handed to the judge after the close of the evidence; but if no such admission had been made, the ruling of the court, in refusing to entertain the prayer of defendant, is fully sustained by adjudications of this Court. *Powell v. R. R.,* 68 N. C., 395; *Taylor v. Plummer,* 105 N. C., 56.

Judgment affirmed.

Cited: Grubbs v. Insurance Co., 108 N. C., 479; *Posey v. Patton,* 109 N. C., 456; *Boomer v. Gibbs,* 114 N. C., 81; *Craddock v. Barnes,* 142 N. C., 99.

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(549)

THOMAS J. THOMPSON ET AL. v. WESTERN UNION TELEGRAPH COMPANY.

Damages—Telegraph Companies—Negligence—Judge's Charge—Mental Suffering—Proximate Cause.

1. Where, in an action against a telegraph company for damages for failure to send a message in time, the court failed to instruct the jury, in response to a prayer of defendant, whether or not they would be at liberty to give the plaintiff damages for mental suffering, unaccompanied by any other injury, or whether, if damages could not be assessed for that cause, the testimony tended to show any concomitant wrong to the person: *Held,* to be error.

2. In such case the error committed by the judge in his instructions that, in any event, plaintiffs were entitled to nominal damages, is not cured by his subsequent instruction that, if they should find that defendant's agent was prevented by obstruction of the line, due to causes beyond its control, from sending the message promptly, they should respond No to the issue as to defendant's negligence.

THOMPSON *v.* TELEGRAPH CO.

THIS was a civil action, for damages, brought by the plaintiffs against the defendant for a failure to deliver a certain telegram, tried before *Bynum, J.*, at the April Term, 1889, of CASWELL Superior Court, upon the following issues:

1. Did the defendant corporation contract to forward immediately and promptly deliver the telegraphic message described in the complaint? Answer: Yes.

2. Did the defendant negligently and carelessly fail to forward and deliver said message? Answer: Yes.

3. Was the negligence of the defendant company the direct and proximate cause of the damage and injuries complained of by the plaintiffs? Answer: Yes.

4. What damage have the plaintiffs sustained by the failure to forward and deliver the message as agreed? Answer: Three thousand dollars.

(550) It was in evidence, on the part of the plaintiffs, that *feme* plaintiff Mary E. Thompson, then living at Danville, Va., was in labor of childbirth on 1 February, 1888. At about 10 o'clock a.m. on that day her little son delivered a telegram to the defendant telegraph company's agent at Danville, Va., directed to her husband, the coplaintiff herein, then living at Wilton, N. C., in the following words: "Father, come at once; mother sick," for which he paid 25 cents, and the agent promised to send it right away.

The telegram was not received by the husband until 2 February, between 1 and 2 o'clock, and he did not arrive home until 8:30 p.m. of that day. There was evidence that *feme* plaintiff's labor was prolonged and painful; that she had since been greatly enfeebled thereby; that the absence of her husband added to her pain and mental anxiety; that the child died in two or three days, from umbilical hemorrhage, and probably also from severe constitutional trouble. There was also evidence that *feme* plaintiff was neglected before the arrival of her husband.

It was in evidence, on behalf of defendant, that the message was not repeated, and that the line wires were down so that the message could not have been sent earlier; that the increased pains of the *feme* plaintiff were due to the child being turned in the womb, and not to her anxiety on account of her husband's absence. The usual printed contract, or memorandum, upon the message was also introduced.

The plaintiff introduced evidence of the lineman tending to show the wires were in good condition on 1 February, 1888.

There was much contradictory evidence upon these questions, and other questions, not necessary to be considered in this appeal. The other facts are set out in the opinion.

J. W. Graham for plaintiffs.
George V. Strong for defendant.

AVERY, J., after stating the facts: The assignment of error, (551) predicated upon the position that the court misdirected the jury in the fifth paragraph of the charge delivered, and erred in refusing to substitute that asked, or any other specific instruction upon the same subject, must be sustained.

The erroneous proposition is as follows: "Upon the third issue, if the jury believe from the evidence that the wrongs and injuries complained of are the direct and proximate result of the negligence of the defendant company—that they followed as a natural consequence of the negligence of said company—then they must answer the third issue, Yes. But if they believe that said wrongs and injuries were produced by any cause whatsoever, other than the negligence of said defendant company, then they must answer said third issue, No."

Defendant had submitted a prayer for instruction in which the judge was requested, in substance, to tell the jury that mental suffering, "unless productive of special damages, or resulting from personal injury, is not alone sufficient ground upon which to maintain an action for damages, and if they believe from the evidence that mental anguish and suffering are the only grounds for damages in this action," they should find the third issue for the defendant. The defendant contended, in effect, that, in any view of the testimony, the plaintiffs could not recover damages for mental anguish, unless accompanied by injury to the person, property or name of the *feme* plaintiff, and whether we concur in the correctness of the view of the law embraced in the request for instruction or not, it is evident that his Honor was in error in refusing to give the jury the benefit of his opinion of the law one way or the other. Instead of leaving them to grope in the dark in the effort to ascertain what were proximate or remote causes of injuries in the application of the law to the facts in this particular case, he should have told them, in response to the prayer of the defendant, if not of his own motion, whether they would be at liberty to give the plain- (552) tiffs damage for mental suffering, unaccompanied by any other injury, or whether, if damage could not be assessed for that cause alone, the testimony tended to show any concomitant wrong to the person that would warrant the jury in considering with it the agony of mind of which the *feme* plaintiff complained. It was the duty of the court also to tell the jury whether the bodily pain endured by the *feme* plaintiff at the time, or her bad health after her confinement, were consequent upon her husband's failure to receive the message and return home im-

mediately, by the negligence of the agents of the defendant, was the proximate cause, or whether it was too remote to sustain the action.

In the third paragraph of the instruction given, the jury were told that, in any event, the plaintiffs were entitled to recover nominal damages, to wit, the cost of sending the message, and though, as an independent proposition, the judge subsequently instructed them that, if they should find that the defendant's agent was prevented by the obstruction of its line, due to causes beyond its control, from sending the message promptly, they should respond No to the second issue, still the right to recover even nominal damage should have been left to depend upon proof of negligence on the part of the defendant as a prerequisite. The failure to qualify the former proposition, which was in conflict with that subsequently submitted, was calculated to confuse the jury.

It is not necessary to pass upon the other exceptions, nor to decide the interesting question involving the measure of damages that has been discussed by counsel, and which would have been raised by more specific instruction.

There was error, for which a new trial will be granted.

Error.

Overruled, S. c., 107 N. C., 455.

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(553)

*OREN BONDS v. RAIFORD SMITH.

Estoppel—Fraud—Evidence—Landlord and Tenant—Statute of Limitations—Possession—Pleading—Issues—Recitals in Deed—Action to Recover Land.

Where B. bought a one-hundred-acre tract of land and left the State after putting his father G. in possession, and entering into an agreement with G. to pay the tax on the land in consideration of the rent, and, in the absence of B., the land being sold for taxes, S. bought it at sheriff's sale, and though G. repaid the amount of tax with twenty-five per cent thereon to S., within twelve months after the sale, S. fraudulently procured the sheriff to make a deed to himself, and thereupon G. brought an action against S. for the recovery of the land which was compromised by a conveyance to G. of forty-nine and one-half acres of the tract, which B. had verbally promised to give to G. on his return: *Held*—

1. That where one enters into possession of land as the tenant of another, not only the tenant, but his sub-lessees are estopped from denying the title

*Head-notes by AVERY, J.

of his landlord or those holding the fee through the lessor until the possession is surrendered to the landlord and an entry is made under some other title.

2. That where one acquired a pretended title or possession, or both, by collusion or a fraudulent compromise with another, whom he knows to be holding as the agent, or tenant, the former is considered in privity with the latter and with his landlord and estoppel, just as the agent or tenant would have been from denying the title of the principal or landlord till after a surrender of the possession and an entry in some other right.

3. That, in this case, the recovery of B. against S. was not barred by the possession of the latter for seven years, because it was not adverse to B.

4. That the statement of the foregoing facts was a sufficient allegation of fraud in a complaint, but if it were not sufficient, the defendant had, in his answer, denied that he procured the deed or the possession by fraud or collusion, and the doctrine of aider would apply.

5. That it was not error to submit an issue involving title and another involving the fraud, the appellant having failed to show that he was deprived of the opportunity to present to the jury any view of the law arising out of the evidence.

6. That the equivocal denial of the allegation as to the nature of the deed is an admission of its truth, and apart from that principle it is a universal rule that where a deed is attacked for fraud recitations contained in it may be shown to be false, or it may be proven that others, which should have been inserted, were omitted, if such evidence tends in any way to establish the alleged fraud.

7. That it is within the sound discretion of the judge who tries a case to determine what is sufficient proof of the loss or destruction of an original paper to make evidence of its contents competent, where nothing appears to the contrary the appellate court will assume that the judge below admitted the secondary evidence after hearing plenary proof of the loss or destruction of the original.

8. A plaintiff is required generally to show title good against the world, while a defendant can ordinarily prevent his recovery by showing a better outstanding title in any person; but it is a well-established rule, adopted originally for convenience in the trial of actions of ejectment, that where both parties claim under the same person neither will be allowed to deny that such person had title, and a defendant in such cases cannot show a superior title without connecting himself with it.

9. Where the plaintiff shows from the deeds offered, or the admission in the pleadings, that both claim from a common source, he is required only to exhibit a better title in himself derived from it, than that of the defendant, in order to establish *prima facie* his right of recovery.

THIS was a civil action, for the possession of land, tried at the (554) December Term, 1889, of the Superior Court of CUMBERLAND County, before *MacRae, J.*

The action was begun by issuing a summons against Raiford Smith and Jack Inman, 10 April, 1886. Inman, who held as a tenant under Smith, was not served.

The plaintiff alleges that Jane D. Byrnes and others conveyed to him on 19 March, 1872, one hundred acres of land, described in the complaint, and that the defendants, Inman as tenant and Smith as landlord, wrongfully withhold the possession of the lower portion of
(555) said tract of land, containing fifty-nine and a half acres. In stating his second cause of action the plaintiff alleges that he (the plaintiff), in the latter part of the year 1875, left the State of North Carolina, and remained out of the State for several years, but before leaving he put his father, Granville Burnes, or Bonds, in possession of the one hundred-acre tract of land, and that said Granville, who was plaintiff's father, agreed to occupy said land as plaintiff's tenant during his absence, and to pay the taxes on the land in consideration of receiving the rents.

The plaintiff further declares "that the said Granville Bonds, now dead, procured the defendant Raiford Smith, during the absence of plaintiff from the State, and without the knowledge or consent of plaintiff, to pay the taxes to R. W. Hardie, sheriff of Cumberland County, for the year 1876, amounting to $5.60, so he is informed and believes, and that the said Granville paid to said Smith the sum so advanced, together with more than twenty-five per cent additional, paying him at one time $9.40, and at another $5.60, within the twelve months, and, upon his further demand, paying him twenty-five dollars additional; yet, the said Smith, so this plaintiff is informed and believes, by misrepresentations, induced Sheriff Hardie to make him a tax deed for the property, one hundred acres, less one acre—that is, ninety-nine acres—and took possession thereof by virtue of said tax deed"; and "that before the return of the plaintiff to this State, and without his knowledge, the said Granville Bonds brought suit in his own name against the said Raiford Smith for the property in the Superior Court of the county of Cumberland at Fall Term, 1889, and during its pendency, and by arrangement between them, unknown and unsanctioned by the plaintiff, the said Smith executed a deed for forty-nine and a half acres of this land to said Granville Bonds, and now claims the remainder
(556) thereof under the said Sheriff Hardie's tax deed, and is still in possession by his tenant, and Jack Inman (colored), and they wrongfully withhold possession from the plaintiff of the lower or southern part of said one hundred acres, to wit, forty-nine and one-half acres."

The plaintiff prays for possession of the forty-nine and one-half acres that he bought at a sheriff's sale for taxes about the year 1876.

The defendant Smith then set forth more specifically his grounds of defense as follows: "This defendant admits that Granville Bonds brought suit against him to recover possession of said land, and that afterwards said suit was compromised. The said Granville, by the compromise, paid to defendant Smith $12.50, and afterwards a deed was made conveying to said Granville the upper half of a tract of one hundred acres that was conveyed to defendant Smith by said sheriff's deed."

The defendant, further answering, says: "That intimations or insinuations contained in plaintiff's complaint that defendant Smith made misrepresentations to Sheriff Hardie, or any other person, to procure said deed, or to get into possession of said land, are wholly untrue; and the like intimations and insinuations that defendant Smith, by any sort of arrangement or collusion with Granville Bonds, obtained said deed for possession, are untrue, except that, being in possession under said deed at time of said suit, he contracted, at the instance of said Granville, to make him a deed, as above stated, for the upper part of the land."

The defendant Smith further alleges "that after his said purchase and deed, say about 187...., he took possession, and has ever since held the open, notorious and exclusive adverse possession of said land, or lower half of what said deed conveyed to him, and has so continued to hold the same until this time, up to the known and visible boundaries thereof. And defendant pleads that by reason of the facts set forth in the complaint, together with the above alleged facts, the plaintiff's (557) said claim or right to have possession of said land is barred by the statute of limitations, because the plaintiff's alleged cause of action did not accrue within seven years next before the commencement of this action."

In his replication the plaintiff, after reoffering the allegations of the complaint, says "that he left the State of North Carolina in 1875 and did not return until December, 1885, being the year of his father's (Granville Bonds) death, and that it was not until after his father's death, in 1885, that this plaintiff received any information whatever, or made any discovery of the facts constituting the fraud upon the plaintiff's right, committed by the defendant, set forth in the second cause of action of the complaint, and that the suit was instituted in April, 1886."

The following issues were submitted to the jury:

"Is the plaintiff the owner and entitled to the possession of the land described in the complaint?

"Did the defendant fraudulently procure the sheriff of Cumberland to make him a deed for the land described in the complaint?"

The defendant objected to this issue as not raised by the pleadings, as irrelevant, as unnecessary and as calculated to mislead the jury. Objection overruled. Defendant excepted.

"Does the defendant wrongfully withhold possession of the forty-nine and one-half acres described in the complaint?

"What damage, if any, has the plaintiff sustained?"

The plaintiff offered in evidence a deed from Jane D. Byrnes and others to Oren Bonds for one hundred acres, more or less, dated 19 March, 1872, the courses and distances of which were the same as those set out in the complaint, and plaintiff testified that the land described in said deed was the land in dispute.

The plaintiff offered in evidence the record of an action and judgment in the case of Granville Byrnes against the defendant.

Defendant objected, but, upon the plaintiff's counsel stating (558) that it was offered for the purpose of showing the fraud as charged in the complaint, the objection was overruled, and the plaintiff excepted.

R. W. Hardie, a witness for the plaintiff, testified that he was sheriff of Cumberland and tax-collector in 1876, and produced the tax-book kept as a record in the office, and from which the tax-list was made out. The land described in the complaint is in Gray's Creek Township, but was in Rockfish Township in 1876. This land is not on the tax-list, but the tax-lists in witness' hands as sheriff were constantly added to.

Witness identified a paper offered as a deed which witness made to defendant, R. W. Hardie, sheriff, to Raiford Smith, with plot attached, for ninety-nine acres, containing the same description as the land described in the complaint, less one acre, dated 28 November, 1878.

Plaintiff's counsel stated that this deed was offered for the purpose of attacking and for the purpose of estopping the defendant.

Oren Bonds, the plaintiff, testified, in his own behalf, that he bought the land in controversy from J. T. Byrnes and others, as appeared from the deed which is already in evidence; that he (plaintiff) was in possession of the land three months before he bought it, and remained in possession until 1875, when he left his father, Granville Bonds, or Burnes, in possession for him, and went to South Carolina, and was absent from North Carolina for ten years, and returned in 1885, about a year after the death of Granville Burnes, and, upon his return to North Carolina in 1885, plaintiff first heard of the sale of the land for taxes. Witness had paid for the land, and had promised to give his father (Granville) one-half of it when witness came back, but had given him no writings about it. The father was to hold the balance of the land for witness. He (Granville) lived and died on the upper end of the land. Defendant is in possession of the lower end.

R. W. Hardie, being recalled for the plaintiff, produced a book (559) which he testified was marked "Official copy of the tax list for Rockfish Township for 1876," showing thereon, under the head of "Unlisted," "Oren Bonds, 100 acres, valued at $200, and other taxables; tax due, $2.35."

Objected to by defendant. Objection overruled. Defendant excepted.

No property was listed in the name of Granville Bonds. There was some conflict as to whether his name was Bonds or Burnes.

Much testimony was introduced by plaintiff to show the payment of the taxes, and the twenty-five per cent premium.

Objection to proving the contents of some lost tax receipts was overruled. Defendant excepted.

The plaintiff rested, and defendant offered no testimony.

The defendant's counsel presented no prayer for instruction in writing, but contended, in his argument that plaintiff could not recover, because he had not proven title out of the State and relied solely on his deed from Byrnes, of 19 March, 1872. And further, that, according to the evidence, the defendant had been in possession for more than seven years before the action was brought, under color of title, the deed from Hardie to defendant. Defendant's counsel further contended that plaintiff had failed to prove that the deed was procured by fraud from Hardie, sheriff.

The court, after telling the jury the nature of the action, and the plaintiff's claim of title in himself, under the deed from Byrnes, and the admission of possession by defendant, and his claim to hold it of right, continued:

"The plaintiff offers, for the purpose of showing to you the title under which defendant claims, a tax deed from Sheriff Hardie to defendant for the land described in the complaint, except one acre, and as the defendant has offered no testimony, you will be warranted in finding that the defendant claims title under the deed; then (560) the plaintiff offers testimony tending to prove that the deed to defendant was made by the sheriff on a sale for taxes of the land as the property of the plaintiff. If the land was sold by the sheriff as the property of plaintiff, and bought by defendant, the defendant claims under the title of plaintiff, and it is not necessary for the plaintiff to show title out of the State. If you have not been satisfied by the evidence that defendant bought the land as plaintiff's land, you will respond to the first issue No. But if the defendant's deed for the land was on a sale of plaintiff's land for taxes, you will proceed to examine and respond to the issues; and as the second issue seems to be the main one, you may consider it first."

On this issue the court instructed the jury that if the defendant bought plaintiff's land at a tax sale, and before a year after the sale had expired, received from those representing the plaintiff the amount paid by him (defendant) with twenty-five per cent additional, and afterwards procured from the sheriff a deed for the land to himself, it was a fraudulent act, and their response would be Yes; that the burden was upon the plaintiff to satisfy them of the truth of this allegation.

The court then proceeded to say: "If you think it was a fraudulent sale, the plaintiff offers testimony tending to show that he never knew of the fraud until a short time before he brought his action; that he was out of the State, and had left Granville Burnes in possession, and when he learned that defendant had been in possession, he came home and brought his action—coming home in 1885 and bringing this action in April, 1886." If this is so, defendant would not have had possession under color of title, and the court read section 155, subsec. 9 of The Code.

The plaintiff excepted to the charge, "that as the defendant introduced no evidence, the jury would be warranted in finding that the defendant claimed under the deed from Hardie, sheriff, for taxes
(561) as read by the plaintiff, and in that case the plaintiff is not required to prove title out of the State." But this was not the charge given by the court, as will be seen by reference to the charge as given above.

The defendant excepted to the court telling the jury "that the second issue was the main one for them to try, and that they had better consider it first."

The defendant excepted to the charge of the court, "that the plaintiff testified he was absent from the State for ten years—from 1875 to 1885—and that it was only upon his return in 1885 that he found out about the sale and deed"; and then stated, if that is so, the defendant would not have had possession under color of title, and the court read section 155, subsec. 9, of The Code. Defendant excepted to this part of the charge, and contended that the section referred to had no application to the facts of this case. There was a verdict for plaintiff.

Defendant moved for new trial for errors in (1) rejecting evidence, (2) in refusing to charge as requested, (3) to the charge as given. Motion overruled. Defendant appealed.

R. P. Buxton for plaintiff.
N. W. Ray for defendant.

AVERY, J., after stating the facts: The plaintiff alleges in his complaint that his father, Granville Bonds, was left in charge as his tenant of the whole one hundred acre tract, when the former left the State

in the latter part of the year 1875, it being verbally agreed between them that his father should take all of the rents of said land in consideration of paying the taxes during the son's absence. He further declares that subsequently, during the year 1876, his father, by collusion with the defendant Smith, permitted the land to be sold for the taxes of that year, and though the full amount of said (562) tax, with twenty-five per centum thereon in addition, was repaid to said Smith by Granville Bonds within a year from the time of his purchase, still the said Smith fraudulently induced the sheriff (Hardie) to make to him, after the lapse of the year from the time of sale, title to the said one hundred acre tract, save one acre, in accordance with the statute then in force in reference to the collection of taxes. The plaintiff further charges that Granville Bonds, while he (plaintiff) was still absent from the State, brought suit against said Smith in his own name to recover possession and title of said land, and by an arrangement made without the knowledge or approval of the plaintiff, compromised said action, the said Smith executing to said Granville a deed for forty-nine and a half acres of the land, and retaining, through his tenant, the defendant Inman, possession of the residue of the tract, claiming title to it under the said deed from Hardie, sheriff. The defendant admits the purchase at "a regular sheriff's sale in the year 1876," and that he claims under a sheriff's deed, but denies that the amount of tax was repaid to him till the action was brought by Granville Bonds, more than a year after the sale. The defendant further denies that he obtained possession of the land from Granville Bonds, or the deed from the sheriff, or compromised said suit, by making the said conveyance in pursuance of any arrangement or under any collusive agreement with said Bonds.

We think that there is a sufficient allegation of fraud, but if the complaint were not so full and distinct as it is, the denial of collusion in the answer shows that the defendant comprehended the nature of the action, and the doctrine of aider would be brought to bear for the plaintiff's benefit. *Garrett v. Trotter,* 65 N. C., 430; *Knowles v. R. R.,* 102 N. C., 59. The objection, that the issue involving the question, whether the defendant fraudulently procured the sheriff to execute a deed to him, was not raised by the pleadings, is untenable. The de- (563) fendant admits, either in terms or constructively, by failure to deny, that he bought the land when sold as the property of the plaintiff for taxes, and that he went into possession under that deed, and subsequently conveyed to Granville Bonds the upper half of the tract. The jury find that the deed was procured from the sheriff by fraud, and we can place no other construction upon the finding, than that the defendant Smith, having received the amount of tax due, with the per

centum prescribed by law, from the plaintiff's agent, still procured the sheriff, by fraud, to make him a deed, and entered into possession under that deed, but subsequently conveyed to plaintiff's agent, in his own right, a portion of the land in consideration of the money paid, as the defendant knew, in the capacity of agent for the plaintiff.

Where one enters into possession of the land as tenant of another, not only the tenant but his sub-lessors are estopped from denying the title of his landlord or those holding the fee through the lessor until the possession is surrendered to the landlord and an entry is made under some other title. *Conwell v. Mann,* 100 N. C., 234; *Freeman v. Heath,* 13 Ired., 498; *Sikes v. Basnight,* 2 Dev. & Bat., 157; Buswell L. & A. P., secs. 304 and 308; Wood on Lim., sec. 265.

Where one acquires pretended title or possession of land, or both, by collusion, or a fraudulent compromise with another, whom he knows to be holding as an agent or tenant, the former is considered in privity with the latter and with his landlord, and is estopped, just as the agent or tenant would have been, from denying the title of the principal, or landlord, till after a surrender of the possession and an entry in some other right. *Springs v. Schenck,* 99 N. C., 551; *Farmer v. Pickens,* 83 N. C., 549; *Pate v. Turner,* 94 N. C., 47; *Davis v. Davis,* 83 N. C., 71; Angell on Lim., secs. 442 to 446. The statute of limitation does not
(564) operate as a bar therefor in favor of the defendant Smith, because he stood in the shoes of Granville Bonds, and his mouth was effectually stopped from denying the title of plaintiff. His possession was not adverse, but in subordination to the plaintiff's title.

It constitutes no ground of exception if it be admitted that it was unnecessary to submit both the first and second issues. The defendant has not shown that the court failed, when requested by him, to present to the jury, through medium of some issue, any view of the law applicable to the evidence in this case. *Emery v. R. R.,* 102 N. C., 209; *McAdoo v. R. R.,* 105 N. C., 140.

The equivocal denial of the allegation as to the nature of the deed is an admission of its truth. But apart from that principle, it is a universal rule that where a deed is attacked for fraud, recitations contained in it may be shown to be false, as it may be proved that others, which should have been inserted, were omitted, if such evidence tends in any way to establish the alleged fraud. *McLeod v. Bullard,* 84 N. C., 515; *Knight v. Houghtalling,* 85 N. C., 17.

On the trial of an issue of fraud, the range of the testimony is often necessarily very wide, and we do not think that his Honor erred in admitting as relevant to the second issue the record of the action brought by the plaintiff's agent claiming in his own right the land of his principal and showing the compromise made by him with the defendant.

A witness for the plaintiff testified that he delivered to George M. Rose, the attorney of Granville Bonds, certain receipts, showing the payment of tax on the land by Granville Bonds to the defendant Smith, and the time of the payment, which receipts are admitted to be relevant testimony, if before the court and properly identified. The witness got the receipts from Granville Bonds, who has since died. Mr. Rose testified that he could not find the receipts, and thought he (565) delivered them to Granville Bonds, but was not certain. It was in evidence that the receipts could not be found among the papers of Granville Bonds. We do not think that his Honor erred in admitting evidence of the contents of the receipts. *Mobley v. Watts,* 98 N. C., 284; *Clifton v. Fort,* 98 N. C., 173; *Mauney v. Crowell,* 84 N. C., 314. This Court would assume, when nothing appeared to the contrary, that the court below admitted secondary evidence as to the contents of receipts, or other documents, after hearing plenary proof of the loss of the originals. It is always within the sound discretion of the judge who tries a case to determine what is sufficient proof of the loss or destruction of an original paper to make evidence of its contents competent. 1 Greenleaf, sec. 558; *ibid.,* sec. 509.

A plaintiff must generally show title good against the world, while a defendant can ordinarily prevent his recovery by showing a better outstanding title in any person. But it is an old and well established rule, adopted originally for convenience in the trial of actions of ejectment, that where both parties claim title under the same person, neither will be allowed to deny that such person had title. While a defendant in such cases may set up a title superior to him through whom both claim as the common source, provided he connects himself with it, he is not allowed, as in other cases, to show a better title than that of the plaintiff in a third person. *Whissenhunt v. Jones,* 78 N. C., 362; *Ives v. Sawyer,* 4 Dev. & Bat., 52; *Barwick v. Wood,* 3 Jones, 306; *Caldwell v. Neely,* 81 N. C., 114. Where the plaintiff shows from the deeds offered, or the admissions in the pleadings, that both claim from a common source, he is required only to exhibit a better title in himself derived from it than that of the defendant, in order to establish prima facie his right of recovery. *Spivey v. Jones,* 82 N. C., 179; (566) *Mobley v. Griffin,* 104 N. C., 112.

The defendant does not deny the allegation of the complaint, that the sheriff sold for tax due from the plaintiff; that he bought at said sale the interest of the plaintiff, and took the sheriff's deed for it. He cannot, therefore, avoid being subjected to the rule by reason of omitting the necessary recitals in his deed if the fact of his purchase for tax due from the plaintiff sufficiently appears *aliunde.* It does appear, from the pleadings and evidence, that he claims under a tax title for the

plaintiff's interest, and if that deed is shown to be fraudulent and void, there is no further obstacle in the way of plaintiff's recovery. We have held that the defendant claiming title and possession by fraud under one who was himself estopped from denying the plaintiff's title, will not be heard to set up a claim by adverse possession against him. We have not deemed it necessary, as the defendant did not hold adversely, to determine whether the plaintiff, though out of the State, would have been deemed to have had constructive notice of his claim if the defendant had entered under a fraudulent deed, but free from the estoppel arising out of his relations to Granville Bonds.

There is no error. Judgment affirmed.

Cited: Springs v. Schenck, ante, 164; *Denmark v. R. R.,* 107 N. C., 187; *Turner v. Williams,* 108 N. C., 212; *Waller v. Bowling, ibid.,* 294; *Braswell v. Johnson, ibid.,* 152; *Grubbs v. Insurance Co., ibid.,* 478; *Gillis v. R. R., ibid.,* 443; *Bass v. Nav. Co.,* 111 N. C., 456; *Vaughan v. Parker,* 112 N. C., 100; *Redmond v. Mullenax,* 113 N. C., 510; *Smith v. R. R.,* 114 N. C., 763; *Patton v. Garrett,* 116 N. C., 856; *Mizzell v. Ruffin,* 118 N. C., 72; *Tucker v. Satterthwaite,* 120 N. C., 122; *Collins v. Swanson,* 121 N. C., 68; *Hendon v. R. R.,* 125 N. C., 127; *Pool v. Lamb,* 128 N. C., 2; *Stewart v. Keener,* 131 N. C., 487; *Avery v. Stewart,* 134 N. C., 294; *Campbell v. Everhart,* 139 N. C., 515; *Wells v. Harrell,* 152 N. C., 219.

(567)

STATE ON RELATION OF E. A. KIVETT AND WIFE v. R. E. YOUNG.

Official Bonds—Registration—Mistakes in Registration—Damages—Code—Former Decision.

1. A register of deeds and surety renewed his official bond in December, 1885, conditioned to be void if he should safely keep the records and books belonging to his office, and at all times truly and faithfully *discharge the duties of his said office* during his continuance therein. In September, 1886, the relator delivered to him a deed of mortgage for registration to secure one thousand dollars, which was registered "one hundred dollars": *Held,* in an action for damages for breach of the official bond on account of such misregistration, the plaintiff could recover.

2. The words "and faithfully discharge the duties of his office," do not refer alone to the safe-keeping of the "records and books," but to all other official acts, the nonperformance of which results in injury.

3. The Code, sec. 1883, enlarges the scope and purpose of official bonds, and is in accord with sound public policy.

4. The former decisions of this Court on this subject are now construed in the light of this section (1883) of The Code.

IT APPEARS that the defendant Cheatham was register of deeds of the county of Vance, and, as such, renewed his official bonds on 7 December, 1885, in the sum of $5,000, with his codefendant Young as surety thereto, as required by law. The following is a copy of the condition of that bond:

"The condition of the above obligation is such that whereas Henry P. Cheatham, the above bounden, has been duly elected register of deeds for Vance County for the term of one year from the ..... day of December, 1885: Now, therefore, if the said Henry P. Cheatham shall safely keep the records and books belonging to his office, and at all times truly and faithfully discharge the duties of his said office, during his continuance therein, then this obligation is to be void, other- (568) wise to remain in full force and effect."

On 17 September, 1886, the relator delivered to the said register of deeds for registration, a deed of mortgage of real estate to secure the payment of a single bond for $1,000, due 1 October, 1887. The register of deeds negligently registered this deed of mortgage, and omitted from the registration thereof the words "one thousand dollars," and placed on the registry in place thereof, the words "one hundred dollars," so that it appeared from the registry that the mortgage debt was "one hundred dollars" instead of "one thousand dollars," the true amount.

This action is brought upon the official bond of the said register of deeds for damages, and it is assigned as a breach of the condition of this bond that the said register thus failed to truly register the deed of mortgage, etc.

The defendant demurred to the complaint, assigning as ground of demurrer that it failed to state facts sufficient to constitute a cause of action. The court overruled the demurrer, and the defendants, having excepted, appealed.

T. M. Pittman for plaintiff.
M. V. Lanier (by brief) and E. C. Smith for defendants.

MERRIMON, C. J., after stating the facts: The statute (The Code, sec. 3648) prescribes that the register of deeds in each county shall give bond "conditioned for the safe-keeping of the *books and records,* and the faithful discharge of the duties of his office." This condition of the bond required is the same in substance and effect—almost the same in words—that has been prescribed for more than a century. (Rev. Stat., ch. 98, sec. 4; Rev. Code, ch. 96, sec. 3; Bat. Rev., ch. 100, sec. 2.)

The learned counsel for the appellant contends in his cogent brief that the condition of the bond of the defendants sued upon, is such as that so prescribed, and that this Court has repeatedly decided (569)

that the duty of the register embraced by it is confined to "the safe-keeping of the *books and records*" of his office, and that the general words, "and for the faithful discharge of the duties of his office," have reference to, and only to, such duty, and not to other general duties. This Court did, in the past, so interpret the statute and like conditions in other classes of official bonds. *Moretz v. Ray,* 75 N. C., 170; *Holt v. McLean, ibid.,* 347; *Eaton v. Kelly,* 72 N. C., 110, and cases there cited.

But afterwards, the scope and purpose of the condition of the official bonds, registers and other classes of public officers, was enlarged by legislative enactment. The statute (The Code, sec. 1883), among other things, prescribes that such official bonds "may be put in suit and prosecuted from time to time until the whole penalty shall be recovered, and every such official and the sureties to his official bond shall be liable to the person injured for all acts done by said officer by virtue or under color of his office." This clause is very comprehensive in its terms, scope and purpose. It, on purpose, enlarges the compass of the conditions of official bonds and their purpose, and the Legislature intended by it, it seems, to prevent an evil pointed out in two or three of the cases cited *supra.* There were no adequate reasons why the conditions of official bonds should not extend to and embrace all the official duties of the office, and there were serious ones of justice and policy why they should. All persons interested are bound to accept the official services of such officers, as occasion may require, and they should be made secure in their rights, and have adequate remedy for wrongs done by them. Besides, such officers, indeed all public officers, should be held to a faithful discharge of their duties as such. It is singular that the clause last recited, notwithstanding a known evil to be remedied, was not enacted until 1883. It first appeared as part of The Code. (570) So that now official bonds and the conditions of them embrace and extend to all acts done by virtue or under color of office of the officer giving the bond.

The failure of the defendant register, in purporting to register the mortgage deed mentioned, to put in the registry the important and material words, "one thousand dollars," in the proper connection, or at all, and putting where they ought to be the other words, "one hundred dollars," not in the deed, was certainly a failure to discharge and a neglect of his official duty. The deed was not registered in an important and material respect, and the words "one hundred dollars" were misleading to the serious prejudice of the relator. It was the duty of the register to register the deed precisely as it went to him. The statute (The Code, sec. 3654,) prescribes that "the register of deeds shall register all instruments in writing delivered to him for registra-

tion within twenty days after such delivery, except mortgages and deeds of trust, and other instruments made to secure the payment of money which he shall register forthwith after delivery to him," etc. This does not mean a partial or imperfect registration—it means a registration complete and perfect, so that it may serve all the purposes of the law in protecting the rights of parties directly interested, and give notice truly to the public.

The defendant register, by virtue of his office, undertook and purported to register the deed correctly. He failed to do so, and, in fact, registered it incorrectly—improperly—imperfectly. This he did in the exercise of and by virtue of his office, and the statute of 1883 gave the relator remedy on his official bond, as pointed out above. It cannot be said with force that the condition of the bond of the defendants is, substantially, in form as it was required to be before the enactment of the statute just mentioned, and as, indeed, the statute (The Code, sec. 3648) now, in terms, requires it to be, and, therefore, it must be interpreted as contended by the appellant's counsel, because it was competent for the Legislature to enlarge the scope of the condi- (571) tion of such bonds, and to assign more comprehensive meaning to the words, "and for the faithful discharge of the duties of his office," as seems to have been the purpose of the statute. In any view of the matter, the scope of the bond is enlarged, and if the condition is not expressed in the aptest words, the other statute (The Code, sec. 1981) cures any possible defect in such respect.

There is no error, and the judgment must be affirmed. To the end that further proceedings may be had in the action according to law, let this opinion be certified to the Superior Court.

Cited: Joyner v. Roberts, 112 N. C., 114; *Redmond v. Staton,* 116 N. C., 142; *Daniel v. Grizzard,* 117 N. C., 108; *Warren v. Boyd,* 120 N. C., 60; *Comrs. v. Sutton, ibid.,* 301.

THE PEOPLE, BY THE ATTORNEY-GENERAL, EX REL. JOHN BOYER, v. MILTON E. TEAGUE.

Certiorari, When Granted in Supreme Court to bring up Evidence Omitted from the Case on Appeal—Powers of Superior Court Judge.

1. A *certiorari* will be granted by this Court when it appears, by affidavit, that certain material testimony produced on the trial below was omitted in the case on appeal, and a communication from the judge who tried the case states that such omission was by inadvertence.

2. In such case, the *certiorari* will be granted after the case has been argued in this Court, but before it has been considered in conference.

3. It is the duty of this Court to have the assignments of error in every case on appeal presented with such fullness of statement as will enable the Court to determine the case upon its real merits.

4. A judge cannot *resettle* a case on appeal; he can only correct such errors as have resulted from inadvertence, mistake, misapprehension, or the like.

(572) THIS was a petition for a writ of *certiorari* filed by the plaintiff in this Court.

The facts sufficiently appear in the opinion.

C. B. Watson, J. C. Buxton and R. B. Glenn for plaintiff (petitioner).

L. M. Scott and W. S. Ball, contra.

MERRIMON, C. J. After this case was argued at the present term, but, before the Court considered it in conference, the plaintiff (appellee) suggested, upon affidavit, that the case settled on appeal failed to set forth certain evidence produced on the trial in the court below tending to show that certain persons, specified by name, who voted at the election in question for the appellant, were not entitled to vote, and that such evidence should have been so set forth in order to a fair understanding of the exception referred to, and that the judge who presided at the trial and settled the case can and is willing to send up the evidence. The judge referred to states, in writing, signed by him and filed with the motion herein, that if the evidence referred to above was not set forth in the case settled by him, as he thought and believed it was, the omission to so set it forth in the proper connection was an inadvertence on his part, and he says: "I can, with the aid of my memoranda, certify and send up the whole, or any portion, of the evidence bearing upon the illegality of said votes, and will willingly do so if directed by the Court; or, if the whole evidence in the cause is needed, can send that."

Thereupon, the plaintiff moved that the writ of *certiorari* be issued in this case, directed to and commanding the clerk of the Superior Court to certify to this Court a more perfect transcript of the case settled on appeal, when and as soon as the judge who settled the same shall correct that now on file in his office in this action, and that the said judge be notified that he may have opportunity to

(573) make such correction of the case settled as ought to be made.

The defendant opposed such motion, and produced and filed sundry affidavits tending to prove that no such evidence as that so

suggested by the plaintiff was produced on the trial. He further insisted that this Court had no authority to allow such motion; that, at all events, it should not; that it came too late after argument, and that the judge had no authority to correct the case as settled.

The case stated on appeal by the parties to the action, or settled by the judge from whose judgment the appeal was taken, is very important and essential in the course of the action. It is the means—the regular method of procedure prescribed by the statute (The Code, sec. 550)—whereby this Court can correct errors of the court below; and, indeed, it is the only means for such purpose, except in cases where errors appear in or by the record proper, or are assigned in the record. The case should, therefore, be stated or settled with great care, precision, clearness and fairness. This is essential to the due administration of justice in this Court of last resort. Hence, the Court is anxious, in every case, to have the assignments of error presented with such reasonable fullness of statement in all necessary respects as will enable it to determine the case upon its real merits. The Court facilitates such disposition of every case, as far as it may do so with fairness to the parties and consistently with the course of its business. It is its duty to do so, and the statute contemplates and intends that it shall. To this end, the statute (The Code, sec. 965) confers upon the Court very extensive and great powers. It is clear and well settled that this Court must receive and act upon the case settled for this Court as importing absolute verity and as it comes from the court below; but it is likewise settled that where it appears, upon proper application, that, by inadvertence, mistake or accidental misapprehension, or the like cause, the judge, in settling the case, has failed or omitted to state or set forth something that ought to appear, or has stated (574) or set forth something that ought not to appear, this Court will allow the judge reasonable opportunity to make the proper correction, if it appears that he desires to make the same, or that he will probably do so. This Court, however, has no authority to suggest to, direct or require the judge, in settling the case, as to the exceptions he shall specify, or what facts he shall state, or what matter he shall set forth. Such corrections as those suggested are to be made in his discretion. This is settled by many cases. *McDaniel v. King,* 89 N. C., 29; *Currie v. Clark,* 90 N. C., 17; *Cheek v. Watson, ibid.,* 302; *Ware v. Nisbet,* 92 N. C., 202; *S. v. Gay,* 94 N. C., 821; *Mayo v. Leggett,* 96 N. C., 237; *Porter v. R. R.,* 97 N. C., 63; *S. v. Gooch,* 97 N. C., 982.

Without reference to the affidavits filed in support of and against the motion, it is sufficient that the judge who settled the case says to us, directly, that he, by inadvertence, omitted to set forth therein the evidence referred to, which he intended to and thought he had so set

forth, and that he can and will now set it forth, if opportunity shall be afforded him to do so. He is a high, disinterested and important public officer, in whom is reposed great trusts, charged by the law to learn and know, officially, that such evidence as that referred to in the motion was or was not produced on the trial. The presumption is that he will discharge his duty correctly and faithfully. It appears that the defendant requested the court to instruct the jury in the court below that no evidence was produced on the trial to prove material facts. The court declined, for some reason, to tell them that there was or was not such evidence, and that he so declined is assigned as error. But there was evidence—the judge says so—upon which it is said the jury acted, and thus, it is said, cured possible error of the court. If there was such evidence, it ought to have been set forth in the case settled on appeal.

The judge says he intended to and thought he had set it forth. (575) Why shall he not be allowed to do so now? Ought the defendant, in fairness, to have benefit of the mere inadvertence of the judge? Ought the case settled not to appear here, as the facts warranted and the judge intended it should appear? Ought the case here to turn possibly upon the mere inadvertence of the judge, after the case was tried in the court below? The trial in the court below was long, and, in its nature, must have been very expensive to the parties and to the public. In such a case, shall there be a new trial, not founded upon the real merits of the case, but possibly upon such inadvertence of the judge that might be corrected without injustice to the appellant? These questions must surely be answered in the negative, as, clearly, the mistake may be readily corrected. It is the plain duty of this Court to allow such correction if it can and ought to be made.

It was further contended, on the argument of the motion, that the judge has no authority to correct his mistake; that, as to this case, he is no more than a private person. This contention is without force. The official character and authority of a judge is continuous, and prevails at all times and in all places in the State for all proper purposes. It is the sole duty of that judge, from whose judgment an appeal is taken, to settle the case on appeal for this Court. The statute so contemplates, and, in the nature of the matter, another judge could not settle it for him. In such case, he alone is supposed to have the information essential to the proper settlement of the case. Hence, he alone can make proper corrections. There is no good reason why he should not do so, and the ends of justice require oftentimes that he shall. He should exercise such authority cautiously, and never unless he is satisfied that there was inadvertence, mistake, misapprehension, or the like. He could not resettle the case—make a new one—because the statute

prescribes when and how the case shall be settled. He can only make such corrections as those indicated above. The power thus exercised by judges is no greater or more important than many other (576) powers constantly exercised by them, and they are amenable for the prostitution of such power just as they are for the prostitution of any of the powers of their office. This Court has said, in many cases, that a judge may so correct mere errors in the settlement of cases for this Court. See the cases cited, *supra*. This motion was made before the Court considered the case after the argument, and we can see no sufficient reason why the writ of *certiorari* shall not be allowed, as demanded. The case will not be further considered until the writ shall be returned.

Petition allowed.

Cited: Allen v. McLendon, 113 N. C., 320; *Bank v. Bridgers,* 114 N. C., 107; *Sherrill v. Tel. Co.,* 116 N. C., 654; *Finch v. Strickland,* 130 N. C., 25; *Cameron v. Power Co.,* 137 N. C., 102; *Barber v. Justice,* 138 N. C., 23; *Slocumb v. Construction Co.,* 142 N. C., 351; *Davis v. Board of Education,* 186 N. C., 234.

THE PEOPLE, BY THE ATTORNEY-GENERAL, ON THE RELATION OF JOHN BOYER, v. M. E. TEAGUE.

Pleading — Sufficiency of Complaint — Bill of Particulars — Jury — Challenge to Array—Sheriff Interested in Action—Qualification of Electors—Domicile—Intent—Evidence—Declarations of Electors—Circumstantial Evidence—Evidence as to whom Elector voted for—Exclusion of Votes when not to Defeat an Election—Province of Jury as to Whether There is Any Evidence—Burden of Proof—Issues, Form and Number — Registration — Removal — Persons Under Imprisonment—Illegal Votes—Registration on Election Day—Acts of Registrar Outside of Township.

1. In an action involving the title to the office of sheriff, a complaint which alleges the aggregate number of illegal votes alleged to have been cast for the defendant, the grounds upon which the charges of illegality are based as to each class, and when and where the votes were polled, the defendant, upon his motion for a "bill of particulars," cannot claim as of right a fuller and more definite specification of what the relator expects to prove.

(577)

2. In such case, it is not requisite that the plaintiff should be required to give the defendant the name of every alleged illegal voter as to whom he proposes to offer proof.

3. Where, upon a challenge to the array, it appeared that the jury was drawn for a special term of the court, called mainly to try an action involving the sheriff's title to his office; that the sheriff (who was the defendant in such action) had taken charge of the drawing of the jury, receiving the scrolls as they were drawn by a boy, calling the names without submitting more than two or three to the inspection of any other person, and passing them into a locked box; and it also appeared that one name that ought to have been in box No. 2 was again found in box No. 1: *Held*, that the drawing was irregular, and the array was properly set aside, although the drawing took place in the presence of the board of county commissioners in regular session.

4. Where, in such case, upon challenge to the array, the same was set aside for irregularity, the court had power, under chapter 441, Laws 1889, to appoint a suitable person to summon a jury from the bystanders.

5. The Act of 1889, ch. 441, providing for the summoning of a jury from the bystanders, in cases where the sheriff is interested, etc., is applicable to actions brought before its passage.

6. A person, in order to become a qualified elector in this State, must have come into the State a year before the election, or have been domiciled within it for twelve months after forming the purpose to remain, and the same intent must be concurrent with the actual occupation of a domicile in the county in order to entitle him to the rights of an elector within its limits.

7. The question of domicile is often a question of intent, and the declarations of a voter as to his qualifications, if made at the time of voting, are admissible in evidence as part of the *res gestæ;* and, if not contemporaneous, but made previously, are admissible, if such declarations are in disparagement of his right.

8. An honest elector, who has observed the law, enjoys the privilege, which is a personal one, of refusing to disclose, even under oath as a witness, for whom he voted.

9. As between contestants for an office, the testimony of an elector, if pertinent and relevant, is always admissible.

10. Neither contestant nor contestee are called upon to contend for the rights of a witness who does not demand protection, and if compelled to testify against his will, the testimony, competent without objection on his part, should go to the jury for what it is worth.

(578)

11. The judge who tries the case may, in the exercise of his discretion, determine (if there is any evidence at all) how much testimony tending to show the illegality of a particular vote is sufficient as a foundation for compelling the voter to tell for whom he voted.

12. Where it does not appear from direct testimony for what candidate a voter voted, circumstantial evidence tending to establish the fact is admissible.

13. The fact that a certain person engaged in handing out tickets for a certain candidate, and for no other person, and that he gave tickets to one W. and "voted him," is admissible in evidence and tends to show for whom W. voted.

14. It is competent to show that a man voted in a certain township; that he had been a resident of another township the previous spring; had been indicted under a different name, and convicted and imprisoned; had escaped jail and had not lived in the township in which he voted for two or three years before the election. The identity of the man being established, the record of his indictment, etc., was admissible, not to disqualify him for crime, but to prove the fraudulent voting.

15. A witness is competent to testify to a fact, of the truth of which he says that he feels "reasonably certain."

16. The exclusion of legal votes, not fraudulently, but through error of judgment, will not defeat an election, notwithstanding the error is one which there is no mode of correcting, even by the aid of the courts, since it cannot be known with certainty afterwards how the excluded electors would have voted, as it would obviously be dangerous to receive and rely upon their subsequent statements as to their intentions, after it is ascertained precisely what effect their votes would have upon the result.

17. The defendant requested the court to charge the jury that there was no evidence, or not sufficient evidence, to warrant the jury in deducting from defendant's vote the votes of certain named persons. His Honor charged that, where there is no evidence tending to prove *an issue*, it is generally the duty of the court to so declare, but a separate issue has not been framed or submitted as to each vote, and left it to the jury to determine whether there was any evidence, and if so, whether it was sufficient to convince them, by a clear preponderance, that the votes were illegal, bearing in mind all the rules of law laid down by the court.

(579)

18. When an elector is allowed to deposit his ballot, the burden is on one who questions its validity to show, by a preponderance of testimony, the truth of such facts or circumstances as are relied upon to establish the disqualification.

19. The form and number of the issues submitted must be determined by the judge who tries the case, in the exercise of a sound discretion, except that they must be such as that the court can proceed to enter judgment upon the responses, and that the appellant shall lose no opportunity to present to the court below, and, on appeal, to this Court, any view of the law applicable to the evidence.

20. When a voter is registered in a precinct, and desires to move to another in the same county, he must procure a certificate before he can vote or lawfully register in the other precinct. If he fails to get this, and registers without it, the vote is illegal and should not be counted.

21. When a voter resides on or so near the precinct line, or the line be so uncertain that it is doubtful in which precinct the voter lives, and the voter, honestly and in good faith, *bona fide*, registers and votes in the precinct he, in good faith, alleges and believes he lives in, and has good reason to believe he is correct, and registers and votes in no other precinct, such vote is legal.

22. If a person in jail for misdemeanor (not infamous), and sentenced to imprisonment, escapes, and, before he is recaptured, his term or sentence expires, and he votes in his own precinct, in which he resided before he was sentenced, such vote is valid if the voter be otherwise qualified; but, if the voter is a fugitive from justice, and hiding from one part of the county to another, and voted in the precinct he happened to be in, and not in the precinct of his residence when sentenced, such vote is illegal.

23. If a voter was previously registered in one township, and his name still appears on the registration books, not erased, and he registers and votes in another township without any certificate having been granted, such vote is illegal.

24. Any registration on the day of election is invalid, unless the voter becomes of age on that day, or shows that, for any other good reason (of which the judges of election are to determine), he has become entitled to vote.

25. Where a registrar receives a certificate of removal outside of the township for which he is acting, administers the proper oath to the voter, and enters his name on the registration book after his return home, although he did not have the book with him, such registration is valid.

(580) THIS was an action, tried at the Special Term, January, 1889, of the FORSYTH Superior Court, before *Brown, J.*, and was commenced to try the title to the office of the sheriff of Forsyth County. The election had been held on 6 November, 1888, and the defendant had been duly declared elected, and was inducted into said office. The relator of the plaintiff was the opposing candidate, and claimed that illegal votes had been cast for the defendant in sufficient numbers to nullify his election and give title to the relator. The defendant, on his part, alleged that numbers of illegal votes had been cast for the relator, and that these should be deducted from the relator's aggregate. All this, as well as other pertinent matters, is fully and particularly set out in the pleadings.

The facts material to the discussion of the first, second, third, eighth, ninth, tenth, fifteenth and sixteenth exceptions are embodied in the opinion of the Court.

The plaintiff filed a challenge to the array of the jury, drawn for the said special term, before the jury were called and empaneled and in due time.

The said challenge is set out in full in the transcript herewith sent.

Issue being joined as to the said challenge to the array, the same

was tried by the court, the witnesses being examined before his Honor, the presiding judge, who, upon the evidence adduced, found the following facts, the defendant offering no testimony:

THE FINDINGS OF FACT AND ORDER.

"That a special term of this court was ordered to be held for the trial of civil business, commencing 6 January, 1890, and that such court was duly ordered prior to 1 December, 1889; that at the December (1889) meeting of the board of commissioners of Forsyth County, the board proceeded to draw the jurors for said special term; that said jurors were drawn in manner as follows, to wit: The (581) board being in regular session the sheriff, M. E. Teague, the defendant in this action, brought into the commissioners' room a boy under ten years of age and opened box No. 1; that the boy drew out a scroll containing a name of a juror from said box, and handed it to the said sheriff, who read the name thereon and undertook to call it out; that none of the commissioners read or saw the name on said scroll, and no one else did, except said sheriff, who immediately put said scroll into box No. 2; that each scroll was read and drawn in this way, without any one seeing the name thereon, except said sheriff, until twenty-four jurors were drawn from box No. 1, and put in box No. 2 by said sheriff; that there were one or two scrolls that the clerk to the board, or some other person, assisted the sheriff to read, but no more.

"That it appears that nine (9) of said jurors were from Clemmonsville Township, much the smaller township in the county, with a voting population of from 125 to 150; that only one juror came from Winston Township, which has a voting population of 1,800, and one juror only from South Fork Township, a very large township, and none from Kernersville, another large township.

"That the chairman of the board, and the clerk wrote down such names upon the list of jurors as Sheriff Teague called out, and the list was put in the hands of said sheriff, who summoned or caused said jurors to be summoned.

"That Clemmonsville Township, up to March, 1889, was a part of Davidson County, and by act of Assembly was made a part of Forsyth County; that at September (1889) meeting, the commissioners of Forsyth caused the names of fifty-seven persons from said township to be placed in the jury box; that they selected said persons from the tax-lists of 1889, and which went into the sheriff's hands in September, 1889, and also from a list furnished them by the register of deeds of Davidson County, and also called in one Womack, who resided (582) in Clemmonsville Township, to assist them.

"That at the time of the drawing of the jurors at said December meeting, it was well known by said Teague, and by the people of the county generally, that the cause now on trial would be tried during the first week of the special term, and that the said special term was called largely with the view to afford time to try this cause.

"It also appeared that the commissioners, for more than five past years, have drawn the scrolls from box No. 1, and put them in No. 2, without exhausting No. 1, and that during the past five years the scrolls in No. 2 have not been returned to No. 1; that W. N. Best was drawn as regular juror from box No. 1 for October Term, 1885, and that he is now also drawn as a juror again out of box No. 1 for this term, and the same as to one other of the present jurors, who was duly drawn before for October Term, 1887.

"That the plaintiff Boyer was sheriff for four years preceding the defendant, and that he used to be present generally with the commissioners when jurors were drawn, and sometimes read out the names on the scrolls, and sometimes a commissioner did it, but plaintiff stated that he then had no suits in court, or cases on docket.

"This plaintiff also testified that he was present a short while, casually, at September (1889) meeting of the board of commissioners, when they were revising the jury lists, and the chairman asked his opinion of one or two men, and he gave it; that he took no part in the proceedings, and was there only a few minutes.

"It further appears that at September meeting, 1889 (since passage of the act of 1889), the board of commissioners of Forsyth County proceeded to revise, generally, the entire jury lists and boxes, and took out many names and put in others, and that they had the tax-lists,
(583) levied in June, 1889, before them, and revised the lists from them, and that two persons, residents of Davidson County, were placed in said boxes.

"The court finds the above facts from the testimony offered by the plaintiff, on his motion to challenge and set aside the array. The defendant offered no evidence.

"In sustaining plaintiff's challenge to the array, upon the facts hereinbefore stated, the presiding judge stated that he did not find an actual, intentional fraud, but it was very irregular and gross negligence upon the part of the board of commissioners to permit the defendant Teague to draw this jury for this special term, called principally to try this cause, and to solely read and call out the names on the scrolls, no one else examining or verifying the same, as set forth in the evidence, and that he could not give judicial sanction to so grave an irregularity.

"The court sustained the challenge and set aside the array, to all of which the defendant, in due time, objected and excepted."

The following is a statement by the court:

"The court having set aside the array of jurors upon challenge of the plaintiff, and having made an order concerning the same, the defendant appeals from said order, and asks a stay of the trial until said appeal is heard." Declined by the court. Exception by defendant. [Error and exception No. 4.]

The court having set aside the array, as above recited, directed that a jury be drawn in accordance with section 1732 of The Code. The plaintiff's counsel insisted that the talesmen should be called from the bystanders, the defendant contending that the jurors should be drawn under section 1732 of The Code; but the plaintiff acquiescing, the drawing took place in the presence of the court.

The panel so drawn was returned, and thereupon defendant (584) challenged the array, but not because it had been drawn under section 1732 of The Code. Testimony having been taken, his Honor sustained the challenge, and the second panel was set aside, and the plaintiff did not except.

The court thereupon appointed Samuel H. Smith (in accordance with the act of 1889, ch. 441, ratified 11 March) to summon jurors from the bystanders, which was done, the jury being entirely made up from the bystanders so summoned by the said Smith; and to this the defendant objected and excepted. [Error and exception No. 5.]

The testimony bearing upon the exceptions, from the eighth to the sixteenth, both inclusive, is sufficiently set forth in the opinion of the Court.

The defendant's prayer for instructions was as follows:

1. A residence of twelve months in the State and ninety days in the county entitles a citizen to vote.

2. If it appears that the voter whose ballot is attacked for nonresidence has resided in the State twelve months, and in the county ninety days, the presumption is raised that he is entitled to register and vote, and it will take affirmative evidence to remove the presumption.

3. The fact that a voter goes from the county in which he has voted, immediately after the election, does not raise the presumption that he has voted illegally, nor that he is a nonresident. [See charge.]

4. The fact that a voter removes into a county, if such removal is more than ninety days before the election, and that he goes into another county, or State, immediately after the election, even if to change his residence, does not destroy the presumption that he has voted legally, provided he was a resident of the State for twelve months before the election.

5. Temporary absence from a county, even beyond the confines of the State, for the purposes of business or pleasure, does not take from a citizen his domicile, and the right to vote.

(585) 6. If a vote is challenged for any cause, and the challenge is tried by the judges of election, and the decision is in his favor, it strengthens the presumption that he is a legal voter, which must be removed by evidence.

7. The residence, or domicile, of a voter is determined by his intention.

8. The fact that a citizen registers and votes is evidence of his intention as to residence. (The charge does not embody this instruction, but it should do so.) [Error and exception No. 19.]

9. If a voter has lived twelve months in the State and ninety days in the county, and does not intend to become a citizen of the county where he votes until the time of his registration, his vote, if cast, is lawful. (Overruled by judge's charge. See, also, proposed instruction No. 24.) [Error and exception No. 20.]

10. The provisions of section 2680, of the Election Law, that the "residence of a married man shall be where his family resides," does not necessarily imply that his family consists of his wife alone. [See charge.]

11. If a voter's wife abandons him, or separates from him, without his fault, it does not affect his domicile.

12. If a voter's wife refuses to go with him to the place where he decides to have his domicile, his right to vote in the new place of residence is not thereby affected.

13. A voter may be lawfully placed upon the registration book of a precinct, if the registrar receives from him the certificate of removal under section 2681 of the Election Law, and administers the necessary oath to the voter in another precinct, not having the registration book then present, but putting the voter's name therein afterward, within the rightful precinct. This instruction applies to the case of Cons. Brooks, of Abbott's Creek precinct.

(586) 14. The judges of election have the right, within their reasonable discretion, to permit the registration of a voter on election day, under section 2682 of the Election Law, although such registration may be for a cause other than that the voter has become of the age of twenty-one years on the day of election; and when a voter is so registered he has the right to vote.

15. Evidence which might have been sufficient to put the voter to his explanation, if challenged at the polls, is not sufficient to prove a vote illegal, after it has been admitted.

16. After a vote has been admitted, something more is required to prove it illegal than to throw doubt upon it.

17. The declaration by the board of commissioners of Forsyth County of the election of M. E. Teague as sheriff, establishes a prima facie right in his favor to the said office.

18. If a vote has been received by the judges of election and counted in the returns, and the relator (Boyer) questions the legality of the same, the burden of the proof is upon him to satisfy the jury, by affirmative evidence, that such vote was illegal and improperly received and counted for the defendant (Teague). [See charge.]

19. If the registrar in Winston precinct, in giving a certificate of transfer to Samuel H. Belton, to Broadbay precinct, failed to enter the fact in, and erase his name from, the registration book of Winston precinct, such failure on the part of said registrar does not disqualify the voter thus transferred from voting in Broadbay precinct.

[*Note by the Judge.*—Admitted and agreed in argument that this be not deducted from Teague.]

20. If the registrar of Winston precinct, through mistake, in the certificate of transfer of Sam. H. Belton, wrote the name "S. H. Belden," instead of the correct one, this would not disqualify the said Belton as a voter in Broadbay precinct.

[*Note by the Judge.*—The court did not charge on this, as during the argument it was agreed by counsel, before the jury, that it be counted for Teague and not deducted from the Teague vote.] (587) [See charge.]

21. If the jury believe, from the evidence, that the registrar of Winston precinct, by mistake, wrote into his registration book the name of "Boldin" Brooks instead of "Golden" Brooks, and that the said "Golden" Brooks was actually registered as "Boldin" Brooks, and voted at the election in controversy, it would be their duty to count his vote for the defendant. [See charge.]

22. If Ed. Conrad, *alias* Ed. Jones, a registered voter in Bethania precinct, was convicted of an offense, not infamous, and sentenced by the court to imprisonment, and escaped during the term thereof, and went at large, and while thus at large (the time for which he was sentenced having expired) cast his vote for M. E. Teague for sheriff, being otherwise qualified to vote, the ballot thus given is not illegal. (See Judge's charge.) It is assigned for error that the charge so modifies the instruction prayed for as to destroy its rightful effect, and is misleading. There is no evidence to sustain the assumptions of the charge. If so, it should be rehearsed to the jury. [Error and exception No. 21.]

23. The defendant contends, and asks the court to charge the jury, that there is not sufficient evidence to sustain the allegations and con-

tentions of the plaintiff, that the votes of the following persons should be thrown out and not counted for the defendant, namely:

Tom Hanes, Frank Fowler, Thomas Lee, PAUL HARRIS, CHES. HOWELL, JOHN HILL, F. E. SETZER, GEORGE JAMIESON, WALLACE MOORE, WILLIAM (or JACK) FOY, *George Foy, H. L. Young, Ed. Davis,* JAMES HANSBERRY, *Charles Yokely, Creed Hairston, James Brown,* PETER FOY, *Bob Moore, William Holmes.*

[See Judge's charge.] The court says it is admitted by the plaintiff that he has not offered evidence sufficient to show the illegality
(588) of the votes of the persons above designated by SMALL CAPITALS, nor for whom they voted.

In the charge, in the *italicised* part, the judge refuses to charge the jury in accordance with the prayer for the instruction No. 23, so far as the names above *italicised* are concerned; and this the defendant assigns for error, in connection with the refusal of the judge to allow the "issues" proposed by the defendant. [Error and exception No. 22.] [See charge, where the issues proposed by defendant, and the ruling of his Honor, are fully set out.]

24. The question of residence being controlled by the intention of the voter, and William Belies, a witness for plaintiff, having sworn that he had decided to make Old Town his home at the time he registered and voted, and that he had been living in Old Town for a year or more before then, continuously, and that at the time he voted, he considered Old Town his place of residence, he is a lawful voter, and should be counted for Teague. [See instruction 9.] This is identical with it; and, being overruled, is likewise assigned as error. [Error and exception No. 23.] (See charge.)

25. That registration is an essential prerequisite of suffrage, and when the registration of a voter is made by the lawful officer, such registration furnishes prima facie evidence of the right to vote. (See charge.)

26. John Below having testified that he was less than twenty-one years of age when he voted, and that he voted for the relator, Boyer, and there being no evidence to the contrary, the said vote must be lost to Boyer. (See charge.)

27. It appears from the evidence that Lorenzo Wise was registered in Salem, and that he there voted for Teague. His name was also in the registration book of Winston, followed by the word "removed."

The presumption is that the said word "removed" was written
(589) by the authorized officer, and the record must be taken as true, unless proof is made by plaintiff that such word was written therein fraudulently; and the vote in the Salem precinct must be counted for Teague. (See charge.)

[The defendant assigns for error that part of the charge evidently relating to this instruction. The words of the charge are calculated to mislead the jury.] (Error and exception No. 24.)

28. It appears from the evidence that Henry Goings voted for Boyer in Winston, and that his residence was beyond the limits of that precinct when the vote was cast. If the testimony is believed by the jury, they should throw out the said vote and not count it for Boyer. (See charge.) [Error and exception No. 25.]

29. There is no evidence for whom the following persons voted, and therefore their votes should not be lost to Teague, namely: John Hill, Ed. Davis, Wallace Moore, William (or Jack) Foy, George Jamieson, and Tom Hanes.

[See charge. The notes under the proposed instruction, No. 23, apply to this, No. 29. Error is assigned for the same cause.] [Error and exception No. 26.]

30. There is no evidence as to the nonresidence of the following persons and, therefore, their votes should not be lost to Teague, namely: F. E. Seitzer, Ches. Howell, Thomas Lee, and Paul Harris.

[See charge. The notes to instructions 23 and 29 apply to No. 30, so far as the name Thomas Lee is concerned. Error is assigned for the same cause.] [Error and exception No. 27.]

31. The proof being that W. W. Self and John Bullen had not resided in the county ninety days before they voted for Boyer, the jury, if they believed the evidence, should throw out said votes and not count the same for Boyer.

32. It appearing, without contradiction, from the testimony of (590) Clayton Snider, that he removed from Abbott's Creek to Kernersville, without any certificate of removal, and voted for Boyer in the latter precinct, the jury, if they believe the testimony, should throw out said vote and not count the same for Boyer.

[*Note by the Judge*—Admitted in the argument that this vote is illegal, and should be deducted from Boyer.]

The foregoing proposed instructions were signed by defendant's attorneys and filed with the clerk of the court.

Next comes the written charge of his Honor, as read to the jury.

Before reading the written charge, the court said to the jury that while something had been said by witnesses and attorneys about Democrats and Republicans, as indicating the political parties to which the plaintiff and defendant belonged, that the jury should be careful not to allow any such expression, or consideration, of this sort to influence them in the least; that they must guard against the influence of such expressions and decide the case solely upon the testimony, and nothing else.

THE CHARGE.

THIS is a civil action in the nature of a *quo warranto,* brought in the name of the people of the State by the Attorney-General, upon the relation of John Boyer, against the defendant, to recover possession of and try the title to the office of sheriff of Forsyth County. The plaintiff alleges that he was duly and legally elected to that office at November election, 1888; that he received a majority of the qualified and legal votes cast at said election. It is admitted by the plaintiff that defendant Teague, according to the return made by the judges of the various election precincts and by the legally authorized canvassing board, has an apparent majority on the face of said return of twenty-four (591) votes.

Here the court read from the evidence the votes given for the relator Boyer and defendant Teague, at each precinct in the county, which was as follows:

	BOYER.	TEAGUE.
Abbott's Creek precinct	40	135
Ballew's Creek precinct	92	97
Bethania	173	163
Broadbay	110	202
Kernersville	186	173
Lewisville	135	86
Middle Fork	67	193
Old Richmond	110	96
Old Town	179	89
Salem	326	267
Salem Chapel	83	139
South Fork	165	160
Vienna	118	88
Winston	636	556
Total	2420	2444
		2420
Teague's majority		24

You are instructed that the findings of the county canvassers and the returns of the judges of election are not conclusive, but that those findings and returns, together with the induction into office of the defendant by the commissioners, established a prima facie right to the office by the defendant, and the court charges you that so far as the action of the commissioners and the returns go, the induction into office of the defendant Teague was prima facie legal and proper, and clearly establishes a prima facie right in behalf of the defendant, which the relator must overthrow by testimony. [Instruction 17.]

The relator claims that the defendant received a large number of illegal votes in the precinct of Winston and other precincts (592) of the county, sufficient, if deducted from defendant's apparent majority, to wipe out that majority and leave a fair majority for relator Boyer. The defendant Teague replies that he denies the receiving of alleged illegal votes, or that they were illegal, and further, that relator Boyer, himself, received illegal votes, which is denied by Boyer.

The issues submitted to you require, upon your part, the careful examination of each vote attacked by the relator Boyer, and each vote attacked by defendant Teague. By the word attacked, I mean "alleged to be illegal."

The burden of proof is upon the relator Boyer to satisfy you that, after all the alleged illegal votes are deducted from the person's column of votes for whom they were cast, that he (Boyer) received a majority of the legal and qualified votes cast for sheriff in November, 1888. [Instruction No. 18.] The relator is not compelled to prove this beyond a reasonable doubt, but by a clear preponderance of the evidence only. The relator's evidence must preponderate, but he is required to show nothing in this case beyond a reasonable doubt. As before stated, the returns are only a prima facie case for defendant. You have the right, and it is your duty, to go behind those returns and examine into the actual legality of each vote concerning which evidence has been given in this cause—if a vote be illegal, to determine for whom it was actually cast. The relator has introduced evidence concerning a large number of votes which he has attacked—some sixty-five or seventy—the exact number of which the court will not undertake to state, but leaves that to you, as you have been taking very extensive notes, I am glad to notice, and paying great attention to the evidence.

You should take the returns from each precinct (all are in evidence) of the county and give Boyer and Teague credit for the number of votes each received and apparent on the face of the returns. You should commence a careful examination of the testimony in (593) respect to the illegal votes cast in each precinct. If you are satisfied that a person voted for Teague, in a certain precinct, and that such vote was illegal, you should deduct that vote from the number received by Teague at such precinct, as appears on the returns. So if the evidence shows, by a preponderance, that a certain vote was cast for Boyer, and that it was illegal, then you should deduct that vote from the number received by Boyer, as appears on the face of the returns. So you should patiently and conscientiously canvass and weigh the evidence as to each vote attacked by either party to this action.

After you have gone through all the testimony and deducted from Teague or Boyer, as the case may be, each vote actually cast for either,

which you may find to be illegal, you will then ascertain which of them received a majority of the remaining legal votes actually cast at last election in November, 1888. Whichever received a majority of all the legal votes cast at said election, is the person lawfully elected. If you find that Boyer received such majority, you will answer the first issue Yes and the second issue No.

If the plaintiff has failed to satisfy you, by a clear preponderance of evidence, that he was so elected, then you should answer the first issue No and the second issue Yes; bearing always in mind that the burden of proof is on Boyer to satisfy you by a preponderance of evidence on both issues, viz., that he was, and that Teague was not, legally elected. [Instruction 18.]

This brings us to the consideration of the various grounds and causes whereby certain votes are claimed to be illegal.

It is essential that relator show, by a preponderance of evidence, that the alleged illegal vote was cast for Teague. If he fails, in any case, to show this, then you should not deduct the vote from the Teague (594) column. And so it is essential for Teague to show that a vote he claims to be illegal was actually cast for Boyer, before you deduct it from Boyer's column.

Now as to the legality of votes:

The fact that a man was registered in a certain precinct and was permitted by the judges to vote in said precinct, establishes a prima facie case that such vote is legal, and you must have evidence sufficient to establish, by a clear preponderance, that such vote was in fact illegal, before the prima facie right is overcome. [Instruction 25.]

What constitutes the right of suffrage? [Here the court read from the Constitution of North Carolina, Art. 6, secs. 1 and 2, reading the whole of said sections.]

The Legislature, under the Constitution, has also passed laws for the regulation of elections. [Here the court read sections 2679, 2680, 2681 and 2682 of The Code, to the jury.]

There are several causes or grounds of illegality assigned in respect to the many votes canvassed and investigated by all parties during the trial, viz: Voters claimed to be under 21—minors; voters claimed to be fraudulent because of double registration; voters claimed to be illegal for improper registration; voters claimed to be illegal, non-residents of the county, or State, or voting in wrong precincts.

MINORITY VOTES.

It is claimed upon the part of the relator that Bethel Smith, Wallace Doub, and perhaps others, voted for Teague, and were under twenty-

one years of age when they voted. It is claimed by defendant that John Belo, and perhaps others, voted for Boyer, and were under twenty-one years. The law requires that the voter shall be twenty-one years old, either before or on the day he voted. If he arrives at twenty-one on election day, he is permitted to vote. If the voter is not then twenty-one, his vote is illegal. You have heard and taken full (595) notes of all this testimony, and it is agreed that I need not state it to you. You have a right to consider, in addition to the other evidence, the family records offered to show the age of any of the voters claimed to be under age; also to inspect said records, and see if any material alteration has been made.

The voter, John Belo, testifies that he was under age on election day, and voted for Boyer. If you believe his testimony to be true, then his vote is illegal. Then it is for you to say whether he voted for Boyer or not. (Instruction 26.)

After you have canvassed all the testimony offered in respect to the alleged minors, you will determine whether it has been shown by a clear preponderance that any of them, or all of the votes attacked by either party, were illegal on the ground of minority, and if you can ascertain from the testimony how they voted, you will deduct the votes according to the method and instructions heretofore given.

REGISTRATION.

It is also claimed upon the part of the plaintiff, that Jacob Burke, Golden Brooks, and others, voted for Teague, and were not properly registered; and it is claimed by the defendant that one John Shields, R. P. Kerner, and others, voted for Boyer, and that they were not registered, or not properly registered, or were registered in two precincts, or had no certificates of transfer, and the like. As it has been agreed that I need not state all the testimony, and as you have taken, yourselves, copious notes and paid the best attention to the evidence, I will not go over all these cases attacked on this ground, but will state the law as the Court comprehends it. In addition to actual residence in State and county, the voter must register in the precinct of the county where he resides, before he can legally vote. Any vote that either the relator, Boyer, or the defendant, Teague, has received, (596) unless duly registered, is illegal and should not be counted, but should be deducted.

When a voter is registered in a precinct and desires to move to another in the same county, he must procure a certificate before he can vote in the other precinct, or lawfully register there. If he fails to get this, and registers without it, the vote is illegal, and should not be

counted, but should be deducted, if the evidence satisfies you how he voted. (Error and exception No. 28.)

If the voter procures the proper certificate and duly registers thereunder in the precinct to which he removes, then the registrar in the precinct from which he removed must make the proper entry on his book, and erase his name. If such registrar, however, fails to erase the name, after issuing the certificate, without any connivance or complicity of the voter, then such neglect of the registrar of the precinct issuing such certificate would not invalidate the vote, and it would be legal. (Instruction 19.) So, also, if a voter properly and correctly gave his name to the registrar, and took the required oath, then if the registrar erroneously registered or misspelled the names, if the identity of the person be the same, that would not invalidate the vote. [Instruction 21.] But if the voter voluntarily and on purpose gave to the registrar any other than his true name, then his vote is illegal and should not be counted, but deducted, as heretofore directed. To illustrate: I will select the case of "Bolin Brooks." It is claimed by the plaintiff that one Golden Brooks voted for Teague and was not registered. The defendant admits that Golden Brooks' name is not registered as Golden Brooks, but defendant says that the name "Bolin Brooks" was intended for Golden Brooks, and that they are one and the same person, and that the registrar made a mistake in registering the name, being misled by similarity of sound. If this be true, (597) then the vote would be legal and should not be disturbed, or deducted from the Teague column. But if that is not true, and the registrar made no mistake, and Bolin Brooks is another person, or if you believe the said voter wilfully—intentionally—gave in the name Bolin Brooks, another than his own, then the vote is illegal and should be deducted from Teague, as it is admitted that Teague received such vote. [Instruction 21. If there is evidence tending to sustain the supposition of the charge, it should have been recited to the jury.] [Error and Exception No. 29.]

Again, any registration which takes place on the day of election is invalid and illegal, unless the voter becomes of age on that day, or shows the judges of election that for any other reason he has become entitled to register—of which cause the judges of election are to judge. [Instruction 14.] It does not appear that any new, general registration has been ordered in this county for many elections past. It becomes necessary, where registration books are worn out, to copy them. If the registrar omits to bring forward a name on the new book, then he may bring it forward on election day, if he has the old book present; for the old book is the registration book where no new, general registration has been ordered. If, in transcribing a book a name is misspelled, or a

voter misnamed, the registrar may correct it. To illustrate: It is claimed by defendant, Teague, that R. P. Kerner voted for Boyer, without legal registration, and offers the registration books. If that be so, then the vote is illegal. But the plaintiff claims that R. P. Kerner was registered as R. B. Kerner; that the registrar made a mistake, without the fault or complicity of the voter, in the middle letter, and that on election day he changed the letter from "B." to "P."; that Kerner was a well-known voter, and, as he testified, had voted at Kernersville every election since the war. If this view of the testimony be true, then the vote is legal and should not be disturbed.

The law requires that a voter shall not only register, but that (598) he shall register in the precinct in which he lives. Section 2676 of The Code says, that "no elector shall be entitled to register or vote in any other precinct, or township, than the one in which he is an actual and bona fide resident on the day of election."

It matters not if a man has registered and voted in but one precinct in the county, yet, unless he lives—resides—in that precinct on election day, the vote is illegal, and if, upon a careful examination of the testimony, you find any such cases, they are illegal, and if it be shown for whom they voted, you should deduct them.

But if a voter resided on or so near the precinct, and the precinct line be so uncertain and not well known, that it was doubtful in which precinct the voter lived, and the voter honestly and in good faith, bona fide registers and votes in the precinct he in good faith alleges and believes he lives in, and has good reason to believe he is correct, and registers and votes in no other precinct, then such vote is legal, and should not be disturbed or deducted.

To illustrate: It is in evidence and claimed by the defendant that Henry Goings registered and voted in Winston precinct, and it is claimed by defendant that Henry Goings did not reside in said precinct, and that he voted for Boyer. Goings testified that he lived in Winston Township, and that he voted for Boyer. But if, as claimed by plaintiff, Henry Goings lived in said township, or so near the line of the precinct that it is fairly doubtful in which precinct he resides, or that the line is doubtful and may include his then residence, and acting under the honest bona fide belief that he resided in Winston precinct, Goings registered and voted in this precinct and in no other, then the vote should not be rejected, or declared illegal, but must remain undisturbed. [Instruction 28. Assigned for error.] [Error and exception No. 30.] (599)

Now, as to Cons. Brooks, the registrar must keep his book open from sunrise to sunset in the precinct, as required by law, and there register voters, but if, as is claimed in one of the cases, the regis-

trar receives from the voter a certificate of removal under section 2681 of The Code, and administered the proper oath to the voter, outside of the precinct, not having the registration book with him, and when he returns to the precinct puts the name on it and registers him, it is a valid registration. [Instruction 13.]

(The court also read sections 2676 and 2675 of The Code.)

So if a person in jail for misdemeanor (not infamous) and sentenced to imprisonment, escapes and before he is recaptured his term, or sentence, expires and he votes in his own precinct and there registers, the precinct he resided in before he was sentenced, such vote would be valid, if otherwise qualified. But if the voter was a fugitive from justice and hiding from one part of the county to another and voted and registered in the pricinct he happened to be in, and not in the precinct of his residence at the time of sentence, then such vote is illegal, and should be deducted from the person's vote for whom it was cast, if that be shown in the testimony. [Instruction 22.]

Bearing this instruction in mind, you will examine the testimony carefully in regard to Ed. Conrad, *alias* Ed. Jones, and also as to whether he voluntarily registered under a wrong name. [Error and exception No. 31.]

If a voter had previously registered in Winston and his name appears still in said registration books, not erased, and he registered and voted in Salem, without any certificate having been granted, then the vote is illegal and should be deducted, if it should be shown for whom he voted. [Error and exception No. 32.] [Instruction 27.]

But if a certificate was actually granted, and the registrar did not erase the name on the Winston books, but wrote the word
(600) "removed," that does not make the vote invalid. You have the right to consider the parol testimony admitted by the court, to show by whom the words "removed," in pencil were written. [Instruction 27, *supra.*]

You will remember this instruction in examining the case of Lorenzo Wise and others. [See evidence.] Also Clayton Snider, who, it is admitted, voted in Kernersville, without legal registration, for Boyer.

NONRESIDENCE.

The most numerous voters disclosed by the testimony, are attacked by the plaintiff, and some are attacked by the defendant, upon the ground of nonresidence.

An actual, bona fide residence in the State twelve months, and in the county ninety days, entitles a male citizen over twenty-one years, and not coming within the exceptions embraced within section 2679 of

The Code, heretofore read to you, to vote. A presumption is then raised that such person has a right to register and vote, and where it is claimed that such a voter voted illegally, because of nonresidence, the party attacking such vote must show it by affirmative evidence. [Instructions 1 and 2.]

If a voter has been duly registered and his vote received by the judges of election and counted in the returns for either Boyer or Teague, as the case may be, if the legality of such vote is contested by Boyer, or by Teague, then the burden is on Boyer, or Teague, whichever attacks it, to satisfy the jury, by affirmative, preponderating testimony or evidence, that such vote was illegal, and also for whom the vote was cast.

The fact alone that a voter goes from the county at once, after he has voted, will not rebut the above-named presumption of legality, but it is a circumstance only that may be considered, with other evidence, upon the question of residence or domicile. It is not (601) sufficient alone. [Instruction 3.]

The plaintiff claims that William Belies, John Blount, Willis Reed, and many others, voted for Teague and were not actual, bona fide residents of the precints and of this county on election day, or had not been for ninety days, of the county, or for twelve months, of the State. The same grounds of illegality are claimed by Teague, as to the votes of John Clayton, Joe Golding, E. B. Fulk, W. R. Arthur and others who, the defendant claims, voted for Boyer. It is unnecessary for the court to consume time in reading over to you the names of the large number of persons whose votes are attacked by the plaintiff, and some by the defendant, upon this ground of nonresidence. You have taken down each name, and the evidence connected with it, on your tablets and *memoranda,* under the direction of the court, as each case was investigated, and under the agreement of counsel of both plaintiff and defendant, the court will not state it all over to you again.

In determining the legality of these votes, it becomes necessary to determine what is such residence as the Constitution requires. What is meant by the words "shall have resided?" The use of this word residence is synonymous with domicile. It does not mean a temporary place of abode. It means the home of the voter, the actual, bona fide home of the voter, to which he expects and intends to return when he goes away from it, either on pleasure or business. This *animus revertendi,* or intention of returning, is very material. Residence or domicile is very essentially a question of intention, and entirely governed by the intent of a person's mind. This intention is not only manifested by words and statements of the voter, but also by his acts. The acts and doings of a person are oftentimes very valuable evidence of such person's intentions and his mental determinations; for a per-

son may say one thing and do another. A great lawwriter,
(602) endorsed by our Supreme Court, has declared that a person's residence or domicile, is "the place where such person lives or has his home, that is, where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning."

This law does not intend to deprive actual, bona fide citizens of North Carolina of their right to vote, because they have left the State and resided temporarily beyond its limits, with a constant purpose to return to their homes in the county of their residence, and to return to such home when their business, which calls them away, has been completed.

This clause requiring *residence* was more especially designed to meet the case of persons coming into the county, or the State, who are not allowed to vote, or exercise political rights, until they have for the said periods of time been in the State or county; and not then, unless they have, before exercising their rights, made it their actual bona fide residence or domicile for the periods prescribed by the Constitution in respect to the State and in respect to the county. [See exceptions 20, 23 and 34.]

The test of domicile is the intent of the person—in this case, of the voters. The intent to make this county a home, or domicile, must concur with the acts of the person. This intent is established, not solely by the declarations of the alleged voter on the witness stand, but also by all the attendant circumstances offered in evidence.

Temporary employment in this county, summer after summer, with a home retained elsewhere, is not a residence within the contemplation of the law, and does not confer the right to vote.

The provisions of section 2680 of The Code determine, to a certain extent, the residence of a married man, as well as a single man. It enacts that the residence of a married man shall be where his
(603) family resides, and that of a single man where he boards and sleeps; and where a single man boards in one ward or precinct and sleeps in another, then his residence shall be in the ward or precinct in which he sleeps, and he shall not register or vote in any other ward or precinct; and no elector or person shall be allowed to register in any ward or precinct, to which he shall have removed, for the mere purpose of being a voter therein, nor unless his *residence* therein is actual and bona fide.

A man's family may consist of his wife alone, or, if he has children, of his wife and children; or it may consist of himself and his children, and others residing with him, whom he regards as his family. If a man's wife abandons him, or separates from him without his fault, it

does not affect the man's domicile. A man has the legal right to change his domicile, and if his wife refuses to go with him to the place where he decides to reside as his home, his right to vote in the new domicile cannot be thereby affected. [Instructions 10, 11, 12.]

It is claimed by the plaintiff that the testimony offered by him shows that very many of the voters whose cases have been investigated in this trial voted for Teague for sheriff, and were not actual bona fide residents of this county at the time of voting.

The plaintiff contends that the testimony shows that these voters came here from Danville, Reidsville, Leaksville, and other places and towns, for a temporary purpose—to work for a certain season during the time when tobacco is manufactured here; that they leave their families behind them, and after the season is over return to their homes; and that the evidence discloses that their bona fide homes are the places to which they return, and not this town or county. The plaintiff offers the declarations of these voters (confined by the courts to such declarations as were made by the voter at or before the time of voting). He says these declarations show that the voters themselves regarded their homes as at the places where they came from, and not in (604) this county.

The defendant has replied to this testimony and put on the stand many of the voters themselves, and introduced other witnesses and testimony, which the defendant contends rebuts the plaintiff's evidence and shows that these voters regarded this county as their home, and moved here with the bona fide purpose of making it their home, or after they moved here, then determined to reside here as a home, and that when they go away, it is not to return to their homes, but only on temporary business or pleasure.

The defendant also offers testimony which he says proves that certain voters, whose names you have, voted for Boyer, and who were nonresidents of this county at the time of voting. To this testimony the plaintiff replied, undertaking, as he says, to show that these votes cast for him and attacked by defendant were legal, and that the voters were bona fide residents of this county when their votes were cast, and had been, the proper length of time, as required by law.

Now apply the principles of law laid down to you by the court to all this mass of testimony, and determine if any of such votes were illegal, and for whom the vote was cast. Remember always, that where a voter has registered and voted and passed the judges, and his vote deposited in the box, it makes a prima facie right to vote, and whoever attacks that vote and alleges its illegality must prove it by satisfactory testimony, and by a preponderance of evidence, and must further show for whom the vote was cast before you can deduct it.

If the vote is thus shown to be illegal and for whom it was cast, you should deduct it from the votes, or column of votes, of him for whom it was cast.

It is admitted by the plaintiff that he has not offered evidence sufficient to show the illegality of the following votes, or as to whom they voted, viz., Paul Harris, Ches. Howell, John Hill, F. E. Setzer, George Jamieson, Wallace Moore, William (or Jack) Foy, James Hanes-
(605) berry and Peter Foy. You will, therefore, not consider those voters, whose votes were cast at last election; and you will not deduct them from either plaintiff or defendant.

The court at this point gave the instruction embodied in the opinion, which was the subject of the 33rd exception.

After the first argument in the cause, the court granted a writ of *certiorari,* the return to which is appended.

You will now take the case, and, after a careful examination of the testimony, and taking the law as expounded by the court, you will write your answer to each of the two issues submitted to you by the court.

If you are satisfied, by a clear preponderance of the evidence, that Boyer received a majority of the *legal* votes cast for sheriff at the election in 1888, you will answer the first issue Yes, and the second issue No.

If you are not so satisfied, then you should answer the first issue No, and the second issue Yes.

The court has received from the defendant thirty-two prayers, or requests, for specific instructions, and the court has charged upon all except such as were rendered unnecessary by admissions of plaintiff's counsel, on the argument, and except the ninth.

The court is requested by the defendant to charge that if a voter has lived twelve months in this State and for ninety days in this county, and does not intend to become a citizen of this county until the day he registers, his vote, if cast, is legal.

The court declines to so charge you, but does charge you such interpretation of the law by the defendant is unwarranted and against the express words of the Constitution. Living in the State for twelve months and in the county for ninety days is not sufficient to acquire the right to vote. The person must have entered into the State and taken it as his residence, home or domicile for twelve months
(606) before he can vote. And also, if he is a resident of this State and moves to another county, the law requires actual residence and domicile in such county for ninety days. Mere living, or being there, will not do. The voter must be there the Constitutional period of time, with the intention to make his home or residence for such period.

To illustrate: If a person comes here from Virginia, where he has heretofore resided, and desires to acquire political privileges in North Carolina, and is otherwise qualified, he must have relinquished and given up his Virginia domicile and have resided in this State, in some part of it, for twelve months before he votes, and three months of this twelve, his actual residence, home or domicile, must have been in the county prior to the time he votes, or offers to vote, in such county. [Instruction 9.] [Error and exception No. 34.]

The intention to acquire a domicile in the State and county, and the act of acquiring such domicile, must concur and exist for the Constitutional period of time before the right to vote is acquired. A man must vote where his actual home or domicile is. As Mr. Payne, in his work on elections, says: "A person cannot have a domicile for political purposes in one place, and an actual home in another place."

The defendant proposed the following issues:

1. Were any illegal votes cast for Milton E. Teague, for sheriff; if so, how many, and by whom were they cast?

2. Were any illegal votes cast for John Boyer, for sheriff; if so, how many, and by whom were they cast?

His Honor declined to submit defendant's proposed issues. The defendant excepted. [Error and exception No. 17.]

His Honor thereupon submitted the following issues to the jury:

1. Was the relator, John Boyer, duly and legally elected sheriff of Forsyth County, at the election held in November, 1888?

2. Was the defendant, Teague, duly and legally elected sheriff (607) of Forsyth County, at the election held in November, 1888?

[The defendant maintains that these issues are insufficient and assigns the same for error.] [Error and exception, No. 18.]

The return to writ of *certiorari,* ordering that the evidence in relation to the qualification of certain voters be sent up, is as follows:

"On receipt of the *certiorari,* I fixed a time and place, and notified both parties that I was informed by counsel that the only evidence desired by your Honors is such as was adduced on said trial in reference to Thomas Hanes, Frank Fowler, Thomas Lee, George Foy, N. L. Young, Ed. Davis, Creed Hairston, James Brown, Charles Yokely, Bob Moore and William Holmes. I hereby certify that the evidence admitted on the said trial as to said votes was substantially as follows: The poll-books and all the registration books introduced by the plaintiff showing the names of the voters who voted at the several precincts in Forsyth County at the election in November, 1888; said poll books showed that Thomas Hanes voted in Winston, number 1191.

Noah Kimmel testified that he lived in Davidson County at the time of the election, and that Thomas Hanes was a young colored man who

lived with his father, Solomon Hanes, near witness, in Davidson County. About Christmas, 1887, he got into a difficulty and went to Charlotte, and on 4 August, 1888, witness met Thomas Hanes and carried him home in his wagon; that Hanes then lived at his father's until about 29 September, 1888, working on witness' farm, then he left his father's in Davidson County and went off.

J. C. Bessent testified that at the November election he acted as challenger at Winston box for the plaintiff, Boyer, and generally for the Democratic ticket, and H. R. Starbuck acted as Republican challenger.

Witness kept up closely with all the voters, and challenged only
(608) for his side. Thomas Hanes, a young colored man, offered to vote early in the morning, and was challenged by witness. He was a strange man, and did not live in Winston. He returned and was permitted to vote. Witness cannot swear that he saw every name on his ticket, nor does he know that every colored voter, with a few exceptions well known to witness (none of which exceptions mentioned by the witness are embraced in the names in this statement), got their tickets from a certain table where Teague tickets only were handed out, and from Teague's recognized agents, and came down the line within the ropes and voted.

Frank Johnson, witness for the defendant for other purposes, upon cross-examination stated that he handed out Teague tickets all day; that Teague had a table near the head of the line with Teague tickets on it; that colored voters got their tickets, fell into line about three deep and passed down the ropes to the window where the voting was done. Several other witnesses, upon cross-examination by the plaintiff, testified that they had not seen Thomas Hanes, Frank Fowler, Ed. Davis, Thomas Lee or Bob Moore in Winston since the election.

As to Frank Fowler, poll books show that he voted in Winston, number 102.

J. C. Bessent testified that he saw him vote for Teague; that he, Bessent, was town tax collector in Winston, and had been for many years; that he was well acquainted with the people, white and colored; that he knew nearly all the colored people in Winston; made it a special business to keep up with them in order to save taxes. He knew that Frank Fowler voted at the election for Teague. Never saw him in Winston until a few months before the election, and that he was never there before. Never gave in or paid taxes that year in Winston; thinks he came from Virginia. The day following the election, witness saw him buy a railroad ticket to Clarksville, Va. He left that
(609) evening on the train, and has never been in Winston since.

As to Thomas Lee, poll-books show that he voted in Winston, Number 577.

J. C. Bessent testified that he saw him vote for Teague; that he knew him; that he was a young looking negro.

John G. Young, registrar for Winston precinct, testified that Thomas Lee came to him to register; that he was a young looking negro, and, on account of his very youthful appearance, he examined him as to his age. Thomas Lee told witness that he was born in October, 1868; witness told him he was not twenty-one, and refused to register him. Afterwards a party unknown to witness brought him back, and stated, on oath, that he was twenty-one, and witness registered him. His appearance indicated that he was not twenty-one.

As to George Foy, poll-books show that he voted in Winston, number 1046.

A. Stewart testified that he knew George Foy in Rockingham County. Shortly before the election in 1888, witness met George Foy in Winston, and asked him where he lived. Foy said he lived in Rockingham County on the Webster place; that his home was with his father in said county; that he had been working in the factory; that the factory had stopped, but that he was not going home until after the election. After the election he did go to Rockingham County.

George Foy was examined as a witness, and testified that he voted for Teague; that he came from Rockingham County in the summer to work in the factory, and always went back when the factory stopped work. On cross-examination by the defendant, witness stated: "I consider Winston my home and go to Rockingham to see my parents."

As to N. L. Young, the poll-books show that he voted in Winston, No. 584. Being called by plaintiff, Young stated that he came to Winston in the summer of 1887, on a visit; stayed a short time (610) and left; that he was raised in South Carolina, and came to Charlotte, N. C., in January, 1885; that he "pastored around," preaching in Charlotte, Statesville and other places, having no settled home; that in January, 1887, his wife died in Chester, S. C.; at Christmas, 1887, he came to Winston to live; that he remained here, except once in 1888, when he returned to Chester, S. C., to see one of his children, who was sick; that he voted for Teague.

Giles Bason, colored, was introduced as a witness by defendant for some other purpose, and, on cross-examination by plaintiff, stated that he had lived in Winston a long time, and was well acquainted with the colored people in it; that N. L. Young did not come to Winston until the summer of 1888, after electioneering had commenced; that he had not seen him in Winston until about that time, when he first saw him in the church as a preacher.

As to Ed. Davis, the poll-books show that he voted in Winston, No. 219.

Green Williams, chief of police in Danville, Virginia, testified by deposition that he knew Ed. Davis, a colored man; that up to about the first of 1888, he resided in Danville, Virginia, and was often in jail there; that between Christmas, 1887, and the spring of 1888 (witness not being certain as to the exact day), he left Danville; he returned the following fall or winter of 1888, and stated in the presence of witness that he had been over to Winston. Said deposition is sent as part of this statement. No objection was made to the reading the part of said deposition above quoted.

Frank Johnson, upon cross-examination further stated, without objection, in addition to what is set forth elsewhere, that the colored voters got to the polls as soon as they were opened, and they got their tickets from the table where the Teague tickets were distributed,
(611) and filled the ropes back about three deep, crossed close together, for a distance of about one hundred feet, nearly to the outside gate of the court-house square. The registration showed that Ed. Davis was registered as "Ed. Davis, Colored."

The poll-book of Abbott's Creek Township showed that Charles Yokely voted, No. 100. William Clinard testified that he saw Yokely vote for Teague at the election in November, 1888. Landon Charles testified that Charles Yokely's father lived in Davidson County; that in the spring of 1887, Charles Yokely rented land from witness, in Forsyth County; that he came to his home to make a crop, and, while there, married in the summer of 1888. Charles Yokely and his wife moved back to Davidson County and lived with his father; that Yokely did not return to Forsyth County until the latter part of October, 1888, when he rented land for another crop.

Randall Bodenhammer testified that in October, 1888, he rented Charles Yokely a piece of land; Yokely then lived in Davidson County; he rented from me in Forsyth County on 2 October, 1888, and moved over from Davidson between the 10th and 20th; he told me before the election that he had a great mind to register in Forsyth County.

As to Creed Hairston, the Salem poll-books show that he voted, No. 237.

William Reynolds testified that he knew Creed Hairston; he works generally from April till November in Reynolds' factory; he lives in Stokes County and has a house in Walnut Cove, and goes home every winter.

Creed Hairston testified: "I live in Walnut Cove, Stokes County, and have for several years; I came from there this morning; had a house in 1888; sold it this year after my mother died; I work here in summer and board in Salem with my brother. I was raised in Stokes County, and always made that my home." On cross-examination

by defendant, he said that at the time he registered he considered (612) Salem his home, and boarded with a relative in Salem at that time.

As to James Brown, Dr. Kerner testified that he saw James Brown vote at Kernersville precinct for Teague. Witness had been a practicing physician in that township for forty years; never saw James Brown in the precinct until he applied to vote, and has never seen him since the election, and he challenged him on the ground of non-residence. Brown stated that he came from Virginia; that his wife was there, but that he had a letter to show she was dead; he went away and brought a letter postmarked Reidsville, N. C., and the letter was read at the polls and contained a statement that his wife was dead and some one else in jail, and he could return home.

Frank Davis was afterwards called by the defendant and testified that Brown had lived in Kernersville four years; that he worked on the railroad, and since the election was off in the eastern part of this State working on the railroad. On cross-examination witness was unable to state where, in Kernersville, Brown had lived during the four years.

As to Bob Moore, poll-books showed that he voted in Winston, No. 819.

J. C. Bessent testified that Bob Moore was a crippled negro; that just before the election Moore told him that he lived in Stokes County, and paid his taxes there; he had not been seen in Winston since the election. Witness saw him vote for Teague.

John G. Young testified that Bob Moore told him before the election that his home was in Stokes County.

As to William Holmes, Thomas B. Roberts testified that he knew William Holmes, colored; saw him vote in Louisville Township, in the election of 1888, for Teague; that in the spring of 1888, Holmes stayed a week or two in the township, but went away to work on the railroad. A week or two before the election he first moved his family into the township; they remained until after the election and (613) lived half a mile from witness. Shortly after the election they all left, and witness has not seen them since. A few days before the election, witness asked Holmes if he was going to the speaking that day. Holmes said "No"; that he did not care to go, as he could not vote here; that he had to go to Salisbury, where his home was, to vote. Witness further testified that three or four years before the election, Holmes was married in Louisville Township, and moved his wife to Salisbury.

Wherever the words "voted for Teague" are used, the meaning is, that the vote was cast for the defendant at the election in November, 1888, for sheriff of Forsyth County.

The above is the testimony as contended for and argued to the jury by plaintiff. The defendant denied that the witnesses had so testified. Counsel disagreeing as to the statement of the witnesses, the court declined the defendant's twenty-third prayer for instruction, so far as it relates to the voters named in this statement, and left it to the jury to say how the matter was as per written charge. The presiding judge declares the testimony was substantially as herein set forth.

C. B. Watson, J. C. Buxton and R. B. Glenn for plaintiff.
W. S. Ball and L. M. Scott for defendant.

AVERY, J., after stating the facts: The motion made at the February Term, 1889, to compel the plaintiff to file a bill of particulars, rested upon the ground that the second paragraph of the original complaint was not sufficiently definite. The section referred to was as follows:

"2. That the relator John Boyer at said election, as he is in-
(614) formed and believes, received a majority of all the legal votes cast, and was duly elected to fill the said office of sheriff of said county for the said term of two years, but notwithstanding the relator received said majority of the lawful votes cast and was duly elected to said office, the defendant M. E. Teague, against the protest of the relator and against his consent, has been unlawfully inducted into said office, and now unlawfully usurps the office to which the relator was elected and is wrongfully and unlawfully holding the same and receiving the profits and emoluments thereof, which rightfully belong to the relator."

The plaintiff thereupon amended his complaint by substituting in place of said paragraph the following:

"2. That the relator John Boyer, at said election, as he is informed and believes, received a majority of all the legal votes cast, and was duly elected to the office of sheriff of Forsyth County for the said term of two years, but notwithstanding the relator received a majority of the votes cast by legally qualified voters of said county, a large number of votes were cast for the defendant at the various precincts in said county by persons who were not qualified voters in said respective voting precincts and townships, and were received and counted by the poll-holders. Some of said votes were cast by persons who were not residents of the townships and voting precincts wherein they voted; others by persons who were nonresidents of the State; others by minors; others by persons disqualified by crime under the laws of the State; others who were not legally registered; a large majority of which illegal and fraudulent votes were cast in the Winston Township, and those townships adjacent thereto. That the number of votes thus received

and counted against the relator, as the relator is informed and believes, greatly outnumber the majority by which the defendant was declared by the canvassing board to have been elected." (615)

After the amended complaint had been filed, his Honor, Judge Philips, presiding at that term, in the exercise of his discretion, denied the motion requiring the plaintiff to file a bill of particulars. The refusal of the court to compel the filing of a more specific statement of the grounds of relief asked by the relator, gives rise to the first exception, and the second, third and seventh involve substantially the same point.

At October Term, 1889, before Hon. John A. Gilmer, judge presiding, the defendant submitted the following motion, in writing:

"The defendant moves for specifications to be furnished by the plaintiff, to include the following points:

"1. The names of alleged illegal voters relied upon by plaintiff to reduce the defendant's majority.

"2. The precincts in which such alleged illegal votes were cast.

"3. The specific act relied on by the plaintiff in each instance."

Thereupon, his Honor made the following order:

"That the parties furnish to each other bills of particulars, giving the following notices:

"1. The number of illegal votes cast, and for whom cast.

"2. The grounds of illegality of each respective class of illegal votes.

"3. When and where polled."

The defendant excepted to the foregoing order because it did not furnish the full relief demanded. [Error and exception No. 2.]

On 25 November, 1889, the defendant served upon the plaintiff the following notice of motion:

"To the plaintiff: Take notice, that at the next special or regular term of said Superior Court to be held in said county, the defendant will move the court to require the plaintiff to further (616) amend the complaint, as follows:

"1. To allege, specifically and particularly, the ground of complaint against the validity of the election mentioned in the complaint, and against each voter.

"2. To state, particularly, the names and number of persons who, it is alleged, have been counted as voters, and who ought not to have been so counted.

"3. The specific act relied on by the plaintiff in each case, and the name of each voter to be attached, and the precinct in which he voted.

"Such motion will be made unless the plaintiff so amends the complaint and files a copy in the office of the clerk of said court, or a copy

thereof be served upon the defendant, within twenty days after the service of this notice; or, unless the information required by such amendments be furnished to the defendant, in writing, within said twenty days."

A special term of the Superior Court of Forsyth County was appointed by Hon. Daniel G. Fowle, Governor, to be held on 6 January, 1890.

This case was called on Wednesday, 8 January, during the said special term; whereupon, the defendant, pursuant to the last-named notice, moved the court that the plaintiff be required to amend the complaint in accordance with the demand in said notice contained.

The motion of defendant was denied in the following terms:

"The court having declined to grant defendant's motion for an order to amend the complaint, the defendant prayed an appeal and asked that the court stay the trial until said appeal be heard. Declined by the court. Exception by defendant." [Error and exception.]

The general provision of The Code (sec. 259) is, that "the court may, in all cases, order a bill of particulars of the claim of
(617) either party to be furnished." When a complaint contains a statement of facts that constitutes a cause of action, according to the established principles of law, the responsibility rests upon the trial judge, in the exercise of a sound discretion, to determine whether more specific and detailed statements of facts, when demanded by either of the parties to the action, should be required to prevent surprise or prohibited to avoid confusion and prolixity in the trial. *Election Cases,* 65 Penn. State Rep., p. 35; *Tilton v. Beecher,* 59 N. Y., 183. When, therefore, the relator alleged in his complaint that a sufficient number of illegal votes had been cast for the incumbent in Forsyth County, and counted for him in the computation upon which his prima facie right to the office depended, to change the result if the illegal voters had been denied the privilege of exercising the elective franchise, his statement, if proven, would have established his right to the judgment demanded. *Yearby v. Snow,* 107 Penn. St., 183; *State v. Mason,* 14 La. Ann., 505; *Halstead v. Roden,* 27 W. Va., 806. The corrective power of the presiding judge to set aside a verdict for surprise, would have given the defendant additional security if it had actually appeared that he was misled in making his preparation to meet the testimony offered for the relator. We think that when *Judge Gilmer* required the relator to give the aggregate number of illegal votes alleged to have been cast for the defendant, the grounds upon which the charges of illegality were based as to each class, and when the votes were polled, the defendant could

not claim, as of right, a fuller and more definite specification of what the relator expected to prove. Brightley's L. C. E., p. 334; *Wheat v. Roysdale,* 27 Indiana, 201; *ibid.,* 162.

In trying the title to an office which involves the preservation of the purity of elections and the protection of the popular right of suffrage, public policy and intrinsic justice alike forbid that a judge, vested with important discretionary powers, should exercise them in such manner as to permit so grave a question to degenerate into a (618) technical contest as to the correct spelling of the name of an obscure tramp, with a convenient supply of *alias* surnames, or to allow an incumbent to enjoy the fruits of his fraudulent practices, because a relator could not induce an unwilling witness to disclose the true name of an individual who had been one of the instruments used in its perpetration, until the information could be extracted from him on his examination under oath. It is sufficient, where there are no restrictive statutes changing the general principle, that the contestant for an office should notify the contestee in his complaint of the nature of the objections made to the validity of the election, and it then rests with the latter to show the court, on a motion to require more definite information, that he cannot prepare his defense without incurring unnecessary expense, or at all, if certain specifications of the contestant's ground should not be made. *Shields v. Howard,* 16 Ohio St., 184; *Griffin v. Wall,* 32 Ala., 150; *Hadley v. Gutridge,* 58 Indiana, 302; *O'Gormon v. Richter,* 31 Minn., 25. We fail to find the rigid rule, that a contestant of an election in a notice on a pleading should be required to give the contestee the name of every alleged illegal voter, as to whom he proposes to offer proof, approved in any of the states, and it seems now to be enforced only in obedience to the letter of a statute requiring it in some states, as in Missouri. *Kreitz v. Behnesmeyer,* 25 Ill., 141. The question involved in the decision of *Rigsbee v. Durham,* 99 N. C., 341, was very different from that presented in this case. There the plaintiff alleged in general terms that a majority of the qualified voters did not vote for the school, and stated as a reason that the defendant commissioners had improperly stricken from the registration books the names of one hundred and eighty voters, and if those names were restored the number cast in favor of the school would not constitute a majority of the whole registration list. Evidence was heard upon an issue framed as to the legality of striking off said (619) names (see p. 345); and the plaintiff submitted to judgment of nonsuit, because the court held that the testimony offered did not tend to show that any persons whose names were stricken off were legal voters. The judgment below was sustained in this Court. It appears,

therefore, that the judge in that case allowed an issue to be submitted upon a much more vague and indefinite statement than we have in the case before us.

The test laid down in *Skerritt's case* (2 Pars. Pa., 509) was, whether the facts set forth are such that, if true, it would be the duty of the court to vacate the election or declare another person than the one returned to have been duly elected. McCrary on Elec., sec. 402. But it seems that the rule was relaxed by the Supreme Court of that State in later cases. *Gibbons v. Shepard, supra.*

The Code (secs. 1722 to 1730, both inclusive) prescribes the mode of selecting and drawing and the qualifications of jurors. Special provision is made in section 1731 for the drawing of jurors for special terms by the commissioners. But the sheriff is not required to act in any case except where the commissioners neglect to draw the jury, and then the duty devolves (under sec. 1732) upon him, the clerk of the board of commissioners and two justices of the peace. A special term of the court had been called when this case had been at issue for several terms, and perhaps with the trial of it particularly in view. We find the sheriff officiously taking charge of the drawing for that term, and receiving the scrolls as they were drawn by a boy, calling the name without submitting more than two or three to the inspection of any other person, and passing them into a locked box. It was the duty of the commissioners to supervise the taking out of the scrolls and depositing them in the other box. While his Honor did not find, and had no means of knowing, that there was actual fraud on the
(620) part of the defendant, it is plain that, by his improper interference with the duties of others, he had the opportunity and the temptation to perpetrate a fraud upon the relator with but the remotest chance of detection. The fact that one name that ought to have been in box No. 2 was again found in No. 1 strongly suggests some irregularity or tampering with the names by some one. Challenges to the array are exceptions to the whole panel, and are generally founded on a charge of partiality or some default of the sheriff or other officer who summoned them. *S. v. Murph,* Winston (N. C.), 129; 3 Blackst. Com., 359; Abbot's Law Dictionary (challenge). The action of his Honor was founded upon the idea, not that there was, but that there might have been, fraud on the part of the defendant, and that the opportunity was afforded him by officiously intermeddling, when a man who had a proper sense of propriety and wished to avoid the appearance of evil would have refused, if requested, to take any part in the drawing.

When the array had been set aside, the defendant moved the court to have another jury drawn, under the provisions of section 1732, but, so soon as they were drawn, challenged the array, and the court set it

aside also on his motion. The judge then appointed one S., under the provisions of chapter 441, Laws of 1889, which authorizes the appointment of some suitable person by the judge to summon a jury from the bystanders when the sheriff is a party or has an indirect interest in the action to be tried. The Legislature has thus given its sanction to the idea that seemed to have operated upon the judge's mind in first discharging the whole panel.

But it is insisted that the summoning of jurors *de circumstantibus* is a mode of supplementing a jury insufficient in numbers to discharge the business, but that a court has not power, when all summoned as regular jurors under any other provision of the law have been discharged, to create the whole panel by an order for a special (621) venire, unless some statute authorizes that course to be pursued. The direct provisions of the various statutes had been resorted to in vain to procure a jury of good and lawful men to try this cause. *Blackstone,* in his Commentaries (Vol. 3, p. 364), says: "If, by means of challenges or other cause, a sufficient number of unexceptionable jurors doth not appear at the trial, either party may pray a tales. A tales is a supply of such men as are summoned on the first panel in order to make up the deficiency." This rule was founded upon a construction given by the courts to the old English statutes in reference to a tales *de circumstantibus.* But our Code, after giving in detail the methods of drawing jurors, provides, in section 1733, in order "that there may not be a defect of jurors, the sheriff shall, by order of the court, summon from day to day of the bystanders, other jurors, being freeholders within the county where the court is held, to serve on the petit jury, and on any day the court may discharge those who have served the preceding day," etc. If there is not an inherent power in a court, under the common law, to provide for the summoning of a venire in order to avoid a failure to administer the law where the officers, by their dereliction of duty, have failed to select a jury, or by their conduct have made it apparent that there was, or possibly that there might have been, fraud in the selection of the panel returned, the section of The Code last cited (1733) was evidently intended to give the court, by necessary implication, the power to meet any such emergency, by requiring the sheriff (for whom the act of 1889 allows the court, in cases like this, to appoint a substitute) to summon freeholders of the county. Perhaps a different rule might prevail were a judge, through mere caprice, or upon insufficient grounds, to discharge the whole panel before ordering the summoning of tales jurors. Thompson & Merriam on Juries, sec. 81. But here the first panel was set aside for reasons (622) that we hold sufficient, and the second, on motion of the party who seeks to take advantage of the allowance of his own motion, to

adjourn the court and hold the office of which he is the incumbent. The suggestion that the act of 1889 was passed after this action was brought, and that it would be unconstitutional to resort to its provisions in procuring a jury in the trial of preëxisting suits is not supported by reason or authority. The Legislature have the right to alter the remedy, provided it is not destroyed or impaired. The evident object in passing the act of 1889 was to prevent possible fraud, on the part of a sheriff, in the selection of jurors to try an action to which he is a party, or in which he has an interest.

The qualification of an elector under our Constitution depends upon the questions whether he was born in the United States or has been naturalized, is twenty-one years old, has resided in the State twelve months, and in the county in which he proposes to vote ninety days, and shall have registered in the township or voting precinct in which he proposes to vote, according to law. Constitution, Art. V, sec. 1 and 2.

The person must have come into the State a year before the election, or have been domiciled within it for twelve months after forming the purpose to remain, in order to constitute him a resident, and the same intent must be concurrent with the actual occupation of a domicile in the county in order to entitle him to the rights of an elector within its limits. The qualification of one who has a domicile in the State, except where the law makes certain acts conclusive evidence in determining where it is, must often depend solely upon the intent which is known only to him, or upon his age, which often cannot be actually ascertained except from family records, not accessible to others, or from his statements. The lives and fortunes of men are constantly
(623) made to depend upon their declarations, used as evidence of the existence of malice or of fraud, as motives controlling their conduct, and we see no sufficient reason why the declarations of a person and such circumstantial evidence as tends to show his intent in so far as it is material in determining whether he is a qualified voter, should not be heard in the adjudication of his rights as an elector, or in passing upon an issue which involves the question whether he was a qualified voter. The declarations of a voter as to his qualifications, generally, if made at the time of voting, are competent as a part of the *res gestæ,* and if not contemporaneous, but made previously, are admissible, if such declarations are in disparagement of his right as an elector, because they are against his interest, and he is considered as represented by the party for whom his suffrage was cast. Taylor, in his Work on Evidence (Vol. 1, sec. 686), says: "On this ground (because the declarant, though not a party, is interested in the subject-matter of the suit) it has been repeatedly held on the trial of election

petitions that the declarations of voters against their own votes, whether made before or after the votes were given, and even though invalidating their own votes on the ground of their having received bribes, are admissible in evidence, for in a scrutiny each case is considered a separate cause, in which the supporter of the vote under discussion and the voter are parties on one side, and the opposers of the vote are the parties on the other."

The rule as stated generally and, as we think, correctly, by the courts in this country, is, that after first showing that a person voted against a contestant, or offering testimony tending to show that he so voted, he is considered a party in interest as against the latter, and any declaration showing his want of qualification to vote is admissible, like those of a party made against his own interest. But it is held by most of the courts in the United States that such declarations, when made some time after the vote has been cast, are not competent. (624) *Beardstown v. Virginia,* 76 Ill., 34; *ibid.,* 81 Ill., 541; Abbot's Trial Ev., p. 750; *People v. Pearse,* 27 N. Y., 45; Am. Dec., p. 268 *et seq.,* notes; Paine on Elec., sec. 773; *French v. Lighty,* 9 Ind., 478.

The eighth exception shows that the judge below was guided by the principles we have announced. It was as follows:

"The plaintiff proved by a witness that Bethel Smith voted for the defendant at the election in November, 1888. Plaintiff then proved the declarations and acts of Bethel Smith, tending to prove that his vote was illegal, and that he was not a duly qualified voter, such acts and declarations being made at and before the time of voting. Objected to by the defendant. The court overruled the objection and stated that it would admit the declarations of an alleged illegal voter made at the time, or before voting, but that the plaintiff must prove, by other legal evidence, that such voter voted for the defendant, and the court would exclude any declarations offered by the plaintiff made by a voter after the election. Exception by defendant. [Error and exception No. 7.]

The ninth and tenth exceptions are substantially the same as the eighth. Counsel, in discussing these exceptions, frequently referred to the competency of declarations as to intent, bearing upon the question of domicile. Declarations accompanying and explaining any act tending to throw light upon the question where the domicile of the person making it was, and what his intent as to residence at a particular time when it was drawn in question, are admissible as explanatory of the act, and it is generally conceded now, that where such declarations come within the rule already stated, as invalidating the right of an elector who makes them, to vote, they are admissible, even if not contemporaneous with, and explanatory of, the act of voting, but made previously. 2 Whar. Ev., sec. 938; Jacob's Law of Domicile, sec. (625)

451; 1 Greenleaf Ev., sec. 108 and notes *(a)* and *(c)*; 1 Wharton's Ev., secs. 258 to 268; Brightly Elec., p. 113; Abbott's L. Ev., p. 107, and notes.

An honest elector who has observed the law enjoys the privilege, which is entirely a personal one, of refusing to disclose, even under oath as a witness, for whom he voted. This rule grows out of the secret ballot system, generally adopted in this country for the protection of the voter and the preservation of purity and independence in the exercise of this most important franchise. If an illegal voter can claim the privilege at all, it is because he finds shelter under the very different principle that he cannot be compelled to criminate himself. As between contestants for office, however, the testimony of the elector, if pertinent and relevant, is always admissible. Neither contestant nor contestee are called upon to contend for the rights of a witness who does not demand protection, and, if compelled to testify against his will, it does not follow that testimony, competent without objection on his part, should not go to the jury for what it may be worth. *People v. Pearse, supra;* McCrary on Elec., 457, 458, 459. It does not appear, in fact, that the witness, Winchester, made any objection whatever to answering the question. We are not to be understood as disapproving of the ruling of the judge upon the abstract question. It seems there are good reasons for sustaining the rule that the judge who tries a case may, in the exercise of his discretion, determine certainly, as between contestant and contestee, if there is any evidence at all, how much testimony, tending to show the illegality of a particular vote, is sufficient as a foundation for compelling the voter to tell for whom he voted. The judge passes upon the preliminary evidence to show loss of papers or establish a conspiracy before admitting proof of contents in the
(626) one case, and declarations of alleged conspirators in the other, and his decision is not reviewable in the appellate court.

Where it does not appear from the direct testimony of the voter, or any other person, for what candidate he voted, there is no reason why circumstantial evidence should not be held competent as tending to establish the fact, leaving the court to pass upon its sufficiency at any stage of its development as a foundation for compelling him to testify, and allowing the jury to determine, upon all the evidence, in whose column of voters he should be counted. The fact that a certain person was engaged in handing out tickets for the defendant, Teague, and for no other person, and that he gave tickets to one Wicker and "voted him," is competent, and tends to show for whom Wicker voted. The courts would not be capable of passing upon the relevancy of such circumstantial testimony, when offered, if they did not take notice of the not very commendable practice of supplying voters with tickets and

leading them to the polls, which the witness described as "voting him." The guidance of reason and common sense must be ignored, as a basis of the rules of evidence, if Lowery's conduct were not held to be circumstantial testimony tending to show how Wicker voted. McCrary on Elec., sec. 458; Paine on Elec., sec. 768; 6 Am. and Eng. Ency. of Law, p. 430, and notes.

It was competent to show that a man who voted in Bethania Township in Forsyth County, under the name of Ed. Conrad, had been a resident of Winston in the spring before the election, had been indicted under the name of Ed. Jones, and had been convicted and sentenced to imprisonment for ninety days; that he had escaped jail, and had not lived in Bethania Township for two or three years before the election, but had lived in Winston Township for that length of time.

The identity of the man being established, the record of his indictment and conviction was admissible, not to disqualify him for crime, but to prove the fraudulent voting. We think that a witness is competent to testify to a fact of the truth of which he says that (627) he feels "reasonably certain." That was the best impression of an eye-witness, and it was not necessary that his recollection should be so vivid as to exclude all doubt. 1 Greenleaf Ev., 440.

Exceptions 15 and 16.—Exceptions numbered fifteen and sixteen are stated in the record as follows:

The defendant next proceeded to prove by Robert Hall and John Watkins, and also by fifty other witnesses, that they were present at the election at Winston precinct, and were duly registered; that they were in the line of voters and tendered ballots with the name of Milton E. Teague thereon for sheriff, to the judges of election; that these votes were challenged by challengers at the polls; that the chief of police, Maroney, when they were challenged, told them to go and get their witnesses and return at 2 o'clock, the time appointed to hear challenges; that said Maroney was in charge of the dispositions to preserve order, by authority of all the judges of election; that said voters returned at 2 o'clock, but, owing to the large number of voters, said voters had no opportunity during the day to have their challenges tried, and were thereby prevented from casting their votes and were left in the line when the polls closed.

The court stated that it would exclude testimony as to how the voter, or witness, offered to vote, unless they actually voted. Defendant excepted. [Error and exception, No. 15.]

The defendant then stated, under the ruling of the court, that he would not actually offer such testimony, but it is considered by the court as offered. The defendant excepted to the ruling. [Error and exception, No. 16.]

Judge Cooley says (Const. Lim., marg., p. 620 and 621): "So it is held that an exclusion of legal votes—not fraudulently, but through error in judgment—will not defeat an election, notwithstanding (628) the error in such case is one which there was no mode of correcting, even by the aid of the courts, since it cannot be known with certainty afterwards how the excluded electors would have voted, and it would obviously be dangerous to receive and rely upon their subsequent statements as to their intentions, after it is ascertained precisely what effect their votes would have upon the result." *Hart v. Harney,* 19 Howard (N. Y.) Pr. Rep., 252; *Webster v. Byrnes,* 34 Cal., 273; *S. v. Judge,* 13 Ala., 805; *Krietz v. Behrensmeyer,* 125 Ill., 141. The law, as stated by *Judge Cooley,* seems to be in accord with the decisions of the American courts. Some of our legislative bodies, possibly in the heat of partisan excitement, have acted upon a different principle. We are the better satisfied as to the propriety and justice of applying the rule in this case from a review of the other testimony, as it appears in the following extract taken from the case on appeal.

Prior to the introduction of Robert Hall and John Watkins, the defendant had introduced H. X. Dwire, who testified as follows:

That he and J. S. White were the Republican judges of election at the Winston box, and C. A. Hall and B. J. Shepherd were the Democratic judges; that the polls were opened promptly at 7 o'clock in the morning and voting immediately began; that the votes were received and deposited as rapidly as possible from that time until sunset, without intermission for dinner; that for an hour or two in the morning they tried each challenge as it was made by the respective sides; that the judges, upon consultation, unanimously decided that it was better to stand aside the challenged voters, and notified them to return at 2 o'clock with their witnesses, rather than to delay the whole line to send for witnesses; that under their direction the chief of police instructed the challenged voters, when challenged, to pass out and return with their witnesses, as aforesaid; that it was apparent, from the largely (629) increased registration, unless this was done, that a large number of the qualified voters would not have time to vote, and this was done solely to expedite the voting, and as soon as the challenged voters returned with their witnesses their cases were heard as rapidly as possible, and that there were a number of voters in line when the polls closed, and that there were 1,206 votes cast in the Winston precinct, where all this occurred.

The defendant requested the judge to instruct the jury that there was not sufficient testimony to justify them in finding that certain persons mentioned in the prayer were illegal voters. The charge of the court upon this point was as follows:

"The request is made by the defendant that the court charge you that there is no evidence, or not sufficient evidence, to warrant you in deducting from Teague's column the votes of Thomas Hanes, Frank Fowler, Thomas Lee, George Foy, N. L. Young, Ed. Davis, Charles Yokely, Creed Hairston, James Brown, Bob Moore and William Holmes.

"Where there is no evidence tending to prove an issue, it is generally the duty of the court so to declare; but a separate issue has not been framed or submitted as to each vote. The evidence as to each vote is simply so much evidence bearing upon the only two issues submitted to you. The plaintiff insists that there is evidence to show said votes illegal. The court declines to charge you that there is, or is not, evidence showing the illegality of the above named votes. Your combined recollections are better than the court's. You have taken, the court is happy to observe, very copious notes of the testimony, and the court leaves it to you to determine whether there is any evidence, and, if so, whether it is sufficient to convince you, by a clear preponderance, that the above named votes are illegal, bearing in mind all the rules of law laid down by the court."

The refusal to give the instruction asked, and the substitution (630) of the foregoing, were assigned as error in the twenty-second and thirty-third exceptions.

The testimony that the voter, Hanes, got his tickets at a table where "Teague tickets" only were distributed, and from the known agent of the defendant, Teague, and "came down the line within the ropes and voted," was sufficient to be submitted to the jury as evidence that he voted for the defendant. The reasons and authorities upon which we reach this conclusion have already been given in the discussion of the exception growing out of the testimony of Winchester.

Thomas Lee, another of the eleven mentioned in the prayer for instruction, told John G. Young, the registrar, when first examined, that he was born in October, 1868, and was, therefore, only twenty years old. It is true that a person unknown to the registrar, came back with Lee and swore that he was twenty-one years old. We think that his statement as to the time of his birth, was just such a declaration, as we have already held in this case, to be admissible as to age. Bob Moore and William Holmes, if the testimony of the witnesses as to their respective declarations is to be believed, were residents, the one of Stokes and the other of Rowan County.

The testimony of N. L. Young and that of Giles Bason are conflicting as to the time when the former came to Winston. According to his own testimony he had no settled home from the time he came from South Carolina in 1885, till his wife died in South Carolina in

January, 1887. He testifies that he came to Winston to live in January, 1887, and also, to what is inconsistent with that statement, that he came to Winston on a visit in the summer of 1887, when the other witness says he first removed to that place in the summer of 1888, after electioneering commenced. If Young, being a resident of South Carolina, came to North Carolina and "pastored around" (to use his
(631) own expression), revisiting his old home occasionally, and having, as described, no "settled home," which we construe to mean no fixed purpose of remaining at any place to which he went till he "came to Winston to live"; then until that time he was not a resident of any county in North Carolina, nor a qualified voter, until he had remained within the State twelve months after coming *animo manendi.*

Having instructed the jury very fully, clearly and correctly as to what were the qualifications essential to confer the right of suffrage, we think that the judge properly left the jury to determine, in view of the fact that Young had contradicted himself in a material portion of his testimony, and was also contradicted by another witness, whether he was a qualified voter under the rules laid down by him.

There was testimony tending directly to show that Ed. Davis resided in Danville, Virginia, until June, 1888, after which time he could not have acquired the right of a citizen to vote by residence in this State.

Creed Hairston's testimony tended to show that he was a resident of Stokes County, and William Reynolds stated explicitly that Hairston lived in Stokes County. The testimony of the witnesses, Charles and Bodenheimmer, if believed, would establish the fact that Charles Yokely had resided in Forsyth County only about one month before the election.

Mr. Bessent, the tax collector in Winston, who made it his business to look up every resident of Winston, testifies that Frank Fowler was never there till a few months before the election and never paid tax there; that the witness saw him buy a ticket for Clarksville, Virginia, on the day following the election, and that he had never been at Winston since. We think that this testimony was properly submitted to the jury, to determine whether the voter was qualified under the general instruction given by the court. The jury were allowed, properly, to say whether George Foy was a resident of Forsyth County.
(632) He left the home of his parents in Rockingham, where he had certainly become a resident, every summer, to work in the tobacco factories, and left when the season was over. The fact that he stated that he considered Winston his home did not settle the question of law. The jury were at liberty to conclude, from his own statement, that he had never abandoned, at any time, the idea of returning to his

father's house when the season was over, and had never lost his right to vote in Rockingham County.

James Brown was challenged as a nonresident by Dr. Kerner, and then admitted that he came originally from Virginia, leaving his wife there, but in order to fix his residence in North Carolina, went off and returned with a letter postmarked "Kernersville," where he was then proposing to vote, and purporting to announce that his wife was dead and another person in jail, and he could come home. Dr. Kerner testified that he had practiced medicine in Kernersville Township for forty years, and had never seen Brown till he came to the polls, and had never seen him since. It is true that another witness testified that Brown had been a resident of the township for many years, but was then working on a railroad in the eastern part of the State; but his evidence, if Dr. Kerner was believed, was in direct conflict with Brown's own statement and letter. It was proper that the jury should have been left to settle the question of Brown's eligibility as an elector under the law as explained to them.

It is in vain to attempt to protect any community, where there is a demand for laborers in manufacturing establishments, on railroads in process of construction, and where an increased number are needed in the fall season, when the crops are being gathered, against an influx of tramps imported in the excitement of a canvass for office, unless juries are allowed to consider every circumstance that tends to show fraudulent practices by which residents of other counties or states, or residents of this State who have not yet acquired the (633) elective franchise, are allowed to defeat the will of a majority of the qualified voters, just as it is competent to admit every circumstance tending to prove or disprove the allegation that the execution of a deed was procured by fraud. The presumption is in favor of the validity of a deed executed with all of the forms of law, but it can be rebutted by proving fraud to the satisfaction of a jury. So, when an elector is allowed to deposit his ballot, the burden is on one who questions its validity to show, by a preponderance of testimony, the truth of such facts or circumstances as are relied upon to establish the disqualification. His Honor's instruction was, in this respect, therefore, correct.

The charge given upon this subject was properly substituted for that asked, and upon the refusal to give which, exception nineteen is based.

The defendant does not contend that the court could not proceed to judgment upon the issues submitted and the responses to them; nor is it insisted that the defendant has lost the opportunity, on account of the form of the issues, to present to the court below, and on appeal

for review here, any view of the law applicable to the evidence. Subject to these two objections, the form and number of the issues that arise out of the pleadings must be determined by the judge who tries the case in the exercise of a sound discretion. *Emry v. R. R.*, 102 N. C., 224; *McAdoo v. R. R.*, 105 N. C., 140.

We think that the judge correctly interpreted and explained the law requiring a voter to procure a certificate when he removes from one township to another. The Constitution (Art. VI, sec. 2) contemplated the enactment of registration laws, passed with a view to prevent fraud, and the disqualification of even bona fide residents or citizens who refuse or neglect to comply with reasonable requirements intended for the purpose mentioned.

(634) We concur with the court below in the construction given to the registration law—that any registration that takes place on the day of election is invalid and illegal, unless the voter becomes of age on that day, or shows the judges of election that, for any other good reason (as to which the judges of election are to determine), he has become entitled to vote.

If the registrar receives a certificate of removal outside of the township for which he is acting, administers the proper oath to the voter and enters his name on the registration book after his return home, though he did not have the said book with him, the registration is valid. His Honor did not err in instructing the jury that such was the proper construction of section 2681 of The Code.

We do not deem it necessary to discuss at length the instruction that gave rise to exception No. 31. It needs no argument, in view of the interpretation we have given to the Constitution (Art. VI, secs. 1 and 2) and the registration laws, enacted in pursuance of its provisions to prove that one whose true residence is in one township is not a qualified voter of another, where, after escaping from prison, he is hiding as a fugitive from justice.

There is abundant evidence of patience, fairness, learning and ability in the conduct of the trial and exposition of the law by the judge below, and upon a careful review of all the exceptions to his rulings and his charge, we find no error of which the defendant can justly complain.

Judgment affirmed.

Cited: Braswell v. Johnston, 108 N. C., 152; *S. v. Sharp,* 110 N. C., 608; *Merrill v. Whitmire, ibid.,* 369; *Bass v. Nav. Co.,* 111 N. C., 456; *S. v. Fertilizer Co., ibid.,* 661; *Blackwell v. R. R., ibid.,* 153; *Vaughan v. Parker,* 112 N. C., 100; *Redmond v. Mullenax,* 113 N. C., 510; *Fulton v. Roberts, ibid.,* 129; *Bank v. Bridgers,* 114 N. C., 107; *Sher-*

rill v. Tel. Co., 116 N. C., 654; *Claybrook v. Comrs.*, 117 N. C., 460; *S. v. Moore*, 120 N. C., 571; *Tucker v. Satterthwaite, ibid.*, 122; *Quinn v. Lattimore, ibid.*, 432; *Moore v. Guano Co.*, 130 N. C., 234, 236, 237; *S. v. Morgan*, 133 N. C., 745; *In re Briggs*, 135 N. C., 146; *S. v. Brittain*, 143 N. C., 669; *Barnett v. Midgett*, 151 N. C., 3; *Jenkins v. Bd. of Elections*, 180 N. C., 172; *Groves v. Comrs., ibid.*, 570; *S. v. Jackson*, 183 N. C., 701; *S. v. Mallard*, 184 N. C., 670.

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(635)

THE STATE v. JOHN POWELL.

Indictment—Rape, Assault With Intent to Commit—Evidence—Judge's Charge—Comments of Counsel.

1. An indictment for an assault with intent to commit rape, which charged that the defendant "feloniously did make an assault, and her, the said S., did then and there beat, wound and ill-treat, with intent her, the said S., then and there feloniously and unlawfully carnally to know and abuse," is fatally defective, because it omits the essential allegation that the assault was made with intent to know carnally the prosecutrix *forcibly and against her will.*

2. Where testimony is introduced for the purpose of corroborating a witness, it is competent for that purpose only, and it is the duty of the court to instruct the jury that they should not consider it in any other view; but where the case on appeal discloses no failure on the part of the court to perform this duty, it will be presumed that the proper instructions were given.

3. Objectionable comments of counsel to the jury will not be considered on appeal, unless they were excepted to at the time, or the court was requested to instruct the jury in respect to them.

THIS was an indictment for assault with intent to commit rape on one Jessie Shines, a colored girl of about fourteen years of age, tried before *MacRae, J.*, at Spring Term, 1889, of HALIFAX Superior Court.

The following is a copy of the indictment:

"The jurors for the State, upon their oaths present: That John Powell, late of the county of Halifax, on 9 December, in the year of our Lord one thousand eight hundred and eighty-eight, did, with force and arms, at and in the county aforesaid, in and upon one Jessie Shines, in the peace of God and the State, then and there being, feloniously did make an assault, and her, the said Jessie Shines, then and there did beat, wound and ill-treat, with intent her, the said Jessie Shines, feloni-

ously and unlawfully carnally to know and abuse, against the
(636) form of the statute in such case made and provided, and against the peace and dignity of the State."

Jessie Shines, the prosecutrix, testified as follows:

"Mother sent me down on the creek after tooth-brushes; defendant asked me what I came for; I said mother's tooth-brushes; he jumped up and threw me down; he told me if I hallooed he would choke me to death, and put his hand over my mouth so I could not halloo; I did all I could to get away, and I could not; my brother walked down; Powell jumped up and ran behind a pine, and told my brother not to tell; he pulled up my clothes and got on me, unbuttoned his pants and just tried to do all he could to me; it was in the woods about one hundred yards from the house; defendant had never treated me that way before; I had never had anything to do with him."

Arthur Shines testified: "When I went down there defendant was on top of my sister, and he jumped off and got behind a pine and told me not to tell, and I came along back to the house and told it. She was trying to get up. He had his hand on her neck and over her mouth, his gallowses off."

Laura Shines, who was next examined on behalf of the State, said: "I sent her (prosecutrix) down to the creek to get me tooth-brushes. I was thinking she might stay too long, and I said to Arthur to go down on the creek and tell his sister to hurry on with the tooth-brushes. He came back quickly and said: 'Mother, Mr. John Powell had my sister down and was on top of her, and she was trying to get up, with his hand over her mouth." [Defendant objected to the testimony of this witness as to what was said to her by the witness, Arthur. Objection overruled, and defendant excepted.] "When she came back to the house and told me what he had done, I said: 'What makes you puff and blow so? She said: 'Mother, Mr. Johnny Powell has done me so
bad." [Objected to by defendant, and excepted.] "She was
(637) fourteen years old on 14 September, 1888. She told me that he threw her down as she went to break the tooth-brushes; pulled her clothes up and got on top of her, and he done all he could to her." Defendant objected. Objection overruled. Defendant excepted.

John Powell, the defendant, being examined, said: "It ain't true. She was perfectly willing. She told me to come Saturday night before, and where to come. She had been there one half-hour, or an hour, before her brother came. I had had to do with her a few times before. She was perfectly willing."

The solicitor for the State, in his argument to the jury, said: "If the color of the parties were reversed, no doubt the jury would neither have the pleasure, nor displeasure, of trying the defendant. This thing

of outraging innocent girls, white or black, must be stopped by the courts, or Judge Lynch will stalk through the land unmolested."

To this remark there was no objection made on the part of the defendant's counsel, until after verdict, when, on motion for a new trial, it was set up as one of the grounds.

Verdict, guilty. Motion for a new trial. Motion refused.

Judgment, that the defendant be confined in the State prison for five years.

Appeal by defendant.

The Attorney-General for the State.
J. M. Mullen, W. H. Day and R. O. Burton for defendant.

SHEPHERD, J. 1. The testimony of Laura Shines was admissible for the purpose of corroborating the prosecutrix and her brother, both of whom had been previously examined. It was, however, competent only for that purpose, and it was the duty of the court to instruct the jury that it was in this view only that they could consider it. *Burton v. R. R.*, 84 N. C., 192; *S. v. Ballard,* 79 N. C., 627. (638)

There is nothing in the record to show that his Honor failed to perform this duty, and we cannot assume that he did not give the proper instructions. It is well settled that when a party complains of error, it is his duty to make it appear to the court. Every presumption is in favor of the correctness and regularity of judicial proceedings. The charge was not excepted to, and is therefore not set out in the record. There is absolutely nothing to show what his Honor did or did not charge.

The exceptions as to the admission of testimony are overruled.

2. The exception to the remarks of the solicitor, in his address to the jury, is also untenable. The remarks were not objected to, nor was the court requested to give any instruction in regard to them. *S. v. Suggs,* 89 N. C., 527.

3. The defendant moves in arrest of judgment, because the indictment does not sufficiently charge an assault with intent to commit rape. The indictment charges the intent as follows: "With intent her, the said Jessie Shines, then and there feloniously and unlawfully carnally to know and abuse."

We think it clear, in view of our authorities, that the indictment is defective and cannot be sustained, even under the liberal rules of construction contained in The Code, sec. 1183.

In *S. v. Jim,* 1 Dev., 142, the bill charged that the assault was with intent to "ravish and carnally know," yet the Court held that the omission of the words "forcibly and against the will" was fatal, and

that the words "feloniously ravished" would not supply the defect. This ruling is upheld in *S. v. Johnson,* 67 N. C., 55, where it is said by *Reade, J.,* "that there is no doubt that the indictment must charge the act to be done forcibly, . . . and although 'ravished' (639) would seem to imply force, yet it is necessary to charge force expressly in some appropriate language." In *S. v. Smith,* 12 Ohio, 466, the indictment was very similar to the one before us. It charged "that the defendant with force and arms, and upon one Desire Franks, did unlawfully and feloniously make an assault with intent unlawfully and feloniously to carnally know and abuse the said Desire Franks," etc. The Court said that "it is not averred in either court that the assault was made with the intent to have carnal knowledge of said Desire Franks, forcibly and against her will, nor are there any other words of equivalent import employed. For aught that is alleged, she may have consented to all that was done or attempted by the accused, and such must be the construction of the indictment in the absence of such averment." In our case there is a total absence of any words indicating that the intent was to be executed violently or against the will of the prosecutrix.

Considering the authorities, we are constrained to hold that the assault, with intent to commit rape, is not properly charged, and that the judgment should be arrested.

Judgment arrested.

Cited: Southerland v. R. R., ante, 105, 106; *S. v. Oxendine,* 107 N. C., 785, 788; *Hudson v. Jordan,* 108 N. C., 12; *S. v. Brabham, ibid.,* 796; *Byrd v. Hudson,* 113 N. C., 211, 212; *Burnett v. R. R.,* 120 N. C., 518; *S. v. Barnes,* 122 N. C., 1037; *S. v. Peak,* 130 N. C., 715; *Harrison v. Garrett,* 132 N. C., 174; *S. v. Marsh, ibid.,* 1102; *S. v. Tyson,* 133 N. C., 695; *S. v. Parker,* 134 N. C., 215; *Tise v. Thomasville,* 151 N. C., 283; *Muse v. Motor Co.,* 175 N. C., 469; *S. v. Steele,* 190 N. C., 509.

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*THE STATE v. PRICEY ARMISTEAD ET AL.

Rescue—Resistance to Officer—Special Constable.

1. When a justice of the peace (under The Code, sec. 645), in writing, appoints a "special constable," without words restricting the authority, this confers a general power to serve all processes and perform all the duties in regard to the particular case which a regular constable could, if present.

*Head-notes by CLARK, J.

2. When a prisoner legally sentenced is placed in charge of a special officer to convey to jail, the legality of his custody by the officer depends upon the validity of the special deputation of the officer, and not upon the sufficiency of the *mittimus*, which is to terminate his duties.

3. It is a criminal offense to take, by force, from the custody of an officer a prisoner legally committed to his charge to convey to jail, and it is no defense that the *mittimus* does not comply, in all respects, with the requirements of The Code, sec. 1238.

THIS was an indictment for assaulting an officer and rescuing (640) a prisoner from his custody, tried before *Bynum, J.*, at Fall Term, 1889, of BERTIE Superior Court.

One Allen had been arrested, for a criminal offense, upon a warrant duly issued, and was brought for trial before a justice of the peace. Upon the warrant the justice wrote:

"J. W. Freeman is hereby appointed special constable.
(Signed) E. H. WALKER, J. P." [Seal.]

On the trial, the justice found Allen guilty, and sentenced him to ten days' imprisonment in the county jail, and directed the special constable to take him to jail.

Freeman testified that he was specially deputized as constable to serve the warrant and to convey prisoner to jail.

The justice gave him the following *mittimus:*

"NORTH CAROLINA,—Bertie County.
Mittimus.

To the Common Jailer of said County: You are hereby commanded to take the body of Abram Allen, and him safely keep in the common jail of your county until discharged according to law.

This 2 February, 1889.

(Signed) E. H. WALKER, J. P.
MILES BAGLEY."

The defendant excepted to this evidence, upon the ground that (641) the *mittimus* did not conform to the requirements of The Code, sec. 1238. One of the justices who tried the case testified that the judgment, as originally endorsed on the warrant, sentenced Allen to be "confined in the county jail for ten ....., and pay costs," but that the sentence, as pronounced at the trial, was for "ten days," the word "days" having been inadvertently left out. The warrant and judgment were in evidence, and the judgment had been amended by the justice to read "ten days." While said Freeman was conveying the

prisoner (Allen) to jail, the three defendants pulled said prisoner out of the buggy in which Freeman was carrying him to jail, cut the rope with which he was tied, and set him at liberty. The defendants, it seems, introduced no testimony, but they asked the court to instruct the jury to acquit them upon the evidence, for the reason that it did not appear that Abram Allen was lawfully in custody of said Freeman. The court declined to give this instruction, and the defendants again excepted.

Verdict of guilty. Judgment and appeal.

Attorney-General for the State.
R. B. Peebles for defendants.

CLARK, J. The justice of the peace is the sole judge of the "extraordinary cases" in which he shall exercise the power of appointing a special constable under authority of The Code, sec. 645. *S. v. Dula,* 100 N. C., 423. The present case is materially different from *S. v. Dean,* 3 Jones, 393, which was relied on by the defendants. In that case the appointment was, "I depute E. S. Dean to execute the within warrant." The deputation, therefore, expired when the warrant was served, and the subsequent *parol* order to execute the *mittimus* was held invalid. The court put their decision upon the ground that the warrant, having been returned, "the deputation had expired," and Dean had no longer any authority to act. They say that the justice should have deputed the officer in writing to execute the *mittimus,* and not have appointed Dean by parol. That if deputed by parol, Dean, in case of resistance, could not show his authority to call on others to assist him in executing the *mittimus* entrusted to him. In the present case the deputation is not limited to serving the warrant. The words are, "J. W. Freeman is hereby appointed special constable." This authorizes the service of all other processes in the case, as much as it does the service of the warrant, and puts the appointee, as to the case in which it is made, in the position *pro hac vice* that a regular constable would have held, clothed with the same powers and subject to the same liabilities. The same emergency that called for his appointment in order to serve the warrant would be likely to exist throughout the trial and until the prisoner should be lodged in jail, if convicted and sentenced. Indeed, Freeman testified that the deputation was given him to execute the *mittimus* as well as to serve the warrant. There is no express restriction on the special deputation, and none is implied, except that it must be limited to the case in which it was given. *S. v. Dean* also differs from this case, in that it was a direct proceeding by the State to subject the officer (Dean) to punishment for an escape, and it was held

(642)

that, as he was expressly deputized to serve the warrant only, he could not be held liable for failure to perform the further duty of carrying the prisoner to jail, which could not be devolved on him by parol. That case is not authority that the validity of an acting officer's power to execute the legal sentence of a court can be tested in this collateral way by third parties, violently and by force, taking a prisoner from his custody.

The other exception advanced is, that the *mittimus* itself is insufficient, under The Code, sec. 1238. It is defective in many respects. The jailer, it may be, would have been authorized to refuse the prisoner until a fuller and more perfect *mittimus* was sent. The (643) defendant certainly, if he chose, could have inquired into the legality of his detention in jail under it by a writ of *habeas corpus*. The latter course, in this particular instance, would have availed little, however, as the judge, upon production of the justice's judgment, must have remanded the prisoner. So far from Allen being sent to jail by parol, the sentence and the appointment of the officer to execute it are both in writing. The instruction to the officer to execute the recorded sentence was oral, and this we see done every day in the Superior Courts. Whether the *mittimus* was such as authorized the jailer to receive the prisoner and relieve the special officer of further responsibility, it is not material to consider here. Freeman was a duly appointed officer, charged by order of the court with the duty of taking to jail a prisoner legally sentenced thereto. Like any other officer, under such circumstances, if the *mittimus* were defective, he was responsible for the safekeeping of Allen till relieved by the jailer, or by further order of the court amending the *mittimus*, or otherwise. Had he wilfully or negligently permitted Allen to escape while in his charge he would have been criminally liable. *S. v. Garrell*, 82 N. C., 580. And any one forcibly and violently taking him out of the custody of such special officer is liable for an escape. Even were this not so, the defendants are liable, under this indictment, for the assault. They had no right to take the prisoner from Freeman in so violent and forcible a manner. If their purpose was lawful and sincere, they should have notified Freeman firmly, but gently, of their purpose, so as to show an intention to vindicate the law and not to violate it, and to show a peaceable and not a hostile intent. They should not have proceeded at once to such violence. *S. v. Hedrick*, 95 N. C., 624. It was not necessary that Freeman should have exhibited his special authority to the prisoner himself, *unless demanded*. *S. v. Dula*, 100 N. C., 423; *S. v. Curtis*, (644) 1 Hay., 471; *S. v. Garrett*, 1 Winst., 144. As to third parties, we know of no right they have to stop an officer in charge of a prisoner

and demand his authority. There was a legal way to test the lawfulness of his authority without resort to force.

In the above cited case *(S. v. Dean)* the *mittimus* was as defective as here, but the court place their decision solely on the "expiration of the deputation" to the officer. No point was made in the argument here, nor was any exception taken below, as to the justice's power to amend the judgment by adding the word "days," inadvertently omitted.

His power to do so was clear. Indeed, no objection was raised as to the validity of the sentence imposed on Allen. That could make no difference to defendants, for its legality could not be questioned in this way. *S. v. Garrell,* 82 N. C., 580.

Upon the facts, about which there is no controversy, it appears that while Allen was in the custody of a lawfully appointed special constable, and was being carried to jail under sentence from a court of competent jurisdiction, the defendants, in a high-handed manner, took the prisoner forcibly from the custody of the law and set him at liberty, without making any show or claim of right. We think there is

No error.

Cited: S. v. Black, 109 N. C., 859; *S. v. Rollins,* 113 N. C., 733; *In re Watson,* 157 N. C., 357.

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(645)

*THE STATE v. JESSE BROWN.

Murder—Form of Indictment.

1. The form of indictment for murder prescribed by chapter 58, Acts of 1887, is valid. *S. v. Moore,* 104 N. C., 743, cited and affirmed.

2. Where no exceptions are made below, and no error is apparent upon the record, the judgment will be affirmed.

THE defendant was indicted for murder and tried before *Boykin, J.,* at November Term, 1889, of the Superior Court of CRAVEN County, and, upon conviction and judgment, appealed to this Court.

Attorney-General for State.
No counsel for defendant.

CLARK, J. There is no statement of case on appeal, no assignment of error, and, upon a careful inspection of the record, no error appears.

*Head-notes by CLARK, J.

The bill of indictment is substantially in the form authorized by chapter 58, Acts of 1887, albeit it contains some expressions not required by it, and which are mere surplusage. The validity of that act, and the sufficiency of an indictment drawn in accordance with it, were sustained by this Court in *S. v. Moore,* 104 N. C., 743. We cite that case and affirm it as to this point.

No error.

Cited: S. v. Arnold, 107 N. C., 864; *S. v. Williams,* 117 N. C., 754; *S. v. Southerland,* 178 N. C., 678.

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(646)

THE STATE v. J. D. WILLIAMS.

Landlord and Tenant—Removing Crops—Intent.

1. Where a tenant without the consent of, or notice to, his landlord, and before satisfying the latter's liens, removed a portion of the crop from the land upon which it was produced and stored it in a building upon his (the tenant's) own land: *Held,* that he was guilty of unlawfully removing crops, notwithstanding he made the removal for the purpose of sheltering the crop, and kept it separate from others. The intent with which the removal was made is not an essential element.

2. A tenant may, in good faith, for the purpose of preserving the crop, sever it from the land and remove it to a place of security *upon the land* upon which it was produced, without notice to his landlord.

CRIMINAL ACTION, tried at Spring Term, 1890, of WILSON Superior Court, *Armfield, J.,* presiding.

The defendant is indicted as tenant of the prosecutor for removing part of the crop from the land in violation of the statute (The Code, sec. 1759). He pleaded not guilty, and on the trial testified in his own behalf as follows: "The contract between the prosecutor and myself was for fifty acres of land, ten in corn, forty in cotton, to be cultivated by me on halves. Nothing was said as to how the crop was to be divided. We picked out 202 pounds of cotton and carried it to the gin-house and kept it to itself. The prosecutor then notified me not to move any more until I paid my store account. I got the money and offered to pay him all but $7.50, which I refused to pay. There was no house on the rented premises to store the cotton in. I moved one load of the cotton after I had picked it out off the premises to my own gin-house without notice to the landlord. I moved it off for the purpose of sheltering it until it

could be divided, and kept it separate from the other cotton. My purpose in moving it was not to deprive the landlord of his rent.
(647) The landlord took the cotton under claim and delivery, and got his rent out of it."

The court instructed the jury that if the evidence of the defendant thus given was true, then he was guilty. The defendant excepted.

There was a verdict of guilty, and judgment thereupon, from which he appealed.

Attorney-General for the State.
Jacob Battle, J. B. Batchelor and John Devereux, Jr., for defendant.

MERRIMON, C. J., after stating the case as above: The statute (The Code, sec. 1759), under which the defendant is indicted, prescribes that "Any lessee, or cropper, or the assigns of either, or any other person, who shall remove said crop, or any part thereof, from such land without the consent of the lessor or his assigns, and without giving him or his agent five days' notice of such intended removal, and before satisfying all the liens held by the lessor or his assigns on said crop, shall be guilty of a misdemeanor; and if any landlord shall unlawfully, wilfully, knowingly and without process of law, and unjustly, seize the crop of his tenant when there is nothing due him, he shall be guilty of a misdemeanor." The obvious purpose of this very stringent statutory provision is two-fold:

First. Inasmuch as the crops raised on the land are ordinarily in the actual possession of the tenant, but by the statute (The Code, sec. 1754) "are deemed and held to be vested in the possession of the lessor or his assigns at all times until the rents shall be paid," etc., the purpose is to protect the landlord or his assigns against the tenant or his assigns, and all other persons, until the rents shall be paid, by preventing the removal of the crops, or any part of them, *from the land* without
(648) the consent of the landlord or his assigns, or without notice as prescribed. The leading and material part of the purpose is to keep the crops on the land, so that they may be easily seen, known, identified and protected, and to prevent fraud and fraudulent practices that would be greatly facilitated by removing them from the land to any distance. If the crops should be so removed, the right of the landlord as to them and his lien upon them would depend generally very much upon what the tenant might do or say in respect to them. The object is to prevent this as much as practicable—to preserve the more certain and reliable evidence of the crops themselves present on the land. The tenant might be honest and faithful—he might not be so; he might state on, or off, his oath truly what part of the crops he had removed

from the land, when and to what place—he might not; he might put the crops (part of them) in his gin-house or barns, or elsewhere—he might not. The purpose is to cut off such opportunities to prejudice the landlord, and to afford the material advantage of keeping the crops certainly identified on the land as indicated above.

How far the tenant might be justified under the statute in severing the crops from the land and storing them on it simply for the purpose of protection to them has been doubtful, but it has been held that he may do so in good faith for such purpose; he may not go beyond that. *Varner v. Spencer,* 72 N. C., 381. This is allowed upon the ground of necessity. Such allowance increases the opportunity for fraudulent practices, but not to the extent that would result from allowing the crops to be stored off the land in a gin-house or barn, where other like crops might be stored, or, indeed, anywhere. To allow the crops to be so removed off the land at all, violates not only the letter, but the spirit and purpose of the statute as well.

It is said, "Shall the tenant not be allowed to protect the crops?" Most assuredly he shall be, in good faith, on the land. If it shall be necessary, in possible cases, to remove them from the land for their protection, this should be done on notice, or legal steps (649) taken as contemplated and allowed by the statute.

Second. The purpose of the statute is to protect the tenant and his assigns from unlawful and unjust seizure of the crops by the landlord or his assigns, by virtue of the statutory provision which declares that "all crops raised on said land shall be deemed and held to be vested in possession" of them "until the rents for said land shall be paid," etc.

The statute broadly forbids the removal of the crops, or any part of them, from the land, except in the case and in the way prescribed, and that without regard to the actual intent. The removal forbidden implies the intent to commit the offense. As was said in *S. v. McBrayer,* 98 N. C., 619, "It is only when the positive, wilful purpose to violate a criminal statute as distinguished from a mere violation thereof, is made an essential ingredient of the offense that honest mistake and misapprehension excuses and saves the alleged offender from guilt." *S. v. Dickens,* 1 Hay., 468 (407); *S. v. Boyett,* 10 Ired., 336; *S. v. Presnell.* 12 Ired., 103.

The testimony of the defendant went directly to prove that he had removed part of the crop from the land without notice to the landlord and before all the rents were paid. The court, therefore, properly instructed the jury that if they believe the witness himself he was guilty.

Affirmed.

Cited: S. v. Powell, 141 N. C., 785.

(650)

THE STATE v. CHARLES E. CROSS AND SAMUEL C. WHITE.

Forgery—Indictment—Several Counts—Verdict.

1. Where there are two or more counts in an indictment charging offenses of the same grade and punishable alike, a general verdict of guilty will be sustained.

2. Where, upon the trial of an indictment for forgery containing several counts, the jury was polled and stated that they had agreed upon a verdict of guilty as to the first and second counts, but had not agreed upon the others, and a *nol. pros.* having been entered as to the latter, returned a verdict of guilty: *Held*, that this constituted a distinct and separate verdict of guilty upon each of the two first counts.

THIS was a motion made in this Court in arrest of judgment. The matters upon which the motion was based are stated in the opinion.

The case has heretofore been fully reported in 101 N. C., 770, and 132 U. S., 131.

Attorney-General for the State.
T. C. Fuller and W. R. Henry for defendants.

CLARK, J. This cause was tried at July Term, 1888, of WAKE Superior Court. On appeal to this Court, the judgment of the Superior Court was affirmed at Fall Term, 1888. Thereafter, a writ of error was sued out from the Supreme Court of the United States. That court having held that there was no error, the defendants now move for the first time in arrest of judgment. They assign as ground of their motion that the first count was for forgery, a statutory offense, and that the second count was at common law for uttering forged paper. There having been a general verdict on an indictment containing two counts, charging offenses not punishable alike, they contend that no judg-
(651) ment could have been properly pronounced, and rely on *S. v. Johnson,* 75 N. C., 123, and *S. v. Goings,* 98 N. C., 766.

Where there are two or more counts in an indictment charging offenses of the same grade and punishable alike, if a general verdict of guilty is rendered it will be sustained. In *S. v. Williams,* 9 Ired., 140, it is said: "The jury should be satisfied that the prisoner was guilty in one of the modes well charged; and if so, it is manifestly of no consequence whether the conviction was on any one or all of these counts, since the offenses were of the same grade and the punishment the same. The instruction might relieve the jury of some trouble in their investigation, but could work no prejudice to the prisoner." This is quoted

with approbation in *S. v. Johnson,* 75 N. C., 123, and in numerous other cases the same rule is laid down. *S. v. Morrison,* 2 Ired., 9; *S. v. Miller,* 7 Ired., 275; *S. v. Long,* 7 Jones, 24; *S. v. Stroud,* 95 N. C., 626; *S. v. Smiley,* 101 N. C., 709; *S. v. Allen,* 103 N. C., 433, and there are many others. The principle is as stated in *S. v. Williams, supra,* "that it is of no consequence whether the conviction is on one or all the counts," since the verdict, if imputed to any one count, will justify the sentence and judgment pronounced.

In *S. v. Johnson, supra,* the Court made an exception to this principle, where the offenses charged in the several counts were of various grades, and punishable differently, upon the ground that it not being apparent upon which count the jury found the defendant guilty, it could not be seen that the verdict warranted the judgment. This decision is opposed to the rule which universally obtains in other states, that even in such cases the judgment will be sustained, and the punishment should be that appropriate to the highest grade. *Crowley v. Commonwealth,* 11 Metc., 575; *S. v. Hood,* 51 Me., 363; Wharton's Cr. Pl. and Pr., secs. 292, 737 and 911, and cases there cited; *Hawker v. People,* 75 N. Y., 485. However, *S. v. Johnson* has been, in this State, followed in *S. v. Goings,* 98 N. C., 766. There might be force, therefore, in (652) defendant's proposition if it had any application to the facts of this case.

Instead of the jury returning a verdict of guilty generally, without specifying upon which count or counts, they were polled and rendered a verdict of guilty as to the first and second counts, and two of the jurors responding not guilty as to the third and fourth counts, a *nol. pros.* was entered as to them.

Thus there are two verdicts of guilty rendered distinctly and unmistakably by the jury: one finding defendants guilty of forgery on the first count, and the other finding them guilty of uttering forged paper upon the second count. The verdict upon the first count supports the judgment imposed. The second verdict may be treated as surplusage.

Very interesting questions were raised in the argument as to the effect of the writ of error in suspending the action of this Court, and whether the present motion could be entertained, after the final judgment rendered in this Court at the Fall Term, 1888. We are not to be considered as deciding those questions in favor of the defendants, as in the view we have taken it is unnecessary to pass upon them.

Motion in arrest denied.

Cited: S. v. Robbins, 123 N. C., 738; *S. v. Poythress,* 174 N. C., 813; *S. v. Strange,* 183 N. C., 776; *S. v. Snipes,* 185 N. C., 746.

(653)

THE STATE v. J. D. SMITH.

Indictment—Removing Crop.

It is not necessary to allege, in an indictment for the unlawful removal of a crop, under section 1759 of The Code, that the lessor or landlord had a lien on the crop, where the bill contains an averment of the lease and of the relation of landlord and tenant, or cropper. By virtue of the statute the law implies a lien, and of this the courts will take notice. *S. v. Rose*, 90 N. C., 712; *S. v. Merritt*, 89 N. C., 506, distinguished.

DAVIS, J., dissented.

CRIMINAL ACTION for removing crop, tried at Fall Term, 1889, of HARNETT Superior Court, *Armfield, J.*, presiding.

The indictment charges that the defendant, "in the county of," etc., "on the first day of," etc., "did, by a certain agreement, rent from one H. C. Avera certain land there situate, for agricultural purposes, and during the term of his said renting did raise certain crops on said land; and that the said J. D. Smith afterwards, to wit, on 27 November, A. D. 1888, in said county, unlawfully and wilfully did remove from said land a part of the crop of cotton and fifty bushels of corn, without the consent of the said H. C. Avera or his assigns, and without giving him, the said H. C. Avera or his agent five days' notice of such intended removal, and without satisfying all liens held by said H. C. Avera or his assigns, on said crops, contrary," etc.

The defendant appeared and moved to quash the indictment because it "does not set forth that the said H. C. Avera or his assigns held liens on the said crops at the time of said removal." The court sustained the motion to quash, and gave judgment accordingly. The solicitor for the State appealed.

The Attorney-General for the State.
F. P. Jones for defendant.

(654) MERRIMON, C. J. The statute (The Code, sec. 1754) provides that, "when lands shall be rented or leased by agreement, written or oral, for agricultural purposes, or shall be cultivated by a cropper, unless otherwise agreed between the parties to the lease or agreement, any and all crops raised on said lands shall be deemed and held to be vested in possession of the lessor or his assigns at all times, until the rents for said lands shall be paid, and until all the stipulations contained in the lease or agreement shall be performed, or damages in lieu thereof shall be paid to the lessor or his assigns, and until said party

or his assigns shall be paid for all advancements made and expenses incurred in making and raising said crop. This lien shall be perferred to all other liens," etc.

In the absence of agreement to the contrary, the purpose and effect of the above recited provision is to vest the crops raised on the leased land in possession of the lessor or landlord, and give him a lien on the same until the rents and advancements, etc., shall be paid as prescribed. It is hence, not necessary in an indictment for removing a crop, or any part of it, from the leased land, in violation of the statute (The Code, sec. 1759), in charging that a lease was made, to charge specially, in that connection, that the lessor or landlord had a lien upon the crop. This is so because, the lease being charged, the law—the statute—implies the lien arising by virtue of the lease, the relation charged. It is not necessary to charge matter of law and what it necessarily implies, because the court must see and take notice of what the law is, and its application to the material facts charged in the indictment. When the lease is charged the lien is charged by legal implication, nothing to the contrary appearing.

So, in the present case, the indictment in charging the lease—the facts constituting the relation of landlord and tenant—charges, in legal effect, a lien upon the crop in favor of the former that the latter is bound to discharge, or deal with in some way, as allowed and (655) required by the statute applicable. This Court has repeatedly upheld indictments for removing crops from leased lands on which they were produced, in which the lien was not specifically charged in the connection above mentioned. *S. v. Pender,* 83 N. C., 651; *S. v. Walker,* 87 N. C., 541; *S. v. Powell,* 94 N. C., 920.

What we have thus said is not at all inconsistent with what is said and decided in *S. v. Merritt,* 89 N. C., 506, and *S. v. Rose,* 90 N. C., 712. Those cases have reference to the material charge in the indictment which negatives the discharge of "all liens held by the lessor or his assigns" on the crop. The requisites of the indictment, as a whole in each of them, were not before the court to be considered, nor did it advert to the general form of it in either case. The assignment of error only extended, and the attention of the court was confined to the part of each mentioned above. The court said, properly, that it must be charged that the removal of the crop, necessary to make up an essential element of the offense, was "before satisfying all the liens held by the *lessor or his assigns* on said crops"—not "without satisfying *all liens* on said crop." When the Court said, in *S. v. Rose, supra,* "The indictment does not aver (charge) that the 'lessor or his assigns' had liens on the crop," it meant to say, in the connection in which the words were used, that it was not charged that the "lessor or his assigns" had

liens on the crop undischarged—it meant that, and no more. Having in view the question under consideration, and taking all that was said in discussing it together, such meaning certainly appears.

What is said in the last paragraph of the opinion in the case last referred to, is merely suggestive of a complete form of an indictment in such cases, and it would be well if the suggestions were observed,

but the Court did not say that an indictment less complete could
(656) not be upheld, if it charged the essential requisites of the offense.

In the case before us the indictment is not so definite and precise in some respects as it might, perhaps ought to be, but in the respect complained of, it sufficiently charges, in connection with what the law implies, that the defendant removed the crop—a part of it—"before satisfying all the liens held by the lessor or his assigns on said crop." And taking the indictment as a whole, we think it sufficient in the respects in question.

There is error. The order quashing the indictment must be set aside, and further proceedings had in the action according to law.

DAVIS, J., dissenting: Every essential fact constituting the offense must be set forth in the indictment with plainness and reasonable certainty and by direct averment, and not inferentially, or by implication. Statutes creating offenses must be construed strictly and nothing essential can be omitted; as for instance, an indictment under the statute for stealing figs, which omits to charge that they were "cultivated for food or market," is fatally defective, and will not be cured by verdict. *S. v. Liles,* 78 N. C., 496. It is not sufficient to *prove* that they were "cultivated for food or market." It must be *averred* in the indictment. Every fact necessary to constitute the offense must be established by the prosecutor. If necessary to be proven, must it not be averred?

The indictment in the case before us simply charges that "one J. D. Smith did, by a certain agreement, rent from one H. C. Avera," etc. It does not set forth with any certainty, or, in fact, at all, what the contract or agreement was; what *rent* was to be paid, whether any money, or

part of the crop, or that any rent was to be paid, or stipulations
(657) be performed, for which the landlord had, or could have, a lien.

If it be said that the words, *"did rent," ex vi termini* imply that something was to be paid or done by the lessee, ought it not to be charged, with reasonable certainty, what that something was, so that the defendant might know what the charge was, and be able to meet it if he could? He might, for instance, be prepared to show that he had paid the rent agreed to be paid, but, on the trial, he is met with some unaverred charge that he had failed to perform some other stipulation,

as to make repairs, clean out a ditch, or perform some other act, which he is wholly unprepared to meet, because he had no knowledge of the nature of the charge, though he might have done so if he had known what the charge was. It seems to me that this indictment is in utter disregard of the well-established and, as I understand, absolutely necessary requirement, that offenses must be charged with reasonable certainty. If there were only one possible conclusion to be drawn from the words "did rent," it might be said, in the language of *Judge Nash,* in *S. v. Hathcock,* 7 Ired., 53, a "conclusion cannot make an averment." But no certain conclusion as to what the contract was can be drawn from those words. For what did Avera have a lien upon the crop? It is impossible to tell from the indictment, and how could the defendant know what would be alleged on the trial; and how could he come prepared to meet it?

I think the essential averments in the indictment may be fairly put thus: "In January, 1889, one J. D. Smith did, by agreement, rent certain land (describing it) of one H. C. Avera *(ergo* he agreed to pay something for rent and perform some stipulation for which Avera held a lien, and it was not agreed that the crop should not be held to be vested in possession of the lessor, etc); that the defendant made a crop on the land and removed it before satisfying the lien and without giving notice. Upon this it is asked by the State that he (658) be adjudged guilty," etc.

If Avera had brought a civil action, and in his complaint alleged his cause of action with no more certainty than the averments in this indictment, would he ever reach the jury? Such a complaint would be about thus: "The plaintiff alleges that in 1889 the defendant did, by agreement, rent from him certain land, etc., and thereby agreed to pay something for rent and perform some stipulation. He made a crop on said land and removed it before satisfying all liens, etc., and refuses to pay for rent and unperformed stipulations, etc. Wherefore, plaintiff demands judgment against the defendant for ..... dollars, for rent and damages."

Could he go to the jury upon such a complaint, and shall less certainty be permitted in the averments in an indictment than would be allowed in the allegation of a complaint?

If the jury were to convict upon this indictment, could the court render any judgment without overruling many adjudged cases? *S. v. Stamey,* 71 N. C., 202, and cases cited; *S. v. Lanier,* 88 N. C., 658, and cases cited.

In *S. v. Pender,* 83 N. C., 651, the agreement was set out in the indictment, and it averred that the landlord was to have two bales of cotton as his part of the crop, and negatived by averment that "by said

contract it was not agreed between said parties that the crop should not be deemed and held to be vested in Newman (the landlord)," etc. The contract was set out, not by implication, but by direct averment, and the exception in the statute was negatived.

In *S. v. Powell,* 94 N. C., 920, it was directly averred that Powell was to pay the lessor 750 pounds of lint cotton, "and in said contract of lease, it was not agreed," etc., negativing the exception in the statute. These authorities, I think, so far from sustaining the indictment before us, are in direct conflict with it.

(659) In *S. v. Stamey,* 71 N. C., 202, an indictment for selling spirituous liquors "during an election day," was held to be fatally defective. It did not aver that it was during a public election, and, the court say, "it may be that no election was held." Again, it is said in the same case, "the bill does not negative the selling upon a prescription of a practicing physician," etc., which was lawful, and it was defective in this.

In *S. v. Sears,* 71 N. C., 295, the defendant was indicted under section 15, ch. 54, of Bat. Rev., which makes it indictable for "any person, with knowledge of said lien (landlord's lien), under the license of authority of such tenant," to remove the crop without the consent of the landlord, it was held that though the defendant had knowledge of the lessor's lien, and though he had the "license and authority of the tenant to remove the crop," yet it was not charged in the bill that he had his "license and authority," and so there was *"probata* without *allegata,"* and the indictment was defective.

In *S. v. Rose,* 90 N. C., 712, it is said, "The indictment does not aver that the 'lessor or his assigns' had liens on the crop. It may be, it is possible, he did not." It was averred that the defendant removed the crop, "without satisfying all liens on said crop," and the indictment was held to be defective. In *S. v. Merritt,* 89 N. C., 506, it is said, "It must be *alleged* in the indictment and *proved* on the trial that the lessor or his assigns held liens on the crop undischarged." It was also said the court could not tell "that the crop, or any part thereof, had been removed from the land before satisfying all liens held by the lessor or his assigns on said crop."

How can the Court in the case before us see what lien or liens Avera or his assigns held on the crop, or that they held any.

In *Foster v. Penry,* 76 N. C., 131 (a civil case), it was held that, under the Landlord Act of 1868-69, where nothing appears but

(660) that there was a simple renting, the title to the crop did not vest in the landlord, but in the tenant. As there was no agreement as to what should be paid, there was no lien.

It seems to me that if we are to adhere to the ruling in *S. v. Stamey, S. v. Sears, S. v. Rose* and *S. v. Merritt, supra,* the ruling of the judge below ought to be sustained; and even if there were a verdict of guilty, there could be no judgment pronounced upon such an indictment.

If it was agreed that any rent was to be paid, the prosecutor knew what it was, and could have easily averred it, and a new bill could have been sent. This is the State's appeal, and the accused ought not to be put to answer upon a charge so indefinite as this, and I regret that I cannot concur in the opinion of the Court.

Per Curiam. Error.

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*THE STATE v. W. G. HAMILTON.

Appeal—Costs—Prosecutor.

1. A judgment that a prosecution is frivolous and not required by the public interest, and that the prosecutor pay costs, is conclusive and not appealable.
2. It is sufficient notice of a motion to mark as prosecutor if the party is present when the motion is made, and the order to mark as prosecutor is also final and conclusive.

THIS was a criminal action, tried before *Armfield, J.,* at September Term, 1889, of WAKE Superior Court.

Motion to mark Charles M. Jones prosecutor, and tax him with costs. The court found that the prosecution was "frivolous and not required by the public interest," and taxed Jones with the costs (661) as prosecutor, from which he appealed.

The Attorney-General for the State.
No counsel contra.

CLARK, J. The Code, sec. 737, empowers the court trying the cause to determine at any stage of a criminal proceeding who the prosecutor is, and tax him with the costs, if such court shall be of opinion that there was not reasonable ground for the prosecution, or that it was not required by the public interest. Section 738 empowers the court to imprison the prosecutor for nonpayment of costs, if it shall adjudge that the prosecution was frivolous and malicious. This is held constitutional. *S. v. Cannady,* 78 N. C., 539. These findings of fact by

*Head-notes by CLARK, J.

the court below have been repeatedly held conclusive and not reviewable by this Court on appeal. *S. v. Adams,* 85 N. C., 560; *S. v. Owens,* 87 N. C., 565; *S. v. Dunn,* 95 N. C., 697. Though such findings of fact by a justice of the peace are reviewable by the Superior Court on appeal. *S. v. Murdock,* 85 N. C., 598; *S. v. Powell,* 86 N. C., 640.

When the prosecutor is marked as such on the bill before indictment found, he can be taxed with the costs without notice and though absent. *S. v. Spencer,* 81 N. C., 519; *S. v. Horton,* 89 N. C., 581. But an order to mark any one as prosecutor after indictment found cannot be made without his consent, unless on notice. *S. v. Crosset,* 81 N. C., 579. It is sufficient, however, if the motion is made in open court, and the party is present. *S. v. Hughes,* 83 N. C., 665; *S. v. Norwood,* 84 N. C., 794. The order may be made on motion of defendant's counsel, at the instance of the solicitor, or by the court *ex mero motu. S. v. Adams,* 85 N. C., 560. In the present case, the prosecutor was present in court, testified in the case on trial, and also in the investiga-
(662) tion of facts upon the motion to mark him as prosecutor and to tax him with the costs, and the motion was made by defendant's counsel, the solicitor having submitted to a verdict of not guilty upon appellant's testimony.

Neither the judgment that Jones was prosecutor, and that the prosecution was "frivolous and not required by the public interest," nor that ordering him to pay the costs, are reviewable. Like other findings of fact by the judge below, such findings are final and conclusive.

No error.

Cited: In re Deaton, 105 N. C., 63; *Merrimon v. Comrs., ante,* 373; *S. v. Roberts, post,* 663; *S. v. Sanders,* 111 N. C., 701; *S. v. Baker,* 114 N. C., 813; *S. v. Jones,* 117 N. C., 772; *S. v. Taylor,* 118 N. C., 1264; *S. v. Butts,* 134 N. C., 698; *Cobb v. Rhea,* 137 N. C., 296; *S. v. Stone,* 153 N. C., 615; *S. v. Bailey,* 162 N. C., 585; *S. v. Collins,* 169 N. C., 325.

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*THE STATE v. JAMES ROBERTS.

Costs—Prosecutor—Appeal.

It is error to tax a prosecutor with costs, unless the court, upon the facts, shall entertain and express the opinion that there was not reasonable ground for the prosecution, or that it was not required by the public interest, or shall adjudge that the prosecution was frivolous or malicious,

*Head-notes by CLARK, J.

or shall be of opinion that there was a greater number of witnesses summoned for the prosecution than was necessary. Such findings of fact, when made, are conclusive and not reviewable on appeal, but they are necessary to be made in order to support the judgment.

THIS was an appeal from an order of *Bynum, J.*, at January Term, 1889, of DURHAM Superior Court, taxing the prosecutor with the costs.

Upon receipt of the certificate from this Court (the case is reported in 101 N. C., 744), notice was issued and served on Dickey, the prosecutor, to show cause why he should not be taxed with the costs.

"After hearing said Dickey, in answer to the said notice, and the solicitor in reply to the same, the court doth adjudge and (663) order that L. Dickey, the prosecutor, pay the costs."

From this order Dickey appealed.

The Attorney-General for the State.
John W. Graham for appellant.

CLARK, J. This is an appeal by the prosecutor (Dickey) from a judgment taxing him with the costs. If the defendant be acquitted, or judgment arrested, or *nolle prosequi* entered, the court is empowered by sections 737 and 738 of The Code to adjudge the prosecutor to pay costs in either of four cases, *i. e.*, if the court shall be of opinion that there was not reasonable ground for the prosecution, or that it was not required by the public interest, or when the court shall adjudge that the prosecution was frivolous *or* malicious, and in the last two cases the prosecutor will also be adjudged to be imprisoned if the costs be not paid. By section 1204, though the court may not find the prosecution frivolous or malicious, nevertheless, if it is of opinion that, by request of the prosecutor, a greater number of witnesses was summoned than was necessary, it may adjudge the prosecutor to pay the attendance of such unnecessary witnesses. It has been repeatedly held that if the judge below shall find either of the above state of facts to exist, such findings of fact are conclusive and not appealable. See *S. v. Hamilton, ante,* 660, in which the authorities are cited and reviewed.

But the right of the court below to tax the prosecutor with costs does not arise as a matter of course. It only exists when one of the states of fact above recited is made to appear by the expressed opinion or judgment of the court. In the present case there is no finding of fact by the judge in this regard, but simply a judgment that the prosecutor pay costs. This has no warrant in the law.

The exception of the appellant to the judgment is not as (664) specific as it should be, but, independent of that, there is error

as apparent upon the face of the record as would be the judgment of the court in a case requiring the intervention of a jury, when there is neither waiver of a jury nor verdict rendered. In such case, the error apparent on the face of the record would be corrected here without assignment. *Thornton v. Brady,* 100 N. C., 38. So, in this case, the judgment that the prosecutor pay the costs, without a previous finding by the court of the existence of one of the states of fact which would authorize such judgment, is error in the record proper, which the Court will correct.

The appellant is not, however, necessarily entitled to a discharge from liability by reason of such error. It is still open to the solicitor to move the court below to tax the costs against the appellant, or that court may do so *ex mero motu.* If, upon the investigation of the facts, it shall entertain and express the opinion or adjudge that they are such as, under the statute, authorize the costs to be taxed against the prosecutor, it can so order.

Error.

Cited: S. v. Carlton, 107 N. C., 957; *Smith v. Smith,* 108 N. C., 369; *S. v. Sanders,* 111 N. C., 701, 702, 703; *Varner v. Johnston,* 112 N. C., 577; *S. v. Baker,* 114 N. C., 812; *S. v. Jones,* 117 N. C., 773; *S. v. Butts,* 134 N. C., 608; *S. v. Stone,* 153 N. C., 615; *S. v. Bailey,* 162 N. C., 585; *S. v. Collins,* 169 N. C., 325.

THE STATE v. P. M. PENDERGRASS.

Municipalities—Police Regulations—City Ordinances.

1. Municipalities cannot use the powers to regulate their affairs to create monopolies for the benefit of private individuals; nor can they enact rules or ordinances imposing penalties that do not operate equally upon all citizens of the State who come within the corporate limits.

2. An ordinance of the town of Durham which enacted that no fresh meats should be sold in said town outside of the market-house—it appearing that a suitable and convenient market-house had been provided—was a valid exercise of its police powers.

(665) THIS was an indictment for a violation of an ordinance of the town of Durham, in selling fresh meat in the town and not at the market-house, tried at October Term, 1889, of DURHAM County Superior Court, before *Graves, J.*

The jury returned a special verdict, to wit:

"The town of Durham is a municipal corporation, with power, under its charter and under the general law, to regulate its markets and prescribe at what place and in what manner, in the town, shall be sold marketable things; that the town of Durham has established a market-house sufficient in size and conveniently located, for the sale of marketable things; that the board of commissioners of the town aforesaid, at their meeting held on 18 June, 1889, enacted the following ordinance: 'No persons shall sell any fresh meats within the corporate limits of the town of Durham, outside the market-house of said town: *Provided,* that this ordinance shall not apply to persons selling beef of their own raising, by the quarter. Any person violating this section shall be fined five dollars for each day said ordinance is violated on and after the first day of July, 1889'; that on 25 September, 1889, the defendant, within the corporate limits of the town of Durham, and outside the market-house of said town, offered to sell fresh meat, to wit, beef, not of his own raising and not by the quarter, to William Shelburn, Charles P. Haweston and others living within the corporate limits of said town, and said William Shelburn, Charles P. Haweston and others did thereby agree to buy the same, and that the defendant subsequently, and during the day aforesaid, did deliver the quantities of beef so agreed to be bought, at the residences of the said William Shelburn, Charles P. Haweston and others, and the defendant did, at the time and places of delivering, during the day aforesaid, receive from the parties aforesaid the price in money agreed to be paid for said fresh meat; that the defendant obtained the fresh meat delivered as aforesaid from a stall or house outside of the corporate limits of the town of Durham, and at his said stall or house, weighed and cut the (666) fresh meat delivered in parcels to the said William Shelburn, Charles P. Haweston and others as aforesaid. If, upon the foregoing facts, the court be of opinion that the defendant is guilty, then the jury so find for their verdict, but if the court be of a contrary opinion, then the jury for their verdict find the defendant not guilty." Whereupon, it is adjudged by the court that the said defendant is guilty, and that he pay a fine of five dollars and the costs of the prosecution, from which judgment the defendant prays an appeal to the Supreme Court.

The Attorney-General for the State.
No counsel contra.

AVERY, J., after stating the facts: The Legislature unquestionably has, and frequently exercises, the right to regulate trade as contra-distinguished from restraining it, and while it would not be within the

purview of its powers to pass a law prohibiting the sale of sound and wholesome meat in any locality, or permitting the authorities of a town to do so, it can confer upon municipalities the power to prescribe, by their ordinances, the manner of disposing of it, for the purpose of protecting the public health or promoting good government, as by prohibiting it to be retailed except at designated market-places. 1 Dillon Mun. Corp., secs. 380, 386, 389; *S. v. Moore,* 104 N. C., 714 (S. E. Rep., Vol. 10, p. 144); *Intendant v. Sorrell,* 1 Jones, 49. In *St. Louis v. Jackson,* 25 Mo., 37, precisely the same question was presented as that before us, and the Court sustained the right of the city of St. Louis, under a general grant by the Legislature of power to regulate the sale of meats, to forbid by an ordinance the sale in smaller quantities than one quarter.

(667) Towns or cities cannot use this power to create monopolies for the benefit of private individuals, nor can they pass by-laws imposing penalties that do not operate equally upon all citizens of the State who may come within the corporate limits. *S. v. Moore, supra; S. v. Chambers,* 93 N. C., 600; 1 Dil. Mun. Corp., sec. 380. The ordinance before us for construction is general in its character, and is, therefore, like a public law that applies to a particular locality, free from objection as imposing peculiar restraints upon, or extending special privileges or immunities to, any one.

There is no error.

Judgment affirmed.

Cited: S. v. Summerfield, 107 N. C., 897, 898; *S. v. Tenant,* 110 N. C., 612; *S. v. Moore,* 113 N. C., 703; *S. v. Biggs,* 133 N. C., 739; *Durham v. Cotton Mills,* 141 N. C., 644; *S. v. Perry,* 151 N. C., 663; *S. v. Denson,* 189 N. C., 176; *S. v. Stowe,* 190 N. C., 86.

THE STATE v. JORDAN PRITCHETT.

Homicide—Evidence—Insanity—Jury—Challenge—Judge's Charge.

1. Where it appeared that the prisoner did not exhaust his peremptory challenges, error in the court in its ruling upon the competency of a juror challenged by the prisoner is not good ground for a new trial.

2. The declarations and acts of one charged with an offense, after its commission—not of the *res gestæ*—are not competent evidence for him.

3. Where the testimony showed that, after the commission of the offense, and pending the trial, the prisoner was committed to the asylum for the insane upon a verdict that he was incompetent to plead, but was afterwards put upon trial and plead "not guilty," and there was some evidence that the insanity was feigned: *Held* not to be error to permit the State, upon cross-examination, to ask him "why he played off crazy."

4. Evidence of the condition of a pistol (with which it is alleged the homicide was committed) on the morning after, was competent.

5. Where a party charged with the commission of a crime has been committed to the asylum for the insane because of insanity supervening after the offense and existing at the time he was called upon to plead, the court does not lose jurisdiction by reason of his commitment, but it may, without any discharge or other formal action on the part of the asylum authorities, cause him, from time to time, to be brought before the court for examination, and, whenever it is ascertained that he is competent to plead, may put him upon trial.

6. The opinion of the superintendent of the asylum as to the mental condition of the prisoner while under his charge is competent evidence upon the question whether such insanity was feigned.

7. Where no instruction is asked to "state, in a plain and correct manner, the evidence given in the case, and declare and explain the law arising thereon," the failure of the court to comply with the statute in that particular will not be sufficient ground for a new trial, especially where the "case on appeal" shows that the charge of the court presented the case in the most favorable light for the defendant.

THIS was an indictment for murder, tried at Spring Term, (668) 1890, of GRANVILLE Superior Court, before *Armfield, J.*

The prisoner was charged with the killing of one Moseley by shooting him with a pistol, at night, in a house where he and a number of other colored people were assembled. The prisoner denied the killing, and, among other things, proposed to show that Amos Hodnett and prisoner were both arrested on the Monday after the homicide, and, pursuant to direction given a witness (then being examined) by Amos Hodnett, witness sent and got his pistol, which was a 32-calibre pistol.

This was objected to on the part of the State. Objection sustained, and prisoner excepted.

The defendant then proposed to show by same witness that, pursuant to directions given by prisoner, witness sent and got prisoner's pistol, which was a 38-calibre pistol.

Objection on the part of the State. Objection sustained, and defendant excepted.

The defendant proposed to show by witness that the pistol admitted to be Amos Hodnett's on the coroner's inquest was a (669) 32-calibre "American Bulldog" pistol.

This was objected to on the part of the State. Objection sustained, and prisoner excepted.

The defendant then proposed to show by witness that when he arrested Amos Hodnett, he searched said Hodnett and found some 32-calibre cartridges on his person.

This was objected to on the part of the State. Objection sustained, and defendant excepted.

Defendant proposed to prove that Amos Hodnett said that he had a 32-calibre pistol at Dicey Smith's, and produced it on the trial.

Objection on the part of the State. Objection sustained. Defendant excepted.

The ball which was extracted from deceased's body was much battered, and a good deal of testimony was introduced, but of a very vague character, as to whether it was a 32 or 38-calibre.

The facts pertinent to the other questions discussed by the court are stated in the opinion.

The prisoner was convicted, and appealed from the judgment of death pronounced against him.

The Attorney-General for the State.
N. Y. Gulley for defendant.

MERRIMON, C. J. In selecting the jury in this case, the prisoner challenged a person tendered as a juror for cause assigned. The objection was not sustained by the court, and the prisoner excepted. It appears that a jury was obtained before the prisoner had exhausted his right to challenge peremptorily. It is settled that such exception cannot be sustained. *S. v. Hensley,* 94 N. C., 1021, and cases there cited.

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The evidence rejected on the trial, referred to in, and embraced by, the exceptions numbered respectively 2, 3, 4, 5, 7, was not competent. It referred to what was said and done after the homicide, on the occasion of the inquest held by the coroner, in respect to the two pistols, one said to have been that of the prisoner, and the other that of another party. If the facts intended to be proven in respect to the ownership of these pistols, their calibre, etc., could be pertinent and competent at all, evidence to prove them should have been produced on the trial without reference to the evidence in respect to them at the coroner's inquest. Moreover, the prisoner could not be allowed to show after the homicide, and after he was arrested, that he "sent and got his pistol," and that of another party, to be examined with a view to his exculpation. This is so, because he could not be allowed to have opportunity to make evidence in his own behalf. Besides, the evidence, if it had been properly

offered, was not of itself relevant. It might have tended very vaguely, remotely and indirectly to show that another person killed the deceased. In possible cases the prisoner might show that a person other than himself slew the deceased, but in such cases "the proof must be direct to the fact, and cannot come from admission or conduct seemingly in recognition of it," of facts that simply give rise to vague conjecture. *S. v. Gee,* 92 N. C., 756.

The prisoner was examined at the trial as a witness in his own behalf, and on the cross-examination the solicitor for the State asked him "what he played off crazy for?" having reference to the fact that he, at a former term of the court, professed to be, or was, insane at the time the action stood for trial. The prisoner objecting, the court allowed the question to be put. We think it was pertinent and competent. If the prisoner had answered substantially that he did feign insanity, such answer would have gone to his discredit and tended, in connection with other evidence, to prove guilt. It would have shown a disposition and a strong purpose to evade justice. (671)

The objection to allowing the witness for the State to testify as to the condition of the pistol with which the prisoner killed the deceased the next morning after the homicide was not well founded. The inquiry proposed, though rather general, was such as would probably elicit evidence pertinent and competent. The evidence called for might have identified the pistol and shown that it had recently been discharged. The evidence given tended to identify it, and otherwise, so far as we can see, it was not of much, if any, importance.

Likewise, the objection to allowing the examination of the superintendent of the insane asylum as a witness for the State in respect to the mental condition of the prisoner while he was in the asylum as a patient cannot be sustained. It was pertinent and proper to ascertain whether the prisoner was insane or otherwise at the time he was committed to the asylum under the order of the court, and whether, if he was insane, as the jury had found him to be, he had recovered his sanity sufficiently to be tried for the offense charged against him. The evidence elicited was important. It tended to show that it was questionable whether the prisoner was insane, as the court supposed he was, and that if he was, he had recovered his sanity, and might properly be put upon his trial.

When the prisoner was first brought into court and required to plead to the indictment, his counsel suggested that he was insane and incapable of pleading. Thereupon, the court submitted to a jury a proper issue as to his sanity, and it found that he was sane. The action was then continued. At the next term of the court the prisoner's counsel again suggested that he was then insane and could not plead. There-

upon, a second jury found that he was insane, and the court made its order, directing that the prisoner "be confined in the lunatic
(672) asylum at Goldsboro, in said State, for treatment by the authorities thereof until his mind may be restored so that he may be competent to plead to the indictment against him in this behalf, upon the happening of which event the authorities of said asylum are hereby ordered to notify the clerk of the Superior Court for the county of Granville, to the end that he may be returned to said county for trial." In pursuance of this order the prisoner was committed to the asylum, and, having remained there several months, escaped therefrom. While he so escaped, he was retaken, pleaded to the indictment not guilty, put upon his trial and convicted. From the judgment of death he appealed. Here his counsel insisted that he could not be required to plead, and be put upon his trial, until the proper authorities of the insane asylum had duly certified that he had recoverd his sanity, etc. This contention is not well founded.

The law does not intend or allow that a person of sufficient age to commit a criminal offense, and sane at the time he commits such offense, shall, because of subsequent insanity, go unpunished, if afterwards he recover his sanity. Temporary insanity does not destroy or abridge his duty, obligations and amenability to society and government, except while he is so affected. His sanity restored, he is amenable for criminal offenses committed when he was sane, on the same footing as other people, and for the like reasons. The statute (The Code, sec. 2255) allowing and requiring judges of the Superior Courts to commit insane persons, charged with criminal offenses in the cases specified, to the proper insane asylum, does not imply or intend that such persons so committed shall remain there after they are cured or restored to sanity. It does not so provide in terms, or by implication, nor does it provide that the authorities of such asylums shall discharge such persons, as in cases where insane persons not charged with crime may be discharged. In the absence of such express authority conferred,
(673) it is not to be presumed or merely implied that the Legislature intended that such persons restored to sanity shall be discharged and turned loose upon the public. Nor does the statute confer upon the constituted authorities of an asylum, or any of its particular officers, authority to ascertain and determine when an insane person, charged with crime and committed to the asylum, shall be sent to the court to be tried for the offense charged against him. Such insane person is committed to the insane asylum by the proper judge to be there kept securely, treated for his disease or diseases, physical as well as mental, cured, if practicable, and when he is cured, the superintendent of the asylum, or some authority thereof designated for the purpose, should

notify the clerk of the county having jurisdiction of the offender that he is restored to sanity, to the end the court, through its officers, may take the proper steps to bring the party to trial, or discharge him according to law, except that when a party has been acquitted of an offense charged against him, because of insanity at the time he committed the alleged offense, and was committed to the asylum, may be discharged by the authorities of the asylum as in cases of insane persons not charged with crime. This is so, because the person so acquitted of crime is not to be held to answer further.

The court does not lose its jurisdiction of a person charged criminally before it by reason of his insanity and the order committing him to the asylum. He is sent there simply for the purpose already indicated. The court may make inquiry from time to time as to his mental condition, and to that end bring him before it. While it ought, and will, ordinarily, pay great respect and deference to the judgment and opinions of the authorities of the asylum as to the patient's mental condition, it may exercise its authority by proper inquiry, and determine that the party is, or is not, sufficiently restored to sanity to be required to plead and be put on his trial. It may (674) cause the party in the asylum to be brought before it by *habeas corpus,* or, in some cases, no doubt, by appropriate order; and when the party has escaped from the asylum he may be arrested upon *capias,* or in any way allowed by the law, and taken before the court; or, if insane, he may at once be returned to the asylum. The court's authority is paramount, and hence, whenever the party charged is brought before it, without regard to whether he escaped from the asylum or not, it may make proper inquiry as to his mental condition, and if it be found that he is restored to sanity, require him to plead and be put upon his trial, or, if it be found that he is still insane, recommit him to the asylum. Nor is it necessary, where manifestly the party is restored to sanity, to make formal inquiry as to his mental condition; but the court should be cautious in this respect and fully satisfied that the party is sane. It is the province of the court to determine the sanity or insanity of the person charged with crime.

It will be observed that the statutory provision (The Code, sec. 2255) conferring authority upon judges to commit insane persons charged criminally to insane asylums is exceptional, and there is no express statutory provision prescribing how such persons committed are to be discharged when restored to sanity. It is, hence, necessary to resort to a reasonable interpretation of the statute and the application of general principles of law. This we have endeavored to do in this case. The prisoner appeared to be sane. There was evidence to prove his sanity,

and, indeed, it was not suggested that he was not sane when he pleaded not guilty and was put upon his trial.

The court was not requested, on the trial, to "state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon" to the jury, nor was there any objection or exception in the court below on that account. In this Court, the
(675) counsel for the prisoner, in his earnest argument, insisted that the court was bound, without special request, to so state the evidence and the law to the jury, and he relied upon *S. v. Boyle,* 104 N. C., 800. In the latter case the court was expressly requested to so state the evidence and the law, and that it did not, was assigned as error. In this case the evidence was not at all complicated or peculiar in its application and bearings; it was simple and easily understood. The court directed the attention of the jury to it, not as fully as it should have done, but, as to the prisoner, it expressly directed their attention to the material evidence in his behalf, and to the view of it most favorable to him, and told them that if it was true, he was not guilty, and they should so find. So he had no just ground of complaint in such respect. He could rely for his acquittal only upon his own evidence. The evidence against him was plain, direct, abundant and strong. If it was true, as the jury found it to be, the prisoner slew the deceased, an unoffending man, without the slightest provocation. The superintendent of the asylum said in his examination that he possessed "eccentricities and peculiarities," but these could not excuse his great crime. Indeed, the defense of insanity was not at all relied upon.

Judgment affirmed.

Cited: S. v. Brady, 107 N. C., 830; *Boon v. Murphy,* 108 N. C., 193; *S. v. Brogden,* 111 N. C., 657; *S. v. Ussery,* 118 N. C., 1177; *Patterson v. Mills,* 121 N. C., 269; *S. v. Ellsworth,* 131 N. C., 779; *S. v. Register,* 133 N. C., 751; *Simmons v. Davenport,* 140 N. C., 411; *Ives v. R. R.,* 142 N. C., 137; *S. v. Bohanon,* 142 N. C., 697; *S. v. Carroll,* 176 N. C., 731.

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THE STATE v. CARRIE CHISENHALL.

Abduction—Evidence—Witness.

1. Fraud or force are not essential elements of the crime of abduction under the laws of this State.

2. The offense is sufficiently described by the word "abduct," and may be committed by violence, fraud or *persuasion.*

3. A statement made voluntarily by a person, against whom no charge is pending, to the Solicitor in reference to the commission of an offense by another, may be received in evidence against the author, who is afterwards indicted for the same transaction.

4. Evidence of the declarations of the father of the abducted child, showing his lack of consent to its carrying away, is competent against one charged with the abduction.

THIS was a criminal action, tried before *Armfield, J.*, at Spring Term, 1890, of DURHAM Superior Court, upon an indictment for abduction.

Martha Chisenhall, a witness for the State, being sworn, testified as follows: "I am the mother of the defendant, and also of Eloise Chisenhall. Eloise lived with me and my husband in the town of Durham. She left my house last Sunday evening about 2 o'clock with the defendant and Mary Douglas. Carrie, the defendant, did not live with me. I went in about two hours to Carrie's house, and found the door locked. I then went to Mag Bush's porch. The defendant was there. I asked Mag to put Eloise out of her house. She said she was not there. I said, 'Yes she is there.' And I said, 'Mag, if you don't put my child out, I will bring somebody here to take her out.' She dared me to bring a policeman to her house. Carrie was sitting in the room. I did not go in the house. I made no effort to go in, and nothing was said to prevent me from going in. Defendant told me Eloise was there in the house. Eloise stayed there all night. I went back the same afternoon before sundown. Eloise was thirteen years old."

The State asked witness if her husband knew that she was (677) going for Eloise? Defendant objected. Objection overruled. Defendant excepted, and witness testified:

"My husband knew I was going for Eloise, and concurred in it. When Eloise left my house, my husband was not in the house, but he was on the lot. The defendant, Eloise and Mary Douglas went out of the back door of the house. I made no objection. I knew Mary Douglas. My husband told me to go for Eloise as soon as he found out she was gone."

Defendant objected to this evidence, as she was not present. Objection overruled. Exception by defendant.

The State proposed to prove the general reputation of the house of Mag Bush by this witness.

Defendant objected. Objection overruled. Exception by defendant.

Witness testified it was bad for men running after women there, and continued: "When defendant and Mary Douglas came on Sunday evening, they stayed about half an hour, talking with me. I had no particular talk with them. Eloise had been to defendant's house before

this, and she stayed away from home all night before. She has left home with defendant before. Eloise did not come home until Tuesday morning."

Eloise Chisenhall, a witness for the State, testified: "I was at Mag Bush's last Sunday evening. I went with Carrie, the defendant, and Mary Douglas. She told me I could go with them, when we left home, or not, as I pleased. I wanted to go. Defendant did not tell me what they wanted with me. I saw Rhodes Herndon at Mag Bush's that night. He did not stay long. I heard my mother when she came to Mag Bush's that afternoon and told her to put me out. I did not want to go home. Herndon came about 8 o'clock."

(678) W. M. Busbee, a witness for the State, testified: "On Tuesday last, at the recess of the court, I was in the office of the solicitor. I am a justice of the peace. I had tried the warrant against Mag Bush for abduction. Martha Chisenhall and the defendant were witnesses for the State against Mag Bush. I told these two witnesses to go to the solicitor's room. I got there before the witnesses. The defendant was examined as a witness by the solicitor in my presence. The bill of indictment had not then been sent against Mag Bush, but the solicitor wished to examine the witness. I remember the substance of the statement made by the defendant." The solicitor then asked witness to give the statement she made.

Defendant objected. Objection overruled. Defendant excepted, and witness continued: "Defendant said she was at the house of Mag Bush on Saturday night, and was asked by Mag Bush and Herndon if she could get Eloise to come to Mag's house to see Herndon. She told them that she could not get her that night, but would try to get her to come next day; that on Sunday she did go to her mother's and get Eloise and take her to Mag's house; that her mother came to Mag's and asked Mag to put her out of the house; that Mag said she was not there. Eloise got behind the door when her mother came to Mag's. She left the house, leaving Eloise there; that she did not see Eloise until next morning; that Eloise stayed at Mag's house that night; that she came to her house on Monday and stayed with her on Monday and Monday night. She said she knew the character of Mag's house, and it was a 'whore-house.'"

Defendant objected to this evidence. Objection overruled, and exception by defendant.

The defendant introduced no evidence, and requested his Honor, in writing, to charge the jury that, upon the evidence, the defendant was not guilty. His Honor declined to charge as requested, and defendant excepted.

His Honor charged the jury that if they believe, beyond a (679) reasonable doubt, that the defendant went to her father's house, where Eloise Chisenhall lived, and induced her to leave her father's house, and took her to the house of Mag Bush, under a previous arrangement with Herndon and Mag Bush, for an immoral purpose, and the father did not consent, then the defendant would be guilty.

To this charge the defendant excepted. The jury returned a verdict of "guilty," and from the judgment pronounced thereon the defendant appealed.

Attorney-General and E. C. Smith for the State.
J. S. Manning for defendant.

SHEPHERD, J. The statute (The Code, sec. 973) under which the defendant is indicted is different from the English and some of the American enactments upon the subject, in that fraud and force are not necessarily constituent elements of the offense, and it is silent as to the taking being against the consent of the parent or other custodian of the child. Many of the refinements of construction to be found in the text-books, illustrated by the various decisions, have, therefore, but little application to the case before us. "Our statute" (says *Ashe, J.*, in *S. v. George,* 93 N. C., 567) "is broad and comprehensive in its terms, and embraces *all means* by which the child may be abducted." The crime is defined in the statute by the term "abduction," which is a term of well-known signification, and means, in law, "the taking and carrying away of a child, a ward, a wife, etc., either by fraud, *persuasion* or open violence." Webster's Dictionary.

It is clear that the consent of the child, obtained by means of persuasion, is no defense, since the result of such persuasion is just as great an evil as if it had been accomplished by other means. Even under the English statutes, where a "taking" is required, it was said by *Wightman, J.* (in *R. v. Handley,* 1 F. & F., 648), that (680) "a taking by force is not necessary; it is sufficient if such *moral* force was used as to create a willingness, on the girl's part, to leave her father's home." And in *R. v. Makelton* (1 Dears C. C. R., 159), *Jervis, C. J.*, enunciated the true spirit of the law when he said that "the statute was framed for the protection of parents." Of course, if there is no force or inducement, and the departure of the child is entirely voluntary, there can be no offense. These principles fully sustain his Honor's charge. But it is insisted that he should have instructed the jury, as requested, that, upon the whole testimony, the defendant was not guilty. This prayer, we suppose, is predicated upon the idea that the declarations of the defendant, as deposed to by W. M.

Busbee, were improperly admitted. It appears that the child Eloise and the defendant were found by the mother at the home of Mag Bush, a prostitute, and that the latter had been bound over to court for the abduction. The mother and the defendant were witnesses for the State, and, during a recess of the court, were told by Mr. Busbee, a justice of the peace, to go to the solicitor's room, where they were both examined by the latter, preliminary to the sending a bill of indictment against the said Mag Bush. It does not appear that any proceedings had been taken against the defendant at that time, and her declarations at said interview seem to have been voluntary. She could have declined answering any question which tended to incriminate her. Indeed, she could not have been compelled to have made any statement whatever to the solicitor, as the examination was purely extra-judicial. *S. v. Williams,* 91 N. C., 599.

We are unable to see any error in the admission of these declarations, and the exceptions based upon it must be overruled.

The testimony was, in our opinion, fully sufficient, in con-
(681) nection with the other circumstances, to warrant a conviction.

The defendant stated that she knew that Mag Bush kept a house of prostitution; that she promised to get Eloise to go there, and, at the request of Mag, "she did go to her mother's and get Eloise and take her to Mag's," for the purpose of meeting one Herndon. It was, as we have said, immaterial that the child was willing to go, if her going was "by any means" induced by the defendant, and this question, we think, was properly left to the jury.

It is further objected that the prosecutrix should not have been permitted to testify to the fact that her husband told her to go after Eloise as soon as he discovered that she had gone off with the defendant. We do not see how this in any way prejudiced the defendant's case, as it was evidently introduced for the purpose of showing that the child was taken without the father's consent. It was unnecessary, under our statute, for the State to have shown this (*S. v. George, supra*), and if it constituted a defense, it was the duty of the defendant to have established it. She offered no testimony tending to show such consent, and the evidence objected to was merely irrelevant, as it only tended to rebut a defense which the defendant did not rely upon. Had it been material, however, we think that the acts of the father, and the accompanying language, upon the discovery of the abduction of his daughter, would have been competent evidence to have shown that her absence was without his consent.

It is also objected that the court erred in allowing a witness to testify as to the general reputation of Mag Bush's house. Such evidence is held to be admissible in Connecticut, even against a defendant charged

with the keeping of a house of ill-fame. *Cadwell v. State,* 17 Conn., 467. Such is not, however, the law in this State, but we think it competent when the character of the house is only collaterally involved, and is attended with evidence of *scienter,* on the part of the defendant, and is only used for the purpose of showing the intent (682) with which an act is done, as, in this case, to show that the defendant's object was to prostitute the child. Moreover, the defendant could not have been prejudiced by the evidence, as it was shown by her own declaration that Mag Bush was a common prostitute and kept a house of prostitution. Besides, it was unnecessary for the State to have shown the intent of the defendant. There is nothing in our statute which requires that the abduction should be with a particular intent. It is only necessary to allege and prove that the child was abducted, or by any means induced "to leave" its custodian. We think the exception is without merit.

Upon a review of the whole case, we are of opinion that there is

No error.

Cited: S. v. McLean, 121 N. C., 595, 6; *S. v. R. R.,* 122 N. C., 1061; *S. v. Burnett,* 142 N. C., 581; *S. v. Marks,* 178 N. C., 732; *Little v. Holmes,* 181 N. C., 418; *S. v. Hopper,* 186 N. C., 410.

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*STATE v. E. L. HARRIS ET AL.

Indictment—Embezzlement—"Force and Arms"—Demurrer to Indictment—Immaterial Defects in Pleading—Duplicity—Misjoinder.

1. Where A. and B. are charged with embezzlement in one count, and in another count in the same bill A. is charged with the same act of embezzlement, this is not a misjoinder, but the latter count is mere surplusage, being embraced in the other.

2. To charge two separate and distinct offenses in the same count is bad for duplicity, but if a count for embezzlement uses words which also may amount to a charge of larceny, the latter words will be treated solely as a part of the charge for embezzlement. *S. v. Lanier,* 89 N. C., 517, cited and approved.

3. When an indictment charges several distinct offenses in different counts, whether felonies or misdemeanors, the court, in its discretion, may quash or require the solicitor to elect. But if the bill is demurred to for a misjoinder that raises a question of law, and if the demurrer is sustained an appeal by the State lies. *S. v. McDowell,* 84 N. C., 798, cited and approved.

*Head-notes by CLARK, J.

4. If the several counts contain a mere statement of the same transaction, varied to meet the different phases of proof, the bill cannot be quashed. *S. v. Eason*, 70 N. C., 88; *S. v. Morrison*, 85 N. C., 561; *S. v. Parrish*, 104 N. C., 679, cited and approved.

5. When each count in an indictment alleges in the beginning that, "on 1 January, 1888, in said county of Granville," the defendant, etc., this applies to the whole count, and is a sufficient allegation that the crime charged in said count was committed in the county of Granville, and it is needless to repeat it at the beginning of each sentence or paragraph in the same count.

6. The omission of the words "with force and arms" in an indictment has been held immaterial since the year 1546 (Statute 37, Henry VIII), citing *Ruffin, C. J.*, in *S. v. Moses*, 2 Dev., 452.

7. A defendant cannot be prejudiced by an indictment concluding, even if unnecessarily, "against the statute." The Code, sec. 1183; *S. v. Kirkman*, 104 N. C., 911.

(683) THIS was an appeal by the State from a judgment of *Armfield, J.*, at January Term, 1890, of GRANVILLE Superior Court, sustaining a demurrer to an indictment.

The first count in the indictment is as follows: "That the jurors for the State, upon their oaths, present that, on the first day of January, 1888, at and in the said county of Granville, E. L. Harris and W. N. Harris were the agents and employees of the Lord & Polk Company, a corporation created, organized and existing by and under the authority of the laws of the State of Delaware, for the sale of a certain brand of fertilizer, known and called by the name of Diamond State Superphosphates, and were also on the day and year aforesaid the agents and employees of said corporation, to have, take and receive into their possession and under their care, from the purchasers of said fertilizers, all moneys that such purchasers might or would pay to them as agents and employees as aforesaid, for and on account of said corporation.

(684) (And they further present that defendants, etc.) certain moneys of the value of one hundred dollars, to wit, the sum of ten dollars each, of the value of ten dollars, of and from W. D. Fuller, W. A. Blackley, W. W. Conway, R. H. Tunstall, R. A. Tunstall, G. W. Reams, B. F. Lane and D. C. White, the property of said corporation; and the said E. L. Harris and W. N. Harris, agents and employees as aforesaid, on the day and year aforesaid, the said moneys, the property of said corporation as aforesaid, unlawfully, fraudulently and feloniously did take, steal and embezzle and convert to their own use, and did make way with and secrete with intent unlawfully, fraudulently and feloniously to take, steal, embezzle and convert to their own use said moneys so received by them, the said E. L. Harris and W. N. Harris, agents and employees as aforesaid, they, the said E. L. Harris and W. N. Harris,

not being apprentices, and being over the age of sixteen years, to the great damage of said corporation, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State."

The second count is a copy of the first, except that it alleges authority to receive "promissory notes, bonds and obligations to pay" of the sum of ten dollars each executed by W. D. Fuller and others named in the first count, instead of "moneys," as charged in the first count, and the receipt of the same and embezzlement thereof as charged in the first count.

The third count is a duplicate of the first, except that it charges E. L. Harris instead of E. L. Harris and W. N. Harris.

The fourth count is a duplicate of the second, except that it charges E. L. Harris alone.

The fifth charges that E. L. Harris and W. N. Harris were copartners, trading in the name and style of Harris & Son, and their agency and the embezzlement of the moneys, promissory notes, bonds, obligations to pay the embezzlement thereof, all as set out in previous counts. With these variations, the last four counts are a copy (685) of the first count, which is substantially set out above.

Attorney-General for the State.

M. B. Lanier, N. B. Cannady (by brief) and A. W. Graham for defendant.

CLARK, J. The defendants demur to the indictment as defective for misjoinder, duplicity and insufficiency, in that:

1. In the first, second and fifth counts the offense is charged to have been committed by E. L. Harris and W. N. Harris, and these counts are joined with third and fourth counts, charging the offense to have been committed by E. L. Harris, and this is bad for misjoinder.

2. That each count charges the two separate and distinct offenses, larceny and embezzlement, and is bad for duplicity.

3. That the indictment charges several distinct offenses.

4. That it is not alleged in what county the offense was committed.

5. That the offense is not alleged to have been committed with force and arms.

6. That the indictment wrongfully concluded *contra formam statuti.*

First. The different counts in the bill are statements in different forms of the same embezzlement varied to meet the different possible phases of the testimony. We do not see any object to be obtained by the counts charging E. L. Harris alone, for if the evidence justified his conviction alone, and not that of W. N. Harris also, he could have been

convicted under the count charging him jointly with another, though the other should be acquitted, but we see no harm which could (686) accrue either to him or the other defendant by a count which is mere surplusage, for it is included and embraced in the other counts. This is different from *S. v. Hall,* 97 N. C., 474, which held that different persons could not be charged with different and distinct offenses in the same indictment.

Second. The defendant's counsel filed a brief, which, if correct, would cure the second ground of demurrer, as they insist that the charge is not sufficient *in law* as a charge for larceny. If so, there remains only the charge for embezzlement and *utile per inutile non vitiatur.* But it is not necessary to consider the correctness of defendant's views on that point, for while the joining of two separate offenses in the same count is bad for duplicity *(S. v. Cooper,* 101 N. C., 684), the Court holds *(Ashe, J.,* in *S. v. Lanier,* 89 N. C., 517) that where larceny and embezzlement of the same article is alleged in the same count "the indictment is good for embezzlement, notwithstanding the charge of larceny," because the latter words "are superfluous and unmeaning in an indictment (for embezzlement) under our statute."

Third. An indictment containing several counts, describing the same transaction in different ways, is unobjectionable *(Ashe, J.,* in *S. v. Reel,* 80 N. C., 442), and the Court will not quash it. *S. v. Parish,* 104 N. C., 679; *S. v. Eason,* 70 N. C., 88; *S. v. Morrison,* 85 N. C., 561. "It is no objection on a demurrer that several felonies are charged against a person in the same indictment for on the face of an indictment every distinct count imports to be for a different offense. It is, however, in the discretion of the Court to quash an indictment or compel the prosecutor to elect on which count he will proceed, when the counts charge offenses actually distinct and separate." *Gaston, J.,* in *S. v. Haney,* 2 D. & B., 390. The same rule applies to misdemeanors as well as felonies. *S. v. Slagle,* 82 N. C., 653, where the Court says "it is well settled that there may be a joinder of counts where the (687) grade of the offense and the punishment are the same." There are many decisions that where there are several counts charging distinct offenses, but of the same grade and punishable alike, the power of the Court to quash or compel the solicitor to elect is a matter of discretion. *S. v. King,* 84 N. C., 737; *S. v. McNeill,* 93 N. C., 552; *S. v. Farmer,* 104 N. C., 887; *S. v. Reel, supra.* But this is a demurrer which demands an adjudication that the bill is defective, as a matter of law, and if the Court so rules, an appeal lies in favor of the State; though, if the demurrer were overruled, the defendant can only have his exception noted, and must proceed to trial on the merits. *S. v. McDowell,* 84 N. C., 798.

Fourth. Each count begins: "The jurors for the State, upon their oath, present that, on the first day of January, 1888, at and in said county of Granville, E. L. Harris," etc. This qualifies and applies to the whole allegation in such count. To hold that it only applied to the first paragraph, or first sentence, would be to exact much "vain repetition." To sustain the demurrer on such ground would ignore the plain provisions of The Code, sec. 1183, which provides: "Every criminal proceeding, by warrant, indictment, information or impeachment, shall be sufficient in form for all intents and purposes, if it expresses the charge against the defendant in a plain, intelligible and explicit manner, and the same *shall not be quashed,* nor the judgment thereon stayed, *by reason of any informality or refinement,* if, in the bill or proceeding, *sufficient matter* appears to enable the court to proceed to judgment."

Fifth. As to the omission of the words "with force and arms," sixty years ago *Chief Justice Ruffin,* in *S. v. Moses,* 2 Dev., 452, said that those words have been "superfluous since the Statute 37, Henry VIII. We are as much bound to dispense with unnecessary and immaterial averments, when permitted by the statute, as if commanded by it, and if the one in question be not of that character, it is difficult to say to what *'unseemly nicety'* (as Lord Hale calls it), *formality* (688) *or refinement* the act can extend." In *S. v. Duncan,* 6 Ired., 236, which, like the case just cited, was an indictment for murder, the Court reiterates that the words "force and arms" are mere surplusage. The Statute 37, Henry VIII, was passed in the year 1546. It would seem that this point should be held as settled. The statute is set out in Whart. Cr. Pl. and Pr., sec. 271, and the learned author says that even prior thereto these words were never necessary in a charge like this, where no actual force was used.

Sixth. The defendant has as little cause to complain that the indictment concludes against the form of the statute as for the omission of the words "with force and arms." Neither is calculated to mislead or prejudice him in the slightest degree. The decisions that the mere formal conclusion to an indictment are immaterial are collected and the principle reaffirmed in *S. v. Kirkman,* 104 N. C., 911, to which we will merely refer. The indictment here concludes both "against the statute" and "against the peace and dignity of the State." If the former was wrong, it was mere surplusage. *S. v. Lamb,* 65 N. C., 419; *S. v. Bryson,* 79 N. C., 651.

In *S. v. Smith,* 63 N. C., 234, it was said: "It is evident that the courts have looked with no favor upon technical objections, and the Legislature has been moving in the same direction. The current is all one way, sweeping off by degrees 'informalities and refinements' until,

indeed, a plain, intelligible and explicit statement of the charge against the defendant is all that is now required in any criminal proceeding."

In *S. v. Moses, supra, Chief Justice Ruffin* says: "This law (referring to what is now The Code, sec. 1183) was certainly designed to uphold the execution of public justice by freeing the courts from those fetters of form, technicality and refinement, which do not concern the substance of the charge and the proof to support it." The reports (689) are full of similar decisions. The legislative intent to cure the evil is clearly expressed in The Code, secs. 1183, 1189, 1194, and many similar statutes. These technicalities and refinements doubtless originated in the humanity of the courts at a time when defendants on trial for the gravest offenses were not permitted the benefit of counsel, nor allowed to have witnesses sworn in their behalf. 4 Bl., 459. They are an anachronism now. Their survival and occasional reappearance, after so many statutes and so many decisions, and when the reason for them and a knowledge of their origin even has passed away, is without a parallel, unless it is in the fact that our time-pieces still mark the fourth hour with IIII, which we are told, is due to the fact that the King of France, to whom the first watch was carried, unable to understand its mechanism, criticised the IV and ordered it replaced by the letters which, with Chinese exactness of imitation, are used by us today.

They do no harm. But to sustain obsolete technicalities in indictments will be to waste the time of the courts, needlessly increase their expense to the public, multiply trials, and, in some instances, would permit defendants to evade punishment who could not escape upon a trial on the merits. If it has not the last mentioned result, it is no advantage to defendants to resort to technicalities, and, if it has such effect, the courts should repress, as they do, a reliance upon them.

There are cases where defects in an indictment or a civil pleading are matters of substance, and objection should be insisted on by the parties and sustained by the courts. But the letter and the spirit of legislation, both as to criminal and civil pleading, require only a plain and clear statement of the matters alleged, and when the objection to such statement is not substantial, but rests upon mere technicalities and refinements, it would be better for the party to disregard them and (690) go to trial upon the merits, if he has any to set up and rely on.

The judgment must be set aside, and the cause remanded for further proceedings in conformity to this opinion.

Error.

Cited: S. v. Perdue, 107 N. C., 856; *S. v. Arnold, ibid.,* 863; *S. v. Peoples,* 108 N. C., 769; *S. v. Barber,* 113 N. C., 714; *S. v. Brown, ibid.,* 647; *S. v. Call,* 121 N. C., 649; *S. v. Wilson, ibid.,* 655; *S. v. Hester,*

122 N. C., 1052; *S. v. Robbins,* 123 N. C., 736; *S. v. Ridge,* 125 N. C., 657; *S. v. McBroom,* 127 N. C., 538; *S. v. Bryson, ibid.,* 576; *S. v. Howard,* 129 N. C., 656; *S. v. Jarvis, ibid.,* 699; *S. v. Peak,* 130 N. C., 715; *S. v. Summers,* 141 N. C., 843; *S. v. Burnett,* 142 N. C., 579; *S. v. Tisdale,* 145 N. C., 430; *S. v. Craft,* 168 N. C., 212; *S. v. Lewis,* 185 N. C., 643; *S. v. Malpass,* 189 N. C., 351.

STATE v. G. K. BAGBY.

THIS was an appeal from the mayor of the town of Beaufort, tried before *Bynum, J.,* at Fall Term, 1889, of CARTERET Superior Court.

The defendant was an itinerant dentist, and was indicted for practicing his profession without a license.

The Attorney-General and Charles R. Thomas for the State.
No counsel for defendant.

MERRIMON, C. J. We are unable to see any cause for this appeal. No error is assigned, and, upon examination, we find the record regular and unexceptionable. In such a case the judgment will be affirmed. *S. v. Freeman,* 93 N. C., 558; *S. v. Bell,* 103 N. C., 438.

Judgment affirmed.

(691)

THE STATE v. GEORGE I. TURNER.

Indictment—Negative Averments—Landlord and Tenant—Receivers—Evidence.

1. The statute (The Code, sec. 1759) making the removal of a crop without notice and before discharging liens a misdemeanor, extends to and protects receivers charged with the management of lands.
2. Where such receiver made a lease of turpentine trees, the tenant was estopped to deny his authority to make the lease; but should proof of his authority be required, the highest evidence of it was the order of the court making the appointment.
3. Where an indictment for removing a crop alleged that defendant did "rent from B.," and subsequently, that he did remove the crop without

satisfying all liens held by said B.": *Held*, that this, in effect, sufficiently changed the relation of landlord and tenant, and that the "liens held by the lessor" were unpaid at the time of the alleged unlawful removal.

4. In an indictment for removing a crop, it is not necessary to negative the fact that, by agreement between the parties, it was stipulated that the crops should not be subjected to the statutory liens.

INDICTMENT for removing crop, tried at Fall Term, 1889, of JONES Superior Court, *Boykin, J.*, presiding.

The indictment charges that on 21 March, 1889, in the county of Jones, the defendant "did, by a certain contract and agreement, rent from C. C. Brown, receiver, certain turpentine trees on the lands known as," etc., 'and afterwards, to wit, on 1 July, A. D. 1889, in said county, unlawfully and wilfully did remove from said land a part of the crop of turpentine raised during the lease and term aforesaid, . . . to wit, two barrels of turpentine, without the consent of the said C. C. Brown, and without giving him, the said C. C. Brown, five days notice of such intended removal, and without satisfying *all liens held by said C. C. Brown on said crop of turpentine,* against," etc., etc.

The defendant pleaded not guilty.

(692) On the trial the evidence produced by the State went to prove that the prosecutor had been appointed receiver in a certain action pending in the Superior Court of Jones County, and that as such he was charged with the land, and turpentine trees growing thereon, and that he leased the trees to defendant for the purpose of getting turpentine therefrom. The State offered the order appointing the said Brown receiver. Defendant objected. Objection overruled, and the defendant excepted.

There was a verdict of guilty. The defendant then moved in arrest of judgment upon the ground that the indictment did not charge that the turpentine was removed "without satisfying *all liens held by the lessor.*"

The motion in arrest was denied. There was judgment against the defendant, and he, having excepted, appealed.

Attorney-General for the State.
No counsel contra.

MERRIMON, C. J., after stating the case: The statute (The Code, sec. 1762) extends the other statute (The Code, sec. 1759) to "all leases or contracts to lease turpentine trees," and thus it is made a misdemeanor for the lessee of turpentine trees to remove any part of the turpentine crop in the like case as when the removal of the crop by an agricultural tenant is made such offense.

The first exception is without merit. As the defendant leased the turpentine trees from the prosecutor, he became the latter's tenant, and could not be heard to say that his landlord was not entitled to rent, and, therefore, had no lien on the crop. If the rights of third parties should arise otherwise than by assignment or operation of law, or if for any cause the landlord should not have the right to the rents and the benefit of the statutory lien on the crops, the tenant should take appropriate legal steps to protect himself against criminal liability, if he should remove the crops otherwise than in the case allowed by (693) the statute.

But, if in this case it was necessary for the prosecutor to show his right as receiver to let the turpentine trees to the defendant, it was obviously competent to put in evidence for that purpose the order of the court appointing him to be such receiver. This would be the highest and best evidence of his authority. It was not objected that the order was defective and insufficient for the purpose of it. Nor could it be said that a receiver could not be invested with or have authority to let land or such trees to tenants. It might, in possible cases, be, indeed it is frequently, important to charge receivers with the duty to let land, secure rents and the like. The statute in terms, certainly in its spirit and in its purpose to protect landlords as to the rents due to them, extends to receivers letting land. Their rights clearly come within the mischief to be remedied.

And so, likewise, the second exception is unfounded. The indictment charges that the defendant "did, by a certain contract and agreement, rent from C. C. Brown," etc. It thus charged the relation of landlord, or lessor and tenant, the defendant being the tenant of the prosecutor as lessor. It further charged, in a subsequent part of the indictment, that the defendant removed two barrels of turpentine "without satisfying all liens held by said C. C. Brown on said crop of turpentine," etc. It thus, in effect, charged the removal of the turpentine "before satisfying all the liens held by the lessor" as certainly as if it had done so in very terms, because "said C. C. Brown" was charged in the indictment to be the lessor, or landlord. It will be observed that the statute does not extend to, and embrace, *all liens* the lessor may have on *any* property of the tenant, but only "all the liens held by the lessor or his assigns *on the crop.*" The indictment here harmonizes with the statute in this respect, and sufficiently charges the removal of the turpentine "before satisfying all the liens held by the lessor" on (694) the crop.

The statute (The Code, sec. 1754) prescribes that "when lands shall be rented, or leased, by agreement, written or oral, for agricultural purposes, or shall be cultivated by a cropper *unless otherwise agreed*

between the parties to the lease, or agreement," the lessor shall have a lien, etc. It has been contended that in this and like cases, the indictment should, in the appropriate connection, negative such exceptive agreement as that mentioned in the statute just cited. We do not think so, because, as contended by the attorney-general, the statute (The Code, sec. 1759) creating and defining the offense here charged, contains no such exception or qualification, or exceptive provision. Such agreement is, when it exists, matter of defense. When, ordinarily, an exception is contained in the same clause of the statute which creates the offense, the indictment must show negatively that the defendant, or the act charged in the indictment, does not come within the exception. But it is otherwise when the exception or qualification appears in separate and distinct clauses. In 1 Chitty's Cr. Law, 284, it is said: "When a statute contains provisos and exceptions in distinct clauses, it is not necessary to state in the indictment that the defendant does not come within the exceptions, or to negative the provisos it contains." *S. v. Norman,* 2 Dev., 222; *S. v. Tomlinson,* 77 N. C., 528; *S. v. Heaton,* 81 N. C., 542; Arch. Cr. Pl., 48; 1 Bish. Cr. Pros., sec. 375, *et seq.*

While the indictment is not so full and formal as it might and ought to be, we think it sufficient.

Affirmed.

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(695)

*STATE v. STEPHEN JACOBS.

Expression of Opinion—Peremptory Challenge—Conduct of Defendant—Evidence.

1. A remark of the judge made before trial begun, that the jailer had informed him the prisoner "would escape if he had the opportunity" is not an expression of opinion upon the facts prohibited by the Act of 1796.
2. The right of peremptory challenge is a right to reject, not to select; hence when there are two defendants, one cannot complain that the other peremptorily challenged a juror who was acceptable to himself.
3. The conduct of a prisoner when arrested is competent to be shown in evidence.

INDICTMENT for murder, tried before *Gilmer, J.,* and a jury, at May Term, 1889, of ROBESON Superior Court.

Attorney-General for the State.
No counsel contra.

CLARK, J. When the case was called for trial, the other defendant, Oxendine, moved for a separate trial, and, at any rate, to be tried with one of the other defendants (there being several indicted in the same bill) rather than with defendant, Jacobs. The court remarked that it intended to try defendant, Jacobs; that it had been informed by the jailer that he apprehended that Jacobs would escape if he had the opportunity. To this remark defendant, Jacobs, excepted. On motion of the solicitor, Jacobs and Oxendine were tried together.

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, when there was a conflict of evidence, there was no inhibition upon his ex- (696) pressing 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 statute was passed which changed the practice in this respect. It is now The Code, sec. 413, and reads as follows: "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."

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 *S. v. Angel*, 7 Ired., 27. To the same purport is the late case of *DeBerry v. R. R.*, 100 N. C., 310; also *S. v. Jones*, 67 N. C., 285; *S. v. Robertson*, 86 N. C., 628, and *S. v. Laxton*, 78 N. C., 564. In the latter case, *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." 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 (697) 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 com-

plimentary to the intelligent 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.

Second Exception. One of the jurors, being called, was tendered to defendant, Jacobs, and was accepted by him, and was then tendered to defendant, Oxendine, who challenged him peremptorily. The court stood the juror aside, and the prisoner, Jacobs, excepted. The prisoner, Jacobs, exhausted his twenty-three peremptory challenges before the jury was obtained.

The question is not an open one. It has often been adjudicated. "The right of peremptory challenge is a right to reject, and not a right to select. Hence, when the trial is joint, neither defendant has cause to complain of a challenge by the other." *Gaston, J.,* in *S. v. Smith,* 2 Ired., 402; *S. v. Bixby,* 6 Ohio, 86; *Maton v. The People,* 15 Ill., 530; *United States v. Marchant,* 4 Mason, 158, and same case affirmed on appeal; 12 Wheat., 430; Whart. Cr. Pl. and Pr. (9 ed.), secs. 615, 620 and 680, and cases there cited.

Third Exception. A witness, after testifying to matters not excepted to, deposed that he arrested Jacobs on this charge, and that, on the way to the guardhouse, and after Jacobs got into the guardhouse, when talking about the matter, Jacobs asked witness to shoot him, and seemed to become furious. The prisoner objected to this testimony, and excepted. We see no force in the objection. The conduct of a party when arrested—attempting flight, offering resistance, or otherwise—is competent evidence against him.

No error.

Cited: S. v. Jacobs, 107 N. C., 774; *S. v. Oxendine, ibid.,* 784; *S. v. Crane,* 110 N. C., 535, 536; *S. v. Jackson,* 112 N. C., 853; *S. v. Howard,* 129 N. C., 662, 676; *Meadows v. Tel. Co.,* 131 N. C., 77; *S. v. Rogers,* 168 N. C., 116; *S. v. Baldwin,* 178 N. C., 690; *S. v. Saleeby,* 183 N. C., 742; *S. v. Hart,* 186 N. C., 602.

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(698)

THE STATE v. D. S. POOL.

Amendment—Working Road—Warrant.

In the affidavit and warrant against a person for failing or refusing to work upon a public road, it was alleged that the defendant was "summoned for more than three days before 18 September, 1889, to appear and work the Keyser public road 18 September, 1889, at 8 o'clock a.m., . . . and that the defendant unlawfully failed to come or send a hand": *Held*—

STATE *v.* POOL.

1. The proceedings were fatally defective, in that they failed to set forth in what county the offense was committed; that the person summoning the defendant was overseer of that particular road; that the road was not sufficiently described; that the defendant was liable to work the public roads and had been assigned to that one, and that they did not negative the fact that defendant had paid the sum.

2. The court had power to permit the proceedings to be amended to conform to the facts.

APPEAL from a justice of the peace, tried at Spring Term, 1890, of MOORE Superior Court, before *Bynum, J.*

The defendant was held to answer criminally before a justice of the peace for having failed to do service on the public road. The affidavit and the State warrant founded upon it, taken together, charge that the overseer of the road mentioned summoned the defendant "for more than three days before 18 September, 1889, to appear and work the Keyser public road on 18 September, 1889, at 8 o'clock a. m., and bring a shovel, and that the defendant unlawfully and wilfully failed to come himself or send a hand, contrary to," etc. Upon the plea of not guilty, there was a verdict of guilty. The defendant moved in arrest of judgment upon the ground that the warrant failed to charge sufficiently that he "was assigned to said road and was liable to work on said road." The court denied the motion and gave judgment against the defendant, who appealed. (699)

Attorney-General for the State.
No counsel contra.

MERRIMON, C. J., after stating the case: Criminal and other proceedings before justices of the peace should be upheld when they embody the essential substance of the matter to which they relate, however informal and disorderly they may be; and when they are defective in form or substance, courts having authority to do so, should freely, but cautiously, exercise their large powers to amend the same, if sufficient facts appear by which to amend. Fair opportunity should be allowed the defendant to complete his defense. The Code, sec. 908; *S. v. Smith,* 98 N. C., 747; *S. v. Smith,* 103 N. C., 410.

But especially in actions charging criminal offenses, the offense must be charged with sufficient certainty and fullness to enable the court to see that an offense, as intended, is charged. When the charge is defective in form or substance, as indicated above, if the evidence satisfies the court that the offense was probably committed, it should at once, in its discretion, allow or direct proper amendments to be made, giving the defendant reasonable opportunity to make his defense.

The charge in the warrant in this case is fatally defective in substance. It is not charged that the offense was committed in the county of Moore, nor that the prosecutor was overseer of the road and had authority as such; nor is the road described with reasonable certainty as a public road; nor is it charged, except very imperfectly, that the defendant was assigned and liable to do duty on the road; nor that the defendant was notified, as required by the statute (The Code, sec. 2019), to attend at a place designated at the time specified to
(700) do service; nor is there any clause in the charge negativing the payment of one dollar in discharge of the defendant's liability to do labor on the day specified. Such defects might have been helped or cured by proper amendments, but they were not asked for or made. It is true the motion of defendant in arrest of judgment was based on the ground that it was not charged that he was assigned to duty, etc., and the court allowed an amendment—probably in the last named respect, but, so far as appears, no amendment was in fact made; nor was any amendment asked for or allowed in other material respects indicated.

The time when a person is required to do service on public roads is a material part of the notice—it is made so by the express provision of the statute prescribing what the notice shall be.

And so, also, it is necessary in the charge to negative the payment of one dollar for the defendant, in discharge of his liability to do service on the day specified in the notice, because the statute creating the offense (The Code, sec. 2020) prescribes that the failure of the party charged to attend and work shall be an offense, "unless he shall have paid the one dollar as aforesaid," etc. The exceptive provision is in and part of the clause of the statute creating the offense, and, in such cases, it is necessary to negative such payment. *S. v. Norman,* 2 Dev., 222; *S. v. Tomlinson,* 77 N. C., 528; *S. v. Narrows Island Club,* 100 N. C., 477; Arch. Cr. Pl., 25.

There is error. The judgment must be set aside and judgment arrested, and the action dismissed, unless the court shall allow the warrant to be properly amended, in which case there will be a new trial.

Error.

Cited: S. v. Neal, 109 N. C., 860; *S. v. Gillikin,* 114 N. C., 834; *S. v. Yoder,* 132 N. C., 1113; *S. v. Green,* 151 N. C., 729; *S. v. Gupton,* 166 N. C., 261; *S. v. Thomas,* 168 N. C., 149.

(701)

*THE STATE v. JOHN BRACKVILLE.

Homicide—Evidence.

The deceased, an aged and helpless man, was taken from his house in the afternoon into the woods and brutally murdered, the body being concealed and not found until the following day. The prisoner, who resided in the same house, was shown to have some feeling against deceased, and to have expressed some vague threats toward him. It also appeared that the prisoner was seen at the house a short time before deceased disappeared, and in the vicinity shortly afterwards, and that the tracks leading to the place of the homicide resembled his. It further appeared that on the evening of the homicide and the day following he was restless and anxious, and expressed a purpose to leave the country, but made no effort to do so. There was evidence that other persons were also at deceased's house shortly before his disappearance, and were in the neighborhood near by that night and following day: *Held*, that while this evidence was sufficient to arouse a strong suspicion of prisoner's guilt, it was not inconsistent with his innocence, and left the matter in such doubt the court should have instructed the jury to acquit.

THIS was indictment for murder, tried at Fall Term, 1884, of RICHMOND Superior Court, before *Shepherd, J.*

The prisoner (and one Amy McNair, who was acquitted,) was indicted for the murder of one Charles McNair.

The testimony was as follows:

Willis Leach, for the State, testified: "Charles McNair was missing on a Friday night in October, 1884. On Friday evening I was going by his house. I noticed that everything was very still. John Brackville came to the door. McNair was lying at the other door on a pallet. I stopped and sat down. I saw Lou Hall coming; she came in and said, 'John, what are you doing here?' John said, 'I came for some tobacco.' Lou said, 'It is strange you came for tobacco, when you know you have none here.' John then went out and commenced talking to himself. I had started to hunt some grapes in the woods, and left (702) the house for that purpose between the hours of 12 M. and 1 P.M. I told Lou to come also. She said she would as soon as she heard me cutting in the woods. She soon joined me, and we got some grapes; we then returned to McNair's house, where we found John Brackville and Dave Morrison. This was between 2 and 3 o'clock. Very soon Dave started off. I followed, and left Lou and John Brackville with Charles McNair. McNair was an old man and had been

*The prisoner escaped from jail while his appeal was pending in this Court. It was thereupon dropped from the docket, and afterwards reinstated upon his recapture.

burned. He could not walk without a stick. Next morning (Saturday) I heard that Charles was gone. I went to the house; Amy was there (Charles' wife). I asked her where Charles was. She said, 'Here is his pallet, stick and hat, but I don't know where he is.' I then went around the house and found a track about fifteen steps off. I asked her to come and look at it. She said it was no good; that I knew it was not his track. I then started home, and met Lou Hall; she was going after a warrant; we returned to Charles' house. We found a track on the other side of the fence. It led to a place about four steps from the road, where there was blood. There was signs of the body having been dragged from the spot to some distance further in the woods, where there was blood. We then went further on. About one hundred or one hundred and seventy-five yards from the first spot, and there we found the body of Charles McNair. He was dead. His skull was crushed and his forehead broken in with what I thought must have been an axe. I saw tracks leading to where Charles was killed. They were the same that were in the field that Charles' house was in. John Brackville, Amy McNair and Lou Hall all lived in the house with Charles McNair."

Henry Monroe testified: "I saw the dead body of Charles McNair about 1 o'clock Saturday. It was lying behind a log in the woods; head was mashed with the back of an axe; forehead and skull also broken in.

(703) It looked as if he had been moved twice, by the blood near the road and further in the woods, and had been dragged to where we found him. I heard Amy say, in August, that she wished Charles was dead. Charles McNair was an old man. John Brackville moved to the house about five months before the missing of Charles. The Saturday evening after Charles was missing, Amy came to my house. My daughter said to her: 'You needn't come here hunting Uncle Charles; you know you have killed him and thrown him into a well somewhere.' Amy said: 'I knew I would hear the devil when I got here,' and got up and started off. I asked her when she had seen Charles last? She said, 'I haven't seen him since yesterday (Friday) morning.' I asked her why she was so contented about his missing? She said, 'I would have been hunting him before but thought some of his folks had taken him off.' On Friday night after the missing I went to Charles' house. The doors were shut and no one there. I went to the mill, between a quarter and a half a mile from the house, and found Amy near there, at Eliza Morrison's house. I heard her laughing. I took her off to myself. I told her about her husband being missed. She said he couldn't walk. She denied having had any quarrel with him, but afterwards said she had had a little falling out with him on Thursday, but that it did not amount to anything. We all went to Charles' house. I

suggested that he might be in the well, and that it be examined. Amy said she would not go and look into the well unless Lawrence went. Amy seemed jolly when she went from Eliza's to her house. At the well one of the party said, 'I have got him,' and Amy cried until it was discovered that it was only a well-bucket. I then told her I was going to arrest her. She said, 'I am not going to leave the place where my husband was murdered.' I went to get a warrant and when I returned Lou Hall and John Brackville had come up. I asked John where Charles was. He said he didn't know. Lou said, 'What the devil does all this mean?' I said, 'You may consider yourself under arrest until Charles is found.' Lou and John said they would not be (704) arrested."

Lou Hall testified: "I was living in the same house with Charles McNair, John Brackville and Amy. On Friday morning I left the house between 8 and 9 o'clock and went to the mill. Amy went with me. We left Charles alone. John Brackville had left that morning before sunrise for the mill; we went to carry his breakfast and dinner. I returned to Charles' house about 12 o'clock in the day. I left Amy at Eliza Morrison's house, near the mill. When I reached Charles' I found Willis Leach there. I stayed until 3 o'clock. After that I had gone in the woods for grapes. Amy had not come. John was there when I got there. He said he had come after some tobacco. I said: 'It looks queer for you to come for it when you know you have none here.' Willis Leach got up and asked Charles for his axe; said he wanted to go in the woods and get some wild grapes. I said I would join him when I heard him cutting. Soon I joined him. When I spoke to John Brackville about the tobacco he seemed mad; went off saying he 'would fix things better than so.' When I went after the grapes I left Charles alone. When I returned I saw John returning again from the direction of the mill. He hadn't had time to go to the mill. He came in the house and looked angry at Charles. Charles raised up on his pallet and said to him: 'I know you are angry, and I am going to tell this gal how you have been talking about her, and how you have been saying that you did not intend to pay her for what she has done for you.' John was eating. He threw his bread down and said: 'What in the devil have you got to do with it?' He shook his fist in Charles' face and said: 'By the living Jesus, you have got to attend to your own business; I am going to make you attend to your business.' About 3 o'clock I left and John Brackville followed (705) me as far as the hedge row. He said: 'If Charles has told you what I said, and you believe it, Charles won't get a chance to tell you any more.' He went back in the direction of Charles' house. I left no one with Charles. About a quarter of an hour after sunset I returned

to the house; both doors were open and no one there. The axe which Willis had returned was gone; my clothes gone, and John's satchel and best pants gone. Charles' stick was there. I called him and there was no response. I then went to the mill and found Amy at Eliza's. I asked her where Charles was. She said she did not know. She didn't seem interested; said John Brackville had been that course twice. She asked if John wasn't there. It had been two months since Amy had stayed away from her house that late, and five months before John Brackville had ever stayed out at night. Amy went home with me. I saw John that night at Archie Shaw's shanty. I told him about Charles and the clothes being missed. He said, 'Well, I reckon not; I can't say about Charles, but I reckon my clothes are there.' I saw a track Friday night at the place near the road where Charles was reputed to have been killed. It led by the field back towards the house. The track went to Charles.' It was John Brackville's track. I so told Willis Leach next morning. On Friday morning, I told Amy to go dress Charles' leg. She walked to him, snatched the blanket from him and abused him for being nasty, and said: 'Damn your nasty soul, if you don't quit spitting on the floor, and quit your nastiness, I will kill you, or have you killed.' I remonstrated. She said: 'Lou, nobody knows what trouble I have with this bald-headed son-of-a-bitch but me.' We never found the axe. I did not measure this track. In the line of this track I found a spool of my thread, which I had left in the house; it was unwound a part of the way along the track."

(706) Willis Leach, recalled, said: "On Sunday morning, after the missing of Charles, Lou Hall showed me the tracks, and they were John Brackville's."

Charles H. Daniel testified: "I was living at McMillan's mill, a quarter of a mile from Charles McNair's. On the Friday night of the missing of Charles, I went to bed between nine and ten o'clock. After I went to bed, John Brackville came to the shanty. John used to stay there, but had not stayed there at night for five months. He shoved the door open, sat on a box, and asked if we had anything to eat. He ate something, then sat down on the box again, and leaned his face on one of his hands. He appeared worried. Shaw said, 'What have you lost?' He said, 'I have lost my valise and pants,' and that 'Lou Hall had lost some of her things.' When he put his hand to his face he said, 'Great God, boys! I am going to leave this country.' He never said a word about Charles."

James L. Haley testified: "John Brackville and Dave Cromartee were working at the mill. I wanted hands to pack cotton. On Friday morning (of the day of the missing of Charles) they packed one bale. When I was about to drive off, I saw John, Lou Hall and Amy in the

road talking about something. On Saturday morning John came to me and wanted a settlement. I said, 'I have no money with me,' but could pay him if he went to Laurinburg. He appeared very uneasy."

David Cromartee testified: "John Brackville and I were working at the mill together on the Friday of the missing of Charles McNair. About 11 A. M. I went to Eliza Morrison's house; when I returned John was gone; he came in about an hour; then he wheeled dirt awhile, and said he would go and get his dinner, and he went off. This was about half-past two o'clock. I never saw him any more until after night. I stayed half an hour after he left."

Here the State closed its testimony. (707)

Amy McNair was introduced in her own behalf, and testified as follows: "On Friday morning I went after meal to the mill between 9 and 10 o'clock. Lou Hall went with me. She carried John Brackville's breakfast with her, but no dinner. I went to Eliza Morrison's near the mill. I never left there until Lou came after me, about supper time, and then I went home. I never had anything to do with the killing of Charles, nor did I know anything about it. That night after I got home, Lou and I hunted for Charles nearly all night. The reason I stayed away from home was because I wanted to borrow some meal from Lou Hayes. About dinner time I told Dave Morrison, who was going by home, to tell Charles I would be home after awhile. Before I left Eliza's John Brackville passed, just about dark, with his pipe. Then Lou and I went home. After awhile we returned past the shanty of the Bladen boys. I saw John there. Archie Shaw was there also. We then returned home. John Brackville came afterwards. About one-quarter of an hour after we got home, John Brackville said: 'Do you want me to help look for him?' I told him there was no use asking me that question; he might know I wanted him to do so. Shortly afterwards Brackville went away."

Eliza Morrison testified: "I saw Amy at 12 o'clock of the Friday of the missing of Charles. She stayed at my house until Lou Hall came. They went off soon after Lou Hall came. John Brackville passed a little before Lou came, between sunset and dark."

Monroe Cox, witness for the State, testified: "Amy's general character is bad. He heard Amy say, in April, that she was tired of Charles, and that she 'wished he was dead and out of her way.'"

The prisoner asked the court to instruct the jury that there was not sufficient testimony to convict him, and that they should return a verdict of "not guilty." The court declined to so instruct the jury, and the defendant excepted. There was no other exception during the trial. (708)

There was a verdict of "not guilty" as to Amy, and verdict of "guilty" as to John Brackville.

The prisoner moved for a new trial, because of the failure of the court to instruct the jury according to his prayer.

The motion was overruled, and the court pronounced the sentence of death. The defendant prayed an appeal to the Supreme Court.

The prisoner escaped from the jail while his appeal was pending. The case was not carried forward upon the docket, but was reinstated upon his recapture. (See 91 N. C., 945, 972.)

Attorney-General for the State.
No counsel contra.

MERRIMON, C. J. Competent evidence, sufficient in pertinency and force in some reasonable view of it to be taken by the jury to warrant them in finding a verdict of guilty, must be submitted to them on the trial of the issue of fact raised by the plea of not guilty in a criminal action. Such evidence must be produced, else there cannot be a lawful verdict of guilty. It is the province and duty of the court to determine that such evidence is, or is not, produced on the trial, when any question in that respect is raised. It is the province of the jury to determine when such evidence is so produced, that it is true or not true, in whole or in part, and its weight and sufficiency or insufficiency to induce them to render a verdict of guilty. What is evidence is a question for the court. Whether evidence is true or not, and what is its weight, are questions ordinarily for the jury. *S. v. White,* 89 N. C., 462, and cases there cited; *S. v. James,* 90 N. C., 702; *S. v. Atkinson,* 93 N. C., 519; *S. v. Powell,* 94 N. C., 965.

(709) In the present case, the evidence produced on the trial was strong and abundantly sufficient to go to the jury to prove that the deceased was brutally murdered by some person; but, in our judgment, it was not sufficient to go to them to prove that the prisoner was the guilty party. It tended to show that the prisoner had motive, but not very strong; that he made threats—indefinite, but rather suggestive that he might kill the deceased; that he had opportunity to kill him; that others had like and as great opportunity; that his tracks were seen by one witness as if he were going from the place where the body of the deceased was found towards the house from which he was taken, but this evidence was not definite or satisfactory. So far as appears, the tracks were not scrutinized—they were not measured—the prisoner's feet were not measured or fitted to the tracks, nor did it appear that his feet were at all peculiar in any respect, nor did the witness say how she knew the tracks were his. On the night of the homicide,

probably shortly after it was committed, the prisoner was in a cabin with several other persons, and appeared to be uneasy and anxious, and exclaimed, without apparent cause, "Great God! boys, I'm going to leave this country." He gave no reason for this exclamation. The next morning he demanded the wages due to him from his employer, and seemed anxious. But he did not fly. There was other evidence in connection with that referred to, going to prove that the wife of the deceased was tired of him—wished he was dead; that she was a dissolute woman and of bad character. It did not appear that the prisoner was her paramour, or that there was undue intimacy between them. It may be that some person other than the prisoner, at her instance, or on her acccount, murdered the deceased. Indeed, she was charged in this action as a participant in the murder, and she was not at all free from suspicion.

We think the evidence simply raised strong suspicion of the (710) prisoner's guilt. It could not, in any reasonable view of it, prove his guilt. Taking the strongest view of it adverse to him, upon serious reflection, it leaves the mind in a state of painful anxiety, doubt and uncertainty as to his guilt. The evidence giving rise to suspicion, accepted as true, was far from conclusive. Leaving out the evidence as to the tracks, the leading fact, whether taken severally or collectively and in their combined force, were not necessarily inconsistent with his innocence. As we have seen, the evidence as to the tracks was very unsatisfactory. It seems that it might and ought to have been made much clearer, especially, as it was very material.

Circumstantial evidence is not only a recognized and accepted instrumentality in the ascertainment of truth, but it is essential, and, when properly understood and applied, highly satisfactory in matters of the gravest moment. The facts, their relations, connections and combinations should be natural, reasonable, clear and satisfactory. When such evidence is relied upon to convict, it should be clear, convincing and conclusive in its connections and combinations, excluding all rational doubt as to the prisoner's guilt; and it is not sufficient to go or be left to the jury, unless, in some aspect of it, they might reasonably render a verdict of guilty. *S. v. Swink,* 2 Dev. & Bat., 9; *S. v. Long,* 7 Jones, 24; *S. v. Matthews,* 66 N. C., 106; *S. v. Bowman,* 80 N. C., 432; *S. v. Freeman,* 89 N. C., 469; *S. v. James,* 90 N. C., 702.

Error.

Cited: S. v. Goodson, 107 N. C., 800; *S. v. Green,* 111 N. C., 651; *S. v. Vaughn,* 129 N. C., 507; *S. v. Wilcox,* 132 N. C., 1138; *S. v. Matthews,* 162 N. C., 550; *S. v. Trull,* 169 N. C., 366; *S. v. Prince,* 182 N. C., 792; *S. v. Melton,* 187 N. C., 483.

(711)

THE STATE v. RHODA PARKER.

Marriage—Husband and Wife—Ratification—Bigamy.

1. The admission of testimony, incompetent because irrelevant, will not be sufficient to warrant a new trial, unless it is apparent that the party against whom it is admitted was, or might have been, prejudiced thereby, and the burden is on the party objecting to show that fact.
2. Marriages entered into by a female under fourteen, or a male under sixteen, are not void, but voidable.
3. Where a marriage is entered into by one under the legal age, but is followed by a cohabitation of twenty years, the parties acknowledging each other and being recognized as husband and wife, though such marriage in its inception is invalid, by reason of such ratification by the parties, it will not be declared void.
4. The failure to procure a license to marry will not invalidate a marriage otherwise good.
5. An elder in the colored Methodist Church is "an ordained minister" of the Gospel within the meaning of the statute, and, as such, can celebrate the rites of matrimony.
6. An exception to the charge "as a whole" will not be considered.
7. A witness will not be allowed to testify in respect to the age of a party, when his evidence is based upon information derived from a third person who is still living.

INDICTMENT for bigamy, tried at January Term, 1890, of CUMBERLAND Superior Court, *Bynum, J.*, presiding.

There was a verdict of guilty, and from the judgment pronounced thereon the defendant appealed.

Attorney-General for the State.
T. H. Sutton for defendant.

CLARK, J. The first assignment of error is, that a witness for the State was allowed to testify, after objection, that the defendant was forty years of age, and that he stated this upon information had
(712) from defendant's sister. As it did not affirmatively appear that the sister was dead at the time of the trial, the evidence was improperly admitted. *Hodges v. Hodges, ante,* 374, and cases there cited.

The defendant testified that she was thirty-six years old at the trial, with the view of showing that she was about thirteen years of age at the time of the alleged first marriage. The evidence was conflicting

as to whether there was a first marriage, and as to its date. The jury, upon the evidence, found that there was such first marriage.

This being so, it is immaterial whether defendant, at its date was thirteen years of age, as she contends, or over fourteen, as contended by the State; for, upon any view of the evidence, the defendant had lived with such husband over twenty years, and has borne him ten children. The evidence, therefore, was merely irrelevant, and as it could not have prejudiced the defendant, its admission affords no ground for a new trial. *Scoggins v. Turner,* 98 N. C., 135; *Jones v. Call,* 93 N. C., 170; *Dupree v. Ins. Co.,* 92 N. C., 417. And the burden is on appellant to show that he has been prejudiced by the admission of immaterial evidence. *Livingston v. Dunlap,* 99 N. C., 268.

While marriage is a contract, it differs from other contracts in many respects, especially in that it can be entered into by minors. The Code, sec. 1810, it is true, provides that a marriage by a female under fourteen years of age, or a male person under sixteen, is void, but the *proviso* speaks of its being "declared void," and the construction of the statute by the courts has always been that the meaning is that such marriages are voidable. The only marriage (under section 1810) which are absolutely void are those between a white person and one of negro or Indian blood (or descent to the third generation inclusive), and bigamous marriages. The others need to be "declared void." That has not been done here, and defendant's first marriage is still a valid one. Indeed, it may be doubted if such marriage can be declared invalid when the parties have ratified it by cohabitation after arriving at (713) the age of consent. "If the parties, after arriving at the above specified age of consent, continue to cohabit and live together as man and wife, this is a ratification." Coke an Littleton, 79; 1 Black. Com., 436; 1 Bish. Marriage and Divorce, 150 (4 ed.), and *Pearson, C. J.,* in *Koonce v. Wallace,* 7 Jones, 194. Though the form of the statute has been somewhat changed since the latter decision, the "reason of the thing" is the same. The evidence here of more than twenty years' cohabitation, and ten children resulting from it, is uncontradicted and should be ample proof of ratification.

The second exception is, that the court told the jury that if defendant was united in marriage to her alleged husband by a colored preacher (shown in the evidence to have been an elder in the colored Methodist Church), with or without license, it was a lawful marriage. The Code, sec. 1813, forbids any officer or minister from performing the ceremony of marriage unless the license therein required shall be produced. The failure to comply with the requirements as to the license "subjects the officer or minister to the penalty (denounced by The Code, sec. 1817), but the marriage is, notwithstanding, good to every intent and purpose."

S. v. Robbins, 6 Ired., 23. The Code, sec. 1812, authorizes the solemnization of the ceremony by "an ordained minister of any religious denomination, or a justice of the peace." A reference to the "Book of Discipline," as authorized by the precedent set in *S. v. Bray,* 13 Ired., 289, shows that an elder in the colored M. E. Church is always an "ordained minister." It may be noted that the statute now is broader than when the decision in *S. v. Bray* was rendered, and the failure to show that the minister possessed certain qualifications then required by the statute, and which caused that case to be sent back for a new trial, is now immaterial.

(714) The third exception is, that the court did not instruct the jury that the weight of the evidence was that there had been no such first marriage, as alleged by the State. Had the judge done so, it would have been a violation of the Act of 1796, now The Code, sec. 413.

The fourth and last exception is "to the charge as given." The whole charge is not sent up. Had it been, still this exception is too general to be considered. *McKinnon v. Morrison,* 104 N. C., 354; *Taylor v. Plummer,* 105 N. C., 56.

No error.

Cited: Maggett v. Roberts, 112 N. C., 74; *Comrs. v. Comrs.,* 121 N. C., 300; *S. v. Wilson, ibid.,* 656, 657; *Wilkinson v. Dellinger,* 126 N. C., 465; *Watters v. Watters,* 168 N. C., 412; *Little v. Holmes,* 181 N. C., 420; *Wooley v. Bruton,* 184 N. C., 440.

THE STATE v. JAMES REID.

Constitution—Assault—Punishment—Discretion.

Where the defendant was convicted of an assault and battery, and it appeared that the assault was made upon his paramour—a colored woman—with a deadly weapon; that the wound inflicted was serious; that afterwards, and while the indictment was pending, the defendant went to the woman's house and made another assault upon her with a shovel, and the court sentenced the defendant to imprisonment for twelve months and to pay a fine of five hundred dollars: *Held,* that such judgment was not a violation of the Constitution forbidding excessive or cruel punishment, but, under the circumstances, was a wise and humane exercise of the discretion conferred upon the court by the statute.

STATE *v.* REID.

INDICTMENT for assault and battery with a deadly weapon upon Lucy Alexander, tried before *Merrimon, J.*, at November Term, 1889, of the Superior Court of ROWAN County.

There was a verdict of "guilty," and the court sentenced the defendant to imprisonment for twelve months in the county jail, and to pay a fine of $500 and the costs.

Defendant excepted to the sentence upon the ground that the (715) punishment was cruel, excessive and unusual in such cases, and appealed.

The defendant is a white man, and Lucy Alexander is a mulatto woman, and the case states "that it appeared from the evidence that, on the night of ..... of ....., 1889, Lucy Alexander was at an entertainment of some kind given by negroes in Salisbury; that she left the place with two negro men and walked down the street. Defendant and another white man followed her for some distance and stopped. The woman and the two negro men stopped, turned around and walked back to where defendant was. The woman said something to defendant, and he struck her with his hand, or fist, knocking her hat off. She stooped and picked up her hat, and again spoke to defendant, using some offensive language, whereupon defendant struck her with a knife in the side, penetrating to the hollow and into one of her lungs, the stab being very near the heart. The defendant then ran off. The woman was confined to her bed for some weeks in consequence of the wound, and is not yet free from its effects."

A witness introduced by defendant testified that defendant said to him, just before he stabbed the woman, that she had called him a "son-of-a-bitch," and that he intended to kill her.

A physician, who examined her wound, testified that if it had been a little higher, it would probably have proved fatal.

During the term of the court, the defendant went into the woman's house and struck her a severe blow upon the head with a fire-shovel. For this assault he was indicted, and pleaded guilty. He also pleaded guilty at this term of the court to an indictment charging him and the woman with living together in fornication and adultery. It was stated upon the prayer for judgment that defendant and the woman had been living in fornication and adultery for several years, and this statement was not controverted by defendant.

The solicitor for the State said he would ask the judgment of (716) the court in one case only. Judgment was accordingly given in the first and suspended in the other two.

Attorney-General for the State.
No counsel for defendant.

DAVIS, J., after stating the case: The defendant invokes the protection guaranteed by Article I, sec. 14, of the Constitution, which forbids excessive bail and the imposition of excessive fines or cruel and unusual punishments.

It is hardly possible, by any fixed or arbitrary rule, to apportion, with exact precision, punishments to offenders, for there are almost as many shades of guilt, and of aggravation or mitigation, to be considered in passing sentence as there are offenses committed. In the chapter on crimes (The Code, ch. 25), it will be found that, in a large number of cases, limits are imposed, sometimes both a maximum and a minimum, and sometimes only a maximum, within which the discretion of the court is confined.

There will be found, also, a large number in which the punishment is by fine, or imprisonment, or both, in the discretion of the court.

This is a legal and not an arbitrary discretion, and must be exercised within the limits of the Constitution and the laws. As was said in *S. v. Driver,* 78 N. C., 423: "What the precise limit is cannot be prescribed. The Constitution does not fix it, and we cannot fix it, and it ought not to be fixed. It ought to be left to the judge who inflicts it under the circumstances of each case, and it ought not to be interfered with, except when the abuse is palpable."

In *S. v. Pettie,* 80 N. C., 367, in which an imprisonment in the county jail for two years for an aggravated assault and battery, in that case committed by the defendant on his wife, was held not to be (717) a violation of the Constitution, the Court said: "There being no specific punishment provided by statute for such offense, it was the duty of the judge, in the exercise of his legal discretion, to fix upon the term of imprisonment suited to the case, without restriction, save that in the Constitution, which forbids 'cruel or unusual punishments' to be inflicted."

The facts set out by his Honor in the case on appeal, exhibit such wicked conduct on the part of the defendant as to call for exemplary punishment adequate to correct him, and to deter others from offending in a like manner. It appears, from the testimony of the physician, that the defendant owed it to a kind Providence, which was not on the side of his guilty intent, that the wound was not fatal, when the punishment might have been capital.

The only circumstance offered in mitigation was the vulgar epithet applied to him by the woman. Whatever might have been the sting inflicted by her language, it appears from the facts that she was his partner in the crime of fornication and adultery, and however great the provocation might have been, under other circumstances, he was not less in fault nor less excusable than she.

As, since the act of 1887, the judgment is not vacated by the appeal, and it cannot affect the sentence in this case, we may be permitted to say that, so far from transcending the reasonable boundary of just punishment, we think his Honor was safely and humanely within the limit allowed by the reasonable exercise of his discretion.

Affirmed.

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(718)

THE STATE v. JAMES WILSON.

Jurisdiction—City and Town Ordinances—Amendment—Nuisance.

1. The mayors of towns and cities have jurisdiction of the offense of violating town or city ordinances.
2. The mere obstruction of a waterway, so that the water cannot flow through a street, does not, *per se*, constitute a nuisance.
3. An ordinance of a town which prohibits the obstruction of a waterway, and thereby prevents a nuisance, is not invalid, because the offense of creating a nuisance is cognizable under the general law of the State.
4. Where it appears from the allegations in the affidavit and warrant, and upon the proofs, that the mayor or justice of the peace really had jurisdiction, an averment that takes the case out of such jurisdiction may be cured by amendment or treated as surplusage.

THIS action was begun before the mayor of Statesville, and, on appeal, was tried at Spring Term, 1890, of the Superior Court of IREDELL County, *Shipp, J.*, presiding.

The defendant was held to answer, criminally, before the mayor of "the city of Statesville" for a violation of an *ordinance* of that town, whereof the following is a copy:

"Ordered by the board of aldermen of the city of Statesville, that no person shall place any obstruction in any waterway, so that the water shall accumulate in any street, or in any manner obstruct the flow of water through or from any street of the city of Statesville, whether such obstructions be placed upon his own property or that of any other; and any one so offending shall be fined $50."

The affidavit upon which the State warrant was founded charges that the defendant, at and in said city, etc., at the time specified, did "dam up and obstruct the waterway and flow of water from the south side of Walnut Street, between Rose Street and Oak, in violation of the ordinance of the said city, passed 2 July, 1888," etc. The warrant refers to and recites the charge so specified in the affidavit. (719)

The defendant was convicted before the mayor, and appealed to the Superior Court. In the latter court he pleaded not guilty.

When the case was called for trial, "the defendant moved to quash the warrant upon the ground that the mayor had no jurisdiction, and as he had no jurisdiction, this court had no jurisdiction. The State asked to amend the warrant, and the court allowed the amendment, by striking out the words in the warrant, 'thereby damaging said street by ponding the water thereon, which became foul and malarious, to the great damage and nuisance of the city of Statesville,' and insert in lieu thereof the words, 'thereby obstructing the flow of water from said streets,' to which amendment the defendant excepted. The court, being of opinion that the mayor had no jurisdiction, rendered judgment quashing the warrant," and the solicitor for the State, having excepted, appealed to this Court.

Attorney-General and C. H. Armfield for the State.
H. Bingham, S. C. Caldwell and W. D. Turner for defendant.

MERRIMON, C. J. The statute (Pr. Acts 1885, ch. 40, sec. 56) makes it a misdemeanor to violate an ordinance of "The City of Statesville," and the general statute (The Code, sec. 3820) makes it a misdemeanor to violate the ordinance of any town or city, and the offender may be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days. Of course, such ordinances must be valid—such as the town or city has authority to make. *S. v. Langston,* 88 N. C., 692; *S. v. Brittain,* 89 N. C., 574.

(720) The statute (The Code, sec. 3818) gives the mayor, or other chief officer of such towns or cities, jurisdiction of such offenses. *S. v. Cainan,* 94 N. C., 880; *S. v. Crenshaw, ibid.,* 877; *S. v. Debnam,* 98 N. C., 712; *S. v. Smith,* 103 N. C., 403. So that the mayor had jurisdiction in this case, if indeed, the offense, as charged, was committed, and for the present purpose, it must be taken that it was. But it is earnestly contended by the defendant's counsel that the ordinance in question—that above recited—creates no offense; that it is void, because it is its purpose to create an offense defined, recognized and punishable by the general laws of the State, of which the Superior, Criminal and Inferior Courts have jurisdiction, and he relied mainly on *Town of Washington v. Hammond,* 76 N. C., 33; *S. v. Edens,* 85 N. C., 622; *S. v. Langston, supra,* and *S. v. Brittain, supra.* The contention is that the acts forbidden by the ordinance, of themselves, constitute a public nuisance.

We think otherwise. The mere obstruction of a waterway, so that water shall accumulate on the street, or so as to prevent the flow of water through or from the streets, does not *per se* and necessarily con-

stitute a public nuisance. The obstruction might be slight, occasional, temporary—such as would not interfere with the use of the street or occasion perceptible harm. Such obstruction would not constitute such a nuisance unless it should interfere with the use of the street—hinder, delay, impede, or render less safe and convenient travel on foot, or otherwise, over it, or cause the water to accumulate, remain, become stagnant, and give rise to noxious vapors and the like, along and near the street.

The very purpose of the ordinance is to prevent such nuisances—to go beyond, extend and enlarge the advantage, convenience and protection ordinarily afforded by the general laws of the State. *S. v. Edens, supra; S. v. Cainan, supra.* The ordinance was, therefore, valid,

and a violation of it constituted the offense charged, not very (721) formally, but sufficiently, in the warrant.

The affidavit and warrant constituted one proceeding, and embodied the criminal charge—the violation of the ordinance—not a *nuisance,* in the ordinary legal sense. *S. v. Sykes,* 104 N. C., 695. The facts stated in them, and the express reference therein to the ordinance, plainly charged, and it was intended thereby to charge, a violation of the ordinance, and the words, "thereby damaging said street," etc., which the court allowed to be stricken from the warrant, could not change or affect the nature of the offense charged—they were mere surplusage, serving no necessary purpose.

The mere addition in an indictment of unnecessary words applicable to another and higher offense than that charged, does not vitiate the indictment or change the nature of the offense. Hence, in *S. v. Keen,* 95 N. C., 646, where the indictment charged a misdemeanor, it was held that, charging the act to have been done "feloniously" was no substantial ground of objection—this unnecessary word was treated as surplusage. *S. v. Thorne,* 81 N. C., 555; *S. v. Edwards,* 90 N. C., 710; *S. v. Watts,* 82 N. C., 656; *S. v. Slagle, ibid.,* 653.

The amendment of the warrant complained of was really not necessary, but clearly the court had authority to make it—it did not change the nature of the offense, and the mayor had jurisdiction thereof. *S. v. Smith,* 103 N. C., 410, and cases there cited.

There is error. The judgment quashing the warrant must be set aside, and the case disposed of according to law.

Error.

Cited: S. c., 107 N. C., 869; *S. v. Sharp,* 125 N. C., 635; *S. v. Gupton,* 166 N. C., 262.

(722)

THE STATE v. T. N. DOWELL.

Assault—Rape—Husband and Wife.

A husband who, by threats to kill in event of refusal, accompanied by presenting a loaded gun at the parties, compels his wife to submit to, and a man to attempt, sexual connection, is guilty of an assault with intent to commit a rape upon his wife.

MERRIMON, C. J., dissented.

THIS was an indictment for an assault with intent to commit a rape, tried at Spring Term, 1890, of ROWAN Superior Court, *Shipp, J.*, presiding.

The defendant was found guilty, and appealed from the judgment. The facts are stated in the opinion.

Attorney-General for the State.
No counsel contra.

SHEPHERD, J. Ordinarily, precedent is grateful to the judicial mind as something approved and steadfast on which it may rest with confidence, but sometimes cases arise of such exceptional enormity that, for the fair name of humanity, the judge would hope to find no counterpart in criminal annals. We incline to believe that the case under consideration is one of such bad eminence. Unmatched in iniquity, as it appears to be, it is hoped, however, that the application of a few elementary principles will harmonize the conclusion to which we have arrived, not only with our moral conceptions of what should be the law, but also with its strict formal administration.

The facts are abhorrently simple. The white husband of a white wife, under menace of death to both parties in case of refusal, and supporting his threat by a loaded gun held over the parties, con-
(723) strains a colored man to undertake, and his wife to submit to, an attempted sexual connection. The details of this shocking transaction are so disgusting that we will not stain the pages of our reports with their particular recital. Suffice it to say, that under the coercion of the defendant, Lowery, the colored man did *actually* make the attempt. Indeed, he did everything necessary to constitute the crime of rape except actual penetration. Fortunately, the fright and excitement rendered him incapable of consummating the outrage, which, as we understand the case, he would otherwise have perpetrated; and alike fortunately, at perhaps the critical moment, the gun discharging

itself in the hands of the unnatural husband, the enforced assailant was enabled to effect his escape.

Under the laws of this State the offense of an assault with intent to commit rape, although subject to very severe punishment, is technically a misdemeanor, and, there being no degrees in this class of crimes, it must follow that if the defendant is guilty at all, he must be guilty as a principal. The defendant strangely insists that he is not guilty because he is the husband of the prosecutrix, and he relies as a defense upon the marital relations, the duties and obligations of which he has, by all the laws of God and man, so brutally violated.

In our opinion, in respect to this offense, he stands upon the same footing as a stranger, and his guilt is to be determined in that light alone. The person of every one is, as a rule, jealously guarded by the law from an involuntary contact, however slight, on the part of another. The exceptions, as in the case of a parent, or one *in loco parentis,* moderately chastising a child *(S. v. Harris,* 63 N. C., 1); or a schoolmaster a pupil *(S. v. Pendergrass,* 2 Dev. & Bat., 365, and *Boyd v. State,* an Alabama case, recently reported in 11 Albany Law Journal, 335), are strict and rare. It was at one time held in our State that the relation of husband and wife gave the former immunity, to the extent that the courts would not go behind the domestic curtain (724) and scrutinize too nicely every family disturbance, even though amounting to an assault. *S. v. Rhodes,* Phil. Law, 453. But since *S. v. Oliver,* 70 N. C., 60, and subsequent cases, we have refused "the blanket of the dark" to these outrages on female weakness and defenselessness. So it is now settled that, technically, a husband cannot commit even a slight assault upon his wife, and that her person is as sacred from his violence as from that of any other person. It is true that he may enforce sexual connection, and, in the exercise of this marital right, it is held that he cannot be guilty of the offense of rape. But it is too plain for argument, that this privilege is a personal one only. Hence if, as in *Lord Audley's case,* 3 Howard State Trials, the husband aids and abets another to ravish his wife, he may be convicted as if he were a stranger. The principle is thus tersely expressed by Sir Matthew Hale: "For though in marriage she hath given up her body to her husband, she is not to be by him prostituted to another." Hale P. C., 629; 2 Bishop Cr. Law, 1135; 3 Howard St. Trials, 401.

It thus appearing, we think, beyond all question, that the defendant in this indictment is to be regarded as a stranger, we will further consider the case in that aspect alone.

It is contended that, as Lowery acted under coercion and was, for that reason, excusable, there was no *intent* to commit rape, and, therefore, the defendant cannot be convicted. It will be observed that the intent

of Lowery to commit the offense is not determined alone by the presumption that every one is presumed to intend the natural consequences of his act; but he testifies that he did actually attempt to have sexual connection. Here, then, we have a specific actual intent to commit the foul deed, and can it be that he who constrains the will of another to commit such a crime is to be permitted to shield himself upon the ground that there was an entire absence of criminal intent? If
(725) this be true, then one who coerces another to shoot down a third person in cold blood is not guilty of murder, because there is no intent for which the person doing the shooting is criminally responsible. The law, in such a case, couples the act of the instrument with the intent of the instigator, and, in this way, he is held guilty of murder. And this is true also where the instrument is under the age of seven, and conclusively presumed to be incapable of having any criminal intent. So, too, if one is indicted under our statute for shooting at a railroad train with intent to injure it, and it appears that he coerced another to do the shooting, can it, with reason, be said that he is not guilty, because his instrument did not have an intent to inflict any injury? These, and other examples which we could cite from our reports, well illustrate the principle upon which our case depends, and especially is this so when, as we have said, the specific intent is expressly shown by the testimony. We are clearly of the opinion that the unlawful act committed in pursuance of the combined intents of the defendant and his enforced instrument are amply sufficient to sustain the conviction.

While placing our decision upon this ground, we are not prepared to say that, under the circumstances, Lowery would have been excusable had he completed the offense. We leave this an open question, remarking, however, that the *tabula in naufragio* of *Lord Bacon* has been well nigh submerged by judicial and critical casuists. See Wharton, secs. 560 and 561, and notes to second edition; *United States v. Holmes,* 1 Wallace, 1; see, also, *Coleridge, C. J.,* in the case of the Mignotte, decided in 1884. But mark the diversity. There, the displaced struggler for life was, by clinging to the plank, insufficient for two, as much attacking his companion in shipwreck as if he were firing at him with a pistol. In our case the victim is entirely innocent, in no way threatening by her act or deed any harm to the attempted ravisher. In this view of the case, let us briefly refer to the authorities.

(726) In Broom's Legal Maxims, 17, 18, it is said: "In accordance with the legal principle, *necessitas inducit privilegium,* the law excuses the commission of an act prima facie criminal, if such act be done involuntarily and under circumstances which show that the individual doing it was not really a free agent. Thus, if A, by force, takes

the hand of B, in which is a weapon, and therewith kills C, A is guilty of murder, but B is excused; though if merely moral force be used, as threats, duress of imprisonment, or even an assault, to the peril of his life, in order to compel him to kill C, this is no legal excuse." For this, is cited 1 Hale P. C., 434, which seems to be entirely in point. East, in his Plea of the Crown, vol. 1, page 294, undertakes to argue that "if the commission of treason may be extenuated by the fear of present death, there seems to be no reason why homicides (or any of the other capital offenses of course) may not also be mitigated upon the like considerations of human infirmity." Bishop's Cr. Law, 348. To this, however, an answer is found in 4 Blackstone, 30, where he says: "In time of war or rebellion, a man may be justified in doing many treasonable acts by compulsion of the enemy, or rebels, which would admit of no excuse in the time of peace. This, however, seems only, or, at least, principally, to hold as to positive crimes so created by the laws of society, and which, therefore, society may excuse, but not as to natural offenses so declared by the law of God . . . And, therefore, though a man may be violently assaulted, and hath no other possible means of escaping death but by killing an innocent person, this fear and force shall not acquit him of murder, for he ought rather to die himself than escape by the murder of an innocent." If this be so, and the crime of rape is considered so heinous as to be punishable in the same way as murder, it would seem that "human infirmity" ought not to be tolerated by our laws to the extent of excluding one for the violation of (727) female virtue on the plea of danger to himself, however great or imminent. For the reasons first stated, we think that the ruling of his Honor was correct, and that there is no error.

MERRIMON, C. J., dissenting: The horrible and detestable purpose of the defendant in doing the acts which constitute the criminal offense committed by him against his wife cannot warrant what I deem a misapplication of well established principles of criminal law. In the nature of the marriage relation, the husband himself cannot ravish his wife; nor, for like reasons, can he, in a legal sense, assault her with the intent to commit a rape upon her. He can only commit the offense of rape, or that of assault with intent to commit a rape against his wife, by procuring, aiding, abetting or encouraging another to commit these offenses. His offense in such case depends necessarily upon the perpetration of the principal offense by another party.

In this case, the negro named did not commit a rape upon the wife of the defendant, nor did he assault her with such intent. There was a total absence of such intent on his part, and such intent was an essential element of this offense. Then, in the nature of the matter, how can the

defendant be chargeable with the particular offense charged against him in the indictment? As the negro committed no assault with intent to commit rape, so the defendant did not.

It is said, Shall the defendant go quit? Has he committed no offense? Most unquestionably he shall not go quit. He has committed an offense—a very serious one. He is chargeable with an assault upon his wife with a deadly weapon and with the intent to kill, and a like assault upon the negro.

It is said the punishment of the offense last mentioned is not adequate. It may be very severe, but it may be said as well that the punishment for the offense as charged is not adequate. This, how-
(728) ever, is no argument—not the slightest reason pertinent here.

The courts have nothing to do with the punishment of offenders further than to impose the same in the cases, and as required and allowed by law. I will not pursue the subject further.

Per Curiam.

Cited: S. v. Fulton, 149 N. C., 496; *S. v. Switzer,* 187 N. C., 96.

THE STATE v. C. M. SIGMAN ET AL.

Arrest—Assault—Homicide—Officer—Town Constable—Municipalities.

1. The powers conferred upon city and town constables by sections 3808, 3810, The Code, are limited, in respect to arrests without warrant, to the territory embraced within the corporate boundaries; but when the constable is acting under a valid warrant from the mayor of the municipality, or other duly authorized officer, he may make arrests at any place within the county in which such city or town is situated.

2. If an officer is resisted in making an arrest, he may use that degree of force which is necessary to the proper performance of his duty; and, after an accused person is arrested, the officer is justified in the use of such force as may be necessary, even to taking life, to prevent his escape, whether the offense charged is a felony or misdemeanor.

3. But, where a person charged only with a misdemeanor flees from the officer to avoid arrest, the latter is not authorized to take life or shed blood in order to make the arrest. Under such circumstances, if he kills, he will at least be guilty of manslaughter, and he will be guilty of an assault if no actual injury is inflicted, if he uses such force as would have amounted to manslaughter had death ensued.

4. Where a person charged with a misdemeanor escaped from the custody of an officer, and was fleeing to avoid a re-arrest, and the officer, being

unable to overtake him, threatened to shoot, and, the fugitive not stopping, did fire his pistol when within thirty yards: *Held*, that the officer was guilty of an assault, no matter whether his intention was to hit the person so fleeing or simply to intimidate him and thereby induce him to surrender.

5. An officer is authorized to take such precautions for the safe custody of his prisoner—such as tying or handcuffing—as in his judgment may be necessary, provided he acts in good faith and without malice.

THIS was an indictment charging both the defendants with an (729) assault with a deadly weapon, to wit, a pistol, tried at the Spring Term, 1890, of the Superior Court of CALDWELL County, before *Bynum, J.*

The defendant, Sigman, was, at the time when the assault was alleged to have been committed, town constable of the town of Lenoir, and arrested the prosecutor, Robert Tuttle, on a lawful warrant, issued by the mayor of said town, and charging the prosecutor with having committed an assault within the corporate limits of said town.

The defendant, Sigman, first arrested Tuttle by virtue of the warrant within the limits of the municipality, but by an artifice he escaped from custody and fled beyond said limits. Subsequently Sigman pursued and arrested him at a house three miles from the town, and while *en route* for the town with the prisoner, met the defendant, Campbell, and, summoning him to assist, placed Tuttle in his custody.

After Campbell had taken the prisoner into the town of Lenoir, the latter again escaped and fled beyond the corporate limits. The defendants pursued him, Campbell taking one direction and Sigman another. The defendant, Sigman, found Tuttle outside of the town, and ran after him some distance till he fled out of his sight, but Tuttle ran near to the defendant, Campbell, who pursued him, threatening to shoot. Campbell was within about thirty yards, when, seeing that he could not outrun Tuttle, he fired his pistol. Tuttle testified that the ball whistled by him, while Campbell swore that it was not aimed at him at all, but was pointed towards the ground near to himself, and fired into the ground in order to frighten Tuttle.

There was a verdict of guilty, and from the judgment thereon (730) the defendant appealed.

Attorney-General for the State.
No counsel contra.

AVERY, J., after stating the facts: The defendant, Sigman, by virtue of his office as constable of the town of Lenoir, was authorized to execute any lawful warrant issued by the mayor, and charging a criminal

offense wherever he might find the person accused within the county of Caldwell, in which said town was situate. This authority was conferred upon him by sec. 3810 of The Code, but, perhaps, in more explicit terms, by the Act of 1885, amendatory of the town charter (ch. 23, sec. 24, Laws of 1885). Section 3810 provides that it shall be lawful for city and town constables to serve all civil and criminal processes that may be directed to them by any court within their respective counties, as prescribed by law in the case of other constables. Section 24, Art. IV of the Constitution requires that "in each township there shall be a constable, elected in like manner by the voters thereof, who shall hold his office for two years; while sections 643 and 644 of The Code invest them with all the powers formerly exercised by them, and make it their additional duty to "execute all precepts and processes of whatever nature to them directed by a justice of the peace, or other competent authority within the county, or upon any bay, river or creek adjoining thereto," etc.

The mayor of every city and incorporated town is constituted by law an inferior court, with "the jurisdiction of a justice of the peace in all criminal matters arising under the laws of the State or the ordinances of said city or town," The Code, secs. 3818 to 3820. The mayor of Lenoir had the right to issue the warrant, under the authority of which the defendant, Sigman, arrested the prosecutor, and the town
(731) constable was protected in executing it, without the use of excessive force, anywhere in Caldwell County.

If the duty of serving warrants had been imposed by The Code in language at all equivocal, the section of the town charter declaratory of the powers and duties of the town constable would have shielded the defendant Sigman, who was confronted, as an officer, with the mandatory requirement that he should "execute all processes issued by the Mayor," when the law added no condition to this injunction except that it should not be void upon its face for want of jurisdiction. Another clause in the same section of the charter, like section 3808 of The Code, limits his power, as a peace officer, to make arrests without warrant, to the territory within the boundaries of the town.

Sigman was not guilty of a simple assault even in making the arrest outside of the town after the first escape. He was not present when the prosecutor was captured by Campbell the third time, and, therefore, did not aid or abet him in the use of excessive force. In the precautionary measure of securing a prisoner (who had shown himself so swift and slippery) by the use of handcuffs, he did not so abuse his power, according to the evidence, as to subject himself to indictment for an assault. *S. v. Stalcup,* 2 Ired., 50; *S. v. Belk,* 76 N. C., 10; *S. v. Pugh,* 101 N. C., 737.

In any aspect of the testimony, the judge should have instructed the jury that the defendant, Sigman, should be acquitted, and for his failure to do so a new trial must be granted to him.

If the prosecutor had turned upon Campbell while he was pursuing him, and resisted arrest, the latter would have been protected in the use of a degree of force that a jury would ordinarily consider excessive, if he was acting in good faith and was free from the influence of malice. *S. v. McNinch,* 90 N. C., 695; *S. v. Pugh, supra;* 1 Bish. Cr. P., 620. But a very different principle prevails where a party charged with a misdemeanor flees from an officer, who is entrusted with (732) a criminal warrant, or *capias,* in order to avoid arrest. The accused is shielded in that event, even from an attempt to kill with a gun or pistol, by the merciful rule which forbids the risk of human life or the shedding of blood in order to bring to justice one who is charged with so trivial an offense, when it is probable that he can be arrested another day and held to answer. 1 Bishop Cr. Pr., 616. An officer who kills a person charged with a misdemeanor while fleeing from him is guilty of manslaughter at least. 1 Wharton's Cr. Law, sec. 5 (9 ed.); 2 Bishop's Cr. L. (7 ed.), sec. 649.

After an accused person has been arrested, an officer is justified in using the amount of force necessary to detain him in custody, and he may kill his prisoner to prevent his escape; provided, it becomes necessary (1 Bishop's Cr. Pr., sec. 618), whether he be charged with a felony or a misdemeanor. But when a prisoner charged with a misdemeanor has already escaped, the officer cannot lawfully use any means to recapture him that he would not have been justified in employing in making the first arrest; and if, in the pursuit, he intentionally killed the accused, it is murder; and if it appear that death was not intended, the offense will be manslaughter. 1 Wharton's Cr. Law, secs. 401 to 407; 2 Bishop's Cr. Law, sec. 549; Hale's P. of C., 481; Foster 271.

A person may be guilty of an assault upon another with a pistol without firing at all, and if he does fire it without intending at the moment of firing it to hit the person upon whom he is charged with committing the offense. *S. v. Morgan,* 3 Ired., 186; *S. v. Myerfield,* Phil., 108; *S. v. Rawls,* 65 N. C., 334. Even if the defendants had consented to the escape, they would have been authorized to rearrest the prosecutor on the same warrant, but neither was empowered to use more force than he would have been warranted in using in first securing him. Such use of a pistol as would have made Campbell guilty of manslaughter if he had killed the prosecutor, was an assault, if no actual injury ensued. (733)

We do not concur with the judge who tried the case below in the opinion that the guilt of the defendant, Campbell, depended on his

intention when he fired the pistol. The prosecutor testified that the ball passed near his head, and was fired when the defendant was threatening to kill him; while the latter swore that he aimed the pistol at the ground when he fired. Another witness thought the weapon was pointed in the direction of Tuttle, and the defendant does not say that it did not at any time bear upon the prosecutor. If Campbell so used his pistol in the pursuit as to constitute an assault upon Tuttle, he was guilty, no matter what may have been his actual purpose, when he shot. The law does not justify killing one accused of a misdemeanor in order merely to stop his flight, and we cannot concur in any view of the law that might be construed to justify such careless handling of guns or pistols by officers armed with criminal process, as would ordinarily constitute an assault, merely because they can satisfy a jury that at the moment of firing they did not intend to hit one fleeing from arrest on a charge of misdemeanor. Judgment is affirmed as to Campbell. A new trial will be granted to the defendant, Sigman.

Error as to Sigman. Affirmed as to Campbell.

Cited: S. v. Rollins, 113 N. C., 732; *S. v. Stancil,* 128 N. C., 612; *Sossamon v. Cruse,* 133 N. C., 474; *Martin v. Houck,* 141 N. C., 321; *S. v. Durham, ibid.,* 749, 758; *Brewer v. Wynne,* 163 N. C., 323; *S. v. Dunning,* 177 N. C., 562; *S. v. Campbell,* 182 N. C., 914.

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(734)

THE STATE v. WILLIAM GRAY.

Asportation—Larceny—Evidence.

The prosecutor's sheep were grazing in a field in which there was a vacant house, the entrance to which was barred by boards. On approaching the house on one occasion the prosecutor discovered the defendant in the house with several of his sheep, the entrance being closed by boards arranged in a different manner; he saw the defendant seize one of the sheep, but upon discovering prosecutor he fled: *Held,* that there was evidence of asportation sufficient, if believed, to support a verdict of guilty of larceny.

THIS was an indictment for the larceny of a sheep, tried at Spring Term, 1890, of WATAUGA Superior Court, before *Bynum, J.*

The only exception taken in the case was to the charge of the court as to the sufficiency of the evidence as to the asportation.

The evidence as to this point was by one Alex. Woody, which was to the effect that he went to his field in which his flock of sheep were

grazing; the field contained about six acres, and in the field was an old outhouse; that he saw defendant in the house with three or four sheep, and saw him catch one of them; he rushed upon the house and the defendant leaped from a window and fled; the house contained but one room, 12 by 14 feet; some plank had been placed across the door to keep some of the sheep out of the house; when witness entered the house after the defendant fled, he found the planks differently arranged from the manner which they were when he last saw them, but still securing the door; some of the flock were outside of the house in the field; one of the sheep found in the house had been hobbled, by tying one of its forefeet to one of its hindfeet; witness found the hobble cut from one foot and attached to the other; there was evidence tending to show that the plank securing the entrance at the door had been taken down and put up differently. (735)

Upon the close of the evidence, the defendant's counsel asked the court to instruct the jury that there was not sufficient evidence of the asportation, and that they must return a verdict of not guilty. This the court refused to do, and the defendant excepted.

His Honor then charged the jury as follows:

"If they found the facts to be that the sheep of Alexander Woody were grazing in Woody's field, and the defendant drove them into the house and cut the cord attached to one of them, and caught the sheep, and had it under his control, and would have taken it away, with the intention of appropriating it to his own use, but for the reason that he was prevented from doing so by the arrival of Woody, and he then turned the sheep loose and jumped out of the window and made his escape, there was sufficient asportation and the defendant would be guilty."

There was a verdict of guilty, and from the judgment thereon the defendant appealed.

Attorney-General for the State.
No counsel for the defendant.

SHEPHERD, J. We are very clearly of the opinion that there was ample testimony to go to the jury upon the question of asportation. It is sufficient if the sheep were removed from the flock and were, even for an instant, under the control of the felon. *S. v. Green,* 81 N. C., 561; *S. v. Jackson,* 65 N. C., 305.

The testimony strongly tended to show these facts, and his Honor very properly refused to give the instruction asked for by the defendant.

Affirmed.

(736)

*THE STATE v. LAURA TOOLE.

General Verdict—Nuisance—Indictment.

1. When a ribald song, containing the stanza charged in the indictment, is sung in a loud and boisterous manner on the public street, in the presence of divers persons then and there present, and such singing continues for the space of ten minutes, this is a nuisance, though the special words charged may not have been repeated.

2. When there is a general verdict of guilty on an indictment containing several counts, and only one sentence is imposed, if some of the counts are defective the judgment will be supported by the good count; and, in like manner, if the verdict as to any of the counts is subject to objection for admission of improper testimony or erroneous instruction, the sentence will be supported by the verdict on the other counts, unless the error was such as might or could have affected the verdict on them. *S. v. McCauless*, 9 Ired., 375, overruled.

3. A defendant has the right to require a separate verdict to be rendered on each count, as he has the right to require the jury to be polled; but this is a privilege, and there is not error unless the defendant asks for a separate verdict, or that the jury be polled, and is refused. He waives the right to insist on them if not asked for in apt time.

AVERY, J., and SHEPHERD, J., dissenting.

THIS was an indictment for nuisance, tried before *Meares, J.*, at August Term, 1889, of MECKLENBURG Criminal Court.

There were two counts in the indictment, and a general verdict of guilty. The first count charged the loud and boisterous use of a single profane sentence in a public place, etc., and its repetition for the space of ten minutes, to common nuisance, etc. The second count charged the singing in a loud and boisterous manner on the public streets, etc., of an obscene song (setting out five lines thereof), and the repetition thereof for the space of ten minutes, in the presence of divers persons then and there present, to the common nuisance. The indict-
(737) ment was in the usual form, and no objection was taken thereto.

On the first count there was evidence tending to show that the profane expression charged therein was used once; that it was on the public street, in hearing of divers persons, and defendant continued to talk in a loud and boisterous manner; but there was no evidence that this expression was used more than once, or that any other profane words were used.

On the second count there was evidence by the State that, on the public street, in the hearing of divers persons present then and there, the defendant passed along, singing a ribald song in a loud and bois-

*Head-notes by CLARK, J.

terous manner, in which occurred the five lines charged; that the singing of such vulgar and obscene song continued for the space of ten minutes, and was loud enough to be heard by many persons, but witnesses could not say whether the words charged were repeated.

The defendant offered evidence to contradict the State's witnesses on both counts, and asked the court to charge:

"If the defendant uttered the words set forth in the first count only a single time, she would not be guilty; and likewise, if she uttered the words set forth in the second count only one time, she would not be guilty."

The court refused so to charge, and defendant excepted.

The jury returned a general verdict of guilty. From the judgment pronounced the defendant appealed, assigning as error the exception above stated.

Attorney-General for the State.
No counsel contra.

CLARK, J., after stating the facts: Four witnesses for the State testified that the defendant passed along a thickly settled street in the city of Charlotte, singing the obscene song set forth in the second count, in a boisterous manner and loud enough to have been (738) heard in several houses; that such loud, boisterous and obscene singing continued for the space of ten minutes, but they could not testify that the particular words set out in the bill were used more than once. The defendant testified that she did not sing such song, and also introduced several witnesses who testified that they lived in that neighborhood near enough to have heard her, and that they did not hear her sing the song as charged. We think it was not error for the court to refuse to instruct the jury, as asked, that "if the defendant uttered the words set forth in the second count only one time, she would not be guilty." The use of the vulgar stanza set out, if uttered as part of a longer song of similar tenor, extending over a period of ten minutes along a public street, would be a nuisance, even though the identical words set out may not have been repeated. If this were not so, the perpetrators of such conduct could not be punished, unless the hearers are quick enough of ear to catch, and tenacious of memory to retain, the whole of a vile song which disgusts them, and not even then, unless there was a repetition. The nuisance complained of, in effect, is the loud and boisterous singing for ten minutes of an obscene song, containing the stanza charged, on a public street, in the hearing of divers persons then and there present. This, though done only on a *single occasion,* may be a nuisance. *S. v. Chrisp,* 85 N. C., 528.

There having been a general verdict of guilty on two counts, for offenses punishable alike, it is immaterial to consider, as to the other count, whether there was error committed or not, unless it was such error as might or could affect the verdict of guilty on the second count, and such is not the case here. When there are several counts in the bill, and there is a general verdict of guilty (or not guilty), that is a verdict, as to each of the counts, of guilty (or not guilty, as the case may be). If it is a general verdict of not guilty, the defendant
(739) is entitled to his discharge. If it is a general verdict of guilty upon an indictment containing several counts, charging offenses of the same grade, and punishable alike, the verdict upon any one, if valid, supports the judgment, and it is immaterial that the verdict as to the other counts is not good, either by reason of defective counts, or by the admission of incompetent evidence, or giving objectionable instructions as to such other counts, provided the errors complained of do not affect the valid verdict rendered on this count.

"To require each distinct though cognate offense to be placed in a separate indictment is to oppress the defendant by loading him with unnecessary costs, and exposing him to the exhaustion of a series of trials, which the prosecution would encounter with unwaning strength, and with the benefit derived from a knowledge of its own case and that of the defendant." 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. Wharton's Cr. Pl., and Pr. (9 ed.), 910. Indeed, with this view, the court will, in a proper case, require a consolidation of separate indictments and treat them as counts in one bill. This was done in the famous tea suits before *Judge Washington,* in which a separate libel was brought for each of a thousand chests of tea, alleged to have been smuggled. In *S. v. McNeill,* 93 N. C., 552, the Court sustained the consolidation of four separate indictments, and treated them as four counts in one indictment. It is usually a benefit to defendants to combine several counts in one trial. When the defendant thinks he will be damaged by the joinder of several counts in the same indictment, it is open to him to move to quash, or to require the solicitor to elect upon
(740) which count he will proceed. *S. v. Reel,* 80 N. C., 442.

Each count is, in fact and theory, a separate indictment. *United States v. Malone,* 20 Blatch., 137. In *S. v. Johnson,* 5 Jones, 221, it is held that a second indictment may be treated as a second

count. To the same effect, *S. v. Brown,* 95 N. C., 685; *S. v. Watts,* 82 N. C., 656, and even though they charge different felonies. *S. v. Reel, supra.*

A general verdict of guilty is a verdict of guilty on each and every count. Whart. Crim. Pl. and Pr. (9 ed.), secs. 292, 738, 771, 907, and cases there cited; also *Hawker v. People,* 75 N. Y., 487; *Kane v. People,* 8 Wendell, 203; *Moody v. State,* 1 W. Va., 337. Indeed, the authorities are uniform and numerous to this effect.

Where the offenses are distinct, the court can impose a sentence on each count; but where it is a stating of the same offense, in different ways, only one sentence should be imposed. *Commonwealth v. Birdsall,* 69 Pa. St., 482; *Commonwealth v. Sylvester,* Brightley, 331; Whart. Am. Cr. Law (Ed. 1868), 417, 421; *S. v. Hood,* 51 Me., 363; *Crawley v. Commonwealth,* 11 Metc., 575; *Elridge v. State,* 37 Ohio St., 191. If only one sentence is imposed, this is treated as a discontinuance as to all but one verdict. It is open to defendant to have the jury render a separate verdict upon each count, and to have also a separate sentence on each, if he so desires. If he makes no objection to a general verdict, and only one sentence is imposed, it has always been held in this State that if one or more counts are defective, the sentence will be supported by the good count, if there be one. *S. v. Morrison,* 2 Ired., 9; *S. v. Miller,* 7 Ired., 275; *S. v. Williams,* 9 Ired., 140; *S. v. Speight,* 69 N. C., 72; *S. v. Bailey,* 73 N. C., 70; *S. v. Beatty,* Phil., 52. The same rule prevails generally. Whart. Cr. Pl. and Pr. (9 ed., sec. 292); Chitty's Cr. L., 4 Am. Ed., 640; Bish. Cr. Pr., 841. *Lord Mansfield,* in *Grant v. Astle,* 2 Doug., 730, regrets that this rule did not apply in civil cases also, which it (741) could not do under the practice then obtaining of a single issue.

And a general verdict of guilty will be sustained though the counts are inconsistent. *S. v. Baker,* 63 N. C., 276; *United States v. Pirates,* 5 Wheat., 184.

Where there are several counts, and evidence was offered with reference to one only, the verdict, though general, will be presumed to have been given on that alone. *S. v. Long,* 7 Jones, 24; *State v. Bugbee,* 22 Vermont, 32. In the latter case, the Court say: "There was no evidence tending to support the second count, and the jury should have been so charged. But the conviction on the first count was right. The court will not arrest the sentence by granting a new trial, but will sentence on that count alone upon which the conviction was properly had, though the jury rendered a general verdict of guilty. This is in analogy to cases where there has been a general verdict of guilty on several counts when a part of them is bad."

For the same reason, in *S. v. Stroud,* 95 N. C., 626, it is held by *Ashe, J.,* that a general verdict of guilty upon two counts will be sustained, if the evidence justifies either. The objection made in that case was, that certain evidence was not admissible, and, therefore, that the instruction to the jury was erroneous upon one of the counts. The Court, in the opinion, says that it makes no difference, if the evidence was applicable to either count. To the same effect is *Hudson v. State,* 1 Blackf. (Ind.), 317, and *S. v. Posey,* 7 Rich., 484. The same general principle as to verdicts upon indictments containing several counts is laid down by *Mr. Justice Davis* in *S. v. Smiley,* 101 N. C., 709, and *Mr. Justice Shepherd* in *S. v. Allen,* 103 N. C., 433, the two latest cases on the subject.

In opposition to the numerous authorities to the same effect is *S. v. McCauless,* 9 Ired., 375, which seems to distinguish the case where the error complained of is an erroneous charge as to one of the (742) counts, but we fail to see the force of the distinction. As we have seen, where there is a general verdict on several counts, held by the court below to be valid, and some of the counts are held invalid in this Court, the judgment is supported by the valid count. *S. v. Morrison,* 2 Ired., 9, and other cases, *supra.* And when incompetent evidence is admitted as to one count, the judgment is imputed to be given on the other count. *S. v. Stroud* and *S. v. Smiley.* We see no difference whether the verdict on the count assailed is invalid upon those grounds, or for erroneous instructions. The principle is this: That when there is a general verdict of guilty upon a bill containing several counts, there being as many verdicts of guilty as there are counts, if the offenses are punishable alike and of the same grade, any one of the verdicts, if valid, supports the judgment and defendant cannot complain. In a case like ours, the Supreme Court of South Carolina, in *S. v. Dawkins,* in an opinion filed at this term and to appear in the next volume of South Carolina Reports, have held, as we do, that where there is a general verdict upon two counts, if one of the verdicts is good, "it is immaterial that there was error in the charge of the court upon the other counts."

It cannot be said that the judge imposed the sentence upon the objectionable count or verdict, for the law places it on the valid count and unobjectionable verdict. Nor that his judgment was increased by reason of the number of the counts, for so long as the judgment on the valid verdict is within the limits allowed by law for the offense charged in it, this Court cannot find error.

It is consonant to precedent and the reason of the thing, that when there is a verdict against a defendant to which no error can be assigned, and a judgment is pronounced thereon within the limits allowed by

law, such verdict and judgment should not be disturbed by reason of defects, whether in the indictment, the evidence or the instructions, alleged as to other verdicts against the same defendant, and it can make no difference whether such other verdicts are in other (743) indictments or on other counts in the same indictment, if they are such errors as do not, and cannot, affect the valid verdict.

In the present case, the defendant was charged in separate counts for different offenses, but of the same grade and punishable alike. She might have been tried on two separate indictments, but she made no objection, and the court had the discretion to try in one action. By the general verdict, there stand two verdicts of guilty against her. As to one, no valid objection has been raised, and the judgment upon it is such as the law authorizes. She is not entitled to a new trial upon that, and it can serve no good purpose to give or refuse a new trial as to the other verdict, which is surplusage. If there was error, it was *error immaterial to the verdict on the second count,* and, there being but one sentence, it is placed upon the sound verdict, as it would be placed on the sound count, if the other were defective.

It would put the State to a great disadvantage and greatly increase the difficulties and technicalities which already hamper the administration of justice upon the merits, if, when a defendant is tried upon several counts (which practice is favored to save defendants unnecessary costs), and found guilty upon all, a slight error in the judge's charge upon one count, in no wise affecting the trial on the other counts, should be allowed to vitiate the verdicts on all the other counts, though no error whatever can be found against the verdicts thereon. The rule herein stated can work no hardship to defendants, for they can always move to quash or to require the solicitor to elect, which motion, it is to be taken, the presiding judge, in all proper cases, will allow. *S. v. Reel, supra; Carlton v. Commonwealth,* 5 Met., 532.

The defendant also has the right to require a separate verdict to be rendered on each count if he doubts that the general verdict of guilty applies to all, and if he does not ask to have this done he (744) cannot afterwards be heard to complain. *S. v. Basserman,* 54 Conn., 88. It is like the right to have the jury polled, which is waived unless asked for at the time. *S. v. Young,* 77 N. C., 498.

SHEPHERD, J., dissenting: The defendant was indicted in two counts for *distinct* offenses. It is conceded that the court erred in refusing to give the defendant's prayer for instruction to the effect that the testimony was insufficient to sustain a conviction on the first count. There was a general verdict of guilty, and it is, I think, improperly held by the Court that the defendant must lose the benefit of her exception

because she did not request the court to require a separate finding upon each count. This, it seems to me, is a novelty in the criminal practice of this State, and so opposed to the general principles controlling criminal trials that I am constrained to enter my dissent. I concur in nearly all of the general propositions laid down in the opinion of the Court, but deny that they have any application to the case before us. It is undoubtedly true that where there is a general verdict of guilty, and some of the counts are defective, the law presumes that the conviction was upon the good counts; but this is held *only upon motions in arrest of judgment,* in which it is *assumed* that there was evidence upon the good counts, and that no error was committed on the trial.

It is also conceded that where there are defective counts, and evidence is offered as to the *good counts only,* it will be presumed that the verdict was upon the good counts, and a general verdict will be sustained on a motion for a new trial. *S. v. Long,* 7 Jones, 24. In *none* of the cases cited in the opinion was it decided that a general verdict will be sustained *upon a motion for a new trial,* where it appears (745) that the court has erroneously instructed the jury, or where there is not sufficient testimony to sustain a conviction upon all of the counts, and especially upon all of the good ones. The error of the court consists, I think, in a failure to observe this fundamental distinction. The jury may have believed only the testimony bearing upon the count which was the subject of the erroneous charge, and yet we are called upon to assume that they acted only upon testimony relating to the second count. This, as I have remarked, is something new in the criminal practice in North Carolina, and is, in my opinion, not only unsupported by reason or authority, but is *directly* opposed to the rulings of this Court.

It has generally been understood that when a defendant makes his objection to testimony, or presents his prayer for instruction in *apt time,* he has done all that can reasonably be required of him, and that it is the duty of the court to conduct the trial to a proper conclusion. In lieu of this plain and well-settled practice, it is now proposed to make it the duty of the defendant to interfere and assist the court in extricating itself from an erroneous ruling, upon the penalty of losing the benefit of his exceptions.

Sympathizing, as I do, with the policy of trying cases upon their merits, and relieving the administration of the criminal law of many useless refinements and technicalities, I fail to see what evil is to be remedied or good accomplished by the present ruling of the court. In this case the judge erred; that defendant excepted, and having this express notice that the objection was to be insisted upon, the solicitor failed to *nol. pros.* the first count or to ask for a separate verdict, and

the court failed to direct such a verdict, although it might have done so *ex mero motu.* Where is the public exigency that requires the defendant to act in such a case instead of the court, which has committed the error? I know of no authority in support of such a complete reversal of the position of the State and the defendant in a criminal prosecution. It is, clearly, not found in the opinion (746) of the Court. Nearly all of the numerous authorities cited therein relate only to the general principle which I have conceded, and there are but five cases which seem to be relied upon in support of the particular question here presented. *S. v. Smiley,* 101 N. C., 709, only decides that upon a *motion in arrest of judgment* a general verdict will be sustained if "either count be good." This, as we have seen, is conceded, and it is plain that the case has no bearing upon the question under consideration. Equally inapplicable is *S. v. Allen,* 103 N. C., 433. In that case there was no error in the rulings of the court, and the only point decided was that a general verdict would be sustained in an indictment for larceny and receiving. The only case which I think at all approaches the point is *S. v. Stroud,* 95 N. C., 626. An examination of that case will disclose that there was no exception whatever to the admission of the testimony, and the Court held that there was no error in any of the rulings of the judge. How, then, can such a case be regarded as authority upon a question which can only arise where there has been some erroneous ruling on the part of the court? What was said, therefore, by the learned Justice who delivered the opinion can only be regarded as a *dictum,* and as the two counts were based upon the same transaction, and the evidence was applicable to both, it is not very clear that the remarks of the Justice furnish sufficient ground to warrant the inference which is sought to be drawn from them. It cannot be seriously contended that the case *decided* the point which we are considering. In *Hudson v. State,* 1 Blackford's R., 319, the indictment contained two counts, "one charging Hudson with shooting an Indian, the other with aiding and assisting another man in stabbing him." The court held that "evidence of the aid and assistance charged in the second account was sufficient to support the charge of shooting set out in the first count," and a general verdict of guilty was sustained. How a case in which there is sufficient evidence to warrant a (747) finding upon both counts is authority in one where there is only sufficient evidence to sustain a finding upon *one* count I am unable to understand. This is all that the case decides, and it does not, therefore, apply to the question under discussion.

I now come to the remaining case, which is *S. v. Basserman,* 54 Conn., 92, in which it was said that it is the duty of the defendant in a case like ours to ask for a separate verdict upon each count. These

remarks, like those in *Stroud's case,* were unnecessary, as the Court expressly decided that the testimony in question was not only competent, but had not been objected to. Thus it is seen that there are only these two *dicta* (one of which is not at all clear) to be found in all of the cases cited, which tend to sustain the decision of the Court. It is not a little strange, if the position is correct, that no *direct* authority, either from the text-books or the reports, can be found in its support, and yet it is proposed, in the absence of any exigency requiring it, to overrule an express decision of this Court, and work a very great change in an important particular in the conduct of jury trials in criminal cases. The decision of the Court in *S. v. McCauless,* 9 Ired., 375, is *directly* in point. Indeed, the case is precisely like ours in every respect. *Pearson, J.,* for the Court, says: "We think his Honor erred in the instruction given. It is insisted that, the defendants being properly convicted upon the second count, that will sustain the judgment, notwithstanding the error in the charge in reference to the first count. It is true, when one count in an indictment is defective, and another count good, and there is a general verdict, a motion in arrest cannot be sustained, for the good count warrants the judgment, and, although the punishment is *discretionary,* the judgment is presumed to have been given upon the good count. In this case *both counts were good.*

There was error in the instruction given in one of the counts, (748) by reason whereof the defendants were improperly convicted upon that count, and are entitled to a *venire de novo.*"

In *S. v. Williams,* 9 Ired., 150, the same principle is affirmed by *Ruffin, C. J.* Eight of the counts were defective, and it was contended that, as to these, there was error in the charge, and that there should be a new trial, there having been a general verdict. The Court said: "For it is argued the case is not within the rule that there may be judgment on an indictment containing defective counts if there be a good one, *because that proceeds on the ground that there was evidence to authorize a conviction on each and all of the counts,* whereas here the jury were told, it is said, that they might convict upon all, if they thought the prisoner was guilty upon any one. *If that be true, there ought to be a venire de novo,* certainly; for, unquestionably, the eight counts are bad, in which a taking without conveying, and a conveying without a taking, are respectively charged." The Court sustained the conviction only because it appeared that the trial judge had, in his charge, "explicitly put these counts (the defective ones) out of the case." The irresistible inference to be drawn from the opinion is, that if these counts had not been put out of the case, the general verdict would not have been sustained.

I prefer to stand by the decisions of these distinguished jurists, especially as they seem to be in accord with the true spirit of the practice governing the administration of the criminal law, and there is no advantage, in any respect, to be gained by departing from them.

No harm can come to the State by the existing practice, as it is always, as I have said, in the power of the Court to direct separate findings upon each count, or for the solicitor to *nol. pros.* the count upon which there has been an erroneous ruling.

AVERY, J., dissenting: I feel constrained to express my dis- (749) sent, though my brother *Shepherd* has relieved me, by a very clear and elaborate presentation of the law, and a full citation of authorities, of the trouble or necessity of extended discussion. I do not think that the legal proposition upon which the opinion of the Court is founded is supported by the previous adjudications of our own Court. I feel assured that the new principle, when adopted in practice, will prove unjust and oppressive to ignorant and helpless people who are sometimes arraigned in the courts upon false and groundless charges; and its enforcement will vindicate the wisdom of the old rule, which did not relieve the State of the laboring oar from the arraignment of a prisoner till the final judgment was entered against him. The opinion is, I think, misleading in assuming that the power and duty of the Court to proceed to judgment after verdict upon several counts, one of which is good and the others defective, has been drawn in question. In such cases, a motion in arrest of judgment cannot be sustained. In this we can all heartily concur, because it does not appear upon the face of the record that the trial judge has committed any error, and it does not imperil the rights or liberty of any one to assume that the conviction was upon the good count, and that the trial upon it, in the absence of any exception that opens the way for us to look behind the verdict, was fair and just. But I cannot concede, or, by silence, acquiesce in the ruling, that when a defendant points out an error of the judge, to which he excepted in apt time in the court below, either in the refusal to admit competent testimony offered, or the admission of incompetent testimony objected to bearing upon one or two good counts in the indictment upon which he is being tried, or in the misdirection of the jury as to such count, he is to be deprived of the right of a new trial, when it is admitted that the judge made an erroneous ruling because the defendant did not go further, and while the court and solicitor remained passive, demand separate verdicts upon (750) the different counts in the indictment. It seems to me that when we shift the burden of calling for distinct findings upon the courts from the prosecuting officer to the prisoner, we have gone one step in

the direction of wiping out the fundamental principle, that every citizen is presumed to be innocent until his guilt is proven and established by the verdict of a jury. Included in this rule, and distinctly legible between the lines, the courts and legal profession have read and acted upon the principle, that when a defendant assigned in the way prescribed by law an error of the court *that might have led to* (not that it did cause) his conviction, he had a right to demand a new trial. It is not denied that in the cause before us the jury might have discredited all testimony tending to show that the defendant uttered the oath, as charged in the first count of the indictment. If so, it would follow that she is to be punished, when the only credible testimony applied to the second count, and she must have been convicted on that, though she would not have been, if the court had not misdirected the jury as to the law. The dirty and disgusting details of this trial are naturally calculated to make us forget that, even in such cases, there may be a great principle involved that permeates the whole criminal practice and affects the security of even good citizens when called upon to answer false charges. It will prove more than questionable progress if, under the specious plea of dispensing with technicalities and allowing no guilty man to use them as a shelter, we break down any of the barriers that have been thrown around the people, both innocent and guilty, and make it possible, by the failure on the part of the accused, to make a purely technical request, in apt time, to cover up an admitted error of a judge charged with the administration of the criminal law.

(751) It seems to be conceded that the cause of *S. v. McCauless,* 9 Ired., 375, is not in harmony with the principle announced in the opinion of the Court in this case, and it cannot be denied that the case of *S. v. Williams,* 9 Ired., 150, is equally irreconcilable with the construction now given by the Court to the case of *S. v. Stroud,* 95 N. C., 626. If my brother *Shepherd* is not justified in characterizing the authority relied upon as an inadvertent expression, it would follow that the Court intended in *S. v. Stroud* to overrule, in a single sentence, two well considered opinions delivered for the Court by *Chief Justice Ruffin,* without dignifying them by the slightest notice. I am satisfied that such a conclusion would be unjust to this Court, and to the learned and careful *Justice* who spoke for them in *S. v. Stroud.*

If there is any conflict in our authorities upon this subject, except that raised by a dictum, which seems to have been especially controverted by *Justice Shepherd,* the most satisfactory solution of the trouble will be reached by adhering to the merciful rule, and throwing the burden upon an able judge and competent prosecuting officer of making clear the meaning of the jury by requiring findings upon the separate counts. This would be in accord with every principle of our system of

administering the criminal law, which is founded upon the idea that every man is presumed to be innocent till he is shown to be guilty, and that the government takes the burden of establishing his guilt at every stage of the prosecution.

Per Curiam. Affirmed.

Cited: S. v. Brady, 107 N. C., 827; *S. v. Hall,* 108 N. C., 779; *S. v. Bost,* 111 N. C., 645; *S. v. Carter,* 113 N. C., 640; *S. v. Edwards, ibid.,* 654; *S. v. Perry,* 122 N. C., 1020; *S. v. Robbins,* 123 N. C., 738; *S. v. R. R.,* 125 N. C., 670; *S. v. Peak,* 130 N. C., 713; *Smith v. Paul,* 133 N. C., 67; *S. v. Holder, ibid.,* 711; *S v. Sultan,* 142 N. C., 575; *S. v. Sheppard, ibid.,* 589; *S. v. Dowdy,* 145 N. C., 435; *S. v. Sprouse,* 150 N. C., 862; *S. v. Rumple,* 178 N. C., 720; *S. v. Coleman, ibid.,* 760; *S. v. Mills,* 181 N. C., 534; *S. v. Strange,* 183 N. C., 776; *S. v. Snipes,* 185 N. C., 746; *S. v. Switzer,* 187 N. C., 97; *S. v. McAllister, ibid.,* 404; *S. v. Hammond,* 188 N. C., 605; *S. v. Malpass,* 189 N. C., 350; *S. v. Jarrett, ibid.,* 519.

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(752)

THE STATE v. A. R. EAVES.

Statute, Construction of—Indictment—Liquor Selling.

1. The maxim *cessante ratione legis, cessat et ipsa lex* has no application in the construction of statutes.

2. If the *language* of a statute is doubtful, and the *intention* of the Legislature is clear, the former will be construed by the latter; but where the language is plain, the courts cannot look into the motive or purpose of the Legislature in the enactment of the law.

3. A statute prohibited the sale of spirituous liquors within a prescribed distance of "Rutherfordton Baptist Church, Rutherford County," and, upon the trial of an indictment for a violation thereof, the church building had, at the time of the alleged offense, been removed from the place where it stood at the time of the passage of the act: *Held,* that the statute did not become inoperative by reason of the removal, and that a sale of liquors within the territory prohibited was indictable.

4. The allegation in the indictment that the sale was within "three miles of the old site of Rutherfordton Baptist Church" was not such misdescription as vitiated it—the words "old site" being surplusage; and the defect, if any, was cured by the verdict.

THIS was an indictment tried before *Merrimon, J.,* at Spring Term, 1889, of RUTHERFORD Superior Court.

By an act of the General Assembly, entitled "An act to prohibit the sale of spirituous liquors in certain localities," ratified 12 March, 1881 (chapter 234), the sale of spirituous liquors within three miles of "Rutherfordton Baptist Church, in the county of Rutherford," was prohibited.

It is alleged in the indictment that the defendant, on the first day of June, 1888, "to one W. B. Scroggins one quart of spirituous liquors unlawfully and wilfully did sell," within three miles of the *old site* of Rutherfordton Baptist Church, in Rutherford County," contrary to the form of the statute, etc. The defendant pleaded not guilty to the indictment.

(753) On the trial it was shown by the evidence introduced on behalf of the State that, at the time of the passage and ratification of the statute above mentioned, there was in the county of Rutherford a church known as and called by the name of "Rutherfordton Baptist Church," but that it had since been removed; that the defendant was the owner and keeper of a barroom within three miles of the place where said church formerly stood, and that he had, within the last two years, sold to W. B. Scroggins, at said barroom, one quart of spirituous liquor.

The jury found the defendant guilty, and he moved in arrest of judgment upon the ground that the facts set forth in the bill of indictment—admitting them to be true as therein alleged—do not constitute a violation of the statute.

The court was of the opinion that "the bill of indictment is defective in not setting forth the fact that, at the time of the ratification of the statute, there was a church in Rutherford County known as 'Rutherfordton Baptist Church,' and that it had since been moved. The law was passed to protect the church, and, as the church has been removed and no longer needs protection at the old site, does not the law cease to be operative? The reason having ceased, does not the law cease also?"

The judgment was arrested, and the solicitor for the State appealed.

The Attorney-General and R. H. Battle for the State.
J. N. Holding for defendant.

CLARK, J. Chapter 234, Acts 1881, prohibited the sale of spirituous liquors at numerous points named, and among others "within three miles of Rutherfordton Baptist Church, in Rutherford County." The defendant was indicted for selling spirituous liquor "within three miles of the old site of the Rutherfordton Baptist Church, in Ruther-

(754) ford County, contrary to the statute in such case made and provided," and was found guilty. He moved in arrest of judgment, which was allowed, as stated by the Court, upon the grounds:

"1. That the indictment was defective in not setting forth the fact that at the time of the ratification of the statute there was such a church in Rutherford County as the Rutherfordton Baptist Church, and that it had since been moved."

"2. That the law had been passed to protect the church, and as the church had been removed and no longer needed protection at the old site, the law ceased to be operative; the reason ceasing, the law ceased also."

The principle quoted, that "the reason ceasing, the law ceases also," has reference solely to the application of settled legal principles to a given state of facts, a system which is usually called the "common law." It has no application to the supposed legislative reason for adopting a statute which must speak for itself, and is construed according to its tenor. There are rules for the construction of statutes where their meaning is doubtful, such as considering the mischief to be remedied or the object to be attained.

Potter's Dwarris on Statutes, quoting Story's Eq. Juris., 10, and *Denn v. Reid,* 10 Peters, 524, says: "Although the spirit of an instrument is to be regarded no less than its letter, yet the spirit is to be collected from the letter." The rules for construing the meaning of doubtful language in a statute by the intention of the Legislature, do not authorize the courts to infer the motive of that body in passing an act, and when a state of facts which then existed ceases, the courts have no power to hold that such state of fact caused the act to be passed, and therefore the act itself is at an end. Here there are no doubtful words to construe. The meaning and intention are clearly to forbid the sale of spirituous liquor within three miles of the point named. There is no intent indicated that the law should cease to operate if the state of facts then existing should change. The rule is, if the (755) language is doubtful and the intention clear, to construe the language by the intention. Here the language being clear, the supposed "policy of the Legislature is too uncertain a ground upon which to found the interpretation of the statute." *Brown v. Brown,* 103 N. C., 213. If the object was solely to protect the church in the quiet exercise of religious services, and not the people of the adjacent territory as well, it is strange that the act was to be in force all the time, and was not limited to the days such services are held, as is the case with the act prohibiting the sale or giving away of intoxicating liquor within five miles of a polling place (The Code, sec. 2740); or the act prohibiting the same within two miles of a political speaking (The Code, sec. 1079); or the general act prohibiting it (except by licensed dealers) within one mile of any place where religious exercises are in progress (The Code, sec. 3671).

It may be that the motive with the Legislature was to protect the church. The statute does not so declare. If such was the motive, and the occasion of it has ceased, another Legislature may see fit to repeal the law. The courts cannot do so. If the church had been burnt, an accident or an incendiary could not destroy an act of the Legislature, nor could the removal of the church by vote of a majority of its members nullify the law. The church is merely designated as the locality from which the distance of three miles is to be measured. Its removal can no more repeal the statute than the destruction of a beginning corner can vitiate a deed. The removal to a new site cannot make it the centre of a new district of three miles, but the distance must still be measured from the spot where the church stood when the act was passed.

In Spain, where wind-mills are common, they have a saying: "Though the mills are down, the winds are blowing there still." Though the church has been removed, the people are still living within the
(756) three-mile radius of where it stood, and they cannot be deprived of the protection of the statute upon the assumption that the Legislature meant to protect churches only. Indeed, in this same act, territory within a given distance of certain mills, mines, factories and railroad stations, and also certain entire townships, are protected. Could the act of a private citizen in closing his mine, or removing his mill or factory, or the act of a railroad corporation in changing its depot, or of the county commissioners, in the division or absorption of a township, repeal the application of the statute to the territory described in the act? With as much force it might be argued that a change of name would have that effect. If the continuing force of a statute depends upon the conduct of individuals, the congregation would take the adjacent territory out of the statute as certainly by a change of the name of their church as by a removal of the building, possibly a few yards or more. In both cases the test is, what spot was designated by the Legislature as the point from which the territory exempted is to be measured, and no one except the Legislature can change or repeal the statute. *S. v. Moody,* 95 N. C., 656; *S. v. Patterson,* 98 N. C., 666.

The case of *S. v. Hampton,* 77 N. C., 526, is not in point, for there the act prohibited the sale of intoxicating liquors within three miles of A. & S. R. R. *during the construction of said road,* and the act was held to be in force only during the time limited. There is no such limitation here. Had the act prohibited the sale of liquor within three miles of the church *during divine services,* whenever no services were held there, whether the omission was caused by a removal of the building or otherwise, the act would not be in operation. *Aliter* when as here, the church, or the mill, or railroad station is only a designation of the central point of the protected territory.

Another objection applies to both of the grounds assigned in (757) arrest of judgment. An arrest of judgment can only be granted for a defect appearing upon the face of the record. Nothing which appears thereon shows that the church had, in fact, been removed at all, or stands elsewhere than it did the day the act was ratified. It is true the bill charges "the old site of Rutherfordton Baptist Church." If those words can be taken as showing a removal of the church since the statute, there is no defect, for the old site is the proper point from which the three miles are to be measured. *Non constat,* however, that the church named in the act was not built upon such old site. It may or may not be so. It is a matter of surmise, and not a "defect apparent." If the old site of Rutherfordton Baptist Church was not the same as that of the church named in the act, there was a defect of proof to be argued to the jury. Probably it would have been better if the additional allegation suggested by the court below had been made in the indictment, but advantage of any supposed defect in that regard could only be taken before verdict. It is cured by verdict, for apart from the knowledge derived from the evidence, which cannot be considered on a motion in arrest of judgment, there is nothing to show that the words "old site" are anything other than mere surplusage.

The judgment in arrest must be set aside, and the cause remanded, that the Superior Court may proceed to pass judgment upon the verdict, in conformity to this opinion.

Per Curiam. Error.

Cited: Jones v. Comrs., ante, 438; *Sherrill v. Conner,* 107 N. C., 545; *Randall v. R. R., ibid.,* 752; *Harris v. Scarborough,* 110 N. C., 236; *S. v. Barringer, ibid.,* 527; *S. v. Downs,* 116 N. C., 1066; *Battle v. Rocky Mount,* 156 N. C., 334; *S. v. Hall,* 183 N. C., 815.

(758)

THE STATE v. W. B. BAKER.

Amendment—Justice of the Peace—Warrant—Working Roads.

1. The Superior and criminal courts have power to amend any warrant, process, pleading or proceeding begun before a justice of the peace, even after verdict and judgment; but where such amendment is made after verdict, it should be in conformity with evidence elicited on the trial.
2. Where an amendment to a warrant was allowed after verdict, wherein facts were alleged not in the original, and the record did not show there had been any evidence introduced to support them: *Held,* that there was error, and a new trial ordered.

3. A warrant charging simply that the defendant "did refuse to work the public road, after being legally warned by P., supervisor, against the peace and dignity of the State," is insufficient.

APPEAL from a justice of the peace, tried before *Meares, J.*, at Fall Term, 1889, of the criminal court of MECKLENBURG County.

The warrant charged "that W. B. Baker did, on 31 July and the first day of August, 1889, with force and arms, at and in the county aforesaid, refuse to work the public road, after being legally warned by said P. P. McClelland, supervisor, against the peace and dignity of the State."

Upon conviction in the court of a justice of the peace, the defendant appealed to the criminal court. In the latter court he pleaded not guilty. On the trial, the jury rendered a verdict of guilty. Thereupon, the defendant moved in arrest of judgment, assigning as grounds of his motion that the warrant was fatally defective in the respects specified in his exceptions to the amendment of the warrant. Thereupon, the solicitor for the State moved to amend the warrant. The court allowed this motion, and the defendant objected, assigning as grounds of his objection:

"Because there was no evidence in the case to show—

(759) "1. That the defendant was notified to work any particular road, either by name or any particular description.

"2. That defendant was duly assigned and liable to work on any particular road.

"3. That the defendant was between eighteen and forty-five years of age, and a resident of Crab Orchard Township."

The court gave judgment against the defendant, and he, having excepted, appealed.

The Attorney-General and R. H. Battle for the State.
P. D. Walker and C. W. Tillett for defendant.

MERRIMON, C. J. Obviously, the charge in the warrant was insufficient. It indicated, in terms entirely too general and indefinite, the particular offense intended to be charged, and failed to specify, as it should have done, its constituent elements. But, clearly, the court had authority to allow the amendment, even after verdict. The offense was a petty misdemeanor, and cognizable in the court of a justice of the peace. The statute (The Code, sec. 908) confers upon the Superior and criminal courts very large powers of amendment in such cases. *S. v. Smith,* 98 N. C., 747; *S. v. Crooke,* 91 N. C., 539; *S. v. Smith,* 103 N. C., 410; *S. v. Sykes,* 104 N. C., 694. But when the court allows

such amendments after verdict, it should do so cautiously, and be sure that the evidence produced on the trial went to prove the offense in every material aspect of it, as if it had been completely charged in the warrant. There should be evidence to prove the offense as if properly and sufficiently charged at the time of the trial. Although it is petty, it should be fully proven. In such a case, if such evidence was not produced on the trial, the court should set the verdict aside and grant a new trial, and then allow proper amendments, to the end the action may be tried upon its merits. Regularly, such amendments should be made before trial, and thus possible mistakes may be (760) avoided and prevented.

In this case, after the amendments were allowed, the defendant complained and contended, that no evidence was produced on the trial to prove the offense as charged by such amendments. It does not appear that there was. As the court, in settling the case for this Court, does not state that there was, it must be taken that there was not, because the matter was directly called to the attention of the court; and if there was such evidence, it should have set it forth, or, at all events, have said there was evidence.

The objection that the supervisor of roads was not duly appointed seems to be without merit, but it was not ground for arresting the judgment, if it had been well founded. The judgment could be arrested only for some matter appearing on the face of the record, or that failed to appear there when it should have done so.

Error. *Venire de novo.*

Cited: S. v. Neal, 109 N. C., 860; *S. v. Norman,* 110 N. C., 487; *Cox v. Grisham,* 113 N. C., 281; *S. v. Yoder,* 132 N. C., 1118; *S. v. Green,* 151 N. C., 729; *S. v. Poythress,* 174 N. C., 811; *S. v. Mills,* 181 N. C., 533.

THE STATE v. J. B. FAIN.

Embezzlement—Indictment—Evidence.

1. An allegation in an indictment for embezzlement that the defendant "did steal, take, carry away" the property alleged to have been embezzled, is surplusage, and will not vitiate an indictment otherwise sufficient.

2. The description of the property embezzled, as "one note for five dollars in money of the value of five dollars," is sufficiently specific. The Code, secs. 1020, 1183.

3. The precise value of the property alleged to have been embezzled is not essential; it is sufficient if it have *any* value.

4. There was evidence tending to prove that one K. placed in the hands of defendant a note to collect; that defendant called upon the payee, who had a lease upon the tract of land claimed by defendant, and proposed to surrender a lease for the note; that this proposition was accepted by defendant, and the note was surrendered and destroyed; that when called upon to account, defendant denied having collected anything, and stated he had mislaid the note: *Held*, that this evidence was properly submitted to the jury, and, if believed, warranted a verdict of guilty.

(761) INDICTMENT for embezzlement, tried before *Clark, J.*, at Fall Term, 1889, of the Superior Court of CHEROKEE County.

The indictment charges that defendant "was employed in the capacity of an agent to one H. J. Kisselburg, and being above the age of sixteen years, and not being apprenticed to said Kisselburg, and, as such agent, intrusted by the said Kisselburg to receive money and notes for him, the said Kisselburg, and, being so employed and trusted, the said J. B. Fain, by virtue of such employment, then and there, did receive and take into his possession one note for the payment of five dollars, and of the value of five dollars in money, being lawful money of the United States, for and on account of the said Kisselburg, his said employer, and that the said J. B. Fain afterwards . . . fraudulently and feloniously, did embezzle and make way with the said note and money so received by him as aforesaid. And so the jurors aforesaid . . . do say that the said J. B. Fain did then and there . . . feloniously steal, take and carry away the said note and money from the said Kisselburg, his said employer, for whose use and on whose account he, the said J. B. Fain, so employed, . . . received the same and took the same into his possession, the said note and money being, at the time of the committing of the felony aforesaid, the property of the said H. J. Kisselburg," *etc.*

(762) H. J. Kisselburg, for the State, testified, in substance, that he placed in the hands of the defendant, for collection, a note for $5, signed by Perry Allen; that he called on the defendant for the note, and defendant told him he had not been able to collect it, and had it among his papers; that learning from Allen that defendant had collected the note, he again called on him for it, or its proceeds, and defendant told him he had collected nothing on it and still had the note, but had mislaid it.

Perry Allen, for the State, testified that he executed the note for $5 to Kisselburg; that he had a lease on land belonging to the defendant, who called on him with the note for collection; that by an arrangement between him and the defendant, the lease was surrendered to the de-

fendant in consideration of the note, which defendant gave up to him (Allen) and which was burned in his (Allen's) presence.

One Carter testified, for the State, that he was present and saw the note given by defendant to Allen in exchange for the lease, and it was burned by Allen.

The defendant testified, in his own behalf, that Kisselburg, when he gave him the note to collect, told him to do the best he could with it, and he could have half for collecting it; that Allen was insolvent and had a lease on some of his land, and proposed to surrender the lease, and if he (defendant) could make anything out of the land to do so and pay the note; that the offer was accepted, but that he never made anything off of the land, and did not surrender the note, but has lost it; that at the time referred to by witnesses (Allen and Carter) he held a mortgage on two steers of Allen's, and did give the mortgage to Allen; that neither Allen nor Carter could read or write, and that the land on which the lease was, had not been cultivated since.

The court charged the jury, among other things, that if the defendant took up the lease under an agreement to appropriate any profit he might make on the land, surrendered the note and had made no profit, to find the defendant not guilty; but if the jury should (763) find that the defendant used the note for his own benefit, by using it to relieve his land of the incumbrance of a lease on it, and the surrender of the lease was of any value, and the defendant had refused and failed to account to Kisselburg for the value of the benefit, to find the defendant guilty; that if the relieving the defendant's land of the lease was of any value to him (about which the evidence conflicted), it was the duty of the defendant to account, as he would have failed otherwise to perform his trust, and he would be guilty of embezzling the note and converting it to his own use and benefit; but if they found he relieved his land of the lease in exchange for the note, but such relief and extinguishment was of no value, the defendant would be not guilty, but in such a state of facts it would not be necessary to find that the lease was not worth five dollars; that if it was of any value—even five cents—and the defendant procured its extinguishment for his own benefit, if only five cents in value, by using the note, with the collection of which he had been entrusted, for his own use and benefit, and had denied it and refused to account for it, and the jury were satisfied of that beyond reasonable doubt, to find the defendant guilty.

There was a verdict of guilty. Motion for a new trial, because the verdict was against the weight of the testimony, and because the court should have told the jury that there was no evidence of embezzlement. There was also a motion in arrest of judgment, on the ground that no

indictable offense was charged under the statute, and for want of sufficient description of the note, there being no evidence that any money went into the hands of defendant.

These motions were respectively denied, and there was judgment and appeal.

Attorney-General for the State.
J. W. Cooper for defendant.

(764) DAVIS, J., after stating the facts: If there was any evidence reasonably sufficient to go to the jury, its weight, as has been said time and again, is a question with which this Court has nothing to do. That is exclusively within the province of the jury.

The evidence on behalf of the State, if believed, sufficiently established the facts that the defendant received the note executed by Perry Allen to collect for Kisselburg; that he was Kisselburg's agent to collect; that he surrendered it to Perry Allen for the consideration testified to by Perry Allen; that it was destroyed upon being so surrendered; that, when called on by Kisselburg for the note, or its proceeds, defendant said he had not been able to collect it, but had it among his papers, and, when called on again for it, he said he had collected nothing on it, and still had it, but had mislaid it. These facts and denials, and concealment, if believed, undoubtedly constituted evidence.

They were denied by the defendant and presented questions of fact for the jury.

The value of the note, if it had any, is not an essential element in the crime, and it was only necessary to prove that it had *some* value.

We need not consider whether the defendant, by agreement with Kisselburg, had an interest in what might be realized on the note or not—that was a question of fact, and his Honor's charge was, in this respect, all that the defendant could rightfully ask. If the facts were as testified to by the defendant, under the charge of the court, he was not guilty, but if they were as testified to on behalf of the State, he was guilty, and the verdict was with the State. There was no error in the refusal of the court to instruct the jury that there was no evidence, or in the instruction given.

The defendant moved in arrest of judgment upon the ground that no indictable offense was charged, etc.

(765) Embezzlement is not a common-law crime, but depends entirely upon statute. By section 1014 of The Code, it is enacted that: "If any officer, agent . . . of any corporation, person or copartnership (except apprentices and other persons under sixteen years of age), shall embezzle or fraudulently convert to his own use, or

shall take, make way with or secrete, with intent to embezzle or fraudulently convert to his own use any money, goods or other chattels, bank-note . . . or other valuable security whatsoever, belonging to any other person or corporation, which shall have come into his possession or under his care, he shall be guilty of felony and punished as in cases of larceny." By section 1020, which was in the original act of 1871-72, a part of section 1014, it is enacted that: "In indictments for embezzlement, except when the offense shall relate to a chattel, it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained, if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved."

By section 1183 it is sufficient if the indictment express the "charge against the defendant in a plain, intelligible and explicit manner" and "sufficient matter appears to enable the court to proceed to judgment."

The indictment sufficiently charges the fiduciary relation—that the defendant, by virtue thereof, received one note of the value of $5 in money, for and on account of his employer, and that he fraudulently embezzled and made way with the note and money received by him, and, as we have seen, under section 1020 of The Code, it is sufficient to allege "the embezzlement to be of money, without specifying any particular coin or valuable security."

There is unnecessary surplusage in the indictment, but the (766) charge of embezzlement is sufficiently made, and is not vitiated by the needlessly added charge that the defendant "did steal, take and carry away," etc. *S. v. Lanier,* 89 N. C., 517.

There is no error. Judgment affirmed.

Cited: S. v. Summers, 141 N. C., 843; *S. v. Shine,* 149 N. C., 481.

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*THE STATE v. JOHN B. STEELE.

Innkeepers—Municipal Ordinances—Reasonable Regulations—Assault.

1. Where an innkeeper made a regulation that "no liveryman, or agent of any transportation or baggage company, no washerwoman or sewing-woman not connected with the house, or loafer, or lounger, or objectionable person, will be allowed in the hotel," and gave notice to the agent

*Head-notes by AVERY, J.

of a livery stable, who had previously been in the habit of "drumming" for custom at his hotel, not to come upon the hotel premises again: *Held*, that the innkeeper had a right to expel said agent from the hotel without using unnecessary force, if he entered if after such notice and engaged in drumming for custom, although at the time the hotel keeper had made an arrangement with another keeper of a livery stable, by which the former should receive ten *per centum* of the proceeds of the business derived from the guests of the hotel, and notwithstanding the further fact that a third liveryman, representing his own stable, and who had received a similar notice, was actually in the hotel at the time of the expulsion, and had been soliciting patronage for his business among the guests, but was not shown to have had actual license from the innkeeper to approach the guests.

(767)

2. Guests of a hotel, and travelers, or other persons entering it with the *bona fide* intent of becoming guests, cannot be lawfully prevented from going in, or be put out, by force, after entrance, provided they are able to pay the charges and tender the money necessary for that purpose, if requested by the landlord, unless they be persons of bad or suspicious character or of vulgar habits, or so objectionable to the patrons of the house, on account of the race to which they belong, that it would injure the business to admit them to all portions of the house, or unless they attempt to take advantage of the freedom of the hotel to injure the landlord's chances of profit, derived either from his inn or any other business incidental to or connected with its management and constituting a part of the provision for the wants or pleasures of his patrons.

3. When persons, unobjectionable on account of character or race, enter a hotel, not as guests, but intent on pleasure or profit to be derived from intercourse with its inmates, they are there not of right, but under an implied license that the landlord may revoke at any time.

4. Regulations, such as those made by the Battery Park Hotel, of which the defendant was the manager, are reasonable, and any person violating them may be expelled, after notice to desist from violating them, if it be done without using excessive force.

5. An innkeeper has the right to establish a livery stable in connection with his hotel as he can a barber shop, a news stand, or a laundry; or he may contract with the proprietor of a livery stable in the vicinity to secure for the latter, as far as he legitimately can, the patronage of his guests for a *per centum* of the proceeds of profits derived by the owner of such vehicles and horses from dealing with the patrons of the public house: and where he enters into such contract, he may, after notice, enforce such a regulation as that made by the Battery Park Hotel, by expelling the agents or representatives of livery stables who enter to solicit the patronage of guests: or where such agent persists in visiting the hotel for that purpose after notice to desist, the landlord may expel him without excessive force, if he refuse to leave, and may eject him, even though he enter for a lawful purpose, if he does not disclose his true intent, when requested to leave, or whatever may have been his purpose, if he has in fact engaged in soliciting the patronage of the guests.

6. The rule is, that the proprietor of a public house has a right to request a person who visits it not as a guest or on business with guests, to depart, and if he refuse the innkeeper may expel him, and if he do not use excessive force, may justify on a prosecution for assault and battery in removing him.

7. If the prosecutor went into the hotel at the request of a guest, and for the purpose of conferring with the latter on business, still if, while in the hotel, he engaged in "drumming" for his employer, after notice to desist from it, the defendant might expel him in the same way; and if the prosecutor, having entered to see a guest, did not then solicit business from the patrons of the hotel, but had done so previously, the defendant, seeing him there, had the right to use sufficient force to eject him, unless he explained, when requested to leave, what his real intent was. The guest, by sending for a hackman or carriage-driver, could not delegate to him the right to do an act for which even the guest himself might be lawfully put out of the hotel.

8. If it be admitted that the rule laid down in *Markham v. Brown* is correct, our case comes under the exception in that case, because it appears that the conduct of the prosecutor was calculated to injure the business of the hotel by diminishing its profits derived from the contract made with the keeper of the other livery stable.

9. The defendant, as manager of the hotel, could make a valid contract for a valuable consideration with Sevier to give him the exclusive privilege of remaining in the house and soliciting patronage from the guests in any business that grew out of providing for the comfort or pleasure of the patrons of the house. The proprietor might contract for a *per centum* of the amount realized from doing a livery business with the guests, and expel, without excessive force, the agents of rival establishments who, after notice to desist, persisted in soliciting business from the guests, on the ground that they were entering his inn to injure him in his business connected with the hotel.

10. The proprietor could permit S., who contracted to pay the hotel ten *per centum* of the proceeds of his business with the guests, to remain, or omit to order C., a liveryman who had received a notice similar to that sent to the prosecutor, to leave, and expel the prosecutor without violating the constitutional inhibition against monopolies.

THIS was a criminal action, tried before *Moore, J.*, at the (768) October Term, 1889, of the Criminal Court of BUNCOMBE County, on an appeal from a court of a justice of the peace of said county.

Joseph Weaver, the prosecutor, swore that a Mr. Dawson, who was a guest at the Battery Park Hotel, in the city of Asheville, called to him to supply him some horses from a livery stable in the city of Asheville, with which stable the witness was connected as the (769) agent of the manager and owners thereof; that because of this, he went up on the porch of the hotel, when the defendant, who was the manager of the hotel, came up to him and asked him to get off; the witness replied, "All right, sir," and then started off, but before he

could get off, the defendant pushed him, and he would have fallen and been hurt had he not caught on the railing. Witness stated, on his cross-examination, that he did not know whether the defendant knew he was drumming for a livery stable or not; that the defendant had notified him in writing, previous to that time, not to go on the grounds of the hotel; that defendant told him before that day to go on the back side of the hotel when he had livery business to transact with the guests of the hotel, to a place designated for liverymen to conduct such business; that he had been notified by the defendant to keep off the porch before that day; that on that day he was standing on the steps of the hotel porch; that the defendant did not give him time to get off; that the defendant was within two feet of him when he said, "Get off of here," and that before he could get off the defendant pushed him off, as he above described; that defendant pushed him after he was down off the steps, where he was permitted to stay.

The defendant introduced in evidence the rules and regulations of the hotel, which were printed on a heavy piece of card-board.

The defendant being introduced to testify in his own behalf, said he was the manager of the Battery Park Hotel and its business; that the prosecutor, on the day of the alleged assault, was on the porch of the hotel interfering with parties working on the hotel; that he told the prosecutor to go away and go off the porch, and that he might stay at the place designated for liverymen; the prosecutor was a liveryman;

(770) that he kept two persons to receive orders for all liverymen from said place so designated from guests at the hotel, and that it was the duty of these two persons to transact all business between the guests of the hotel and liverymen, and that he made no charge against liverymen or any one else on account of the services of such persons; that the prosecutor knew of this rule and regulation of the hotel, and was on the porch in violation of the rule; that he told him to go away and he did not go; that he then put his hands gently on the prosecutor and pushed him gently down the steps off the porch; that he only used such force as was necessary to put the prosecutor off the porch; that he used no violence whatever.

Witness further testified that the prosecutor constantly came into the hotel and would "hang around"; that he would go on the porch and hang around there, spitting tobacco juice around on the floor and on the railing of the porch; that on the morning of the difficulty, the prosecutor had a stick under his arm; that it was the duty of the witness, under the rules of the hotel, to keep all liverymen out of the hotel.

On cross-examination, the witness testified that he had told Weaver and other liverymen not to come there; that he saw the prosecutor spitting on the floor; that he had some time before that made a con-

tract with one Sevier, a liveryman, to do the livery business for the hotel, and that Sevier was to pay him ten per cent of the proceeds of the business; that he had thrown up the contract with Sevier by order of Colonel Coxe, the owner of the hotel; that he heard the prosecutor drumming that morning; that he was talking about horses and carriages, and was talking loud; that Mr. Sevier and all other persons in the livery business could get orders to and from the guests of the hotel; that he had never seen the prosecutor drunk; that he does not know for certain that Sevier is now, and was then, paying ten per cent of the proceeds of the livery business of the hotel to Colonel Coxe.

The defendant then proposed to offer in evidence two ordi- (771) nances of the city of Asheville, as follows:

"Sec. 681. Any porter who shall enter the general passenger depot, or any passenger depot in this city for any hotel or boarding-house, or eating-house without the consent of the railroad authorities in charge of such depot, shall upon conviction, be fined five dollars.

"Sec. 682. If any person or persons shall enter any passenger depot, hotel, boarding-house, or other place of business, and violate the rules thereof, or hinder or obstruct the business therein, may be ordered out by the person in charge, and, upon refusal to go, shall be punished as provided in the preceding section, provided said rules shall be reasonable, and shall have been approved by the mayor and board of aldermen."

The defendant then offered in evidence other ordinances of the city of Asheville, for the purpose of showing that the rules of the hotel had, by an ordinance of the said city, been duly approved. The solicitor for the State objected to the introduction of these ordinances. The objection was sustained by the court, and the defendant excepted.

Henry Nettles was then introduced by the defendant, and swore that he was employed at the Battery Park Hotel; that it was his duty to announce carriages when ready, to take orders from guests of the hotel, and to send orders to any livery stable in town desired by the guests, and to take orders to and from liverymen at places designated for them by the hotel authorities; that a Mr. Reynolds was also employed for the same purpose; that he had seen the prosecutor there; had seen him often spitting tobacco juice on the floor and drumming among the guests; that he had seen him when pretty full of liquor at the hotel, but not down drunk; that he saw the difficulty between the defendant and the prosecutor; that he had collected bills for the prosecutor from guests of the hotel; that when he was asked by a guest to (772) order a carriage, that he would ask what stable he wanted it from, and if no particular stable was mentioned, he would give it to the one he (witness) wanted to have it.

In reply, the State introduced one H. S. Loomis, who swore that he was the room and bill clerk of the Battery Park Hotel; that the written contract between Sevier and the defendant, as to the livery business of the hotel, had been destroyed, but the agreement was still in force, the only difference in the terms being that, under contract originally, he collected the money, while now Sevier collected it; that he knows the hotel gets ten per cent of the proceeds of the business done by Sevier, and not of the business done by other liverymen.

E. C. Chambers swore that he was a liveryman, doing business in the city of Asheville; that he had received the same notice received by the prosecutor; that he drummed at the hotel among the guests for custom since he had received the notice, and that he had not been put out of the hotel, or ordered to leave; that he had also had a man employed to drum for him since the notice had been given him.

The court gave the following instructions (only those parts of the charge material to the exceptions are set out):

"It being admitted by both the State and the defendant that the premises from which the defendant put the prosecutor, in this case, were those of a public inn or hotel, and that the defendant was at the time the manager thereof and in control of the same. The court charges you that it was the duty of defendant, and the law devolved it upon him, to prescribe such reasonable rules and regulations as were necessary to the comfort of his guests, to secure quiet and good order, and to procure the exclusion from the hotel of disorderly persons, and such, as (773) by their conduct, manner and habits or business are nuisances and an annoyance and discomfort to the guests of the hotel. It was also the duty of the defendant to his guests, and he had the right, to prevent all such persons coming into the hotel, and after they should come into the hotel, or upon the porch thereof, to order them to go away, and, upon a refusal to go, to put his hands gently upon them and gently remove them, and, in the event of resistance, to use such force as would be necessary to remove them.

. . . . . .

"The questions, then, for consideration and determination, are: 1. Did the prosecutor have the right to go to the Battery Park Hotel to transact the business of his employer—that of a liveryman—with the guests of the hotel? 2. If he did have such right, did he so conduct and demean himself while there as to forfeit his right to be there? 3. If he had no right to go to the hotel to transact his business as a liveryman, or if, while there, having such right to go and to be there, he so conducted himself as to forfeit such right, did the defendant use only such force as the law permitted him to use in removing the prosecutor, or was the force excessive and unlawful?

"The court charges you that, if you shall find from the evidence that others engaged in the same business as the prosecutor were permitted by the defendant to go to the Battery Park Hotel for the same purpose for which the prosecutor went there—that is, to secure and transact business for his employer's livery stable—then the prosecutor had also the right to go there for that purpose, at reasonable times, and to remain there a reasonable length of time for the transaction of such business; and it would not matter that the rules of the hotel forbade his entering the premises of the hotel for that purpose, or that he had been previously forbidden, in writing, to come upon the premises of the hotel, nor would it matter that the defendant had designated a place at the back of the hotel where liverymen could transact their livery business with the guests of the hotel through the servants and (774) employees of the hotel, even though the prosecutor knew of such place being so designated. He would not, however, have the right to go there at all times, nor would he have the right to remain there all the time, or an unreasonable length of time, for the transaction of such business, against the will of the owner or manager.

"If the jury shall find from the evidence, under the charge of the court, that the defendant permitted others engaged in the same business as the defendant, to wit, the livery business, to go to the hotel to transact such business, and that other persons did go there, and there transact such business, although the prosecutor would then have the same rights at the hotel as such other person, yet, if while at the hotel the prosecutor so demeaned himself, by becoming intoxicated, by spitting tobacco juice on the floor, loud and boisterous talking, cursing, swearing, and other conduct, as to become a nuisance, an annoyance and discomfort to the guests and officers of the hotel; or if he went there at an unreasonable time for the transaction of such business, or remained there an unreasonable length of time for the transaction of such business, against the will of the defendant, he lost all right to be at the hotel for any purpose, and it became the duty and right of the defendant to order him away, and upon his refusal to go, to first put his hands gently upon him and gently put him away, and in the event of resistance, to use such force as would be necessary to eject him.

"The defendant would, in no event, have the right to use excessive force in putting the prosecutor off the porch and steps of the hotel."

The defendant excepted to the charge of the court as follows:

1. The court erred in submitting the question to the jury, as to whether or not the rules and regulations adopted by the Battery Park Hotel were reasonable and proper.

2. That the court erred in submitting the question to the jury, (775) as to whether or not other persons engaged in the same business

as the prosecutor were permitted by the defendant to go to the hotel for the purpose of carrying on this business, for that there was no evidence that the defendant permitted or allowed such to be done.

3. That the court erred in the following instructions given to the jury: "If you shall find from the evidence that others engaged in the same business as the prosecutor were permitted by the defendant to go to the Battery Park Hotel for the same purpose for which the prosecutor went there—that is, to secure and transact business for his employer's livery stable—then the prosecutor had also the right to go there for that purpose at reasonable times, and to remain there a reasonable length of time for the transaction of such business; and it would not matter that the rules of the hotel forbade his entering the premises of the hotel for that purpose, or that he had been previously forbidden, in writing, to come upon the premises of the hotel."

4. That the court erred in the following instructions given to the jury: "Nor would it matter that the defendant had designated a place at the back of the hotel where liverymen could transact their livery business with the guests of the hotel through the servants and employees of the hotel, even though the prosecutor knew of such place being so designated."

At the meeting of the board of aldermen of the city of Asheville, on 16 August, 1889, the following was adopted:

"It was moved and seconded, that the following rules for the regulation and government of the Battery Park Hotel be approved by the board:

"No liveryman or agent of any transportation or baggage company, no washer-woman or sewing-woman not connected with the house, or loafer or lounger, or objectionable person, will be allowed in the hotel."

There was a verdict against the defendant, and he, having (776) excepted, appealed.

The Attorney-General and G. A. Shuford for the State.

D. Schenck, H. A. Gudger, J. B. Batchelor and John Devereux, Jr., for defendant.

AVERY, J., after stating the facts: It was formerly held by the courts of England that where an innkeeper allured travelers to his tavern by holding himself out to the public as ready to entertain them, and then refused to receive them into his house when he had room to accommodate them, and after they had tendered the money to pay their bills, he was liable to indictment. But this doctrine (says Bishop, Vol. I, sec. 532, Cr. Law) has little practical effect at this time, being rather a relic of the past than a living thing of the present. *Rex v. Lewellyn,*

12 Mod. Rep., 445. In a *dictum* in *S. v. Mathews,* 2 Dev. & Bat., 424, this old principle was stated with some qualification, viz., "that all and every one of the citizens have a right to demand entertainment of a public innkeeper, if they behave themselves and are willing and able to pay for their fare; and as all have a right to go there and be entertained, they are not to be annoyed there by disorder, and if the innkeeper permits it he is subject to be indicted for a nuisance." *Rommel v. Schonbacker,* 127 Penn. St. Rep., 579. The duty and legal obligation resting upon the landlord is to admit only such guests as demand accommodation, and he has the right to refuse to allow even travelers who are manifestly so filthy, drunken or profane as to prove disagreeable to others who are inmates, and thereby to injure the reputation of his house, to enter his inn for food or shelter, though they may be abundantly able to pay his charges. 2 Wharton Cr. Law, sec. 1587; *Recks v. Rymer,* 13 Cox Cr. Law, 378. The right to demand admission to the hotel is confined to persons who sustain the relation of guests, and does not extend to every individual who invades the premises, not in response to the invitation given by the keeper to the public, but in order to gratify his curiosity by seeing, or his (777) cupidity by trading with, patrons who are under the protection of the proprietor. Wharton Cr. L., sec. 625. The landlord is not only under no obligation to admit, but he has the power to prohibit the entrance of any person or class of persons into his house for the purpose of plying his guests with solicitations for patronage in their business, and especially is this true when the very nature of the business is such that human experience would lead us to expect the competing drummers, in the heat of excitement, not only to trouble the guests by earnest and continued approaches, but by their noise, or even strife. The guest has a positive right to demand of the host such protection as will exempt him from annoyance by persons who intrude upon him, without invitation and without welcome, and subject him to torture by a display of their wares or books, or a recommendation of their nostrums or business. That learned and accomplished jurist, *Chief Justice Shaw,* delivering the opinion in *Commonwealth v. Power,* 7 Metc., 600, said: "An owner of a steamboat or railroad, in this respect, is in a condition somewhat similar to that of an innkeeper, whose premises are open to all guests; yet, he is not only empowered, but he is bound so to regulate his house as well with regard to the peace and comfort of his guests who there seek repose as to the peace and quiet of the vicinity, and to repress and prohibit all disorderly conduct therein; and, of course, he has a right and is bound to exclude from his premises all disorderly persons and all persons not conforming to regulations necessary and proper to secure such quiet and good order." This principle

was stated as an established one, and used by the court as an argument to sustain, by analogy, its ruling, announced in a subsequent portion of the opinion, that a railroad company had a right, by its regulations, to exclude from its depot and cars, at any station, persons who visited them for the purpose of soliciting passengers to stop at particular hotels; and one of the reasons given for holding the regulation
(778) reasonable was, that where the agents urged the claims of their respective hotels "with earnestness and importunity, it was an annoyance to passengers." The doctrine is there laid down, too, that persons other than passengers prima facie have the right to enter the depot of a railroad company as others besides guests may go into hotels without making themselves trespassers, because, in both instances, there is an implied license given to the public to enter; but such licenses, in their nature, are revocable, except in the one case as to passengers, and in the other as to guests, who have the right to enter the train, ticket-office or hotel, as the case may be, if they are sober, orderly and able to pay for transportation or fare. The Court went further in that case and held that in enforcing the reasonable regulation against drummers for hotels at the depot, the servants of the railway company were not guilty of an assault for expelling by force, not excessive, a person who had repeatedly violated the regulation by going upon the platform and soliciting for a hotel, though, on the particular occasion when he was ejected from it, he had a ticket and intended to take the train destined for another town, but failed to disclose to such servants the fact that he entered for "another purpose, when it was in his power to do so." Were we to follow the analogy to which the principle laid down in that case would lead, an innkeeper could not only make and enforce a regulation forbidding persons to come on his premises for the purpose of soliciting his guests to patronize the livery stables that they might represent, but he might, in enforcing the rule against one, who had previously violated it after notice that he should not do so, put such person off his premises, without excessive force, though, at the particular time the person had entered with the bona fide intent to become a guest at the hotel, but failed to announce his purpose, or, under the same principle, he might expel by force one who becomes a guest and takes advantage of his situation to subject other inmates of the
(779) house to the annoyance of drumming for such establishments.

The same distinction is drawn between guests and others who enter a hotel intent on business or pleasure by the courts of Pennsylvania. In *Com. v. Mitchell,* 1 Phil. (Pa.), 63, and *Com. v. Mitchell,* 2 Pars. (Pa.) Sel. Cases, 431, it was held that an innkeeper is bound to receive and furnish food and lodging for all who enter his hotel as guests and tender him a reasonable price for such accommodations;

but "if an individual (other than a guest) enters a public inn, and his presence is disagreeable to the proprietor and his guests, he has a right to request the person to depart, and, in case of refusal, to lay his hands gently upon him and lead him out, and if resistance is made, to employ sufficient force to put him out, without incurring liability to indictment for assault and battery."

Justice Story, in *Jencks v. Coleman,* 2 Summer's Rep., 224, discussed the doctrine to which we have referred, that the right even of one who pays for his passage on a steamboat or railway, is subject not only to the limitation that he shall be sober, and shall not be guilty of such nuisance, or make such disturbance as shall annoy other passengers, or whose characters are doubtful, dissolute, suspicious or unequivocally bad, but to the further restriction that he may be refused admittance or expelled, after he enters the boat or car, if it appear that his object is to interfere with the interests or patronage of the proprietors, or company, so as to make the business less lucrative to them.

In the case last cited, the proprietors of the boat "Franklin" had entered into a contract to run a line of stages between Boston and Providence in connection with the boat, which was running from New York to Providence. The plaintiff Jencks had been in the habit of coming on board the boat at Newport to solicit passengers for an opposition line of stages between Providence and Boston, thus interfering with the business of the owners of the boat, and the ar- (780) rangement made by them for their own profit and advantage with a different line from that represented by said plaintiff, just as in the case at bar the proprietors of the hotel had entered into a contract with one Sevier by which they were to receive ten per centum of the amount realized by him for the hire of carriages to the guests of the Battery Park Hotel. *Justice Story,* too, runs the parallel between the hotel and boat line just as *Chief Justice Shaw* did between the inn and the railway company, but with the marked difference that the former goes much further in tracing the analogy that makes the public house subject to some of the same liabilities created, and entitled to the full measure of protection afforded by law to companies engaged in transporting passengers. In discussing the principle, he says: "A case still more strongly in point, and which, in my judgment, completely meets the present, is that of an innkeeper. Suppose passengers are accustomed to breakfast or dine or sup at his house, and an agent is employed by a rival house, at the distance of a few miles, to decoy the passengers away the moment they arrive at the inn. Is the innkeeper bound to entertain and lodge such agent, and thereby enable him to accomplish the very objects of his mission to the injury or ruin of his own interests? I think not."

In the case of *Barney v. Steamboat Co.*, 67 N. Y., 302, the Court of Appeals held that a company running a line of steamboats for transporting passengers had a right to establish in connection with their boats an agency for the delivering of baggage at the terminus, and that one who had had the contract to transfer such baggage upon similar terms two years before could be expelled and refused as a passenger, if, after notice, he would not discontinue his efforts to induce passengers to employ him in the same capacity rather than an expressman with whom the company had entered into a later agreement, for their
(781) own pecuniary interest, to deliver the baggage of its passengers. All of the authorities that we have cited above are collated and approved in Angell on Carriers, secs. 530, and 530*a* and 530*b*.

In the case of *Harris v. Stevens,* 31 Vermont, 79, it was held that when a railway company erected station-houses, it impliedly opened the doors of them to every person to enter, but that the license was revocable as to all persons except those who had legitimate business there, growing out of the operation of the road and with the officers or employees of the company, and that the corporation had the right to direct all other persons to leave the depot or ticket office, and, on their refusal to depart, to remove them. It was further held in the same case, that it was a reasonable regulation to require every one who expected to take the train and desired to remain in the station-house for that purpose, to purchase a ticket, and that the servants of the company would be justified in expelling, without excessive force, one who did not declare his purpose to buy a ticket, and actually buy it within a reasonable time, or one who had bought a ticket even, if he failed to disclose that fact when requested to leave.

In the recent case of *Old Colony Co. v. Tripp,* 147 Mass., 35, the Court laid down the rule in reference to the rights of persons at depots, as follows: "Passengers taking and leaving the cars at the station, and persons setting down passengers or delivering merchandise or baggage for transportation from stations, or taking up passengers, or receiving merchandise that had been transported to the station, had a right to the building and grounds superior to the right of the plaintiff (corporation) to exclusive occupancy." And it is further held to be the correct construction to be placed on a statute passed by the Legislature, giving to all persons "equal terms, facilities and accommodations for the use of its depot and other buildings and grounds," that it
(782) was intended only to govern the relation between the common carrier and its patrons; and hence, that a railroad company, even in the face of such a statute, had a right to contract with an individual to furnish the means to carry incoming passengers, or their

baggage and merchandise, from its stations, and might grant to him the exclusive right to solicit the patronage of such passengers.

Upon a review of all the authorities accessible to us, and upon the application of well-established principles of law to the admitted facts of this particular case, we are constrained to conclude that there was error in the charge given by the court to the jury, because—

1. Guests of a hotel, and travelers or other persons entering it with the bona fide intent of becoming guests, cannot be lawfully prevented from going in, or be put out, by force, after entrance, provided they are able to pay the charges and tender the money necessary for that purpose, if requested by the landlord, unless they be persons of bad or suspicious character, or of vulgar habits, or so objectionable to the patrons of the house, on account of the race to which they belong, that it would injure the business to admit them to all portions of the house, or unless they attempt to take advantage of the freedom of the hotel to injure the landlord's chances of profit derived either from his inn or any other business incidental to or connected with its management and constituting a part of the provision for the wants or pleasure of his patrons. *Jencks v. Coleman, supra; Comrs. v. Mitchell, supra; Comrs. v. Power, supra; Pinkerton v. Woodard,* 91 Am. Dec., 660; *Barney v. Steamboat Co., supra;* 1 Wharton's Cr. L., sec. 621; Angell on Carriers, secs. 525, 529 and 531; *Britton v. R. R.,* 88 N. C., 536.

2. When persons, unobjectionable on account of character or race, enter a hotel not as guests, but intent on pleasure or profit, to be derived from intercourse with its inmates, they are there not of right, but under an implied license that the landlord may revoke at any time, because, barring the limitation imposed by holding out (783) inducements to the public to seek accommodation at his inn, the proprietor occupies it as his dwelling-house, from which he may expel all who have not acquired rights growing out of the relation of guest, and *must* drive out all who, by their bad conduct, create a nuisance and prove an annoyance to his patrons. *Harris v. Stevens,* 31 Vt., 79; 1 Wharton's Cr. L., sec. 623.

3. The regulation, if made by an innkeeper, that the proprietors of livery stables and their agents, or servants, shall not be allowed to enter his hotel for the purpose of soliciting patronage for their business from his agents, is a reasonable one, and after notice to desist, a person violating it, may be lawfully expelled from his house if excessive force be not used in ejecting him. *Comrs. v. Power, supra; Harris v. Stevens, supra.* See, also, *Grizwald v. Webb,* recently reported in 41 Alb. Law Jour., 351 (a Rhode Island case); *Old Colony Co. v. Tripp, supra.*

4. An innkeeper has, unquestionably, the right to establish a newsstand or barber shop in his hotel, and to exclude persons who come for

the purpose of vending newspapers or books, or of soliciting employment as barbers, and, in order to render his business more lucrative, he may establish a laundry or a livery stable in connection with his hotel, or contract with the proprietor of a livery stable in the vicinity to secure for the latter, as far as he legitimately can, the patronage of his guests in that line for a *per centum* of the proceeds or profits derived by such owner of vehicles and horses from dealing with the patrons of the public house. After concluding such contract, the innkeeper may make, and, after personal notice to violators, enforce a rule excluding from his hotel the agents and representatives of other livery stables who enter to solicit the patronage of his guests; and where one has persisted in visiting the hotel for that purpose, after notice to desist, the proprietor may use sufficient force to expel him if he
(784) refuses to leave when requested, and may eject him, even though, on a particular occasion, he may have entered for a lawful purpose, if he does not disclose his true intent when requested to leave, or whatever may have been his purpose in entering, if he, in fact, has engaged in soliciting the patronage of the guests. *Barnes v. Steamboat Co., supra; Jencks v. Coleman,* and *Harris v. Sneeden, supra;* Angell on Corporations.

5. The broad rule laid down by Wharton (1 Cr. L., sec. 625), is that the proprietor of a public house has a right to request a person who visits it, not as a guest or on business with guests, to depart, and if he refuse, the innkeeper has a right to lay his hands gently on him and lead him out, and if resistance be made, to employ sufficient force to put him out. For so doing, he can justify his conduct on a prosecution for assault and battery. It will be observed that the author adopts, in part, the language already quoted from the courts of Pennsylvania.

6. If it be conceded that the prosecutor went into the hotel, at the request of a guest, for the purpose of conferring with the latter on business, still, in any view of the case, if, after entering, he engaged in "drumming" for his employer when he had been previously notified to desist, in obedience to a regulation of the house, the defendant had a right to expel him, if he did not use more force than was necessary; and if the prosecutor, having entered to see a guest, did not then solicit business from the patron of the hotel, but had done so previously, the defendant, seeing him there, had a right to use sufficient force to eject him, unless he explained when requested to leave what his real intent was. *Harris v. Stevens,* and *Comrs. v. Power, supra.* The guest, by sending for a hackman, could not delegate to him the right to do an act for which even the guest himself might lawfully be put out of the hotel.

7. If we go further and admit, for the sake of argument, that (785) the principle declared in *Markham v. Brown,* 8 N. H., 209, and relied on to sustain the view of the court below, is not inconsistent with the law on the same subject, as we find it laid down by Wharton and other recognized authorities, still our case will be found to fall under the exception to the general rule stated in express terms in that case. The Court said: "Where one comes to injure the innkeeper's house, or if his business operates directly as an injury, that may alter the case, but that has not been alleged here. Perhaps there may be cases in which he may have a right to exclude all but travelers and those who have been sent for by them. It is not necessary to settle that at this time." There was no evidence in *Markham v. Brown* that the proprietor of the hotel had any contract with another stage line, or would suffer pecuniary loss or injury if the agent who was expelled were successful in his solicitations, and it seems that Angell and others, who cite as authority that case, as well as *Jencks v. Coleman* and *Barney v. Steamboat Co.,* reconcile them by drawing the distinction that in the latter cases, and in the hypothetical case of an innkeeper, put by *Justice Story,* the person whose expulsion was justified was doing an injury to the proprietor who had him removed, by diminishing his profits derived legitimately from a business used as an adjunct to that of common carrier or innkeeper. In using the language quoted above, *Justice Parker* seems to have had in his mind, without referring to it, the opinion of *Justice Story,* delivered in the Circuit Court but two years before.

8. The defendant, as manager of the hotel, could make a valid contract for a valuable consideration with Sevier to give him the exclusive privilege of remaining in the house and soliciting patronage from the guests in any business that grew out of providing for the comfort or pleasure of the patrons of the house. The proprietors of the public house might legitimately share in the profits of any such (786) incidental business, as furnishing carriages, buggies or horses to the patrons, and for that purpose had as full right to close their house against one who attempted to injure the business in which they had such interest, as the owner of a private house would have had, and this view of the case is consistent with the doctrine enunciated in *Markham v. Brown.* There was no evidence tending to show that Chambers had actual permission from the proprietors to approach the inmates of the hotel on the subject of patronizing him, nor that they had actual knowledge of the fact that he had continued his solicitations after receiving a similar notice to that sent to the prosecutor. The fact that he was overlooked or passively allowed to remain in the hotel (it may be under the impression on the part of the defendant that he had desisted from his objectionable practices) cannot, in any view of

the law, work a forfeiture of the right to enforce a reasonable regulation made to protect their legitimate business from injury. If, therefore, a permit on the part of the defendant to Chambers to "drum" gratuitously in the house, would at once have opened his doors to all of the competitors of the latter (a proposition that we are not prepared to admit), the defendant did not, so far as the testimony discloses the facts, speak to him on the subject, and the soundness of the doctrine that, without interfering with the legal rights of the guests, the proprietor of a hotel is prohibited by the organic law from granting such exclusive privileges to any individual as to the use or occupancy of his premises, as any other owner of land may extend, is not drawn in question.

We, therefore, sustain the second and third assignments of error. His Honor erred for the reasons given in instructing the jury that the guilt of the defendant depended upon the question whether he permitted Chambers or Sevier to solicit custom in the house. He had a lawful right to discriminate for a consideration in favor of
(787) Sevier, while it does not appear from the evidence that he granted any exclusive privileges to Chambers.

We hold that the regulation was such a one as an innkeeper had the power to make, and must not be understood as approving the idea that the sanction of the municipal authorities could impart validity to it, if it were not reasonable in itself, and within the powers which the law gives to proprietors of public houses in order that they may guard their own rights and protect their patrons from annoyance.

For the reasons given, the defendant is entitled to a new trial.

Error.

Cited: McMillan v. School Committee, 107 N. C., 614; *Hutchins v. Durham,* 118 N. C., 471; *Money v. Hotel Co.,* 174 N. C., 511.

THE STATE v. JOHN RINEHART ET AL.

Fornication and Adultery—Evidence.

1. Where the offense charged in the indictment is a *joint* one—as fornication and adultery—if one of the parties, on the joint trial, be acquitted, or if one has been previously acquitted on a separate trial, there can be no conviction of the other.

2. While the admissions or confessions of one defendant in an indictment for fornication and adultery are competent against the person so making

them, they are not to be received against the codefendant; but, on a joint trial, it is not error to admit evidence of such confessions, where the jury is instructed that they can only be considered in determining the guilt of the person making them.

3. Where there was evidence tending to show that the *feme* defendant resided on the land of the male defendant, and in a house erected by him for her; that he was married and she was single; that they were frequently seen together under suspicious circumstances; that while living on his land she gave birth to a bastard child, and that he became her bail upon an indictment for fornication and adultery with him: *Held*, there was sufficient evidence, if believed, to justify a verdict of guilty.

INDICTMENT for fornication and adultery, tried before *Gil-* (788) *mer, J.*, at Spring Term, 1889, of the Superior Court of MADISON County.

It was in evidence that Rinehart is a married man, and the defendant, Lindsay, is a single woman; that the female defendant has a bastard child about two years old; that she now lives and has lived at the defendant, Rinehart's, house and on his land since before the child was born; that she now lives on the land of Rinehart, in a house built by him for her, and into which she moved soon after it was built; that Rinehart has been seen at the house in which she lives, and she has been seen at his house on different occasions.

A witness testified that he had had a conversation with the defendant, Rinehart, in which he asked witness "if he thought Mary Lindsay's child favored him" (Rinehart), and, in conversation, Rinehart told witness that he (Rinehart) "had tried as hard as any man to get the child, and he guessed that he was its father." Witness also testified that Rinehart told him "that, on one occasion, Mrs. Rinehart (his wife) caught the defendants in the act of adultery, and that it was all he could do to keep his wife off of Mary Lindsay."

These conversations were objected to as evidence against the defendant, Lindsay, and the "court held that the said conversations were evidence only against the defendant, Rinehart, and that the jury could not consider the same as any evidence whatever against Mary Lindsay."

It was also in evidence that the defendant, Rinehart, kept a store, and the defendant, Lindsay, had been seen at the store in secret conversation; that they had been seen together at the house of her father, and they went off together in the direction of the house in which she lived. It was also in evidence that a few months before the trial she had a child, and when the officer went to execute a *capias* upon her, the defendant, Rinehart, was there and went on her bond for her appearance at court.

It was also in evidence that they had been seen going about (789) together, and on one occasion they were seen seated on a log,

near the woods, on the male defendant's land, not far from where the female defendant lived.

His Honor was asked to instruct the jury that there was no evidence against the female defendant, and, as to her, they must return a verdict of not guilty; and that as there was no evidence as to her, they should return a verdict of not guilty as to both defendants.

This was refused. There was no exception to the charge as given. There was a verdict of guilty, judgment and appeal.

Attorney-General and H. A. Gudger for the State.
No counsel contra.

DAVIS, J., after stating the facts: When two persons are tried jointly for the commission of an offense that requires the joint act of the two to commit, and one of them is acquitted, there cannot be a verdict of guilty as to the other.

The defendants are charged with fornication and adultery, and, as the offense charged is a joint one, if one of the parties in the joint trial be acquitted, or if one of them has been previously acquitted on a separate trial, it operates as an acquittal of the other, and there can be no judgment as to either. *S. v. Mainor,* 6 Ired., 340; *S. v. Parham,* 5 Jones, 416.

This has been the ruling in North Carolina, though the doctrine held by us has been fully reviewed in Texas where it is repudiated, and it is held that the acquittal of one does not *per se* operate as an acquittal of the other. *Alonzo v. State,* 15 Texas App., 378. The same has been held by the Supreme Court of Tennessee. *S. v. Coldwell,* 8 Baxter, 576.

(790) It may well be doubted whether, when one of the parties has confessed and admitted guilt, or there is competent evidence to convict as to one and not the other, it would not be more in accord with reason to permit the jury to render a verdict of guilty as to the one admitted or proved to be guilty and return a verdict of not guilty, because not proved as to the other, than to require them to say not guilty as to both, contrary to the admitted or clearly proven facts. Under such a rule no innocent person would ever be punished, and no injustice could be done, unless it be an injustice to convict and punish the guilty. While it is well settled that the admissions, or confessions, of one defendant are competent as evidence against the party making the admissions, or confessions, it is equally well settled, both by judicial decision and by statute (The Code, sec. 1041), that such admissions, or confessions, "shall not be received in evidence against the other."

If, therefore, in the case before us, the declarations of the male defendant, which are competent only against him, and which his Honor properly instructed the jury not to consider as any evidence whatever against Mary Lindsay, have such weight as to facts and circumstances which, by themselves would not amount to evidence reasonably sufficient to go to the jury, it would have been the duty of the court to direct a verdict of not guilty as to Mary Lindsay, and there could have been no judgment against either.

But we think there was evidence against Mary Lindsay, other than the declarations of the defendant, Rinehart, sufficient to go to the jury as to her. From the very nature of the offense, it is usually proved by circumstances—rarely by positive and direct evidence of the adulterous acts. It is not necessary that the defendants should have been seen bedding and cohabiting together.

If facts and circumstances are proved from which the jury may infer, beyond a reasonable doubt, that Mary Lindsay voluntarily and habitually submitted her person to the embraces of the male defendant, it will be sufficient, and we think facts and circumstances, (791) independent of Rinehart's declarations, sufficiently appear to warrant the conviction of both. *S. v. Eliason,* 91 N. C., 564, and cases cited.

The equivocal situations in which they were seen together; the fact that he built a house for her on his land; that he visited her there; that they went about together; that a bastard child was born; that he gave bond for her, are all circumstances to go to the jury reasonably pointing to the guilt of the parties. They are sufficient to create more than a mere suspicion; they cannot be viewed as consistent with the innocence of the parties, and in all these she furnished her full share, and the fact that she had the child, which, by itself, would have been no evidence against Rinehart, would, perhaps, fully offset his declarations in the aggregate weight of evidence.

If it be said that the declarations of Rinehart, notwithstanding the charge of his Honor, would, of necessity, operate upon the minds of the jury to the prejudice of his codefendant, the answer is two-fold: first, it is to be presumed that the jury will follow the instructions of the court, and not consider the declarations as any evidence whatever as against her; and second, if it be impossible for the jury to look at competent evidence as against Rinehart, without also seeing evidence of her guilt, it is due to the unfortunate situation in which she has placed herself, for which she is responsible, and no injustice is done of which she can complain. If it appear that her codefendant was in any way antagonistic to her, or that he was base enough to make false declarations to her prejudice, or for any reasonable cause, the court, in its

sound discretion, might have allowed a severance in the trial, but this was not asked for, and they entered upon the trial in the same boat, and, so far from its being lightened by her virtues, she seems to have furnished her full share of weight in sinking it.

Affirmed.

Cited: S. v. Cutshall, 109 N. C., 767, 771; *Moore v. Palmer,* 132 N. C., 977; *S. v. Simpson,* 133 N. C., 679; *Burroughs v. Burroughs,* 160 N. C., 516; *Powell v. Strickland,* 163 N. C., 402; *S. v. Wade,* 169 N. C., 307.

(792)

STATE v. TYNE BRUCE.

Appeal—Assignment of Error—Evidence—Larceny.

1. The objection that there was no evidence to go to the jury cannot be taken for the first time in the Supreme Court.
2. Where there was evidence tending to show that the prosecutor was drunk, and, in that condition, carried into a building open to the public, where he soon became unconscious, and while in that condition his pocket-book, containing currency and coin, was stolen; that the defendant and a comrade were seen in and around the building about the time of the theft; that, a short time before, defendant had no money, but soon thereafter made a deposit of a certain sum and expended more; that a pocketbook resembling the one prosecutor had lost, except the clasps, which were recently broken off, was found on defendant's person, and that his comrade had also been found in possession of a sum of money, which defendant said he had given him: *Held* to be sufficient evidence to be submitted to the jury and, if believed, to support a verdict of guilty of larceny.

INDICTMENT for larceny, tried before *Moore, J.,* at February Term, 1890, of the Criminal Court of BUNCOMBE County.

The defendant was convicted, and appealed.

The facts are sufficiently stated in the opinion.

Attorney-General for the State.

H. A. Gudger and V. S. Lusk for defendant.

CLARK, J. The counsel for defendant asked the court to charge the jury that there was no evidence against him, and to return a verdict of not guilty. The refusal of the court to so charge presents the only question for review.

"If the evidence merely raised a suspicion or conjecture of guilt, it was not legal evidence, and the court should have directed a verdict of not guilty; but if the evidence, considered as a whole, could, in any just and reasonable view of it, warrant a verdict, it should (793) have been left to the jury as the proper triers of the fact." *S. v. Eller;* 104 N. C., 853. The same principle has been settled by many cases. This Court cannot pass upon the question whether the verdict was against the weight of the evidence. That rested with the court below, and its decision is final. Whether the evidence is sufficient to convict is for the jury, but whether there is *any* evidence sufficient to go to the jury is a question of law. This objection cannot be taken for the first time in this Court (*S. v. Glisson*, 93 N. C., 506), but when taken, as here, in the court below by a request to instruct the jury, an appeal lies from its refusal, and all the evidence against the defendant is presumed to be sent up.

The principles applicable are as above stated. The difficulty lies in the application of them to the evidence in any given case.

In the present case it was in evidence for the State that defendant and one John Dryman (who was also convicted on this indictment, but who has not appealed) were in and about the warehouse, in the city of Asheville, together with several others, from which the prosecutor was carried to the "camp-house" while intoxicated, and while in that condition he fell asleep, and when he woke up his pocketbook was gone, and with it a $20 bill, a $10 bill, a $5 bill and $3.50 in silver, which were in it; that both defendants were seen with prosecutor while drunk in the camp-house. The defendants were indicted for larceny of the pocketbook and money, and receiving the same knowing them to have been stolen. The pocketbook taken from Bruce's person, the prosecutor testified, resembled the one he had lost, except that the catches, or clasps, were broken off; he would not swear positively that it was his pocketbook, but thought it was his. It was also in evidence that the prosecutor lost his pocket-book about 5 P. M., and the same evening about from 8 to 9 P. M., defendant deposited $8.50 with the clerk at a bar- (794) room for safe-keeping; that two or three days before defendant had been fined $5 in the mayor's court for violation of a city ordinance, and said clerk had stood his surety for its payment; that in the interval thereafter, and before the larceny, the defendant had worked one day on the streets at $1 per day; that the evening after the larceny, the defendant treated a friend to whiskey at a bar-room, and to breakfast next morning at a restaurant, and bought two quarts of whiskey; the defendant swapped pocketbooks next day with witness, and that the pocketbook shown to witness was the one then received from the defendant, and

that the catches were then freshly broken off; that defendant had been seen after the larceny with a pocketbook resembling the one shown on trial, and that the catches were not broken off; that he took a dollar out of it and asked some one to change it; that on the night of the larceny, the codefendant Dryman (as to whom there was other evidence) had a $20 bill, which he offered for change in payment for goods, and that defendant stated in jail that the money he had let Dryman have he worked for. This, without reiterating the testimony of the different witnesses, is the testimony for the State. If believed, it shows: 1. Opportunity. 2. Circumstances tending to show that defendant was without money two or three days before the larceny, and that immediately after the larceny, though he had worked only one day (at $1 per day), he was suddenly flush of money, depositing $8.50 for safe-keeping, besides being free with money and treating his friends. 3. His being in possession of a pocketbook, just such as prosecutor lost, though he could not swear positively to its identity. 4. Circumstances tending to show that defendant endeavored to destroy evidence of his guilt by breaking the clasps on the pocketbook, and then exchanging it with a friend for another. 5. That his companion, the codefendant Dryman, had a
(795) $20 bill that night, and defendant stated to the officer after being arrested that the money he (defendant) had let Dryman have he had worked for.

S. v. Wilson, 76 N. C., 120, very much resembles this case. There the evidence showed that the prosecutor was drunk and unconscious; that the defendant knew he had money, and had opportunity of taking it from his person; that defendant had no money that night, but had some next day. This was held sufficient evidence to be submitted to a jury. The evidence in the present case was circumstantial. The jury might have deemed it proper to acquit defendant upon it. It was sufficient, however, to convict upon, if it satisfied them, beyond a reasonable doubt, as their verdict declares, that the defendant was guilty. Much depends upon the bearing upon the stand and the character of the witnesses, and incidents and circumstances of the trial seen and appreciated by the jury but which cannot be transmitted to this Court by a transcript of the evidence. Something must, and ought to be, trusted to the intelligence of the jury, whom the evidence was sufficient to satisfy of the guilt of the defendant, and of the presiding judge, who held that the evidence was sufficient to be submitted to them. Whether or not the evidence sent up has sufficient weight to fully satisfy us of the defendant's guilt, if the case had been submitted to us upon it, is not the question for this Court to decide. It seems to us there were sufficient circumstances in evidence, if believed by the jury, to warrant the case being submitted to them as the sole

triers of the fact. "While none of the circumstances, standing alone, was sufficient evidence of the defendant's guilt, yet, taken together as a whole they constitute evidence which was properly submitted to the jury." *S. v. Christmas,* 101 N. C., 749.

Per Curiam. No error.

Cited: S. v. Brabham, 108 N. C., 795; *S. v. Bridgers,* 114 N. C., 871; *S. v. Kiger,* 115 N. C., 751; *S. v. Hullen,* 133 N. C., 659.

(796)

STATE v. T. F. HUNTER.

Arrest—Police Officers—Municipal Ordinances—Constitution—Nuisance.

1. A police officer may make arrests, without warrant, for violations of municipal ordinances, when committed in his presence; but he must determine, at his own peril, the fact that there has been a violation of a *valid ordinance.* If the ordinance is invalid, the fact that he acted in good faith will not protect him—the question of *bona fides* only arises in determining the *extent of force* used by him in overcoming resistance to arrest.

2. An ordinance which declared that "whenever three or more persons obstruct a sidewalk it shall be the duty of the officer to request them to move on, and if such persons unreasonably persist in remaining so as to incommode others passing, he (the officer) shall take them to the station-house," is in contravention of the Constitution, in that it subjects the citizen to imprisonment at the will of the officer, and without giving him an opportunity for trial or preliminary examination.

3. The act of one person in simply stopping on the sidewalk of a street for a reasonable time, without misbehaving in any way, does not constitute such a nuisance as the city of Asheville had the power to forbid and punish under its charter.

(DAVIS, J., dissenting.)

THIS was an indictment for false imprisonment, tried at January Term, 1890, of the Criminal Court of BUNCOMBE County, *Moore, J.,* presiding.

The defendant was a policeman of the city of Asheville, and arrested one Samuel Bennett, without warrant, for alleged violation of city ordinances, in the following words:

"Any persons assembling and loitering on the streets in sufficient numbers or in such manner as to cause an obstruction to free passage

of the streets, or sidewalks, or crossings, and failing to disperse upon notice by any officer or any member of the police, shall, on conviction, be fined ten dollars.

(797) "Whenever three or more persons obstruct the sidewalk, it shall be the duty of the officer to courteously request them to move on, and if such persons unreasonably persist in remaining, so as to incommode others passing, he shall take them to the station-house."

After several witnesses had been examined for the State, the defendant testified, in his own behalf, as follows: "Four or five months ago, Mr. Bennett and four or five others were standing on the sidewalk in front of Powell & Snyder's store while people were passing, and they had to step out on the curbing to get around them. I asked them, politely, to get off the sidewalk and not obstruct it, and they all went off, except Bennett, who said to me, 'There is room.' I told the prosecutor for the third time to move, and he refused to do it. I had no warrant or other process for the prosecutor at the time, but the next morning I swore out a warrant" (which was produced in evidence). "I was at that time a policeman. The prosecutor was drunk and acted like a drunken man. I told him that he was drinking. The prosecutor only remained in the calaboose twenty or thirty minutes, and I told him that if he or any of his friends would deposit five dollars in lieu of bond, I would let him go until next morning, and then appear before the mayor. One Smith deposited with me the five dollars. The prosecutor did not demand to be permitted to give bond, nor did he offer bond nor deposit any money in lieu thereof. No one offered to go his bail, and Smith deposited the five dollars after the prosecutor was confined in the calaboose."

On cross-examination, the defendant stated that "Bennett was standing nearly in front of the store door, and about three and a half feet from the edge of the sidewalk, and when he asked him to move he said, 'There's eight feet'; but there was not so much as eight feet between the place where the prosecutor was standing and the edge of the sidewalk, which is not more than eight feet wide at that place. The arrest was made, about sunset, for a violation of the city ordinances

(798) by blocking the sidewalk, and people were passing at the time. He did not decline to tell the prosecutor for what he arrested him, but did tell him. Prosecutor said something about going to Thrash's, or, somewhere else, to get bond. Defendant declined to go with him, but told him he could give bond, but would not take him to hunt it up. Prosecutor did not offer to go to procure bail before he got into the calaboose. Pulliam, one of the aldermen of the city, was, at that time, mayor pro tem. His place of business is in the Bank of Asheville, two hundred yards away, and it was about the same distance

to the calaboose from where the arrest was made. Pulliam was not in the bank at that time, but was at his residence, about half a mile distant."

Upon redirect-examination, the defendant stated that "Thrash's place of business was between said bank and the place of arrest. No surety was present to go on the bond, and prosecutor only suggested that he could give bond."

Other witnesses were examined and a number of exceptions were taken to the charge that became immaterial in the view of the case taken by the Court. The defendant appealed from the judgment pronounced on the verdict of guilty.

Attorney-General for the State.
George A. Shuford for defendant.

AVERY, J., after stating the facts: In the case of *S. v. Freeman,* 86 N. C., 683, the Court distinctly recognized the right of a police officer to arrest without warrant, not only for felonies, riots and breaches of the peace, but for violations of a city or town by-law prohibiting nuisances, and which the municipality has the power to make, when the offense is committed in his presence. The Code, sec. 3820, makes it a misdemeanor to violate any valid city or town ordi- (799) nance.

The city law, relied upon by the defendant to justify the arrest, is not very happily and clearly expressed. The first section offered (number 348) makes the graveness of the offense created by it consist in the failure on the part of the persons, who, by assembling in sufficient numbers in the streets, have caused an obstruction "to disperse upon notice by any officer, or any member of the police." According to the defendant's own account of the transaction, the prosecutor, Bennett, and four or five others were standing in front of Powell & Snyder's store, when they were asked, politely, not to obstruct the sidewalk, and all of the others immediately went away, leaving Bennett alone. Bennett then said, "There's room," whereupon the defendant, after the prosecutor had been requested three times "to move," and had not done so, arrested him. A man cannot be guilty of a nuisance by merely standing still on a sidewalk and refusing to move at the command of a policeman. Even under the phraseology of the ordinance he was not guilty, if the failure to "disperse" was essential to constitute guilt. An obstruction may be removed and a crowd dispersed if all save one go off in different directions and he stands his ground. The act of one person halting on the streets for a reasonable time without misbehaving himself in any way is not such a nuisance as the city has a right to

forbid by its laws under the general power delegated to it. Cooley Const. Lim., star p. 200. The section referred to imposes a fine of ten dollars for a violation, and if its provisions are within the purview of the powers granted to the corporation, the violation was also a misdemeanor. The other ordinance (Rule 15) is not materially different as to what it professes to prohibit and prevent, but it is amenable to objection as legislation *ultra vires,* in that, instead of a fine, it imposes the punishment of imprisonment in the station-house, to be in-
(800) flicted at the discretion of an officer without a previous preliminary examination. Not only is the right of municipalities to make by-laws restricted to the express legislative grant of authority given in the charters, or contained in the general laws defining the rights, duties and powers of all such corporations, but they are subject to the limitations contained in the Constitution of the United States and that of the state in which they may be situated. Cooley's Const. Lim., star p. 198 and 199.

The second ordinance relied upon for the protection of the officer (Rule 15) is clearly in violation of the Constitution (Art. I, secs. 12, 13 and 17), in providing that a person may be arrested because he refuses to "move on," and (in the opinion of the officer, who is left to judge of his conduct) "unreasonably persists in remaining so as to incommode others passing," and can be taken, without warrant or hearing to the station-house. Under this law he may be deprived of his liberty and sent to a dungeon, not only without trial, but without even a preliminary examination, or an opportunity to give bail for his appearance at an investigation to be had in future, because, in the opinion of a policeman, he consumes an unreasonable time in exchanging greetings with two friends whom he meets upon the sidewalk of the city. In the case of *Judson v. Reardon,* 16 Minnesota, 431, defendant justified in an action, brought against him to recover damages for arresting the plaintiff under an ordinance of the city of St. Paul, which provided that any one who refused, without sufficient excuse, to obey any order or direction given at a fire by a person duly authorized to order or direct, should pay a fine not exceeding fifty dollars, and that "any member of the common council or any fire warden may arrest and detain such person till the fire is extinguished." The Court held that the clause permitting the arrest and detention during the fire was unconstitutional and void, and that if the plaintiff had violated any
(801) valid city ordinance, he might have been arrested without warrant. This case has been cited with approval by both Cooley and Dillon. Cooley's Const. Lim., star p. 201, p. 245, note 3; Dillon on Corp., sec. 414, note.

It was held also that an ordinance providing for the destruction of property as a nuisance, without a judicial hearing, was void under a section in the Constitution of Illinois, substantially the same as that already cited from our own organic law (Art. I, sec. 17). *Dorst v. People,* 51 Ill., 286.

The by-law, distinguished as Rule 15, is unconstitutional and void. If the other section is sufficiently intelligible to be enforced under a strict construction of its language in any conceivable case, it is certain that the conduct of the prosecutor in failing "to disperse," after his comrades had deserted him, did not, according to defendant's own account of the transaction, subject him to liability either for the penalty prescribed or to indictment under the general law making it a misdemeanor to violate a town ordinance.

The charter of the city (ch. 111, secs. 26, 27 and 59, Private Laws of 1883) gave the city marshal the powers as a peace officer of the sheriff or constables of the county of Buncombe, and to both the marshal and a policeman the authority to make arrests:

"1. Whenever he shall have in hand a warrant, duly issued by the mayor of the city of Asheville or a justice of the peace of the county of Buncombe.

"2. Whenever any misdemeanor or violation of any ordinance has been committed, and he has reasonable cause to believe that the suspected party may make his escape before a warrant can be obtained."

The power to arrest without warrant is, in express terms, confined to two classes of cases—where he sees an offense committed, or where he knows it has been committed, and has reasonable ground to apprehend an escape. The latter provision enlarges his au- (802) thority beyond that of a sheriff or constable, but upon condition that the ordinance has certainly been violated.

Judge Dillon, in his work on Municipal Corporations (Vol. 1, sec. 211), says: "Charters authorizing municipal officers to make arrests upon view and without process, are to be viewed in connection with the general statutes of the State, and being in derogation of liberty are strictly construed." *Petersfield v. Vickers,* 3 Coldw. (Tenn.), 205; *White v. Kent,* 11 Ohio S., 550.

In the exercise of the extraordinary power given him by the charter, it was the duty of the defendant, before he touched the person of the prosecutor and demanded a surrender of his liberty, to know that the misdemeanor had been committed, either from seeing or from such information as made him willing to incur the risk of indictment, or of being mulcted in damages if no ordinance had been violated. The question of good faith on the part of the policeman comes to his aid when he is resisted in making an arrest that he has an undoubted right

to make, if there be resistance, and the question arises whether excessive force was used to overcome it; but policemen of Asheville must determine, at their peril, preliminary to proceeding without warrant, whether a valid ordinance has been violated within or out of their view. The principle recognized in the cases of *S. v. McNinch,* 90 N. C., 695, and *S. v. Pugh,* 101 N. C., 737, was never intended to apply in any case except where an officer is making a lawful arrest. In the case of *Judson v. Reardon, supra,* another principle was laid down, which seems to have met with approval also. It was held that, the arrest having been made under a void by-law, and being without authority, the officer making it could not rely upon his good faith as a defense to an action brought by the party imprisoned for malicious prosecution, and that if the arrest was made upon the first part of the
(803) ordinance, which was not unconstitutional, the honest purpose of the defendant would not protect him, because the plaintiff had violated that part of the ordinance by crossing the hose. There two distinct provisions, one valid and the other void, were embodied in one paragraph, while in our case they are the subjects of distinct sections. The difference in that respect can give rise to no distinction between that case and the one before us, for a legislative or a municipal law may be valid in part and void in part, and the portion not repugnant to the organic law will be enforced just as if it had been a distinct statute.

There was no suggestion in the evidence that the prosecutor "was found drunk in the streets, hollowing or making an unusual noise," so as to bring him within the letter, or even the spirit, of the only other ordinance offered in evidence, designated as section 645. The fact that the prosecutor told the defendant that he had been drinking, or acted like a drunken man, or that he even was drunk, without making any noisy demonstration, neither subjected him to liability for the penalty, nor to indictment, because, under a strict construction of the law, he must have been both drunk and noisy.

This case may be distinguished from that of *S. v. McNinch,* 87 N. C., 567, in the fact that in the latter the arrest was made under an ordinance declaring public drunkenness and loud and profane swearing to be a nuisance. The Court held that where one was found drunk and swearing in an open space in the rear of a bar-room, it was public drunkenness, though in a private place, and that the defendant was, therefore, liable under the letter of the law. That case went to the extreme limit in sustaining the right to declare any act a nuisance that was not a nuisance at common law, and especially when no specific power to enact the by-law was shown to be in the city charter.

We conclude that, according to the defendant's own evidence, (804) he was guilty, and, therefore, though the judge may have failed to state the law correctly in submitting to the jury the whole case, still the defendant is not entitled to a new trial if he was guilty in the aspect of the testimony most favorable to himself and founded upon the conception that his own statement was true. The judgment must be Affirmed.

Cited: S. v. Earnhardt, 107 N. C., 791; *S. v. McAfee, ibid.,* 816; *S. v. Webber, ibid.,* 967; *S. v. Tenant,* 110 N. C., 614; *S. v. Rollins,* 113 N. C., 733; *S. v. Rogers,* 166 N. C., 389; *S. v. Prevo,* 178 N. C., 742; *S. v. Loftin,* 186 N. C., 206.

STATE v. E. D. WILLIS.

PER CURIAM. The opinion in this case, delivered at the last term (104 N. C., 764), clearly indicates that the Court held that the area in question was not a natural oyster bed, and that on the special verdict the defendant was guilty. In entering the judgment, however, we inadvertently said that his Honor committed no error, whereas the judgment should have been, he erred in holding that the defendant was not guilty. For the reasons given in *Cook v. Moore,* 100 N. C., 294, the motion of the Attorney-General to correct the judgment in the particular mentioned, must be allowed. To that end the clerk will certify this opinion, as heretofore delivered, with the amendment, to the Superior Court, and direct the clerk of the latter court to return to the office of the clerk of this Court the certificate purporting to be the certificate of the judgment of this Court.

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CONTRACT.

1. In an action to recover the balance of purchase-money due on land, the issue was as to whether plaintiff agreed to remit a part of the purchase-money if there should be fewer than the given number of acres: *Held*, that the court below properly refused to admit testimony to show the *value* of the land. *McGee v. Craven*, 351.

2. Where, in a contract for the sale of land, a deed passed conveying a specified number of acres, and the maker agreed, verbally, at the time of its execution, that he would make good any deficiency in the acreage: *Held*, such agreement was an inducement to the contract, and was a good defense, *pro tanto*, against the payment of the purchase-money. *Ibid.*

3. This agreement to make good the *quantity* of land was not such as is required to be put in writing, under The Code, sec. 1554. *Ibid.*

4. A contract respecting land may be part *verbal* and part in writing, unless the writing, by its terms, purports to embrace all the contract. *Ibid.*

5. Our statute, (The Code, sec. 683,) requiring that "every contract of every corporation by which a liability may be incurred by the company exceeding $100 shall be in writing and either under the common seal of the corporation or signed by some officer of the company authorized thereto," does not apply to contracts of foreign corporations. *Rumbough v. Improvement Co.*, 461.

Executory, 485.

By *feme covert*, 512.

CORPORATIONS.

1. A railroad company is not required to give signals to passengers as to the movement of trains. *Malcolm v. R. R.*, 63.

2. The State Board of Education is an incorporated body, with capacity to sue and be sued. *County Board v. State Board*, 81.